

**Anti-terrorism Measures, Security
and Human Rights**

**Developments in Europe, Central Asia and North America
in the Aftermath of September 11**

April 2003

**Report by the
International Helsinki Federation for Human Rights
(IHF)**

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Executive Director:	Aaron Rhodes
Deputy Executive Director/Legal Counsel:	Brigitte Dufour

International Helsinki Federation for Human Rights (IHF)
Wickenburggasse 14/7, A-1080 Vienna, Austria
Tel: (+43-1) 408 88 22, Fax: (+43-1) 408 88 22-50
E-mail: office@ihf-hr.org
Internet: <http://www.ihf-hr.org>

Bank account: Bank Austria Creditanstalt 0221-00283/00

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Aaron Rhodes
Executive Director

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Introduction

The attacks on the United States (US) on September 11, 2001¹ horrified and outraged people around the world. Although an attack on civilians was certainly nothing new, the scale of the attacks, not to mention the fact that they resulted in a large number of civilian deaths on US soil, shocked the world and led to a perceptible sense of fear and vulnerability in many countries of the OSCE region, and in particular in the United States. Over 18 months since the September 11 attacks, the repercussions are still being felt throughout the world and are likely to have lasting implications. This is particularly true with regard to human rights protection. One of the most serious casualties of the post-September 11 environment is the erosion of civil and political rights in the region.

The Human Rights Impact of Post-September 11 Security Measures

In response to the tragedy, the member states of the OSCE², both individually and collectively, immediately turned their attention to a re-evaluation of their security. In the months that have passed since the tragedy, states have inter alia increased the powers of law enforcement and intelligence institutions, including to interrogate and detain persons, to intercept private communications and to conduct searches of private homes and personal property without the normal procedural safeguards; have tightened border controls that impede access to their territory and adopted new, restrictive asylum and immigration measures that may limit access for bona fide asylum seekers; and have authorized various registration and profiling schemes that appear to target certain groups solely because of their race, ethnicity or religion. Some of these measures are necessary and appropriate. However, many of the measures that have been adopted appear to be disproportionate to the threats posed or the goal of enhancing national security. A number of these measures violate fundamental human rights that the OSCE member states are committed to uphold, including some which are absolute rights even in times of emergency.

There are many examples of the erosion of rights in the OSCE region since September 11, but nowhere is the concern more acute than in the United States itself. The US, which has strong traditions of ensuring due process and fair trials to criminal defendants, has placed a large

¹ Throughout the report, we use the term “September 11” or “the events of September 11” to refer to the terrorist attacks on Washington, DC and New York that took place on 11 September 2001.

² This report focuses on human rights developments related to the post-September 11 fight against terrorism in the OSCE region. There are, however, human rights concerns related to this fight in other areas of the world as well. See for example, Human Rights Watch, *World Report 2003: Events of 2002*, (New York: Human Rights Watch, 2003), pp. xxv-xxvi. For a list of the member states of the OSCE, see appendix A.

number of persons in legal limbo in Guantanamo Bay, Cuba – outside the jurisdiction of any state and unable to avail themselves of even the most basic due process guarantees accorded to prisoners of war. Suspects inside the US have been detained on immigration charges, as material witnesses, or designated “enemy combatants”, in order to deny them due process rights. The speed with which the Bush administration abandoned any pretense of a presumption of innocence, the right to counsel and to challenge the lawfulness of detention for those held at Guantanamo and inside Afghanistan is particularly troubling, as are reports suggesting that so-called “stress and duress” methods – such as keeping prisoners naked, forcing them to maintain uncomfortable positions for hours on end, sleep deprivation and disorientation, all of which are prohibited under international law – may be used during the interrogation of detainees.³ Similarly, although the US has a proud history of multiculturalism and strong anti-discrimination laws, it has used widespread racial profiling as a tool in its campaign against terrorism.

The US is certainly not the only country in the region that has experienced a significant deterioration in human rights protection since September 11. The United Kingdom (UK), which already prior to September 11 had among the strongest anti-terror laws in Europe, arrested more than a dozen suspects under new powers allowing it to detain indefinitely without charge or trial persons suspected of terrorism. Germany has weakened privacy safeguards that were built up over decades, and carried out nationwide computer profiling of men of Muslim faith or Arab descent, demanding access to private and public computer databases. In Belarus, a new anti-terror law gives security forces virtually unlimited rights to enter homes and businesses and search persons and property without the need for court permission. In Russia, a new anti-extremism law is so vaguely formulated that it could be used to restrict virtually any anti-government protests. A number of countries – including countries such as Sweden, which for decades has been at the forefront in defending human rights at the international level – have extradited, expelled or deported people in violation of the principle of non-refoulement. In Uzbekistan, the government has used its involvement in the international coalition against terrorism as a guise to continue to crack down on religious, political and civil opponents on a massive scale. Many of these measures have also been rushed through parliaments without sufficient transparency or opportunities for public debate.

³ Such “stress and duress” methods are prohibited by international law as “cruel, inhuman or degrading treatment”. See for example, *Ireland v. UK*, (Judgment of 18 January 1978, series A, no. 25, paras. 96 and 168), in which the European Court of Human Rights held that so-called “disorientation” or “sensory deprivation” techniques, such as “wall-standing”, hooding, subjection to continuous loud noise, sleep deprivation, and deprivation of food and drink combined to create a violation of article 3 of the ECHR. See also footnote 4 below.

Weakened Commitment to Human Rights Norms

The human rights violations discussed in depth in this report raise serious concern about the willingness of the member states of the OSCE to fulfil their international human rights obligations while struggling against terrorism. However, what is most troubling is that many states apparently do not view human rights as a matter requiring due consideration in the fight against terrorism. As will be discussed in more detail later, in their rush to counter terrorism after September 11, member states of the OSCE have often focused exclusively on the security aspects of the anti-terrorism campaign with little or no willingness to make human rights protection a core component of any anti-terrorism initiative. While the importance of respecting human rights in the fight against terrorism has been rhetorically affirmed, the balancing of individual rights against the security interests of the state has in practice tended to tip in favour of the state. International human rights norms that had been deemed beyond question prior to September 11 have suddenly become open for reconsideration. So, for example, comments that torture may, under certain circumstances, be acceptable if it is to fight terrorism, are particularly troubling.⁴ As a result, international human rights standards, which have been so painstakingly developed since World War II, are now vulnerable to being eroded by the pressures exerted by the anti-terrorism campaign.

Human Rights Are Not An Impediment to Countering Terrorism

Some governments argue that human rights protection is actually an impediment to the campaign against terrorism (just as they have argued in the past that due process rights were an impediment to anti-crime efforts). However, there is no evidence whatsoever that states need more power than that which is authorized by international human rights law in order to counter terrorism effectively. Human rights conventions provide for the possibility of limitations and derogations in times of crisis, recognizing that some emergencies are of such a serious nature that states may need to have access to additional tools to counter them. At the same time, however, states have accepted that their power cannot be absolute, even during emergencies, and have thus established procedural and substantive conditions for the exercise of emergency powers, accompanied by international or regional oversight. These norms are

⁴ There are reports indicating that since September 11, US authorities have used methods involving ill-treatment and torture when interrogating terrorist suspects. Government officials have also reportedly defended the use of such methods as just and necessary. In a *Washington Post* article that was published in December 2002, one official, for example, was quoted as saying: "If you don't violate someone's human rights some of the time, you probably aren't doing your job". Another official was quoted as saying: "There was a before 9/11, and there was an after 9/11. After 9/11 the gloves came off". See Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations – 'Stress and Duress' Tactics Used on Terrorist Suspects Held in Secret Overseas Facilities", *Washington Post*, 26 December 2002.

codified in international human rights conventions and are, in fact, core values of democratic states ruled by law. Thus, international law has recognized that emergency powers, while sometimes necessary, must be narrowly drawn in order not to erode the very rights that are being defended.

What is more, it is now universally accepted that certain tactics – such as torture and inhuman and degrading treatment – are so repugnant to the world community as to be unacceptable under any circumstances. Simply put, the ends cannot justify the means. The Inter-American Commission on Human Rights recently commented that:

As the Commission has previously observed, “unqualified respect for human rights must be a fundamental part of any anti-subversive strategies.... Not only is a commitment to this approach dictated as a matter of principle, namely to respect the very values of democracy and the rule of law that counter-terrorism efforts are intended to preserve, it is also mandated by the international instruments to which states are legally bound.... These international legal obligations create no general exception for terrorism in their application, but rather establish an interrelated and mutually reinforcing regime of human rights protections with which states’ responses to terrorism must conform.”⁵

This is consistent with international humanitarian law, which applies precisely in times of the greatest crisis. States have recognized that, in times of war, certain practices must be prohibited even if some military advantage could be gained.

In fact, any fight against terrorism that does not maintain scrupulous respect for human rights is incompatible with a state’s efforts to achieve national security. As one scholar has noted, “A state may be said to be secure only when all of its constituent elements, its territory, its inhabitants, and its government are secure. Security in regard to the inhabitants consists of the inviolability of their human rights. In a state where security to inhabitants is completely lacking, state security cannot be said to exist”.⁶

Respect for human rights is a core component of any state governed by law. Any anti-terrorism campaign that undermines human rights is both morally bankrupt and self-

⁵ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc 5, rev. 1 corr., 22 October 2002, para. 22 at <http://www.cidh.oas.org/Terrorism/Eng/intro.htm>.

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

defeating. In a March 2002 speech to the United Nations (UN) Commission on Human Rights, Mary Robinson, then-High Commissioner for Human Rights, observed: ‘Some have suggested that it is not possible to effectively eliminate terrorism while respecting human rights. This suggestion is fundamentally flawed. The only long-term guarantor of security is through ensuring respect for human rights and humanitarian law’.⁷

State Responses to Terrorism Can Also Threaten Security and Liberty

As noted above, the struggle against terrorism and the scrupulous protection of human rights are not conflicting priorities, but integral parts of the long-term fight for liberty and security. Terrorism clearly poses a threat to the most fundamental values of personal liberty and security. Its means are antithetical to human rights and the rule of law. As such, states have a right and obligation to ensure that those in their territory are protected from terrorist violence and that the perpetrators of such violence are brought to justice. Enormous harm and loss of life has already occurred as a result of terrorist violence, and the IHF recognizes that the threat of such violence still exists.

However, the state response to terrorism can itself endanger the very freedom it seeks to protect and pose a serious threat to our security and liberty. In times of crisis and fear, states and their citizenry are more likely to make security the single priority, with little regard for the means used to achieve it. Observers of human rights in states of emergency have noted that civil liberties and human rights are particularly threatened during times of crisis:

Emergencies exert great pressure against continued adherence to protection of human rights. In times such as these, governments often consider protecting human rights and civil liberties to their fullest extent as a luxury that must be dispensed with if the nation is to overcome the crisis it faces. Moved by perceptions of physical threat both to the state and to themselves as individuals, motivated by growing fear and by hatred toward the “enemy,” the citizenry may support and even goad the government to employ more radical measures against the perceived threats. Aroused emotions frequently overshadow rational discourse both among ordinary citizens and among their leaders. In these circumstances, notions of the rule of law, rights, and freedoms

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

take a back seat, considered as legalistic niceties that bar effective action by the government.⁸

In such an environment, there is a real danger that governments will overreact, that human rights values will become increasingly subordinated to the campaign against terrorism, and that minorities and those who represent critical voices in the society will be disproportionately affected. In the end, this process may result in an escalation in human rights abuses and a significant weakening of the mechanisms and institutions that limit absolute state power and help prevent such abuse. This in turn would lead to an increasingly insecure environment for all.

But this need not be the case. It is possible to fight terrorism effectively and protect human rights. As UN Secretary General Kofi Annan has stated: “We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long-term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism...while we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities – such as human rights – in the process”.⁹

While there is no evidence that states need more power in order to combat terrorism effectively, it is clear that states seek ever greater power in times of crisis and that there is invariably a corresponding narrowing of individual rights and freedoms. Effective international and/or regional monitoring is therefore absolutely essential. International mechanisms are needed to ensure that in times of crisis or perceived crisis, when governments may be blind to concerns other than security, they are not allowed to lose sight of their long-term, as well as short-term, priorities, including the protection of human rights and rule of law. In order for such mechanisms to have any deterrent effect, however, stronger international oversight and scrutiny are needed that grant substantially less deference to states opting to derogate from and limit human rights than has been the case to date.

⁸ Oren Gross and Fionnuala Ní Aoláin, “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights”, *Human Rights Quarterly*, vol. 23, no. 3 (August 2001), pp. 638-9.

⁹ Speech by UN Secretary General Kofi Annan to the Security Council, 18 January 2002.

A New Human Rights Status Quo?

The fight against terrorism is a long-term, perhaps permanent, effort. Most believe that it can never be definitively won. There is no event or time at which a government will be able confidently to claim that terrorism no longer poses a threat. However, the limitations and derogations provided for in international law are exceptional by definition and should be only temporary tools that foresee a return to normalcy at the earliest possible opportunity. There is currently a danger that what international law views as an exceptional, rare occurrence – a state’s emergency response – may become the new status quo. In other words, the erosion of rights will be ongoing – with no end in sight – and the minimum level of rights protection will be indefinitely lowered. Any anti-terrorism campaign that does not include human rights protection as a core component of its overall security strategy endangers the very values it is trying to preserve and is therefore counterproductive. The OSCE has worked for more than two decades to promote respect for human rights. Effective regional and international mechanisms, and political courage at the national level, are necessary to ensure that the backsliding that has occurred since September 11 is not allowed to continue.

* * *

Erosion of Human Rights in Eight Key Areas

This report identifies eight key groups of rights that have been eroded in the context of the anti-terrorism campaign since September 11. Member states of the OSCE have adopted a number of laws attempting to prohibit “terrorist acts” and “terrorist groups”: the laws are sometimes so vaguely worded and/or are overly broad as to leave doubts as to the acts being prohibited and run the risk of arbitrary enforcement. Such vaguely worded or overly broad laws also lend themselves to selective application against opposition groups on the basis of political considerations and may result in interpretations that unduly restrict the legitimate exercise of basic civil rights such as freedom of expression, association and assembly.

As noted above, some states in the OSCE region have abandoned principles of liberty, due process and the right to a fair trial where those principles are perceived to present an obstacle to fighting terrorism and prosecuting terrorist activities. States have sought to place terrorist suspects outside the protection of the legal system, both through legislation and action, so as to enable them to detain such suspects indefinitely without trial. In some cases, suspects have been ill-treated in detention.

This report also discusses the xenophobic backlash that occurred in many OSCE member states immediately after September 11, and the increasing number of incidents of harassment and violent attacks that were reported against people of Muslim faith or Arabic appearance. Although the initial level of violence abated after several months, in many countries it remains at a considerably higher level than prior to September 11. While most governments in the region have condemned all forms of “revenge” against Muslims, a number of national political leaders have also exploited public outrage to push through new policies that disproportionately affect Muslims and other minority groups. The policies, which include arbitrary arrests, interrogations, registration and fingerprinting, have served to aggravate intolerance and foster the perception that ordinary Muslims, Arabs and members of other minority communities are potential terrorists.

At the international, as well as regional level, there have been renewed efforts to stop the international financing of terrorist groups and acts since September 11. A UN list initially established in 1999 to freeze Taliban and Al Qaida assets was given new impetus by the Security Council in September 2001. Many OSCE states took prompt action to freeze the assets of persons and groups identified on the UN list. However, these efforts have not been accompanied by the necessary procedural safeguards: the process and criteria used to add names to the list has lacked transparency, individuals and organizations have been immediately named publicly without any opportunity to review their inclusion, mechanisms to apply for the emergency release of funds are inadequate, and until August 2002 there was no mechanism to appeal inclusion on the list.

Efforts to limit asylum and immigration have gained a newfound legitimacy in the OSCE area since September 11 with damaging consequences for refugee protection. Illegal immigration and a lax control of asylum procedures are now commonly viewed as presenting a security risk, and security arguments have been used to justify more restrictive measures toward asylum seekers, refugees and migrants. Member states have applied increasingly tough border control policies and removed undocumented migrants, often without adequate procedural safeguards, at an increasing rate. What is more, a number of OSCE member states have been willing to extradite, expel or exclude individuals from their territory, even if there is a real threat that the person is being sent to a situation where he or she will face torture or cruel, inhuman or degrading treatment or indefinite detention without trial. Some of these measures may unduly block access to asylum procedures and increase the risk of refoulement, in violation of governments’ obligation to provide protection to those fleeing persecution.

The member states of the OSCE have also adopted new legislation and proposals affecting privacy since September 11. Search and surveillance powers have been enhanced and judicial oversight over them has been weakened. Time limits for the retention of telecommunications traffic data have been extended, and safeguards on the collection of and access to personal data have been weakened at both national and regional levels. Government agencies have demanded increasing amounts of personal data from airline passengers, foreign nationals, students and asylum seekers, but there has been no corresponding increase in protections against its misuse. In addition, information gathered through the use of extraordinary powers granted for the conduct of terrorist investigations has not been restricted to use in those investigations.

Some OSCE member states have also restricted freedom of expression in general and freedom of the media in particular since September 11. Some states have passed legislation permitting state interference in media organizations during anti-terrorism efforts, put pressure on media outlets to refrain from critical reporting and blocked or restricted journalists' access to prisoners, court proceedings and war zones. The public's right to know about the activities of its government has been curbed in several states, and, in some cases, the inviolability of journalists' sources has been placed at risk.

Finally, some states have used the post-September security environment as a pretext to further target and repress non-violent domestic opposition. This is particularly true in Central Asia, where even before September 11 governments were aggressively persecuting those perceived as religious and political critics of the government, although the large majority of these groups advocate non-violent change. Because of their geographical proximity to Afghanistan, the governments of Central Asia have benefited from closer relations with the US and other western governments, which refrained from criticizing their poor human rights record in the immediate aftermath of September 11 and more recently have voiced muted concern, but without attaching consequences to their criticism. Similarly, as a key member of the international coalition against terrorism, the Russian government has faced significantly less international criticism for the human rights and humanitarian law violations being committed by Russian forces in Chechnya. The absence of effective international opposition to the repressive policies of the governments of the region has only served to enhance the sense of impunity and encourage further abuse.

This report surveys human right concerns related to the post-September 11 counter-terrorism campaign and the new security environment that has evolved in the OSCE region during that period. The report covers developments between 12 September 2001 and 1 March 2003.

Given the scope of the problem and the number of countries potentially implicated, the report does not cover all possible human rights concerns that have emerged as a result of states' efforts to strengthen domestic tools for combating terrorism during this period. An attempt has been made to report on some of the most typical and troubling developments and to make recommendations to inter-governmental bodies, as well as member states of the OSCE, regarding steps that should be taken to address these concerns. There are a number of concerns not covered in the report, such as measures limiting freedom of assembly and association, which would benefit from a separate, thorough analysis. Similarly, the report does not attempt to cover developments in every country of the OSCE region. The specific country examples that are included in the report were selected because they are cases of particular concern and/or are typical of the kinds of abuses seen more generally throughout the region. The examples are not comprehensive. Thus, the fact that any specific OSCE country is not mentioned under a given heading does not automatically mean there are no such substantive concerns in that country. It may merely reflect the absence of sufficient reliable information.

The IHF hopes that this report will serve to highlight the significant deterioration in human rights protection that has occurred in some parts of the OSCE region since September 11, as well as the negative impact this has had on human rights and the rule of law as governing principles. The IHF also hopes that this report will sound an alarm for the OSCE and UN, as well as other international institutions, that stronger monitoring mechanisms and greater international supervision of states' conduct in the campaign against terrorism is absolutely essential. Ad hoc reporting and monitoring mechanisms, while welcome, are not sufficient.

As noted above, the fight against terrorism will be a long-term one. Member states of the OSCE have had 18 months to review their security plans, outfit and train their security services to function and cooperate better, and develop greater international coordination and cooperation in the fight against terrorism. It is high time that states turned their attention and resources to ensuring that this fight takes place in a manner that does not undermine the very rights and liberties it is supposed to protect. The member states of the OSCE and the international institutions tasked with protecting human rights must insist on a renewed commitment to international standards and a strengthening of the international mechanisms to ensure state compliance with these norms. The international community must make clear its commitment to human rights as a core component of the long-term fight against terrorism.

Derogations and Limitations in International Law

The member states of the OSCE have the right and indeed the obligation to fight terrorism and ensure the security of those present in their territory. States do not, however, have unlimited discretion to choose the means they will use to combat terrorism. International human rights treaties establish the minimum rights that states must ensure to all persons in their territory and subject to their jurisdiction. (These obligations are discussed in more detail in the thematic chapters that follow.) International human rights conventions do recognize that some emergencies may be so serious as to warrant limitations on or the suspension (known as derogation) of certain rights. However, such limitations and derogations are, by definition, exceptional in nature, and the conventions set out both procedural and substantive limitations on what states may do in the face of such emergencies. Furthermore, a number of rights such as the right to life and the prohibition against torture have been deemed so fundamental that no derogation whatsoever is allowed, even in times of grave national emergencies. It is the paramount duty of member states to respect the rights enumerated in international human rights law.¹⁰ Respect for these rights must be viewed as an essential component of individual security. If a state finds it necessary to depart from this duty, it has the burden of justifying any limitation or derogation measures and to set out evidence that such measures comply with the conditions outlined below. It must also indicate precisely the scope of its derogation.

Derogation under Article 4 of the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) provides for the possibility that states may limit a number of rights under certain specific conditions.¹¹ Article 4 of the ICCPR provides that:

¹⁰ This chapter focuses primarily on the derogation and limitation provisions in the International Covenant on Civil and Political Rights, although some reference is also made to the European Convention on Human Rights and occasionally the American Convention on Human Rights. The OSCE member states have emphasized the importance of the obligations contained in the ICCPR. In the Concluding Document of Madrid – The Second Follow-up Meeting (OSCE Madrid document), 6 September 1983, para. 19, member states “reaffirm the particular significance of ... the international Covenants on Human Rights” and “call on all participating States to act in conformity with those international instruments ...”. All OSCE member states with the exception of Kazakhstan and the Holy See are signatories to the ICCPR (of these, all except Turkey and Andorra have ratified, acceded or succeeded to the Covenant) and are therefore directly obliged to uphold the human rights commitments contained therein. See Appendix A for more details about OSCE member states’ international human rights commitments.

¹¹ Similar derogation provisions can be found in the European Convention on Human Rights (article 15) and the American Convention on Human Rights (article 27).

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

“Threatens the life of the nation”

A state may not derogate from its obligations under the ICCPR unless a public emergency exists that is so serious as to threaten the life of the nation. The *travaux préparatoires* of the ICCPR indicates that:

The main concern was to provide for a qualification of the kind of public emergency in which a State would be entitled to make derogations from the rights contained in the Covenant which would not be open to abuse. The . . . wording is based on the view that the public emergency should be of such a magnitude as to threaten the life of the nation as a whole.¹²

This requirement has been interpreted by legal scholars to suggest “a public emergency whose seriousness is beyond doubt and which constitutes a major threat to the nation”.¹³ The Siracusa Principles¹⁴ state:

A threat to the life of the nation is one that:

- (a) affects the whole of the population and either the whole or part of the territory of the State, and
- (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.¹⁵

¹² 10 GAOR Annexes, UN Doc. A/2929, part II, ch. 5, para. 39 (1955).

¹³ Thomas Buergenthal, “To Respect and to Ensure: State Obligations and Permissible Derogations”, p. 79 in *The International Bill of Rights: The Covenant on Civil and Political Rights*, Louis Henkin, ed. (New York: Columbia University Press, 1981).

¹⁴ The Siracusa Principles were drawn up in 1984 at a week-long conference of 31 distinguished international law experts to reflect the state of international law with regard to limitations and derogations.

¹⁵ “The Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights”, *Human Rights Quarterly*, vol. 7, no. 1 (1985), principle 39.

In the *Lawless* case, the European Court of Human Rights interpreted language in article 15 of the European Convention of Human Rights (ECHR) that is identical to that in article 4 of the ICCPR. The court defined “public emergency threatening the life of the nation” as an “exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed”.¹⁶ In the *Greek* case, the European Commission of Human Rights determined that a public emergency could only be said to “threaten the life of the nation” if it had the following characteristics:

1. It must be actual or imminent.
2. Its effects must involve the whole nation.
3. The continuance of the organized life of the community must be threatened.
4. The crisis or danger must be exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.¹⁷

Some legal scholars have concluded from the general definition of “imminent” that, in order for a crisis to be covered by article 15(1) of the ECHR, it must “if not actually exist, be on the verge of breaking out at any moment”.¹⁸ Thus, “the time element should make no room for measures that are merely intended to prevent a potential danger that may only materialize in a few weeks or months”.¹⁹

“Officially proclaimed”

The public emergency must be “officially proclaimed”. The Human Rights Committee, commenting on article 4, has noted that the requirement that a state of emergency be officially proclaimed is “essential for the maintenance of the principles of legality and the rule of law.... When proclaiming a state of emergency ... States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of

¹⁶ European Court of Human Rights, *Lawless case* (Merits), Judgment of 1 July 1961, series A, no. 3, para. 28, quoted in Burgenthal, “To Respect...”, p. 79.

¹⁷ European Commission of Human Rights, Report of the Commission, 12a Yearbook Eur. Conv. Human Rights, (1969), para. 153.

¹⁸ Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, (The Hague: Martinus Nijhoff Publishers, 1998), p. 299. See also F. Van Hoof, “The Protection of Human Rights and the Impact of Emergency Situations under International Law with Special Reference to the Present Situation in Chile,” *Human Rights Journal*, vol. X, nos. 1-2, 1977, p. 239.

¹⁹ Svensson-McCarthy, p. 299.

emergency powers”.²⁰ Member states of the UN are required to inform the UN secretary general, as well as other UN bodies, if they declare a public emergency and to specify which measures have been taken pursuant thereto.²¹

“Strictly required by the exigencies of the situation”

Even when a state can show that a public emergency exists that is of sufficient severity to threaten the life of the nation as set out in article 4(1), it does not have a free hand to adopt any measures it sees fit. All measures adopted in derogation of the obligations set out in the ICCPR “must be strictly required by the exigencies of the situation” reflecting the principle that such measures must be proportional to the aim pursued. The Human Rights Committee has stressed that it is not enough to show that the measures are justified by the exigencies of the situation, but that they must also be strictly required. “This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation”.²² The committee has also noted that “[t]his requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency”.²³ Principle 54 of the Siracusa Principles states, “The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger”.²⁴ Daniel O’Donnell, who served as the

²⁰ Human Rights Committee General Comment No. 29: States of Emergency (article 4), CCPR/C/Rev.1/Add.11, 31 August 2001, para. 2.

²¹ The ECHR and the American Convention on Human Rights (ACHR) also require that a state give formal notice of any derogation. ECHR, article 15(3) requires that “Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore”.; Article 27(3) of the ACHR provides that “Any State Party availing itself of the right of suspension shall immediately inform the other State Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension”. The OSCE requires that “When a state of public emergency is declared or lifted in a participating State, the State concerned will immediately inform the CSCE Institution of this decision, as well as of any derogation made from the State’s international human rights obligations. The Institution will inform the other participating States without delay”. CSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 October 1991 (Moscow document), para. 28.10. In 1992, it was decided that the Office for Democratic Institutions and Human Rights (ODIHR) of the CSCE would “act as a clearinghouse for information on – a state of public emergency according to paragraph 28.10 of the Document of the Moscow Meeting of the Conference on the Human Dimension”. CSCE, Concluding Document of Helsinki – The Fourth Follow-up Meeting, 10 July 1992 (OSCE Helsinki document), para. 5(b). [Note that the Conference on Security and Cooperation in Europe (CSCE) was renamed the Organization for Security and Cooperation in Europe (OSCE) in 1994. See Concluding Document of Budapest (OSCE Budapest document), 6 December 1994, para. 1]

²² Human Rights Committee, General Comment No. 29, para. 5.

²³ *Ibid.*, para. 4.

²⁴ Siracusa Principles, principle 54.

rapporteur on derogation for the Siracusa conference, noted in his commentary on principle 54 that “[t]his principle emphasizes that a finding of strict necessity is incompatible with and cannot be based on dangers that are abstract, remote, hypothetical, or latent”.²⁵

Other obligations under international law

Under article 4(1) of the ICCPR, states cannot adopt measures that are “inconsistent with their other obligations under international law”. Thus, where a state is party to international agreements that have a narrower derogation clause than that contained in the ICCPR, or permit no derogation at all, these instruments can serve as a further limit on permissible state conduct. As one respected international law expert has noted, such obligations would also create enforceable obligations under the ICCPR: “Particularly relevant in this connection are humanitarian law treaties because they apply in time of war: a state which purports to derogate from obligations under the Covenant which are required also by such other treaty would be violating both agreements. Similarly, a state could not take measures under Article 4 which would violate provisions in other human rights treaties to which it is party, for example when such other treaty contains no derogation clause or has a stricter derogation clause forbidding derogation from some rights for which derogation is permitted under Article 4 of the Covenant”.²⁶ Article 3 common to the 1949 Geneva Conventions specifically prohibits the suspension of the right to a fair trial during a non-international armed conflict.²⁷ Similarly, the 1977 protocol additional to the Geneva Convention sets out a number of obligations that apply with regard to criminal proceedings during international armed conflict.²⁸

The Siracusa Principles also note that both the Geneva and ILO conventions contain international obligations that apply in a state of emergency.²⁹ In the commentary on the Siracusa Principles related to derogation, the rapporteur noted that “at least these seven rights

²⁵ Daniel O’Donnell, “Commentary by the Rapporteur on Derogation”, *Human Rights Quarterly*, vol. 7, no. 1 (1985), p. 27.

²⁶ Buergenthal, “To Respect...”, p. 82.

²⁷ With respect to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* ...”, article 3(I) prohibits “at all times and in any place whatsoever ... (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

²⁸ Principle 67 of the Siracusa Principles, discussing the 1977 additional protocol, summarizes these rights: (a) the duty to give notice of charges without delay and to grant the necessary rights and means of defense; (b) conviction only on the basis of individual penal responsibility; (c) the right not to be convicted, or sentenced to a heavier penalty, by virtue of retroactive criminal legislation; (d) presumption of innocence; (e) trial in the presence of the accused; (f) no obligation on the accused to testify against himself or to confess guilt; (g) the duty to advise the convicted person on judicial and other remedies”.

²⁹ Siracusa Principles, principles 66-68.

[due process rights set out in the Geneva Conventions and reiterated in principle 68] are binding, by virtue of the ‘other international obligations’ clause, on all countries which are states parties to both the Covenant and the 1949 Geneva Conventions”.³⁰ Finally, “[t]he I.L.O. basic human rights conventions contain a number of rights dealing with such matters as forced labor, freedom of association, equality in employment and trade union and workers’ rights which are not subject to derogation during an emergency”.³¹ With regard to principle 68, the rapporteur for the derogation provisions of the Siracusa Principles noted that the rights identified therein are not exhaustive. He also stated that: “Among other human rights treaties which do not contain derogation provisions and therefore, barring impossibility, must be respected even during a threat to the life of the nation are the 1951 Convention on the Status of Refugees and 1967 Protocol as well as other instruments concerning the prevention of statelessness and the right of asylum”.³²

Prohibition against discrimination

Article 4(1) also prohibits any derogation measures that would involve “discrimination solely on the ground of race, colour, sex, language, religion or social origin”. Furthermore, the Human Rights Committee has noted that “[e]ven though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant”.³³

Although to date the Human Rights Committee has not dealt with discrimination under article 4(1), it has interpreted discrimination under article 26, holding that “‘the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory’ and that consequently, a ‘differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26’”.³⁴ Thus, at a minimum, discrimination solely on the bases enumerated

³⁰ O’Donnell, “Commentary...”, p. 31.

³¹ Siracusa Principles, principle 68. “Time limitations prevented consideration of other human rights norms which may be unconditional obligations binding on all nations, such as the prohibition of racial discrimination or the principle of non-refoulement”. O’Donnell, “Commentary...”, p. 32.

³² *Ibid.*, p. 30.

³³ Human Rights Committee, General Comment No. 29, para. 8.

³⁴ Svensson-McCarthy, p. 647, quoting Communication No. 172/1984, *S.W.M Broeks v. the Netherlands* (views adopted on 9 April 1987 at the 29th session), GAOR, A/42/40, Report of the HRC, p. 150, para. 13.

in article 4(1) is prohibited even during emergencies threatening the nation, and any other differences are prohibited unless they are both reasonable and objective.

Non-derogable Rights under the ICCPR

There is a core group of rights from which there can never be derogation, even in times of emergency threatening the life of the nation, either because derogation from these rights is specifically prohibited by relevant human rights conventions, the rights at issue are customary rules of international law and therefore binding on all states or are peremptory norms of international law, or because derogation from such rights could never be justified in times of emergency.

The ICCPR specifically identifies a number of rights from which there can never be derogation. Article 4(2) provides that there can be no derogation from the right to life (article 6), the right not to be subject to torture, cruel, inhuman or degrading treatment or punishment (article 7), the right not to be held in slavery or servitude (article 8), the prohibition against imprisonment merely for failure to fulfil a contractual obligation (article 11), the prohibition against the retroactive application of criminal law (article 15), the right to be recognized as a person before the law (article 16), and the right to freedom of thought, conscience and religion (article 18).³⁵

The Human Rights Committee has made clear that the list of non-derogable rights extends beyond that which is set out in article 4(2) of the ICCPR. The committee has stated:

[T]he category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances

³⁵ The European Convention on Human Rights recognizes the following as non-derogable: the right to life (article 2), the right not to be subject to torture or other cruel, inhuman or degrading treatment or punishment (article 3), the right not to be held in slavery or servitude (article 4(1)), and the principle of legality (article 7). The American Convention on Human Rights contains the most extensive list of non-derogable rights: the right to juridical personality (article 3), the right to life (article 4), the right to humane treatment (article 5), the right to be free from slavery (article 6), the prohibition against *ex post facto* laws (article 9), the right to freedom of conscience and religion (article 12), the rights of the family (article 17), the right to a name (article 18), the rights of the child (article 19), the right to a nationality (article 20) and the right to participate in government (article 23). Nicole Questiaux, who prepared the study on states of exception as Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, has recommended that the list of non-derogable rights in the ICCPR be extended to include all that are contained in the ACHR. See Nicole Questiaux, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities: "Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency", UN Doc. E/CN.4/Sub.2/1982/15, 27 July 1982, para. 203, recommendation B. For an opposing view, see Joan F. Hartman, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision", *Human Rights Quarterly*, vol. 7, no. 1 (1985), p. 113.

invoke article 4 of the Covenant as a justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.³⁶

The Human Rights Committee goes on to identify a number of other rights that, while not listed in article 4(2), may nevertheless not be subject to lawful derogation, including, among others, the right of all persons deprived of their liberty to be “treated with humanity and with respect for the inherent dignity of the human person”, elements of the rights of persons belonging to minorities, and the prohibition against “propaganda for war or advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence”.³⁷ Furthermore, the drafters of the Siracusa Principles identified a number of procedural rights from which derogation “can never be strictly necessary in any conceivable emergency” and the respect for which “is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation”.³⁸

Similarly, the Human Rights Committee has noted that “the provisions of the Covenant relating to procedural safeguards may never be subject to measures that would circumvent the protection of non-derogable rights”.³⁹

As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. . . . 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.⁴⁰

³⁶ Human Rights Committee, General Comment No. 29, para. 11.

³⁷ *Ibid.*, para. 13.

³⁸ Siracusa Principles, principle 70. See also Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, (Philadelphia: Univ. of Pennsylvania Press, 1994), p. 69 and fn 80; Hartman, p. 108-9; and Stephanos Stavros, “The Right to a Fair Trial in Emergency Situations”, *International and Comparative Law Quarterly*, 41 (1992), pp. 343-365.

³⁹ Human Rights Committee, General Comment No. 29, para. 15.

⁴⁰ *Ibid.*, para. 16.

Thus, the Human Rights Committee has stressed in its review of states' compliance with the ICCPR that "a State party may not depart from the requirement of effective judicial review of detention".⁴¹ Furthermore, the committee has noted favourably the recommendation of the Sub-Commission on Prevention of Discrimination and Protection of Minorities that "the right to *habeas corpus* and *amparo* should not be limited in situations of emergency".⁴²

General Rules of Interpretation

Article 5(1) of the ICCPR

In addition to the safeguards specifically built into article 4, there are certain interpretative tools that must be taken into consideration in assessing the conditions a state must meet in order to justify derogation. Article 5(1) of the ICCPR states:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

This article forms a further restriction on a state's use of the derogations powers set out in article 4, in that it allows inquiry about the purpose of the measures to be taken. Article 5(1) stipulates, in effect, that rights and powers conferred for one purpose may not be used for another, illegitimate purpose. Viewed in this light, Article 5(1) forms an integral part of all the provisions of the Covenant that authorize derogations, limitations, or restrictions. Thus a government's exercise of the right of derogation under Article 4 of the Covenant, for example, must be judged not only for its formal compliance with the requirements of that provision, but also by asking, in reliance on Article 5(1), what the government's aim or purpose is. If the aim in fact is the destruction of any of the rights that the Covenant guarantees, then the derogation would be impermissible even if it otherwise comports with Article 4. By focusing on the "aim" of a given activity, Article 5(1) calls for a scrutiny of

⁴¹ Ibid., fn 9, citing the Human Rights Committee's Concluding Observations on Israel, (1998) CCPR/C/79/Add.93, para. 21. See also European Court of Human Rights, *Aksoy v. Turkey*, Judgement of 18 December 1996, Reports 1996-VI, p. 2260, para. 65, in which the court ruled that the emergency situation created by terrorism could not justify periods of police custody of 14 days.

⁴² Ibid., citing Official Records of the General Assembly, Forty-ninth session, Supplement No. 40 (A/49/40), vol. I, annex XI, para. 2. The Inter-American Court of Human Rights has also ruled that, in order to protect non-derogable rights, the right to judicial review, through such mechanisms as *habeas corpus* or *amparo*, is itself non-derogable. Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, "Habeas corpus in emergency situations", and Advisory Opinion OC-9/87 of 6 October 1987, "Judicial guarantees in states of emergency", as cited in International Commission of Jurists, *Terrorism and Human Rights*, (Occasional Papers No. 2), April 2002, p. 230, at <http://www.icj.org/download/terrorism.pdf>.

motives and purposes and permits subjective elements to be taken into account in addition to the objective criteria for judging compliance with Article 4(1), Article 22(2), or others.⁴³

“Object and purpose” of the Covenant

Finally, the ICCPR has been characterized as “not just another international agreement but as part of the International Bill of Rights, an instrument of constitutional dimension which elevates the protection of the individual against the power of the state to a fundamental principle of international public policy”.⁴⁴ In evaluating a state’s derogation measures, the object and purpose of the Covenant must always be the guiding principle:

If these provisions are interpreted in a manner that fails to take account of the overall objectives of the Covenant and the protective system it establishes, they will acquire a disproportionately large and unduly restrictive influence on the application of the Covenant and seriously limit the enjoyment of the rights it was designed to guarantee. Stipulations such as Article 4, which authorizes the states parties to derogate from their obligations, must therefore be viewed as applicable only in rare and exceptional circumstances and, as Article 5(1) plainly indicates, are never to be used in a manner calculated to destroy the rights which the Covenant recognizes.⁴⁵

Derogation under the ECHR

In evaluating states’ responses during times of emergency under article 15 of the ECHR, the European Court of Human Rights has often granted states significant discretion, known as the margin of appreciation, in determining whether a state of emergency exists. In *Brannigan and McBride vs. the United Kingdom*, the court noted that “[I]t falls to each Contracting State, with its responsibility for ‘the life of [its] nation’ to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency”.⁴⁶ The court goes on to extend this margin of appreciation not only to a determination of whether a state of emergency exists, but also to the measures that are appropriate to deal with the emergency. The court noted: “It is not the Court’s role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which has direct

⁴³ Buergenthal, “To Respect...”, p. 87.

⁴⁴ *Ibid.*, p. 90.

⁴⁵ *Ibid.*, p. 91.

⁴⁶ European Court of Human Rights, *Brannigan and McBride v. United Kingdom*, Judgment of 26 May 1993, series A, no. 258-B, para. 43.

responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other ...”.⁴⁷

While the European Court of Human Rights has showed significant deference to states in article 15 cases, it has made clear that “[s]tates do not enjoy unlimited power in this respect. The Court ... is empowered to rule on whether the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis... The domestic margin of appreciation is thus accompanied by a European supervision”.⁴⁸ In *Brannigan v. UK*, the court also emphasized that “in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation”. It would therefore appear that the more severe the derogation the less likely the court is to grant a wide margin of appreciation and will instead subject the emergency measures to greater scrutiny.

The margin of appreciation doctrine has been severely criticized by a number of legal scholars who believe that it shows too much deference to the state parties to the ECHR and “inject[s] a strong subjective element into the interpretation of the European Convention, weakening the Court’s authoritative position vis-à-vis national governments”, which may “in turn, undermine any hope of effective regional supervision and enforcement of rights protected by the European Convention”.⁴⁹ Some have argued that it is precisely when states’ resort to derogation that a “heightened level of judicial scrutiny” is most needed.⁵⁰ There are some indications that the court may not grant states as wide a margin of appreciation in future cases involving national security, at least where fundamental rights are concerned.⁵¹

Derogation by Member States of the OSCE

To date, the UK is the only member state of the OSCE that has officially derogated from any of the international human rights conventions as a result of the September 11 attacks on the US. On 18 December 2001, the UK notified the UN that a state of emergency within the meaning of article 4(1) of the ICCPR exists in the United Kingdom and that it would derogate from article 9 of the ICCPR.⁵² The UK made a similar notification to the Council of Europe

⁴⁷ *Ibid.*, para. 59.

⁴⁸ *Ireland v. United Kingdom*, para. 207.

⁴⁹ Gross and Ní Aoláin, “From Discretion to Scrutiny...”, pp. 628-29.

⁵⁰ *Ibid.*

⁵¹ See for example, European Court of Human Rights, *Case of Chahal v. The United Kingdom*, Judgment of 15 November 1996, Reports 1996-V, para. 131.

⁵² “Notification of the United Kingdom’s derogation from article 9 of the International Covenant on Civil and Political Rights”, at http://www.unhchr.ch/html/menu3/b/treaty5_esp.htm. See also the

on the same day, announcing it would derogate from article 5(1)(f) of the ECHR.⁵³ It is highly questionable whether the situation in the UK meets the conditions for a state of emergency set out in the ICCPR and ECHR. Statements by government officials also suggest that the UK may have derogated for convenience sake. As Human Rights Watch has noted, “On November 12, Home Secretary David Blunkett announced that the U.K. would officially declare a ‘state of emergency’ thus permitting it to derogate from certain provisions of the ECHR. Blunkett assured the public that the declaration was a legal technicality—necessary to ensure that certain anti-terrorism measures that contravene the ECHR could be implemented—and not a response to any possible imminent terrorist threat. In a statement to parliament on October 15 announcing the broad outlines of the emergency anti-terrorism measures, Blunkett stated that ‘[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom’”.⁵⁴ The comments by the home secretary raise serious concern that the derogation does not comply with the requirements of article 4, including in particular that the emergency be strictly required by the exigencies of the situation”.

Permissible Limitations under the ICCPR

If there has been no official declaration of a state of emergency, clearly a state may not adopt measures that would derogate from its treaty obligations. Under such circumstances, it is “bound to respect human rights in full, and may only apply the limitations to certain freedoms (e.g. assembly) that are provided for within each treaty provision relating to each right”.⁵⁵ Although a state does not need to show a state of emergency in order to justify a limitation, certain conditions must be met in order for a limitation to be permissible. As is the case with derogations, limitations are exceptional measures which are to be strictly interpreted. States may resort to limitations only under certain limited circumstances set out in the ICCPR and other relevant human rights treaties and discussed below.

The limitation provisions in the ICCPR derive from article 29(2) of the Universal Declaration of Human Rights (UDHR) which states that “In the exercise of his rights and freedoms,

UK’s government’s announcement that it would derogate from article 5(1) of the ECHR: “Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001”, registered by the secretariat general on 18 December 2001, at <http://conventions.coe.int/treaty/en/DeclareList.asp?NT=005&CM=&DF>.

⁵³ For more detailed discussion of the UK’s derogation under the ICCPR and ECHR, see chapter on Freedom from Arbitrary Arrest and Ill-Treatment and the Right to a Fair Trial (hereinafter chapter on arrest).

⁵⁴ Human Rights Watch, *Commentary on the Anti-Terrorism, Crime and Security Bill 2001 the Anti-Terrorism, Crime and Security Bill 2001*, 16 November 2001 at <http://www.hrw.org/backgrounder/eca/UKleg1106.htm>.

⁵⁵ International Commission of Jurists, *Terrorism and Human Rights*, p. 220.

everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.⁵⁶ In the ICCPR, unlike the UDHR, the limitations are not contained in a single article, but are scattered throughout the Covenant. The language contained in the various limitations clauses is generally similar, but there are some differences among the articles. “The fact that there is no general limitation clause in the ICCPR has an important consequence: limitations are permitted only where a specific limitation clause is provided and only to the extent it permits”.⁵⁷

While the Covenant provides for the possibility of limitations to certain rights under limited circumstances (see discussion below), the limitations must be intended to achieve one of the enumerated purposes: to protect national security, public safety, public order (*ordre public*), public health or morals, and in some cases “to protect the rights and freedoms of others”.⁵⁸ This chapter will focus on limitations related to national security, public safety and order, which could conceivably be relevant in the context of the fight against terrorism.

“National Security”

Under the ICCPR, “national security” may justify limitations on freedom of movement and the free choice of residence (article 12(3)); the exclusion of the press and public from all or part of a trial (article 14(1)); restrictions on freedom of expression (article 19(3)), peaceful assembly (article 21); freedom of association with others, as well as the right to form and join trade unions (article 22).⁵⁹ Thus, “all the limitation clauses [in the ICCPR] include ‘national security’ as a possible ground for limitation or derogation of human rights, with the exception of Article 18(3), freedom to manifest one’s religion or belief. It may be deduced that the exigencies of national security do not justify limitations on that freedom”.⁶⁰

⁵⁶ Alexandre Charles Kiss, “Permissible Limitations on Rights”, pp. 290-310, p. 290 in *The International Bill of Rights: The Covenant on Civil and Political Rights*, Louis Henkin, ed. (New York: Columbia University Press, 1981).

⁵⁷ Kiss, “Permissible Limitations...”, p. 291.

⁵⁸ The following articles have limitations provisions: -- national security (articles 12(3), 14(1), 19(3), 21 and 22(2)); public safety (articles 18(3), 21, 22(2)); public order (articles 12(3), 14(1), 18(3), 19(3), 21, 22(2)); public health (articles 12(3), 18(3), 19(3), 21 and 22(2)); public morals (articles 12(3), 14(1), 18(3), 19(3), 21 and 22(2)). Kiss, “Permissible Limitations...”, p. 293.

⁵⁹ It should be noted that this report does not deal with many of the rights in the ICCPR that contain a specific limitation clause. Of the articles that include a specific limitation clause, only the right to freedom of expression is treated in the thematic chapters of the report. However, the right to privacy contained in article 17, while not including a specific limitation clause, only prohibits interferences that are “unlawful” and “arbitrary”. The IHF considers it important to review the factors that are relevant to any determination as to whether specific limitations on human rights are permissible.

⁶⁰ Alexandre Kiss, “Commentary by the Rapporteur on the Limitation Provisions”, *Human Rights Quarterly*, vol. 7, no.1, p. 21.

The term “national” has been interpreted to justify restrictions on rights only if the interests at stake affect the whole country. Limitations that are intended to “avoid riots or other troubles, or to frustrate revolutionary movements which do not threaten the life of the whole nation” may under certain circumstances fall within the scope of “public order” or “public safety”, but are not encompassed by the notion of national security. The Siracusa Principles state that “national security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order”.⁶¹ The term “security” has been interpreted by legal scholars to mean “the protection of territorial integrity and political independence against foreign force or threats of forces”.⁶²

The Siracusa Principles emphasize that “the systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population”.⁶³

“Public Safety”

Public safety may under certain circumstances be a justification for limitations to freedom of thought, conscience, and religion (article 18); the right to peaceful assembly (article 21); and the right to freedom of association (article 22). A precise definition of public safety is difficult. It is clear that the term is not synonymous with “public order”, as the ICCPR sometimes includes both terms as permissible grounds for limitations, but at other times includes only one of the terms.⁶⁴ A review of the discussions in the Third Committee during the drafting of the ICCPR indicates that, with regard to public safety, “rights guaranteed by the Covenant may be restricted if their exercise involves danger to the safety of persons, to their life, bodily integrity, or health”.⁶⁵ A similar interpretation of public safety was adopted by the drafters of the Siracusa Principles. Principle 33 states: “Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property”. However, as the rapporteur on the limitations provisions of the Siracusa Principles noted, “Such rules must be prescribed by law and should not be arbitrary or vague”.⁶⁶

⁶¹ Siracusa Principles, principle 30.

⁶² Kiss, “Permissible Limitations...”, p. 297. See also Kiss, “Commentary...”, p. 21.

⁶³ Siracusa Principles, principle 32.

⁶⁴ Kiss, “Permissible Limitation...”, p. 298.

⁶⁵ Ibid., quoting 14 GAOR Annexes, UN docs. A/4299 (1959), p. 7.

⁶⁶ Kiss, “Commentary...”, p. 21.

“Public Order”

Public order may be a permissible ground for limiting freedom of movement and the free choice of residence (article 12); the presence of the press or the public at all or part of a trial (article 14(1)); freedom to manifest one’s thoughts, conscience, and religion (article 18(3)); freedom of expression (article 19); peaceful assembly (article 21); and freedom of association (article 22).

Legal scholars have noted that the term “public order” is vague and imprecise, and its meaning may be particularly ambiguous in certain legal systems.⁶⁷ During the drafting of the ICCPR, there was much debate about the meaning of “public order”, and specific reference was made to the fact that the English term is not equivalent to the French (*ordre public*) or Spanish (*orden público*) terms. This debate resulted in the French “*ordre public*” being added to the English text to “indicate the importance of the French conception and its jurisprudence in determining the meaning and scope of this limitation”.⁶⁸

A review of French jurisprudence reveals that “*ordre public* includes the existence and the functioning of the state organization, which not only allows it to maintain peace and order in the country but ensures the common welfare by satisfying collective needs and protecting human rights”.⁶⁹ However, this concept itself includes the notion of human rights and limitations on the authority of states. The concept of public order allows limitations on certain human rights

where these limitations are necessary for that accepted level of public welfare and social organization. But the human rights of individuals are part of that minimum civilized order and cannot be lightly sacrificed even for the good of the majority or the common good of all. The result is a concept that is not absolute or precise, and cannot be reduced to a rigid formula but must remain a function of time, place and circumstances. In both civil and common law systems it requires someone of independence and authority to apply it by evaluating the different interests in each case.⁷⁰

⁶⁷ Kiss, *Permissible Limitations...*, p. 299.

⁶⁸ *Ibid.*, p. 300, fn 35. The reference to “public order” in the limitation clause of article 18(3) is the only one that does not also make reference to the French term *ordre public*. But see Svensson-McCarthy, p. 165 questioning whether the Human Rights Committee will give weight to the French interpretation of this concept.

⁶⁹ *Ibid.*, p. 301.

⁷⁰ *Ibid.*, p. 302.

Similarly, the Siracusa Principles state: “The expression ‘public order (ordre public)’ as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public)”.⁷¹

During discussions on the Siracusa Principles, the committee of experts reached the conclusion that public order can only justify a limitation on rights “if the situation or the conduct of the persons concerned constitutes a sufficiently serious threat to public order. Hence, control by an independent organ, be it a political body (parliament), a judicial body (court), or any other organ is important”.⁷²

Finally, in addition to the interpretative principles discussed above, the Siracusa Principles outline a number of general interpretative principles that should be applied when considering the permissibility of limitations to Covenant rights. In particular, no limitation shall be interpreted “so as to jeopardize the essence of the right concerned” and shall be “interpreted strictly and in favor of the rights at issue”.⁷³ Furthermore, “[i]n applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation” and “the burden of justifying” such a limitation is with the state.⁷⁴

“Prescribed by law”

All limitation clauses in the ICCPR except for article 14(1)⁷⁵ require that such restrictions be based on national law. The specific reference to national law takes a variety of forms, such as “provided by law”, “prescribed by law”, “in conformity with law” or “in accordance with law”, but these terms appear to have more or less the same meaning. “The requirement that all restrictions have a basis in national law is referred to as the principle of legality. The objective is the prevention of arbitrary restrictions on human rights by requiring that all limitations be established by general rule”.⁷⁶ Similarly, the Siracusa Principles state: “No

⁷¹ Siracusa Principles, principle 22.

⁷² Kiss, “Commentary...”, p. 20.

⁷³ Siracusa Principles, principles 2-3.

⁷⁴ Ibid., principles 11-12.

⁷⁵ Article 14(1), which allows a court to exclude the press or public “from all or part of a trial”, is different from the other limitation clauses in that it does not include a requirement that the measure be “prescribed by law” or other similar language. In the commentary on the limitations provisions of the Siracusa Principles, the rapporteur noted that the aim of article 14(1) is to “enable a court to restrict publicity in criminal proceedings which would endanger certain public or private interests or prejudice the interests of justice. Such restrictions cannot result from a previous law as a general measure: they are to be decided in circumstances determined by the court”. Kiss, “Commentary...”, p. 22.

⁷⁶ Lockwood, Finn and Jubinsky, “Working Paper ... on Limitation Provisions”, p. 45.

limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied”.⁷⁷

The ECHR also requires that limitations have a basis in national law to ensure the principle of legality, and contains language to this effect that is similar to that contained in the ICCPR. A review of the case law of the European Court and Commission of Human Rights reveals that “restrictions on the exercise of human rights must not only *have a basis in domestic law*, but the ‘law’ concerned must also fulfil the requirements of *accessibility* and *foreseeability*, including *protection against arbitrariness*”.⁷⁸ In the *Sunday Times case*, the European Court of Human Rights concluded that two conditions emanate from the language “prescribed by law”:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁷⁹

However, the court added that the “consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable”.⁸⁰

“*Necessary in a democratic society*”

According to the ICCPR, limitations to the rights to a public trial (article 14), to peaceful assembly (article 21) and to freedom of association (article 22) can only be permitted if they are “necessary in a democratic society ...” in pursuit of specific interests – such as national security, public order or public safety – discussed above. Although not defined in the Covenant, it was intended to protect against arbitrary state action: “The terms ‘a democratic society’ were inserted to control the use of limitation provisions and vague notions such as

⁷⁷ Siracusa Principles, principle 15.

⁷⁸ Svensson-McCarthy, p.75.

⁷⁹ European Court of Human Rights, *The Sunday Times v. United Kingdom*, Judgment of 26 April 1979, series A, no. 30, para. 49. See also European Court of Human Rights, *Silver v. United Kingdom*, Judgment of 25 March 1983, slip op. 29, series A, no. 61, para. 87; and Lockwood, p. 47-8.

⁸⁰ *The Sunday Times case*, para. 49.

‘national security’ and ‘public order’...’⁸¹ The Human Rights Committee has held that it is not for states alone to determine whether a limitation is necessary and has insisted on sufficient details to allow it to evaluate whether such limitations were necessary in the circumstances.⁸² In making its evaluation, the committee has applied the principle of proportionality in determining whether a limitation is “necessary in a democratic society”.

The jurisprudence of the European Court of Human Rights is also helpful in interpreting “necessary in a democratic society”. All but one of the limitation clauses in the ECHR require that any limitation must be “necessary in a democratic society”.⁸³ The requirement that a limitation be “necessary” implies, among other things, that the limitation is proportionate to a legitimate aim and that it is responding to a “pressing social need”. Thus, even where the European Court of Human Rights accepts that a limitation is lawful and for the maintenance of national security, it will still ask whether the measure is strictly necessary to achieve that aim. In the *Sunday Times case*, for example, the court found that “the interference complained of [the prohibition against publication of an article] did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention ... That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary”.⁸⁴

The European Court of Human Rights has emphasized that limitations on the exercise of rights contained in the ECHR are to be given a narrow interpretation and subject to the strict supervision of the court. Unfortunately, it has also applied the margin of appreciation doctrine when considering whether a state’s interference in a convention right is proportionate. In matters of national security, the European Court of Human Rights has been particularly deferential. In *Leander v. Sweden*, the court accepted that “the margin of appreciation available to the respondent State in assessing the pressing social need ..., and in particular in choosing the means for achieving the legitimate aim of protecting national security, was a wide one”.⁸⁵

⁸¹ Svensson-McCarthy, p. 112.

⁸² See for example, *Pietroroia v. Uruguay*, Report of the Human Rights Committee, 36 UN GAOR Supp. (no. 40), UN Doc. A/36/40 (1981), paras. 158-59.

⁸³ Remarkably, article 5 of the ECHR regarding the right to liberty and security of person makes no reference to necessity.

⁸⁴ *The Sunday Times vs. United Kingdom*, para. 67.

⁸⁵ European Court of Human Rights, *Leander v. Sweden*, Judgment of 26 March 1987, series A, no. 116, para. 59 .

Inherent in the notion of “democratic society” is a system of government that guarantees human rights and civil liberties and has strong mechanisms to ensure respect for these rights. Thus, the European Court of Human Rights has also emphasized that a crucial feature of a democratic system is the safeguard provided by courts, which are responsible for reviewing decisions by state authorities.⁸⁶ Similarly, the Siracusa Principles state: “While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition”.⁸⁷ Furthermore, as one legal scholar has noted, the criteria “democratic society”

recognizes the principle that government is limited by the concept of human rights, and that even the good of the majority or the common good of all does not permit certain invasions of individual autonomy and freedom. It does not permit pretext or paranoia. Whatever a state might do by temporary derogation in time of public emergency under Article 4 of the Covenant, it cannot insist that it is *necessary* for its national security or for *ordre public* to maintain intensive regimentation, censorship or other controls limiting freedom of movement and residence; the right to public trial; or freedom of conscience, expression, assembly, or association, which limitations are incompatible with a democratic society committed to individual freedoms and rights”.⁸⁸

Conclusion

The ICCPR recognizes that there may be public emergencies that are so serious as to warrant state derogation from some of the rights in the Covenant on an exceptional and temporary basis. The ICCPR, however, sets out procedural and substantive limitations on when derogations are permissible and what measures may be appropriate in such circumstances. Most importantly, the Covenant sets out a number of rights from which there can be no derogation at any time, even in public emergencies that threaten the life of the nation.

The ICCPR (as well as the ECHR and ACHR) also provides for certain limitations on enumerated rights in situations that do not rise to the level of a state of emergency, but that require a certain balancing between the rights of individuals and the common interest and good functioning of society and/or a balancing between competing rights of individuals.

⁸⁶ European Court of Human Rights, *Handyside v. United Kingdom*, Judgment of 7 December 1976, series A, no. 24, cited in Kiss, “Permissible Limitations...”, p. 307.

⁸⁷ Siracusa Principles, principle 21.

⁸⁸ Kiss, “Permissible Limitations...”, p. 309.

However, as is the case with the derogation clause, such limitations are always of an exceptional nature and are to be strictly interpreted, keeping in mind the object and purpose of the Covenant as a whole.

International Organizations and the Human Rights Component of the Counter-Terrorism Campaign

Since the events of September 11, the global campaign against terrorism has assumed a prominent place in the work of many international organizations. A number of bodies and leading officials of these organizations have acknowledged that measures being imposed in the fight against terrorism have serious implications for human rights and have emphasized the need to incorporate human rights protection as an essential component of that fight. However, in spite of these important interventions, to date human rights have not been given due attention in the work of many international bodies involved in developing and coordinating counter-terrorism efforts.

The following chapter offers an overview of how and to what extent various bodies of the UN, the OSCE, the Council of Europe and the Organization of American States have sought to ensure that measures adopted during the post-September 11 campaign against terrorism comply with international human rights standards and identifies areas that require further attention.⁸⁹

United Nations

Security Council

Chapter 7 of the UN Charter grants the Security Council powers to take decisions binding upon all UN member states in order to maintain or restore international peace and security. In accordance with chapter 7, the Security Council may impose sanctions of various kinds and, if other measures are or prove inadequate, authorize military operations. Since the early 1990s, the Security Council has adopted a number of resolutions declaring acts of international terrorism a threat to peace and security in the world and imposing sanctions on regimes found to support terrorism, including the Taliban regime in Afghanistan.⁹⁰

In the aftermath of September 11, the Security Council's action in the field of counter-terrorism has reached a new level. On 12 September 2001, the Security Council adopted resolution 1368, which called on the international community to "redouble its efforts" to prevent and suppress terrorist acts. Then, on 28 September 2001, the Security Council adopted resolution 1373 under chapter 7 of the UN Charter. Resolution 1373, which has been

⁸⁹ The European Union is not covered in this chapter. However, a number of counter-terrorism measures that the European Union has adopted since September 11, and their implications on human rights, are discussed in other chapters of the report.

⁹⁰ Security Council Resolution 1267 (1999), 15 October 1999.

deemed one of the most wide-ranging Security Council resolutions ever, called upon all states to take a range of measures to combat terrorism⁹¹, including measures to suppress the financing of terrorism, to prevent those involved in terrorism from enjoying a safe haven within their territories and to ensure that those involved in terrorism are brought to justice.

Although the measures contemplated in resolution 1373 have potentially far-reaching implications for the protection of human rights, the resolution did not make adequate reference to member states' obligations to comply with international human rights standards in the fight against terrorism. The preamble of the resolution stresses the need to combat terrorist acts "by all means, in accordance with the Charter of the United Nations". Since the UN Charter establishes as one of the purposes of the UN to promote and encourage respect for human rights and fundamental freedoms, this provision may be interpreted to incorporate the human rights dimension in the resolution. However, the lack of an explicit statement to this effect by the Security Council leaves the impression that human rights protection is a secondary consideration in the campaign against terrorism, instead of an essential component of any counter-terrorism strategy. In the operational paragraphs of the resolution, the only mention of human rights is in a subordinate clause: states are requested to "take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts".⁹²

On 20 January 2003, the Security Council followed up resolution 1373, and subsequent resolutions on the topic of countering terrorism, with a declaration that for the first time since September 11 draws attention to the human rights dimension of the fight against terrorism in a satisfactory manner.⁹³ The declaration concludes that "states must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, *in particular international human rights, refugee and humanitarian law*" [italics added]. The IHF welcomes this declaration as a first step by the Security Council toward effectively incorporating human rights protection in its work to counter terrorism. However, we urge the Security Council not to allow the declaration to remain merely a formal recommendation, but instead to evaluate how states have complied with international human rights, refugee and humanitarian

⁹¹ As with previous Security Council resolutions, this resolution talks about "acts of international terrorism" without defining the term.

⁹² UN Security Council Resolution 1373, para. 3 (f).

⁹³ The declaration was adopted as an attachment to UN Security Council Resolution 1456 (2003) on 20 January 2003.

standards during their efforts to implement Security Council resolutions related to countering terrorism. Such monitoring should be carried out on an ongoing basis. Specifically, we urge that the council's Counter-terrorism Committee (see below) be charged with this task.

Counter-terrorism Committee

Pursuant to Security Council Resolution 1373, all states were required to report on steps taken to implement the resolution within 90 days of its adoption and thereafter regularly. The resolution also foresaw the establishment of a special committee to monitor its implementation and to review states' reports. Accordingly, a Counter-terrorism Committee, comprised of 15 expert members, was set up shortly after the adoption of the resolution. Unfortunately, the work of this committee has increased concerns raised by the absence of any firm human rights clause from resolution 1373. In late October 2001, the Counter-terrorism Committee approved a note offering guidance to states in terms of the reporting requirements of resolution 1373.⁹⁴ Although the measures to be adopted by member states pursuant to resolution 1373 implicate internationally-guaranteed human rights, the committee failed even to mention states' human rights obligations. The committee also declined subsequent proposals by inter alia the High Commissioner for Human Rights that states be requested to include the human rights component when reporting on their implementation of resolution 1373.⁹⁵ Moreover, while the web page of the Counter-terrorism Committee features a directory with information on standards, best practices and sources of assistance in different fields related to the fight against terrorism, the directory does not include any category offering guidance on compliance with international human rights standards. In light of the committee's complete disregard for the human rights implications of the fight against terrorism, it is not surprising that most states have not discussed this aspect when reporting to the committee.

As noted above, in early 2003, the Security Council finally adopted a declaration that explicitly calls on the UN member states to respect human rights when they act to counter terrorism. This declaration, which was issued after the Counter-terrorism Committee had already reviewed a first set of reports from almost all UN member states, also requested the Counter-terrorism Committee "in monitoring the implementation of resolution 1373 (2001) to bear in mind all international best practices, codes and standards which are relevant to the

⁹⁴ Security Council committee established pursuant to Resolution 1373 (2001) of 28 September 2001: Guidance for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001.

⁹⁵ For more information see the section on the UN High Commissioner for Human Rights.

implementation of [the] resolution”.⁹⁶ The IHF does not doubt the good intention behind this request, but deplores the fact that it does not specifically mention human rights standards. The IHF calls on the Security Council to assign the Counter-terrorism Committee specific responsibility for monitoring compliance with human rights standards as part of its examination of states’ implementation of measures to combat.

Secretary General

Since September 11, UN Secretary General Kofi Annan has spoken out vigorously for the need to safeguard human rights in the fight against terrorism. For example, when addressing the UN Human Rights Commission in April 2002, he stated that “[...] states must [also] take the greatest care to ensure that counter-terrorism does not, any more than sovereignty, become an all-embracing concept that is used to cloak, or justify, violations of human rights” and warned that “[a]ny sacrifice of fundamental freedoms in the struggle against terror is not only wrong in itself, but will ultimately be self-defeating”.⁹⁷ In a speech to the Security Council in January 2002, the Secretary General noted, “Of course, the protection of human rights is not primarily the responsibility of this Council – it belongs to other United Nations bodies, whose work you do not need to duplicate. But there is a need to take into account the expertise of those bodies, and make sure that the measures you adopt do not unduly curtail human rights, or give others a pretext to do so”.⁹⁸ The Secretary General’s remarks were very welcome, but they did not have a noticeable impact on the priorities of the Security Council, nor did they result in any public clarification by the council regarding the role that human rights protection should play in the overall anti-terrorism campaign.

In October 2001, the Secretary General also established the Policy Working Group on the United Nations and Terrorism to consider and make recommendations on the role of the UN in the struggle against terrorism. In its subsequent report, the policy working group concluded that “[...] it is in the realm of norms, human rights, justice and communications that the comparative advantages of the UN will be most apparent and that it will make the greatest difference”.⁹⁹ The policy working group also made a number of recommendations regarding the UN’s role in guaranteeing that anti-terrorism measures comply with international human rights standards. Firstly, “all relevant parts” of the UN system were requested to remind states of the fact that there are certain human rights norms that must always be respected and from

⁹⁶ UN Security Council Resolution 1456 (2003), para. 4(3).

⁹⁷ Press release SG/SM/8196, HM/CN/989, “Secretary-General to Commission of Human Rights: Human rights must not be sacrificed to counter-terrorism”, 12 April 2002.

⁹⁸ Press release SG/SM/8105, SC/7277, “Secretary-General, addressing Council meeting on counter-terrorism, says United Nations ‘stands four square’ against scourge”, 18 January 2002.

⁹⁹ A/57/273, S/2002/875, Report of the Policy Working Group on the United Nations and Terrorism.

which there can be no derogation. Secondly, the Department of Public Information of the UN Secretariat was encouraged, after consultation with the Office of the High Commissioner for Human Rights, to publish a summary of the most essential jurisprudence of international and regional human rights bodies on the protection of human rights in the fight against terrorism. Thirdly, the High Commissioner for Human Rights was requested to organize a gathering to consult international, regional, sub-regional and non-governmental organizations on the topic of how to harmonize counter-terrorism measures with human rights norms.

While the IHF welcomes the recommendations of the policy working group, the first recommendation is too vague and narrow in scope. By referring solely to non-derogable rights, the policy working group misses an opportunity to underscore that states have a general obligation to respect all internationally guaranteed human rights and that any limitations on or derogations from those rights are authorized only in exceptional and clearly defined circumstances that must be subject to international scrutiny.¹⁰⁰ Likewise the recommendation fails to acknowledge that not only preventive action but also follow-up mechanisms are needed to safeguard respect for human rights in the fight against terrorism. In addition, while calling on “all relevant parts” of the UN system to remind member states of their human rights obligations, the committee leaves open the question as to which UN bodies will be charged with monitoring compliance and providing effective remedies to individuals whose rights are violated. It is particularly regrettable that the committee did not mention the role the Security Council and its committees should play in this process.

General Assembly

Since the early 1990s, the General Assembly has adopted a number of resolutions on the topic of “human rights and terrorism”. Similarly during the annual session in 2001, the General Assembly adopted a resolution reaffirming that “all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards”.¹⁰¹

Furthermore, in 2002 the General Assembly adopted an unprecedented resolution on “protecting human rights and fundamental freedoms while countering terrorism”, which affirms that “states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and

¹⁰⁰ See Chapter on Derogations and Limitations in International Law (chapter on derogations).

¹⁰¹ Human Rights and Terrorism, A/RES/56/160, 19 December 2001.

humanitarian law”.¹⁰² The resolution also calls on states, when taking steps to counter terrorism, to “consider the recommendations from special procedures and mechanisms of the Commission on Human Rights and relevant comments and views of UN human rights treaty bodies”. In addition, the resolution highlights the role of the High Commissioner for Human Rights in protecting human rights and fundamental freedoms while combating terrorism and requests him to examine this issue thoroughly, make general recommendations to states and to provide additional assistance and advice to states that so request.

High Commissioner for Human Rights¹⁰³

Mary Robinson, the UN High Commissioner for Human Rights at the time of the September 11 events, clearly articulated the human rights dimensions of the campaign against terrorism. Already at a press conference in late September 2001, she voiced concern about certain developments in the EU and the United States that had occurred since September 11 that she believed could result in the erosion of human rights and civil liberties.¹⁰⁴ She followed up this warning with a number of important statements before she left office in September 2002. In perhaps her most important statement on the matter, she concluded in January 2002 that it is possible to have “robust effective action against terrorism” while complying with international human rights standards since these have “a built in flexibility that allows for certain limitations”.¹⁰⁵ At the same time, she stressed that any limitations on rights and freedoms protected under international law must be subject to strict scrutiny and concluded that “It is a sign of a healthy democracy when the drawing of the balance between personal freedoms and national security is subject to vigorous debate and scrutiny”.

¹⁰² Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/RES/57/219, 18 December 2002.

¹⁰³ The High Commissioner for Human Rights is the UN official with the principal responsibility for UN human rights activities.

¹⁰⁴ When asked about the concerns for civil liberties that could result from stepping up the fight against terrorism, the high commissioner stated: “There are very real concerns, and they are general for the global coalition that is forming to address issues of countering terrorism and acts of terrorism. We already saw last week a meeting of European Justice and Home Affairs Ministers, and the outcome of that could be worrying for the further erosion of certain liberties in European countries and a harsher climate and context for refugees and asylum seekers. In other words, potentially a further hardening of the fortress Europe mentality, this time in the name of tackling terrorism, but in reality making life difficult for the vulnerable populations who desperately seek to escape from the harsh realities of their lives. I know also from NGOs in the United States that I met during my visit there, that they are very deeply concerned. Particularly about the use of the existing immigration laws, to erode the normal checks and balances of the United States system that can be very real, by holding people for longer periods under the immigration laws and potentially on evidence that can't be produced from a court because of security reasons”. From “Mary Robinson, High Commissioner for Human Rights, meets the press – transcript of the briefing”, Geneva, 25 September 2001.

¹⁰⁵ Mary Robinson, High Commissioner for Human Rights, “Protecting Human Rights: The United States, The United Nations and the World”, delivered during a special John F. Kennedy library and foundation programme series on responding to terrorism, Boston, 6 January 2002.

In November 2001, the High Commissioner issued a joint statement together with the Secretary General of the Council of Europe and the Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) to call on all states to refrain from “any excessive steps” when acting against terrorism and, in accordance with international law, to ensure that any counter-terrorism measures restricting human rights “strike a fair balance between legitimate national security concerns and fundamental freedoms”. The three representatives also declared the readiness of their respective bodies to assist states with developing counter-terrorism legislation and to monitor its implementation.¹⁰⁶ As of this writing, the Office of the High Commissioner had not received any request for such assistance.¹⁰⁷

In the context of the work of the Counter-terrorism Committee to monitor implementation of Security Council Resolution 1373, the High Commissioner urged the committee also to consider human rights issues.¹⁰⁸ The Office of the High Commissioner prepared a note intended to provide “further guidance” to states on how to report on the steps taken to implement anti-terrorism measures.¹⁰⁹ In the note, the High Commissioner listed a number of general criteria on complying with human rights standards while pursuing a counter-terrorism campaign and in particular set out what limitations are permissible under international human rights law. The High Commissioner also requested that states report on how specific measures taken to implement Security Council Resolution 1373 are compatible with international human rights law and to provide justification for any restrictions or limitations on those rights that have been introduced as part of the counter-terrorism campaign. Unfortunately, the Counter-terrorism Committee failed to endorse this important note or to circulate it among the UN member states, despite repeated requests from the Office of the High Commissioner for Human Rights. In another attempt to ensure comprehensive human rights monitoring of the post-September 11 counter-terrorism campaign, Robinson called on the UN Commission on Human Rights (commission or CHR) to undertake such monitoring at its annual session in March 2002. However, this proposal was also unsuccessful.¹¹⁰

¹⁰⁶ Press release by the Office of the United Nations High Commissioner for Human Rights, the Council of Europe and the ODIHR, “Action against terrorism must not undermine human rights”, 29 November 2001.

¹⁰⁷ Information from E.J. Flynn, Human Rights Officer, coordinator of the Europe and America Team, at the Office of the High Commissioner for Human Rights, per e-mail 9 January 2003.

¹⁰⁸ For more information see the section on the Counter-terrorism Committee.

¹⁰⁹ Office of the High Commissioner for Human Rights, “Proposals for ‘further guidance’ for the submission of reports pursuant to paragraph 6 of the Security Council Resolution 1373 (2001): Compliance with International Human Rights Standards”, 2001.

¹¹⁰ See also the section on the UN Commission on Human Rights.

Moreover, before she left office, Robinson handed over an additional note prepared by her office to the Counter-terrorism Committee.¹¹¹ This note offers an overview of key human rights principles that the office believes the Counter-terrorism Committee should take into consideration when examining counter-terrorism measures adopted by different states. The listed principles are: legality, non-derogability, necessity and proportionality, non-discrimination, due process and rule of law, and the right to seek asylum and non-refoulement. The note also lays down a number of concrete questions based on these principles that the Counter-terrorism Committee is encouraged to make use of in its monitoring of state action. The IHF is not aware that the Counter-terrorism Committee has applied any of the recommendations made in the note.

The current High Commissioner for Human Rights, Sergio Vieira de Mello, has also indicated that he intends actively to promote respect for human rights in the struggle against terrorism. In particular, when addressing the Counter-terrorism Committee in late October 2002, Vieira de Mello stated *inter alia* that “While there is no contradiction at all between implementing Security Council Resolution 1373 and respecting human rights, I am concerned by reports I have been receiving, for example, from the Special Rapporteur on the Independence of Judges and Lawyers, of too many states enacting anti-terrorism legislation that is too broad in scope (namely, that allows for the suppression of activities that are, in fact, legitimate), or who are seeking to fight terrorism outside the framework of the court system. In other words, I am concerned that yet one more casualty of the terrorist has been the erosion in some quarters of fundamental civil and political rights.”¹¹² To underscore his concerns, the High Commissioner recommended concrete steps that the Counter-terrorism Committee could take to incorporate the human rights dimension in its work, including that the committee appoint a human rights advisor; engage in a direct exchange of views with the human rights mechanisms of the UN system; and take advantage of High Commissioner’s willingness to provide information that could help ensure the implementation of Security Council Resolution 1373 in a manner consistent with international human rights standards. He also expressed his commitment to the rapid implementation of the recommendations made by the policy working group set up by the UN Secretary General to consider the UN’s role in the campaign against terrorism.¹¹³

¹¹¹ Office of the High Commissioner for Human Rights, “Note to the Chair of the Counter-terrorism Committee: A Human Rights Perspective on Counter-terrorism Measures”, September 2002.

¹¹² Address by Sergio Viera de Mello, the High Commissioner for Human Rights, to the Counter-terrorism Committee of the Security Council, 21 October 2002.

¹¹³ For more information see the section on the UN Secretary General.

Commission on Human Rights¹¹⁴

At its annual session in March-April 2002, the Commission on Human Rights reaffirmed that all measures to counter terrorism must be in strict conformity with international law, including international human rights standards. The resolution that was adopted to this end was only the most recent in a long series of similar such resolutions.¹¹⁵ At the beginning of the session, a proposal was also made for concrete action in the field of counter-terrorism measures and human rights. In her opening address, then-High Commissioner for Human Rights Mary Robinson urged the commission to establish a mechanism to monitor implementation of Security Council Resolution 1373 from a human rights perspective. In support of her recommendation, Robinson argued that the commission is the body within the UN system that has “primary responsibility” for safeguarding compliance with international human rights standards.¹¹⁶ Unfortunately, the commission failed to create a monitoring mechanism as urged by the High Commissioner.

Sub-commission on the Promotion and Protection of Human Rights¹¹⁷

At its session in August 2002, the Sub-commission on the Promotion and Protection of Human Rights (sub-commission) expressed concern that a number of countries have adopted laws, regulations and practices to combat terrorism since September 11 that are incompatible with international human rights standards: “[The sub-commission] emphasizes that all measures adopted against terrorism should be strictly in keeping with international law, and particularly with international norms and obligations in the sphere of human rights [and] draws attention to the incompatibility of certain laws, regulations and practices recently introduced by a number of countries, in particular those which call into question the judicial guarantees which are intrinsic to the rule of law, notably in relation to police custody, arbitrary detention, incommunicado detention, the rights of defence and the right to an effective remedy”.¹¹⁸ The sub-commission also asked its Special Rapporteur on Human Rights and Terrorism, Kalliopi Koufa¹¹⁹, to prepare a report on national, regional and

¹¹⁴ The UN Commission on Human Rights is one of the main bodies within the United Nations mandated to promote human rights. It meets annually (or on an exceptional basis) to consider human rights concerns throughout the world and submits proposals, recommendations and reports on these concerns to the Economic and Social Council of the UN. It is comprised of 53 member states.

¹¹⁵ Commission on Human Rights Resolution 2002/35, “Human Rights and terrorism”, 22 April 2002.

¹¹⁶ Statement by Mary Robinson, United Nations High Commissioner for Human Rights, at the opening of the 58th session of the Commission on Human Rights, 18 March 2002.

¹¹⁷ The Sub-commission on Human Rights is subordinated to the Commission on Human Rights.

¹¹⁸ Sub-Commission on Human Rights Resolution 2002/2, “Current situation and future of human rights”, 12 August 2002.

¹¹⁹ Kalliopi Koufa was appointed Special Rapporteur on Human Rights and Terrorism in 1994 after the Human Rights Commission had requested the Sub-commission to study this topic.

international counter-terrorism measures introduced or applied after September 11 for its next session in August 2003.¹²⁰

Treaty monitoring bodies¹²¹

Some of the UN bodies that monitor compliance with human rights treaties have addressed problems related to the post-September 11 campaign against terrorism in the context of examining states' reports. For example, the Committee on the Elimination of Racial Discrimination (monitoring compliance with the International Convention on the Elimination of All Forms of Racial Discrimination) has voiced concern regarding increased intolerance and hatred against Arabs and Muslims in countries such as Canada¹²² and Denmark¹²³, while the Human Rights Committee (monitoring compliance with the International Convention on Civil and Political Rights) has criticized the practice of expelling terrorist suspects from Sweden¹²⁴ and draft counter-terrorism legislation in the United Kingdom¹²⁵.

High Commissioner for Refugees¹²⁶

In the wake of September 11, the High Commissioner for Refugees, Ruud Lubbers, has warned states not to allow the fight against terrorism to result in further victimization of asylum seekers and refugees. In an October 2001 speech, for example, he stated that: "There is a growing risk that people will associate terrorist attacks with Afghans, refugees and

¹²⁰ Sub-Commission on Human Rights Resolution 2002/24: "Terrorism and human rights", 14 August 2002.

¹²¹ The UN Human Rights system includes six committees that have been established to monitor implementation of the principal UN human rights treaties.

¹²² "The Committee notes with concern that, in the aftermath of the events of 11 September 2001 Muslims and Arabs have suffered from increased racial hatred, violence and discrimination". Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, 1 November 2002.

¹²³ "The Committee is concerned about reports of a considerable increase in reported cases of widespread harassment of people of Arab and Muslim backgrounds since 11 September 2001". Concluding observations of the Committee on the Elimination of Racial Discrimination: Denmark, 21 May 2002.

¹²⁴ "While it understands the security requirements relating to the events of 11 September 2001, and takes note of the appeal of Sweden for respect for human rights within the framework of the international campaign against terrorism, the Committee expresses its concern regarding the effect of this campaign on the situation of human rights in Sweden, in particular for persons of foreign extraction. The Committee is concerned at cases of expulsion of asylum-seekers suspected of terrorism to their countries of origin". Concluding observations of the Human Rights Committee: Sweden, 24 April 2002.

¹²⁵ "The Committee notes with concern that the State party, in seeking inter alia to give effect to its obligations to combat terrorist activities pursuant to Security Council Resolution 1373 (2001), is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant and which, in the State party's view, may require derogations from human rights obligations". Concluding observations of the Human Rights Committee: United Kingdom and Northern Ireland, 6 December 2001.

¹²⁶ The High Commissioner for Refugees is the head of the UN High Commission for Refugees (UNHCR), whose mandate it is to lead and co-ordinate international action to protect refugees.

sometimes even with Muslims. I have taken, and will continue to take, a strong stand against such discrimination and xenophobia". On the same occasion, he cautioned that Security Council Resolution 1373 must not be "used as a pretext for associating genuine refugees with criminal acts or terrorist activities. Those who have committed crimes should be brought to justice and should be clearly distinguished from asylum-seekers who qualify for protection under the UN Refugee Convention. To equate the two is dangerous and seriously undermines efforts to protect and assist refugees".¹²⁷

Since September 11, the Office of the High Commissioner for Refugees has also offered concrete guidelines to states on how to combat terrorism without jeopardizing refugee protection. For example, in November 2001, a paper on "addressing security concerns without undermining refugee protection" was published. According to this paper: "UNHCR shares the legitimate concern of states to ensure that there should be no avenue for those supporting or committing terrorist acts to [their] territory [and] recognizes that appropriate mechanisms need to be put in place in the field of asylum as in other areas. At the same time care should be taken to ensure a proper balance with the refugee protection principles at stake". In line with this conclusion, the paper outlines recommendations on such essential topics as admission to and exclusion from refugee status, restrictions on the freedom of movement of asylum seekers and expulsion and extradition.¹²⁸

Organization for Security and Cooperation in Europe

Ministerial Council¹²⁹

At its meeting in Bucharest in December 2001, the OSCE Ministerial Council approved a decision "on combating terrorism" in which the OSCE member states pledged to "defend freedom and protect their citizens against acts of terrorism, fully respecting international law and human rights".¹³⁰ On the same occasion, the Ministerial Council also adopted an action plan outlining measures to be taken by the OSCE and its member states in the context of the fight against terrorism.¹³¹ One of the basic assertions of the action plan is that the OSCE should seek to base its contribution to the counter-terrorism campaign on its strengths and

¹²⁷ UNHCR: "Remarks by Mr. Ruud Lubbers, UN High Commissioner for Refugees, at the 9th Extraordinary Meeting of the Organisation of the Islamic Conference (Doha)", 10 October 2001.

¹²⁸ UNHCR: "Addressing Security Concerns without Undermining Refugee Protection" – UNHCR's perspective", November 2001.

¹²⁹ The OSCE Ministerial Council, which is comprised of the foreign ministers of the member states, meets once a year to make decisions regarding the long-term activities of the OSCE.

¹³⁰ Decision No. 1 on Combating Terrorism, adopted by the OSCE Ministerial Council in Bucharest, 4 December 2001.

¹³¹ Bucharest Plan of Action for Combating Terrorism, 4 December 2001.

comparative advantages, including its broad membership and its broad security doctrine linking the military, economic and human dimensions. As regards international legal obligations and political commitments related to the fight against terrorism, the action plan calls on the member states *inter alia* to consider “how the OSCE may draw upon best practices and lessons learned from other relevant groups, organizations, institutions and fora in areas such as police and judicial co-operation; prevention and suppression of the financing of terrorism; denial of other means of support; border controls including visa and document security; and access by law enforcement authorities to information”. The Ministerial Council failed, however, to specify in the action plan any concrete steps for ensuring that human rights are adequately protected within the overall fight against terrorism. The IHF therefore calls on the OSCE to undertake a comprehensive study to identify best practices for ensuring that the rule of law as well as human rights are respected in the fight against terrorism. Such a study should then serve as the basis for monitoring the counter-terrorism efforts of member states throughout the OSCE region.

A year after the Bucharest meeting, the Ministerial Council also adopted a “charter on preventing and combating terrorism” while gathered in Porto.¹³² This charter makes a number of important provisions regarding the human rights dimension of the counter-terrorism campaign. According to the charter, the OSCE member states consider it “of utmost importance to complement the ongoing implementation of OSCE commitments on terrorism with a reaffirmation of the fundamental and timeless principles on which OSCE action has been undertaken and will continue to be based in the future, and to which participating States fully subscribe”. The member states therefore undertook to “conduct all counter-terrorism measures in accordance with the rule of law, the United Nations charter and relevant provisions of international law, international standards of human rights, and where applicable, international humanitarian law”. The member states also stressed that terrorism must not be identified “with any nationality or religion” and that counter-terrorism action is not aimed “against any religion, nation or people”. While the IHF applauds these provisions, it calls on the OSCE to establish an effective mechanism for monitoring member states’ implementation of the commitments set out in the charter and for holding states accountable for serious violations of OSCE standards.

¹³² OSCE Charter on Preventing and Combating Terrorism, adopted by the OSCE Ministerial Council in Porto, 7 December 2002.

*Parliamentary Assembly*¹³³

At its annual session in July 2002, the OSCE Parliamentary Assembly focused on the political, economic and human rights aspects of the international fight against terrorism. As a result of the discussions held during the session, the Parliamentary Assembly adopted a declaration which inter alia condemned “any attempt by governments or political leaders to use the fight against terrorism to suppress human rights and civil liberties [...] or [...] for any unrelated political aims such as oppression of political opposition or restriction on freedom of media”.¹³⁴ The Parliamentary Assembly also called on the OSCE member states to “make all possible efforts to contribute to the international fight against terrorism, in a manner fully in accord with international human rights obligations, to create and strengthen parliamentary human rights oversight committees, and to seek to strengthen cooperation in this area with other parliamentary associations”.

*Office for Democratic Institutions and Human Rights*¹³⁵

The former director of ODIHR, Ambassador Gérard Stoudmann, who stepped down from this position in late 2002¹³⁶, repeatedly underscored the importance of balancing security measures and respect for international human rights standards. For example, at a conference in October 2001, he stated: “But the fight against terrorism should not be fought at the cost of civil liberties and fundamental freedoms. I think human rights institutions, all of us here, have to be a watchdog. The measures against terrorism should be proportionate, targeted and serve their purpose”.¹³⁷ The following month he issued a joint statement together with the UN High Commissioner for Human Rights and the Secretary General of the Council of Europe on the same topic.¹³⁸

Moreover, the Bucharest Action Plan adopted by the OSCE Ministerial Council in December 2002 called on ODIHR to take a number of steps to help states to act in accordance with the rule of law, democratic values and human rights when they take measures to prevent and counter terrorism. ODIHR was requested inter alia to offer interested states “technical assistance/advice on the implementation of international anti-terrorism conventions and

¹³³ The OSCE Parliamentary Assembly, which was established in 1991, is a deliberative forum for parliamentarians from the OSCE member states.

¹³⁴ Berlin declaration of the OSCE Parliamentary Assembly, 10 July 2002.

¹³⁵ The ODIHR is an independent OSCE institution with a mandate to promote human rights and democracy in the OSCE region.

¹³⁶ In early 2003, Ambassador Christian Strohal was appointed the new director of ODIHR.

¹³⁷ Address by Ambassador Gérard Stoudmann at the International Conference on Human Rights and Democratisation in Dubrovnik, Croatia, 8-10 October 2001.

¹³⁸ See the section on the UN High Commissioner for Human Rights.

protocols as well as on the compliance of this legislation with international standards”. As of this writing, ODIHR had not received any request for such assistance.¹³⁹

In October 2002 a coordinator on anti-terrorism issues was appointed within ODIHR. One of the primary tasks of the new coordinator is to highlight areas of human rights concern in the fight against terrorism. The IHF welcomes the appointment of this coordinator and urges the chairman-in-office to work with member states to ensure that the coordinator has sufficient resources to monitor developments related to the protection of human rights within the counter-terrorism campaign throughout the OSCE region. Such monitoring is of crucial importance in order to facilitate effective advocacy on this issue with individual OSCE member states.

Representative on Freedom of the Media¹⁴⁰

In the wake of September 11, the current OSCE Media Representative, Freimut Duve, has made a number of efforts to highlight states’ obligation to act in accordance with human rights when countering terrorism. In December 2001, the media representative was one of the co-organizers of a conference on the topic “media freedom in times of anti-terrorism conflict” in Almaty, Kazakhstan. More than 80 journalists, government officials, members of parliament and NGO representatives from the Central Asian states participated in the event. The final declaration of the conference stated inter alia that: “The governments of the Anti-Terror Alliance should not, in times of conflict, use national security arguments to limit human rights abroad and reduce their support elsewhere”. The declaration also concluded that: “[T]he governments of the Central Asian states should not take the new conflict situation as a justification for repressive steps against opposition media”.¹⁴¹

The media representative has also voiced concern about certain developments related to the fight against terrorism, including increasing pressure on media in Russia¹⁴² and undue monitoring of book-buyers and readers in the United States¹⁴³.

¹³⁹ Information from Peter Keay, appointed Human Rights Coordinator in October 2002, per e-mail 9 January 2003.

¹⁴⁰ The Representative on Freedom of the Media has a mandate to observe media developments in the OSCE member states and provide early warning on violations of freedom of expression.

¹⁴¹ OSCE Representative on Freedom of the Media, “Third Central Asian Media Conference: ‘Media Freedom in Times of Anti-Terrorist Conflict’”, 11 December 2001.

¹⁴² OSCE Representative on Freedom of the Media, “OSCE Media Watchdog concerned over increased pressure on media in Russia”, 3 November 2002.

¹⁴³ OSCE Representative on Freedom of the Media, “OSCE Media Watchdog Criticises U.S. Patriot Act”, 23 January 2003.

Council of Europe

*Council of Ministers*¹⁴⁴

In July 2002, the Council of Ministers of the Council of Europe adopted a set of guidelines on counter-terrorism and human rights for its member states.¹⁴⁵ The guidelines, which were the first of their kind to be adopted by an international body, had been drawn up by a group of specialists appointed by the council's Steering Committee on Human Rights. Based on international human rights treaties and case law of the European Court of Human Rights, they establish minimum standards for the level of human rights protection that states must ensure when they adopt measures to combat terrorism. The guidelines stress that all counter-terrorism measures must be lawful and that arbitrary or discriminatory implementation of such measures is prohibited (article 2 and 3). Likewise they reiterate the requirement of international human rights treaties that any restrictions of human rights must be necessary and proportionate to their aim (article 3). The guidelines explicitly state that the use of torture and other forms of inhuman or degrading treatment are absolutely prohibited in the fight against terrorism (article 4) and that a person convicted of terrorism must never be sentenced to death – or at least not executed (article 10). Other topics covered by the guidelines include the right to privacy (articles 5 and 6); rights related to arrest, detention and legal proceedings (articles 7,8,9); the right to seek asylum (article 12); human rights standards related to return, expulsion and extradition procedures (articles 12 and 13); and the right to property (article 14). The guidelines undoubtedly represent an important effort to safeguard human rights in the struggle against terrorism. However, the IHF also considers it crucial that the Committee of Ministers ensure that existing monitoring mechanisms focus in particular on how the member states of the Council of Europe implement these guidelines and that a timetable is established for reviewing the guidelines with the aim of complementing and expanding them.

Following the events of September 11, the Council of Ministers also agreed to set up a Multidisciplinary Group on International Action against Terrorism (GMT), which inter alia was instructed to consider what action the Council of Europe “could usefully carry out in the field of the fight against terrorism”.¹⁴⁶ In considering this, the expert group was expected to take into account, among other factors, international human rights standards. As of this writing the GMT had not yet published a report on recommended action.

¹⁴⁴ The Council of Ministers, which comprises the Foreign Affairs Ministers of the member states, is the decision-making body of the Council of Europe.

¹⁴⁵ *Guidelines of the Committee of the Ministers of the Council on Europe on human rights and the fight against terrorism*, adopted on 15 July 2002, at [http://press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm).

¹⁴⁶ “Terms of reference of the GMT”, adopted by the Council of Ministers at its 109th session on 8 November 2001.

Secretary General

The current Secretary General of the Council of Europe, Walter Schwimmer, has repeatedly emphasized that the fight against terrorism must take place within a human rights framework. In November 2001, he issued a joint statement together with the UN Human Rights Commissioner and the Director of ODIHR again underscoring the need for states to respect human rights in all counter-terrorism efforts.¹⁴⁷ On another occasion, in May 2002, he stated that: “Terrorism is an assault on human rights, democracy, and the rule of law. It must be defeated with utmost vigour, but not at any cost, certainly not at the cost of those values”.¹⁴⁸

*Parliamentary Assembly of the Council of Europe (PACE)*¹⁴⁹

In January 2002, PACE adopted a resolution on combating terrorism and human rights¹⁵⁰, which establishes that: “The combat against terrorism must be carried out in compliance with national and international law and respecting human rights”. The resolution explicitly calls on the member states not to derogate from the European Convention for Human Rights in the fight against terrorism; and not to extradite terrorist suspects to countries where the death penalty is applied, unless they obtain assurances that this penalty will not be imposed, nor to countries where the suspects risk being subjected to ill-treatment or torture, to trials that compromise fundamental fair trial principles, or, in periods of conflict, to treatment that falls below the standards established in the Geneva Convention.

*Commissioner for Human Rights*¹⁵¹

The Council of Europe’s Human Rights Commissioner has a mandate to ‘identify possible shortcomings in the law and practice of Member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe’. In accordance with this mandate, the current Human Rights Commissioner, Alvaro Gil-Robles, issued an opinion on the United Kingdom in August 2002.¹⁵² The purpose of the opinion was to examine the UK derogation from the European Convention for Human Rights in respect of certain provisions of the Anti-Terrorism, Crime and Security Act (ATCSA) that was adopted by the

¹⁴⁷ See the section on the UN High Commissioner for Human Rights.

¹⁴⁸ Opening speech of Walter Schwimmer, Secretary General of the Council of Europe, at 10th judicial conference in Strasbourg, 23-24 May 2002.

¹⁴⁹ PACE is a deliberative body comprised of parliamentarians appointed by the member states.

¹⁵⁰ PACE Resolution 1271 (2002) “Combating terrorism and respect for human rights”, 24 January 2002.

¹⁵¹ The Commissioner for Human Rights is an independent institution within the Council of Europe with a mandate to promote awareness of and respect for human rights. The current commissioner, who was appointed in 1999, is the first person to hold this position.

¹⁵² Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights: Opinion 1/2002 on certain aspects of the United Kingdom derogation from Article 5 par. 1 of the European Convention on Human Rights.

UK parliament in December 2001. In the opinion the commissioner made the important comment that “general appeals to an increased risk of terrorist activity post September 11 2001 cannot, on their own, be sufficient to justify derogating from the [Human Rights] Convention”. The commissioner also expressed doubt as to whether the UK derogation was strictly required even if it could be shown that a public emergency existed in the United Kingdom.

Moreover, the Human Rights Commissioner has on several occasions pointed out that respect for human rights is not an obstacle to the fight against terrorism but an essential condition for the success of such efforts. When addressing the Council of Ministers of the Council of Europe in November 2002, the commissioner expressed concern about a broader trend to disregard human rights in the name of the fight against terrorism after September 11: “Here and there, derogating measures have been taken, discriminatory or disproportionate actions have been enforced, practices barely respecting the rule of law are being developed and, on occasion even, violent or ill-considered reactions have compromised the long-term effectiveness of our democratic institutions”.¹⁵³ Given this worrisome trend, he considered it a matter of utmost urgency for the Council of Ministers to seek to convince actors at the national, as well as international, level that the fight against terrorism and the protection of human rights must be reconciled.

Committee for the Prevention of Torture

*and Inhuman and Degrading Treatment and Punishment (CPT)*¹⁵⁴

In February 2002, a CPT delegation visited the United Kingdom in order to examine the conditions under which terrorist suspects are detained under the ATCSA.¹⁵⁵ In light of the numerous concerns that have been raised regarding detentions carried out under this law, the visit was most welcome.¹⁵⁶ In the February 2003 report on its visit to the United Kingdom, the CPT raised a number of concerns regarding the treatment of those detained under ATCSA and concluded that “the belief that they [the ATCSA detainees] had no means to contest the broad accusations made against them [also] was a source of considerable distress, as was the

¹⁵³ Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights: “International Action against Terrorism – Contribution by the Council of Europe”, delivered at 111th session of the Committee of Ministers, 7 November 2002.

¹⁵⁴ The CPT has a mandate under the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment to visit and examine the treatment of persons deprived of their liberty in countries that are party to the convention. See article 1 of the Convention.

¹⁵⁵ CPT, “Council of Europe’s Anti-Torture Committee visits suspected international terrorists detained in the UK”, 22 February 2002.

¹⁵⁶ See Chapter on Freedom from Arbitrary Arrest and Ill-Treatment in Detention and The Right to a Fair Trial (chapter on arrest).

indefinite nature of detention”. The CPT also expressed concern about statements by the UK government that the ATCSA detainees can end their detention at any time by agreeing to leave the country, including by returning to their countries of origin. The CPT stressed: “The UK authorities consider that the detainees in question would be at risk of serious human rights violations, including death or torture, in case of return to their countries of origin; indeed, this is the declared reason why they cannot be removed from the United Kingdom”.¹⁵⁷

Organization of American States (OAS)

General Assembly¹⁵⁸

Following September 11, the foreign ministers of the OAS requested the organization’s Permanent Council to draft a regional instrument on terrorism.¹⁵⁹ As a result, the OAS General Assembly adopted and opened for signature an Inter-American Convention on Terrorism in June 2002.¹⁶⁰ This convention, the aim of which is to promote the prevention, punishment and elimination of terrorism in the American hemisphere, also acknowledges the importance of safeguarding human rights in the fight against terrorism.¹⁶¹ The preamble of the convention reaffirms that “[T]he fight against terrorism must be undertaken with full respect for national and international law, human rights, and democratic institutions, in order to preserve the rule of law, liberties and democratic values in the [American] Hemisphere, which are essential components of a successful fight against terrorism”. Article 15 of the convention elaborates the issue of respect for human rights further: “The measures carried out by the states parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms. Nothing in this Convention shall be interpreted as affecting other rights and obligations of states and individuals under international law, in particular the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law”. The article also states that: “Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including the enjoyment of all rights and

¹⁵⁷ CPT: Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 21 February 2002, 12 February 2003.

¹⁵⁸ The General Assembly is composed of the foreign ministers of the OAS and is the organization’s highest decision-making body.

¹⁵⁹ Resolution RC.23/RES.1/101 of the 23rd meeting of consultation of the foreign ministers of the OAS.

¹⁶⁰ Inter-American Convention against Terrorism, adopted at the thirty-second regular session of the General Assembly of the OAS, 2 June 2002.

¹⁶¹ The convention does not define “terrorism” but refers to the definitions of specific terrorist acts laid down in various international instruments.

guarantees in conformity with the law of the state in the territory of which that person is present and applicable provisions of international law”.

Inter-American Commission on Human Rights¹⁶²

In October 2002, the Inter-American Commission on Human Rights published a report on “terrorism and human rights”, which offers a comprehensive analysis of norms and principles of international human rights and humanitarian law that are relevant for the fight against terrorism.¹⁶³ The report deals *inter alia* with standards concerning the right to life; the right to personal liberty and security; the right to humane treatment; the right to due process and to a fair trial; and the obligation of states to respect and ensure non-discrimination and judicial protection. On the basis of the analyses undertaken in the report, the commission also offers a number of recommendations aimed at facilitating efforts by member states to comply with their international human rights commitments when they adopt and implement anti-terrorism measures. The IHF welcomes the publication of this report and hopes that not only OAS member states but also other states will use it for guidance when they develop and reconsider anti-terrorism measures.

Summary

In the aftermath of the terror attacks on the United States, a number of important initiatives and statements from senior representatives of international organizations have emphasized that the fight against terrorism must take place within a framework of international human rights standards. However, it is notable that the UN Security Council – the only body with powers to adopt counter-terrorism strategies that are binding on all states – has failed to effectively incorporate the human rights dimension in its efforts to combat terrorism. The IHF is concerned that the protection of human rights not be relegated solely to the agenda of human rights bodies already tasked with taking up these issues, instead of being integrated into the political and technical work of all bodies assigned to deal with anti-terrorism efforts. In this respect, the failure of the Security Council and its Counter-terrorism Committee to pay due consideration to human rights as it develops and monitors counter-terrorism efforts after September 11 is particularly disturbing. The incorporation of human rights issues in the work of all bodies involved in the fight against terrorism is not only the best way to ensure protection for human rights, but also the most effective way to fight terrorism in the long-term. While the IHF welcomes recent efforts by the Security Council to highlight states’

¹⁶² The Inter-American Commission on Human Rights is an autonomous body of the OAS whose mandate is to promote and protect human rights within the American hemisphere.

¹⁶³ Inter-American Human Rights Commission, *Report on Terrorism and Human Rights*, 22 October 2002.

human rights obligations related to their counter-terrorism initiatives, there is still an urgent need for monitoring mechanisms to ensure that such counter-terrorism measures are subject to careful international scrutiny with regard to their compliance with human rights standards.

Vague, Arbitrary and Overly Broad Definitions of Terrorism in Criminal Law

Since the September 11 events, a number of OSCE member states have adopted new laws or amended already existing laws for the purpose of combating terrorism. Many of the laws raise human rights concerns. Foremost among these concerns is the way the laws define terrorist acts and terrorist groups when they establish criminal liability for terrorist offences, using either vague and imprecise language that leaves doubts as to the acts being prohibited or excessively broad definitions that may encompass acts few would regard as terrorism. Vaguely worded laws may violate the fundamental principle of legality and lend themselves to arbitrary enforcement. Vague and/or overly broad definitions of terrorism involve a fundamental measure of uncertainty and risk criminalizing conduct that has nothing whatsoever to do with terrorism. These definitions may result in interpretations that unduly restrict the legitimate exercise of basic civil rights such as freedom of expression, association and assembly. What is more, these definitions lend themselves to selective application against opposition groups on the basis of political considerations. By this the definitions also set a troublesome example for authoritarian regimes. In another worrying trend, these laws have been introduced through fast-track legislative processes that have granted little time for parliamentary scrutiny and public debate.

These laws are not only problematic in and of themselves, they also form the basis for many of the measures discussed in other chapters of this report. Thus, for example, financial measures, measures that restrict privacy or that form the basis for detention may also be based on definitions of “terrorism” or “terrorist group” that are vague or overly broad, thus further compounding the human rights concerns that are raised.

Defining Terrorism

For decades governments and legal scholars have attempted to elaborate an international definition of terrorism that meets the requirements imposed by the principle of legality and at the same time is ideologically neutral.¹⁶⁴ However, all these attempts have failed. In 1996, a UN ad hoc committee was set up to draft a comprehensive convention on terrorism.¹⁶⁵ As the

¹⁶⁴ It should be noted that there are a number of international conventions on terrorist offences. However, these conventions prohibit certain acts without providing for any general definition of “terrorism”.

¹⁶⁵ Most recently, on 3 April 2003, the UN General Assembly recommended that a working group be established to “settle outstanding issues in two draft conventions on terrorism, **including the definition**

International Commission of Jurists (ICJ) has pointed out, the work of this committee illustrates how difficult it is – for legal as well as political and ideological reasons – to reach a global definition of terrorism.¹⁶⁶

During the work on the UN convention the participating states have not been able to agree on such basic questions as what the purpose of terrorism is or who can commit terrorism. In particular, no consensus has been reached regarding whether a definition of terrorism should cover state terrorism and where the line is to be drawn between terrorism and legitimate struggles against oppression.¹⁶⁷

Definitions of terrorism often include not only a description of who may be a perpetrator, who may be a target of terrorist violence (the public, the government, property etc.), and the character of the acts, but also attempt to set out what the motivations of the perpetrators may be in carrying out terrorist violence, and thus what makes them different from ordinary criminals. This tends to be particularly problematic in that it invariably involves a value judgment about the ideological or political goals of the perpetrators. As the UN Special Rapporteur on Terrorism, Kalliopi K. Koufa, has noted:

[I]t may be that the definitional problem is the major factor in the controversy regarding terrorism. This is all the more true when considering the high political stakes attendant upon the task of definition. For the term terrorism is emotive and highly loaded politically. It is habitually accompanied by an implicit negative judgment and is used selectively. In this connection, some writers have aptly underlined a tendency amongst commentators in the field to mix definitions with value judgments and either qualify as terrorism violent activity or behaviour which they are opposed to or, conversely, reject the use of the term when it relates to activities and situations which they approve of. Hence, the famous phrase “one man’s terrorist is another man’s freedom fighter”.¹⁶⁸

Given the lack of international agreement as to what constitutes terrorism, the term “terrorism” is frequently used especially to target political opponents. As a recent report by a

of terrorism itself...[emphasis in original]. United Nations, “UN Committee Recommends Working Group for Anti-Terrorism Treaties”, *UN News Service*, 3 April 2003.

¹⁶⁶ International Commission of Jurists, *Terrorism and Human Rights*, p. 202.

¹⁶⁷ Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, fifth session (12-23 February 2001), A756/37.

¹⁶⁸ “Terrorism and Human Rights”, Progress report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, UN document E/CN.4/Sub.2/2001/31, 27 June 2001, para. 25, p. 8.

special UN working group on counter-terrorism policy concluded: “labeling opponents or adversaries as terrorists offers a time-tested technique to de-legitimize and demonize them”.¹⁶⁹

Relevant Legal Standards

Notwithstanding the political difficulties of defining terrorism, international law requires that criminal offences be defined in a precise, unequivocal and unambiguous manner and that criminal law not be applied retroactively so that individuals have fair warning regarding the conduct being prohibited. This principle – the *nullum crimen sine lege* principle (the principle of legality) – is inherent in criminal law and is laid down in article 15 of the International Covenant on Civil and Political Rights and article 7 of the European Convention on Human Rights.¹⁷⁰

In *Kokkinakis v. Greece*, the European Court of Human Rights pointed out that article 7 (1) of the ECHR “embodies ... the principle that only the law can define a crime and prescribe a penalty ... and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.”¹⁷¹

When formulating commitments imperative to the rule of law at the 1990 Human Dimension Meeting, the OSCE member states specifically agreed that: “no one will be charged with, tried or convicted for any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity, certainty and precision”.¹⁷²

International law does not, however, require absolute precision in the wording of laws, as this is impossible to attain. The European Court of Human Rights has recognized that “the

¹⁶⁹ Report of the Policy Working Group on the United Nations and Terrorism, Annex to A/57/273, S/2002/875.

¹⁷⁰ Article 15(1) of the ICCPR states: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed...” Article 7(1) of the ECHR states: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed...”

¹⁷¹ European Court of Human Rights, *Kokkinakis v. Greece*, (Application No. 00014307/88), Judgment (merits and just satisfaction) of 25 May 1993, para.52.

¹⁷² Paragraph 5.18.

wording of many statutes is not absolutely precise”¹⁷³ and that domestic courts may clarify points of law regarding the scope of a crime without violating article 7. Similarly, in *the Sunday Times case*, even though the court had “certain doubts concerning the precision with which that principle was formulated at the relevant time”, it ruled that the applicants were able to “foresee, to a degree that was reasonable in the circumstances”, that their conduct might fall within the scope of the law.¹⁷⁴

As the principle of legality is a cornerstone of the rule of law, all major international human rights treaties prohibit any derogation from it, even in times of public emergency.¹⁷⁵ The European Court of Human Rights noted in *Ecer and Zeyrek v. Turkey*, for example, that “Article 7 [of the ECHR], which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency.”¹⁷⁶

Even where a criminal law defining terrorism is sufficiently clear to meet the requirements of clarity laid down in international human rights law, it may still be excessively broad so as to risk criminalizing conduct that is protected under international human rights law, such as the right to freedom of association or expression. As the ICJ has noted, “When such definition allows the characterization as a criminal offence of acts which are not prohibited by international human rights law or international humanitarian law, they are at variance with the principle of legality”, and thus, “any ambiguous, vague or imprecise legal definition, or a definition that criminalizes acts that are permitted and/or lawful under international law, are contrary to international human rights law and to ‘the general conditions provided by international law’”.¹⁷⁷ Furthermore, overly broad definitions of terrorism risk criminalizing crimes committed in a political context. A person who commits a public order offence during a political demonstration in which other demonstrators used violence against the police might theoretically be convicted of a terrorist offence under several of the overly broad definitions adopted by OSCE member states (see discussion below). While such conduct may properly violate a state’s criminal code, it is not the kind of conduct that is typically considered

¹⁷³ *Kokkinakis v. Greece*, para. 40.

¹⁷⁴ European Court of Human Rights, *Case of the Sunday Times v. The United Kingdom*, (Application No. 00006538/74), Judgment (merits) of 26 April 1979, para. 52.

¹⁷⁵ See article 4 of the ICCPR and article 15 of the ECHR.

¹⁷⁶ European Court of Human Rights, *Cases of Ecer and Zeyrek v. Turkey*, (Application Nos. 00029295/95; 00029363/95), Judgment (merits and just satisfaction) of 27 February 2001, para. 29.

¹⁷⁷ International Commission of Jurists, *Terrorism and Human Rights*, p. 206, pp. 213-14.

“terrorism” warranting the particularly severe penalties usually reserved for more egregious acts.

Overly-broad definitions of terrorism may potentially have a chilling effect on freedom of association and expression in the OSCE region. While freedom of association and expression can be subject to legitimate restriction on the grounds of national security (see chapter on Derogations and Limitations), states wishing to impose restrictions should ensure that such restrictions are in full compliance with international human rights standards and should do so explicitly, so that the restrictions can be observed, debated and where necessary challenged in the courts. The impact of overly-broad anti-terrorism laws on public protest or free speech is likely to be harder both to measure and to challenge than direct restrictions on public protest or free speech.

Some of the laws discussed below also raise concern because individuals may be considered to have “participated in” or “facilitated” the commission of a terrorist crime because they were affiliated with a terrorist group. However, in some cases there is no requirement that the individual is actually aware that the group is a terrorist group, or that he or she intends to support terrorist activities. While intent is not always considered an essential element in criminal law, the IHF is concerned that a law that includes severe criminal penalties for interaction with an organization that the individual does not know to be engaged in terrorist activities (in other words a strict liability standard) may have a particularly severe chilling effect on freedom of association. While the IHF acknowledges that it is sometimes difficult to prove intent, and that terrorists organizations often conceal their true aims, for example, behind a façade of humanitarian work, the organization nevertheless believes that it is not an impossible or unreasonable burden for the government to be required to show that an individual had some criminal intent in such cases and believes that this would strike a more appropriate balance between the government’s interest in prosecution and the individual’s interest in freedom of association.

By setting up strict liability in this area, states may also violate the right to be presumed innocent and more generally to a fair trial. The European Court of Human Rights has stressed that when the law establishes a presumption against the accused, the courts must nevertheless have the freedom to accord the defendant “the benefit of extenuating circumstances”, for otherwise this could violate the presumption of innocence contained in article 6(2) of the

ECHR.¹⁷⁸ According to the court, article 6 (2) “requires States to confine [presumptions of fact or law] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”.¹⁷⁹ Thus, the law cannot create an irrebutable presumption. A defendant must be able to present a defence by, for example, presenting evidence of “force majeure” or that he acted out of necessity or unavoidable error.

It is also problematic that such charges are sometimes based on lists of terrorist groups that have been drawn up by states on the basis of questionable evidence and procedure. The ICJ has noted that “In recent years, a new ‘technique’ has appeared whereby the authorities of certain States have drawn up official lists of so-called terrorist groups. Membership in and collaboration with any one of those groups is *ipso facto* a crime.”¹⁸⁰ The drawing up of such lists of terrorist groups raises a number of problems, as identified by the UN Special Rapporteur on Terrorism:

Some of [the legislation] includes provisions in which groups are put on an official terrorist list, frequently with no analysis of the particulars of the situation or the nature of the group. Those groups and others espousing similar views but uninvolved with the groups concerned may face severe consequences. [...] judicial proceedings to challenge this false labeling or to defend a person charged with an offence under such anti-terrorism legislation may leave room for serious negation of a wide range of procedural rights.¹⁸¹

Human Rights Concerns

European Union

Within the EU, a Framework Decision on Terrorism was rushed through in the months following the September 11 events and agreed on by the EU Council in December 2001. The decision, which was to be implemented by the member states by the end of 2002, provides for a common definition of terrorist offences and harmonizes criminal penalties for such offences in the EU member states.¹⁸² While the final version of the framework decision¹⁸³ represents

¹⁷⁸ European Court of Human Rights, *Salabiaku v. France*, (Application no. 00010519/83), Judgment of 7 October 1988, para. 29.

¹⁷⁹ *Ibid.*, para. 28.

¹⁸⁰ *Ibid.*, p. 215.

¹⁸¹ Progress report prepared by Ms. Kalliopi K. Koufa, (2001) para. 111, p. 30.

¹⁸² According to article 5 of the framework decision, member states must ensure that the terrorist offences covered by the decision are punishable with custodial sentences that are heavier than those that would apply under national law for such offences in the absence of a special terrorist intent as defined in the decision. The offences covered by the decision must also be extraditable.

¹⁸³ Council Framework Decision of 13 June 2002 on Combating Terrorism, at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf.

important improvements over the initial draft by the European Commission¹⁸⁴, its definition of terrorism remains problematic. The decision lists a number of offences that are to be deemed and punished as terrorist offences if they,

given their nature or context, may seriously damage a country or an international organization where committed with the aim of:

- seriously intimidating a population, or
- unduly compelling a country or an international organization to perform or abstain from performing any act, or
- seriously destabilizing or destroying the fundamental political, constitutional, economical or social structures of a country or an international organization.

The listed offences include inter alia:

- attacks upon the physical integrity of a person; and
- causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss

Threats to commit such acts, as well as inciting, aiding or abetting terrorism are also prohibited.

Both the criteria for determining that a particular act is a terrorist act and the elements used to characterize the two offences mentioned above are sufficiently vague and imprecise as to risk arbitrary implementation.

It should be noted that several of the elements included in the EU Framework Decision are similar to those considered by the UN Ad Hoc Committee charged with drafting a Comprehensive Convention on Terrorism. For example, expressions such as “serious damage”, “extensive destruction”, “intimidate a population”, “compel a government or an international organization to do or abstain from doing any act” and “major economic loss” are also included in the Ad Hoc Committee’s draft as a basis for its discussions.¹⁸⁵ However, the

¹⁸⁴ Proposal for a Council Framework Decision on Combating Terrorism (COM 521/2001), 19 September 2001, at http://www.europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0521.pdf.

¹⁸⁵ General Assembly (fifty-fifth session), Sixth committee, Draft comprehensive convention on international terrorism, working document submitted by India (A/C.6/55/1). It should also be noted that similar elements occur in the 1997 UN Convention for the Suppression of Terrorist Bombings and the UN 1999 Convention for the Suppression of the Financing of Terrorism. However, in these

committee has reached no consensus regarding these elements. On the contrary, some states participating in the work on the convention have voiced concern that the draft definition is so vague and imprecise that it could give rise to politically motivated interpretations and selective application.¹⁸⁶

The definition in the EU framework decision could also lend itself to interpretations that threaten legitimate dissent. Observers have, for example, expressed concern that the definition could be interpreted to cover protest marches and demonstrations organized by anti-globalization, environmental or animal activists. As has been the case during large demonstrations at international summits in recent years, it is likely that in future such initiatives, some activists may seek to underscore their demands by undertaking acts that violate the law. Given the wording of the framework decision, there is a risk that such conduct could be considered as “attacking the physical integrity of a person” or “causing extensive destruction [...]”. Such acts may well be crimes, but they are clearly not what is typically considered as terrorism.

The preamble of the EU Framework Decision on Terrorism states that nothing in the decision should be interpreted as being intended to reduce or restrict fundamental rights or freedoms, such as the right to strike and to demonstrate. In addition, according to a complementary non-binding declaration that was agreed on by the EU Council in December 2001, the decision should not be understood to criminalize on terrorist grounds persons who exercise their legitimate right to manifest their opinions, even if they commit criminal offences while exercising this right.¹⁸⁷ While these provisions were a welcome response to the criticism the initial draft provoked, it is questionable whether either the preamble or the declaration is legally binding. In any case, these provisions do not remedy the fact that the definition remains open to interpretations that could be used to restrict legitimate opposition.¹⁸⁸ The EU Framework Decision on Terrorism leaves much up to the discretion of the individual member states to determine where the line between legitimate opposition and terrorism is to be drawn.

conventions the broader phenomenon of “terrorism” is not defined but only the specific forms of terrorism that the conventions cover.

¹⁸⁶ General Assembly (fifty-sixth session), Sixth Committee, Measures to eliminate international terrorism – Report of the Working Group (A/C.6/56/L.9). See also International Commission of Jurists, *Terrorism and Human Rights*, p. 205.

¹⁸⁷ EU Council, Outcome of proceedings (14845/01), 6 December 2001, at <http://register.consilium.eu.int/pdf/en/01/st14/14845-r1en1.pdf>.

¹⁸⁸ Compare Steve Peers, “EU Responses to Terrorism”, *International and Comparative Law Quarterly*, vol. 52, January 2003, p. 235-236.

The IHF recognizes that this matter will ultimately be resolved by the national courts of the EU member states, most of which have strong and independent judiciaries that may serve as a check on any overly broad application of the laws. However, the broad wording of the decision does create uncertainty as to what conduct will actually be penalized and, in particular with regard to freedom of association and expression, may have a chilling effect.

Certain initiatives taken in the context of the EU Framework Decision on Terrorism substantiate concerns that some member states may be inclined to use the terrorism definition to quash legitimate protests. For example, in early June 2002, the Justice and Home Affairs Council adopted a recommendation by Spain for the introduction of a standard form to exchange information on “terrorists”.¹⁸⁹ According to the recommendation, such an exchange of information will be a useful tool in “preventing activities carried out by terrorist organizations to achieve their criminal aims *at large international events*” [emphasis added]. The recommendation states that the exchange of information will concern individuals with a criminal record in connection with terrorism, as defined in the framework decision, and that it will not apply to persons who exercise their constitutional rights. However, a scrutiny of the assertions made in the recommendation raises doubts as to whom it is intended to target.

Statewatch editor Tony Bunyan has pointed out that no terrorist attacks have ever taken place and that no terrorist groups have ever been seen propagating their aims at international summits organized within the EU.¹⁹⁰ Thus, while it is unlikely that the member states of the EU as a whole were trying to restrict the legitimate exercise of free speech of anti-globalization protesters or similar groups, it would appear that at least some of the member states may have had such an outcome in mind. In fact, the suspicion that this was at least one of the aims of some of the drafters is strengthened by the reference to “violent urban youthful radicalism” that was made in the first draft of the measure.¹⁹¹

When commenting on the EU Framework Decision on Terrorism and a number of related EU moves, including the recommendation discussed above, one legal analyst concluded that “the ambiguity of the Framework Decision and the ‘side decisions’ taken by the EU Council make

¹⁸⁹ EU Council, Initiative by the Kingdom of Spain for the adoption of a Council Recommendation on the introduction of a standard form for exchanging information on terrorists (5712/6/02), 29 May 2002, at <http://register.consilium.eu.int/pdf/en/02/st05/05712-r6en2.pdf>.

¹⁹⁰ Tony Bunyan, “The war on freedom and democracy”, Statewatch, 9 September 2002, at <http://www.statewatch.org/news/2002/sep/04freedom.htm>.

¹⁹¹ EU Council, Spanish Presidency Proposal, Presentation of a Presidency Initiative for the introduction of a standard form for exchanging information on terrorist incidents, 29 January 2002, at <http://register.consilium.eu.int/pdf/en/02/st05/05712en2.pdf>.

it necessary to keep a close eye on the Union's and the Member States' implementation of the policy because of possible abuse of human rights in certain cases".¹⁹²

Russia

Russian President Vladimir Putin signed a new anti-extremism law in late July 2002 that introduces a range of severe sanctions for activities considered to amount to extremism.¹⁹³ The law was drafted and pushed quickly through the parliament during a period when dramatic hate crimes were being reported around the country.¹⁹⁴ As a result of these incidents, the government argued that stricter provisions were needed to combat individuals and groups threatening national security. While these steps were clearly motivated by domestic Russian developments, President Putin linked Russia's domestic security concerns to the global "war" on terrorism and to the political priorities asserted by western governments in the aftermath of September 11. By comparing its own campaign in Chechnya with the US-led campaign against Al Qaida and Osama Bin Laden, the Russian government has been able to reduce significantly international scrutiny of its human rights record in Chechnya.¹⁹⁵

While stressing that already existing legislation would have been sufficient to combat violent radicalism if it had been properly applied, human rights activists and opposition politicians have criticized the new law for its ambiguous wording and expressed fear that it may be used to repress legitimate non-governmental activities.¹⁹⁶ The law defines "extremist activity" as the planning, organization, preparation and commission of actions aimed at:

- undermining the security of the Russian Federation
- taking over or appropriating official functions
- creating illegal armed units
- carrying out terrorist activities¹⁹⁷
- stimulating racial, national, religious or social hatred in connection with violence or calls for violence

¹⁹² Peers, "EU Responses to Terrorism", p. 233.

¹⁹³ Federal law on counteraction to terrorism, at <http://www.panorama.ru/works/patr/govpol/> (in Russian).

¹⁹⁴ The problem of hate crimes is not new in Russia, but the authorities have been reluctant to recognize the problem, in particular to the extent that the victims are people fleeing the conflict in Chechnya.

¹⁹⁵ See the chapter on Human Rights Abuses in Central Asia and Chechnya: the International Response After September 11 (hereinafter chapter on Central Asia and Chechnya).

¹⁹⁶ See for example, Nabi Abdullaev, "Anti-Extremism Bill Riles Human Rights Activists", *St Petersburg Times*, 7 June 2002; Robert Coalson, "Getting radical about extremism", *RFE/RL Newslines*, 18 July 2002 and Fred Wair: "Russian bill pits free speech against national security", *Christian Science Monitor*, July 2002.

¹⁹⁷ "Terrorist activities" are defined in previously existing Russian legislation.

- disparaging ethnic dignity
- carrying out mass disorders, hooligan acts and vandalism acts motivated by political, racial, national or religious intolerance or hatred or intolerance or hatred against a particular social group
- propagating exclusiveness, superiority or inferiority of citizens on the basis of their religious beliefs or their social, racial, national, religious or linguistic affiliation¹⁹⁸

A number of these elements, such as “undermining the security of the Russian Federation”, “disparaging ethnic dignity” and “propagating exclusiveness, superiority or inferiority of citizens on the basis of their religious beliefs or social, racial, national or linguistic affiliation”, are vague and/or overly broad. What is more, no reference is made to the gravity of threat these actions must represent in order to be subject to the law.¹⁹⁹ Thus, as the Moscow Helsinki Group has noted, the law could be used against almost any kind of activity that the authorities consider “undesirable”, such as criticism of official policies by human rights organizations, calls for recognition of their rights by ethnic minorities or proselytizing activities by so-called non-traditional religious communities.²⁰⁰

The Russian July 2002 anti-extremism law prohibits organizations set up for the purpose of extremist activities. An existing organization that is involved in extremist activities may be liquidated or, if it is not registered with the authorities, banned by a court on recommendation of a prosecutor or the Ministry of Justice. Typically legal steps to liquidate or ban an organization can only be initiated after the organization has been given notice, which should provide time for the organization to take “rectifying” measures if such measures are possible²⁰¹ and is subject to appeal. However, no notification must be given if an organization is considered to have carried out extremist activities “entailing human rights violations, infliction of damage to an individual or the environment, a breach of public order, violations of legal economic interests of a person, a judicial person, society or the state; or creating a real threat of such effects”. Moreover, in the latter situation prosecutors and the Ministry of Justice may suspend the activities of the organization in question, unless it is a political party, after a suit has been filed with a court to liquidate or ban the group. This suspension remains

¹⁹⁸ This quote is from an unofficial translation.

¹⁹⁹ Compare Moscow Helsinki Group, “The law ‘on countering extremist activities’ – what is it like and why it is the way it is?”, July 2002.

²⁰⁰ Ibid.

²⁰¹ The law provides that the notice of intent to liquidate or ban an association may set out any rectifying measures and the time in which such measures must be taken in order to avoid further action.

in effect until the court has issued a decision in the case. A suspension decision takes effect immediately but may be appealed.

Since the provisions on extremist organizations are based on the low threshold for extremist activities examined above, there is reason for concern that the law may be arbitrarily implemented. In addition, the grounds on which organizations may be liquidated or banned without any prior notification or prior opportunity to challenge the evidence on which the decision is based are vague and overly broad and may well be interpreted to encompass legitimate protest or other protected conduct. For example, a protest march to voice criticism against the government could be construed as a “breach of public order”. If the organization also meets the definition of “extremist group” under the law, it could be banned. It is of particular concern that no court approval is needed to suspend the activities of an organization suspected of extremism. Although a suspension decision may be appealed to a court, it may be months, as the Moscow Helsinki Group has stressed, before these court proceedings actually begin.²⁰² Thus, neither the provisions on liquidation/banning nor suspension incorporate adequate safeguards.

Canada

In Canada, a new Anti-Terrorism Act was drafted shortly after the 11 September events and adopted by the parliament in December 2001.²⁰³ The act amends the Canadian Criminal Code by establishing criminal liability for a number of terrorist offences, including the financing, facilitation and instigation of terrorism. The basis of the amendments is a definition of “terrorist activity” as an act or omission, in or outside Canada,

- (i) that is committed
 - (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to

²⁰² Moscow Helsinki Group, “The law ‘on countering extremist activities’ – what is it like and why is it the way it is?”, July 2002.

²⁰³ An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism (Anti-Terrorism Act), assented to 18 December 2001, at <http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&Chamber=C&StartList=2&EndList=200&Session=9&Type=0&Scope=I&query=2981&List=toc-1>.

refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission [...] (section 83.01b).²⁰⁴

A number of the elements of the definition are vaguely worded. For instance, the expressions “intimidating the public, or a segment of the public, with regard to [...] its economic security”, “a serious risk to the health [...] of the public or any segment of the public” and “serious interference with or serious interruption of an essential service, facility or system” are not defined in the text of the law and therefore subject to varying interpretations and potentially to arbitrary enforcement.²⁰⁵

The law does include a protective clause, which provides that serious interference with or disruption of an essential service, facility or system does not fall under the definition if it is “a result of advocacy, protest, dissent or stoppage of work”. The wording of this clause also

²⁰⁴ It should be noted that the new law also defines as “terrorist activity” a number of offences that are defined in international conventions on specific terrorist crimes, to which Canada is a signatory. See section 83.01 (a) of the Anti-Terrorist Act.

²⁰⁵ Some of the terms used in the definition are similar to those under discussion in the UN Ad Hoc Committee working on a Comprehensive Convention on Terrorism. Similar elements also occur in the 1997 UN Convention for the Suppression of Terrorist Bombings and the 1999 UN Convention for the Suppression of Financing of Terrorism. However, in these conventions, the broader phenomenon of “terrorism” is not defined but only the specific forms of terrorism that the conventions cover. Compare the discussion on the EU framework decision on terrorism above.

represents a significant improvement to that of the initial draft of the law, which only covered “lawful advocacy, protest, dissent or stoppage of work”. However, as Amnesty International Canada has pointed out, while the change of wording was very welcome, the protective clause is still open to various interpretations and may not under all circumstances offer sufficient protection for the legitimate exercise of fundamental freedoms such as freedom of expression, conscience, assembly and association.²⁰⁶ The organization therefore believes that the law “should more clearly define what types of serious interference with or disruption of an essential service, facility or system are felt to be sufficiently grave as to come within the scope of the definition” and stresses that “[such an] amendment would better ensure that legitimate protest and dissent is protected and not further criminalized, and would also more accurately capture what is likely the intended meaning of ‘terrorist activity’”.²⁰⁷

Germany

In Germany, a December 2001 package of anti-terrorism measures introduced amendments to the law on private associations, extending the grounds on which “foreign” associations may be banned.²⁰⁸ Under the amended law, associations that have a majority of members who are not German citizens or EU citizens may inter alia be banned if their activities:

- adversely affect or jeopardize the formation of political opinion in Germany,
- run counter to Germany’s obligations according to international law,
- advocate or call for violence as a means to pursue political, religious or other aims.²⁰⁹

These provisions also apply to associations that are based abroad but are active in Germany. The decision to ban a “foreign” association is made at the administrative level but may be appealed to a court of law. As several critics have pointed out, the assumption underlying the revision of the law on private associations is that associations made up predominantly of foreigners (or citizens of non-EU states) are more likely to pose a threat to the society than associations whose members are German or EU citizens.²¹⁰

²⁰⁶ Comment by Alex Neve, secretary general of the English-speaking branch of Amnesty International Canada, per telephone, April 2003.

²⁰⁷ Amnesty International Canada, “Protecting Human Rights and Providing Security: Amnesty International’s Comments with Respect to Bill C-36”, 6 December 2001, p. 6.

²⁰⁸ Law on the combat of international terrorism (Gesetz zur Bekämpfung des internationalen Terrorismus), at http://www.dbein.bndlg.de/schily/docs/terror_BGBL_nur lese.pdf (in German).

²⁰⁹ This quote is from an unofficial translation.

²¹⁰ See for example Die Deutsche Vereinigung für Datenschutz, “Terrorismusbekämpfungsgesetz und Ausländer”, 15 November 2001, at <http://www.aktiv.org/DVD/Themen/teaus.html>

The IHF is concerned that the provisions of this law – especially the phrase “adversely affect or jeopardize the formation of political opinion in Germany” – are overly broad so as to risk restricting internationally protected rights – such as to freedom of expression, association and assembly – under the ICCPR. Furthermore, the IHF is concerned that the law is discriminatory, in violation of articles 2 and 26 of the ICCPR. Article 2 of the ICCPR requires “each State Party ... to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The UN Human Rights Committee, commenting on the rights of non-citizens under the ICCPR, has stressed that “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and [legally resident] aliens”.²¹¹

In contrast, the ECHR permits restrictions on the political activities of aliens. Article 16 states that: “Nothing in Articles 10 [freedom of expression], 11 [freedom of assembly and association] and 14 [non-discrimination] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens”. Some have noted that article 16 of the ECHR is adopted in the same spirit as article 25 of the ICCPR, which provides that certain political rights shall be guaranteed to *every citizen*. However, the rights dealt with in article 25 of the ICCPR relate to taking part “in the conduct of public affairs, either directly or indirectly”, “to vote and be elected” and to have access to public service. They do not limit foreigners’ rights to other political activity, especially that which is guaranteed under articles 19 and 22 without any limitation on the basis of citizenship.

As one scholar has noted: “[N]either the Covenant, nor the other regional human rights treaties, contain any specific limitation on the political activity of aliens, which gives the European Convention the dubious distinction of being the most restrictive in this respect”. The IHF considers article 16 unjustifiably restrictive of the rights of aliens and believes that this provision is not in keeping with recent developments in international law that have attempted to extend and clarify the rights this group. For example, the UN General Assembly has recognized that “the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live”, and has specifically noted that aliens shall enjoy, among other

²¹¹ UN Human Rights Committee, *General Comment No. 15 – the rights of aliens under the ICCPR*, adopted at the 26th session in 1986. See also discussion in chapter on asylum.

rights, the right to freedom of expression and peaceful assembly.²¹² Of course, since article 16 does not define “political activity”, it is ultimately for the European Court of Human Rights to establish its parameters. To date, there has been no case raising these issues.²¹³

Italy

An October 2001 government decree amended the Italian Penal Code to establish criminal liability for involvement in an “association with the purpose of international terrorism”.²¹⁴

According to the amended Penal Code:

- whoever promotes, establishes, organizes, directs, finances, including indirectly, associations that, with the purpose of international terrorism, seek to carry out acts of violence abroad, or against a foreign State, shall be punished with imprisonment for seven to fifteen years
- whoever participates in associations of the kind mentioned above shall be punished with imprisonment for five to ten years
- whoever provides transportation, refuge and/or communication means to associations of the kind mentioned above shall be punished with imprisonment for up to four years.²¹⁵

The provisions of the law referring to “assistance” are excessively broad. Firstly, the law does not distinguish between acts with differing degrees of gravity, in that it punishes those who provide indirect forms of financial support to a terrorist association as severely as direct financial support. Thus, for instance, a contribution to a fundraising campaign initiated by an entity considered a terrorist association could potentially result in seven or more years in prison since there is no provision in the law for a more lenient sentence under these circumstances. Individuals who sponsor or offer their help to an association without knowing that it is involved in terrorist activities could also potentially be held liable under the new provisions, although such an outcome may not be consistent with the spirit of the law.

²¹² See preamble of the Declaration of the Human Rights of Individuals who are not Nationals of the Country in which They Live (G.A. res. 40/144), adopted in 1985. at <http://www1.umn.edu/humanrts/instreet/w4dhri.htm>.

²¹³ To date, only one case (*Piermont v. France*, judgment of 27 April 1995) has involved article 16, but the facts of the case are not analogous to the concerns addressed here.

²¹⁴ Decree Law No.374 of 18 October 2001, enacted as Law No. 438 of 15 December 2001, at <http://www.senato.it/parlam/leggi/014381.htm> (in Italian).

²¹⁵ This is a quotation from an unofficial translation.

Freedom from Arbitrary Arrest and Ill-treatment in Detention and the Right to a Fair Trial

Personal liberty is a cornerstone of any society based on the rule of law. Liberty requires that a person not be arrested or detained by the state without due cause, and that a detained person has the right to challenge the grounds of detention in a court. The value that a state places upon liberty can also be measured by its commitment to a fair trial for those accused of a crime. Only where a person is presumed innocent, has access to a lawyer, is able to mount an adequate defence, and is nonetheless convicted of a crime, can a state be justified in depriving a person of liberty by imprisonment. Persons convicted of a crime must also be able to appeal against their conviction. Those deprived of their liberty must be protected against ill-treatment in detention.

Terrorism seeks to undermine personal liberty and security. Yet the state response to terrorism can also threaten the very freedom it seeks to protect. In times of crisis and fear, states and their populations are more likely to focus on the objective of security than the means by which it is obtained. Since the attacks of September 11, some states in the OSCE region have shown a willingness to set aside basic principles of liberty and the right to a fair trial where those principles apparently conflict with the objective of impeding and prosecuting terrorist activities. Apparently lacking confidence in the ability of their own courts and existing legislation to try and convict terrorist suspects, states have sought to place terrorist suspects outside the protection of the legal system, both through legislation and action, so as to enable them to detain such suspects indefinitely without trial. In some cases, suspects have been ill-treated in detention. Such actions undermine the rule of law and threaten liberty.

Relevant Legal Standards

Personal liberty and security are fundamental human rights. Essentially, they concern freedom from arbitrary arrest or detention.²¹⁶ Human rights standards enumerate a number of important safeguards to prevent arbitrary detention. Chief among them is the right of a detainee to be brought promptly before a judge and challenge the lawfulness of his detention, often referred to as habeas corpus.²¹⁷ Other rights include the right to be informed of the

²¹⁶ ICCPR, article 9(1); ECHR, article 5(1); ACHR, article 7(3); Concluding Document of Vienna – The Third Follow-Up Meeting (OSCE Vienna document), 19 January 1989, para. 23.1.

²¹⁷ ICCPR, article 9(3); ECHR, article 5(4); ACHR, article 7(6); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (OSCE Copenhagen document), 29 June 1990, para. 5.15; OSCE Moscow document, para. 23.1(iv).

reasons for the detention,²¹⁸ and the right to be brought to trial promptly or otherwise released.²¹⁹

Access to a fair trial is a fundamental human right of paramount importance.²²⁰ Persons accused of a criminal offence have a number of important procedural rights to ensure that any trial is fair, including the presumption of innocence²²¹; the right to have prompt access to counsel and to mount an adequate defence²²²; the right of a defendant not to be compelled to testify against himself (the rule against self-incrimination)²²³; and the right to appeal any sentence to a higher court or tribunal.²²⁴ There is a general obligation that defendants be tried in public to allow press and public access to proceedings.²²⁵

Detainees enjoy the absolute protection from torture, cruel, inhuman and degrading treatment afforded to all persons.²²⁶ The prohibition against torture and cruel, inhuman and degrading treatment cannot be derogated from under any circumstances.²²⁷ Moreover, there is an explicit requirement in human rights law that persons in detention are treated with humanity and the inherent dignity of the human person.²²⁸

²¹⁸ ICCPR, article 9(2); ECHR, article 5(2); ACHR, article 7(4); OSCE Moscow document, para. 23.1(ii).

²¹⁹ ICCPR, article 9(3); ECHR, article 5(3); ACHR, article 7(5); OSCE Vienna document, para. 13.9.

²²⁰ ICCPR, article 14(1); ECHR, article 6(1); ACHR, article 8(1); OSCE Vienna document, para. 13.9.

²²¹ ICCPR, article 14(2); ECHR, article 6(2); ACHR, article 8(2); OSCE Copenhagen document, para. 5.19.

²²² ICCPR, article 14(3)(b); ECHR, article 6(3)(b)&(c); ACHR, article 8(c)&(d); OSCE Vienna document, para. 13.9; OSCE Moscow document, para. 23.1(v). The obligation for the state to provide a lawyer where the defendant cannot afford one is limited to circumstances where the “interests of justice so require” [ICCPR, article 14(3)(d); ECHR, article 6(3)(d), OSCE Moscow document, para 23.1(v)]. The ACHR is the exception in granting an “inalienable right to be assisted by counsel provided by the state” [ACHR, article 8(2)(d)]. In the *John Murray* case, the European Court of Human Rights ruled that the UK police in Northern Ireland had breached article 6 (1) & (3)(c) by denying a terrorist suspect access to his lawyer for 48 hours [European Court of Human Rights, *Murray (John), v. United Kingdom*, Judgment of 8 February 1996, Reports 1996-1.] The obligation to provide prompt access to counsel has also been emphasized by the UN Human Rights Committee and in principle 8 of the (non-binding) United Nations Basic Principles on the Role of Lawyers.

²²³ ICCPR, article 14(3)(g); ACHR, article 8(2)(g).

²²⁴ ICCPR, article 14(5); ECHR Protocol 7, article 2; ACHR, article 8(2)(h);

²²⁵ ICCPR, article 14(1); ECHR, article 6(1); ACHR, article 8(5); OSCE Copenhagen document, para. 5.16.

²²⁶ ICCPR, article 7; ECHR, article 3; ACHR, article 5(2); OSCE Vienna document, para. 23.3.

²²⁷ ICCPR, article 4(2); ECHR, article 15(2); ACHR, article 27(2).

²²⁸ ICCPR, article 10; ACHR, article 5(2); OSCE Vienna document, para. 23.2; OSCE Moscow document, para. 23.

The minimum acceptable standards for detention are further enumerated in the United Nations standard rules for the treatment of prisoners (which are not legally binding).²²⁹ The rules include a requirement that prisoners be registered at the detention facility.²³⁰ Prisoners who have yet to be convicted are to be treated in accordance with their presumed innocence,²³¹ housed separately from convicted prisoners²³² and permitted visits from family and friends (subject to restrictions and supervision).²³³ All prisoners must be permitted to worship in accordance with their own religious beliefs²³⁴ and allowed one hour of exercise per day outdoors unless they already perform work outdoors.²³⁵

Human Rights Concerns

Bosnia and Herzegovina

In Bosnia and Herzegovina, the troops from the NATO-led Stabilization Force (SFOR) detained at least five people on suspicion of links to terrorist organizations in the weeks following September 11.²³⁶ Four men – two Bosnian nationals, one Jordanian and one Egyptian – were arrested on 25 and 26 September 2001, in Sarajevo.²³⁷ According to SFOR, between 100,000 and 200,000 Deutsche Marks were seized at the same time. SFOR also admitted that as of 2 October 2002, a week after the four men had been detained, “they ha[d] not been provided with legal counsel”.²³⁸ All four were released without charge on 3 October 2001.

On 2 October 2001, a Jordanian national was detained in the Bosnian town of Bihac by SFOR and Bosnian Federation police and placed in SFOR custody. He was released without charge

²²⁹ United Nations Standard Minimum Rules for the Treatment of Prisoners, approved by the UN Economic and Social Council by Resolution 663 C (XXIV) of 31 July 1957 and Resolution 2076 (LXII) of 13 May 1977.

²³⁰ UN Standard Minimum Rules, article 7.

²³¹ UN Standard Minimum Rules, article 84(2).

²³² UN Standard Minimum Rules, article 8(b) and 85(1).

²³³ UN Standard Minimum Rules, article 92. “An untried prisoner shall be...given all reasonable facilities for communicating with his family and friends and for receiving visits from them, subject only to restriction and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution”.

²³⁴ UN Standard Minimum Rules, article 42.

²³⁵ UN Standard Minimum Rules, article 21. This requirement is subject to weather conditions permitting.

²³⁶ SFOR also detained two Bosnian nationals at Visoko airfield outside Sarajevo during the third week of September 2001, allegedly in connection with arms trafficking. Both were released in early October. The detentions were the first carried out by SFOR against persons not charged with war crimes.

²³⁷ NATO, Transcript: Joint Press Conference, 2 October 2001, 11.30 Hours, Coalition Press Information Centre, Tito Barracks, <http://www.nato.int/sfor/trans/2001/t011002a.htm>.

²³⁸ NATO, Transcript: Joint Press Conference, 2 October 2001, 11.30 Hours, Coalition Press Information Centre, Tito Barracks, <http://www.nato.int/sfor/trans/2001/t011002a.htm>.

on 4 October after being handed over to Bosnian police. According to Amnesty International, the detained man complained that he had been kicked in the chest by an SFOR soldier and denied access to a lawyer and his consulate while in SFOR detention.²³⁹ SFOR have made no public comment on the allegations.

A Bosnian national detained on 26 October 2002 by SFOR outside a US military base in northern Bosnia for possession of a rocket launcher and false passports was held in US custody without access to his lawyer for one month.²⁴⁰ Sabahudin Fiuljanin was given limited access to counsel only after protests by Amnesty International and the Bosnian Helsinki Committee.²⁴¹ As of the end of 2002, he remained in US military custody in Bosnia.

The SFOR detentions raise two major concerns. The first relates to the legal basis for the arrests. SFOR is a peacekeeping rather than police force, and its mandate is strictly limited to maintaining security inside the territory of Bosnia and Herzegovina. While SFOR maintained publicly that the detentions fell within its mandate to protect Bosnia, and told Amnesty International that the detentions were conducted in accordance with international humanitarian law, in the case of the September 2001 and October 2002 arrests, SFOR entirely bypassed local law enforcement authorities, depriving the arrestees of the protection of the courts.²⁴² Moreover, in peacetime Bosnia, it is the ECHR, ICCPR and OSCE standards that are to be applied rather than humanitarian law.

The second concern relates to access to counsel. The denial of access to legal counsel to the men detained in September 2001 and October 2002 violates international human rights standards and Bosnian law.²⁴³ The failure to allow the Jordanian detainee access either to a lawyer or consular officials, albeit for a shorter period, arguably also breaches his rights under article 36 of the Vienna Convention on Consular Relations.

²³⁹ Amnesty International, *Concerns in Europe (July – December 2001)*, EUR/01/002/2002, 30 May 2002.

²⁴⁰ Daniel Simpson, “Rights Groups Criticize U.S. Over Detainee in Bosnia”, *New York Times*, 26 December 2002.

²⁴¹ Amnesty International, “Bosnia-Herzegovina: SFOR detention violates human rights”, 27 November 2002.

²⁴² Amnesty International, *Concerns in Europe (July – December 2001)*, EUR/01/002/2002, 30 May 2002.

²⁴³ The European Court of Human Rights has ruled that denial of access for 48 hours can amount to a violation of the right to a fair trial and the right of access to counsel. [*Murray (John) v U.K.*, Judgment of 8 February 1996]. Denial of prompt access to counsel also violates the Bosnian Law on Penal Procedure.

Bosnian police arrested four Algerian men in October 2001, following an order by the Bosnian Supreme Court, on suspicion of conspiring to blow up the US and UK embassies in Sarajevo.²⁴⁴ In November 2001, the Bosnian Federal Interior Ministry stripped three of the men of their Bosnian citizenship and revoked the permanent residence of the fourth. On 17 January 2002, after a Supreme Court judge ordered that the four be released, the men were transferred into US custody and subsequently removed to the US military prison in Guantanamo Bay, Cuba (see chapter on extradition). On 11 October 2002, the Bosnian Human Rights Chamber (a constitutional human rights court which hears complaints of ECHR violations) held that the Bosnian federal and state authorities had unlawfully detained the men in violation of article 5(1) of the ECHR during the period between the order that they be released and their transfer into US custody, and had subsequently failed to protect them from unlawful detention prior to their transfer out of Bosnia.²⁴⁵

Canada

On 18 December 2001, the Canadian Senate passed Bill C-36 as the Anti-Terrorism Act.²⁴⁶ Drafted in the aftermath of September 11, the law amends the Canadian Criminal Code with respect to terrorist activities and organizations, penalizes hate crimes and hate speech and allows for the freezing of terrorist assets.²⁴⁷ Although the Anti-Terror Act's focus on individual accountability and tackling hate crimes as a side-effect of September 11 was welcomed by some observers, amendments under the act to the Canadian Criminal Code restricting the right to silence and to a public hearing in some circumstances raised concerns

²⁴⁴ Helsinki Committee for Human Rights in Bosnia and Herzegovina, Report on the State of Human Rights in Bosnia and Herzegovina 2002; Human Rights Chamber for Bosnia and Herzegovina, "Press Release: Human Rights Chamber Delivers 3 Decisions on Admissibility and Merits", 11 October 2002, p.3.

²⁴⁵ Human Rights Chamber for Bosnia and Herzegovina, Decision of Admissibility and Merits (Delivered On 11 October 2002): Cases Nos. CH/02/8679, CH/02/8689, CH/02/8690 And CH/02/8691 - *Hadz Boudellaa, Boumediene Lakhdar, Mohamed Nechle And Saber Lahmar v. Bosnia and Herzegovina & The Federation of Bosnia and Herzegovina*. The chamber concluded that the respondents had violated the presumption of innocence in relation to procedures to strip Boudella, Lakhdar and Nechle of their citizenship. It made no finding on whether the three were citizens at the time of their extradition, but found that even as aliens, the extradition procedures were in breach of article 1 of Protocol 7 of the ECHR. The chamber also held that Bosnian authorities failure to seek assurances from the US government that it would not impose the death penalty on the suspects prior to their transfer breached article 1 of Protocol 6 of the ECHR, but found no violation of article 3 of the ECHR.

²⁴⁶ Bill C36, An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism. (Short Title: The Anti-Terrorism Act). Passed by the House of Commons on 28 November 2001.

²⁴⁷ Bill C36 also amends the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and 13 other laws. See also Chapter on Inadequate Safeguards In The Use Of Financial Measures To Fight Terrorism (chapter on financial measures) and the Chapter on Vague, Arbitrary and Overly Broad Definitions of Terrorism in Criminal Law (chapter on terrorism definitions).

about an erosion of due process rights.²⁴⁸ The legislation's vague definition of terrorist activities was also criticized (see chapter on terrorism definitions). The legislation does contain a review process in clause 145, which requires a parliamentary committee to conduct a comprehensive review of the law within three years of its entry into force, and to recommend necessary changes.²⁴⁹

Due process concerns focus on three amendments to the criminal code introduced by the Anti-Terrorism Act. The most troublesome is contained in clause 4 of the legislation, which adds a new section to the criminal code.²⁵⁰ The new section creates a new form of judicial proceeding known as an "investigative hearing" during which a judge is empowered to conduct an investigation into alleged terrorist activity and to compel witnesses to appear.²⁵¹ Under a new subsection 83.28(10) in the criminal code, the general right to refuse to testify or otherwise to provide evidence on the grounds of self-incrimination is waived, but those compelled to give evidence are immune from any prosecutions arising from that evidence other than for perjury or giving inconsistent testimony.²⁵²

The remaining two amendments concern the right to a public hearing. Clause 34 of the act, amends subsection 486(1) of the criminal code to permit a judge to exclude members of the public from a court if it is "necessary to prevent injury to international relations".²⁵³ Clause 43 adds three problematic new subsections to the Canada Evidence Act.²⁵⁴ Subsection 38.06(1) permits a judge to order public disclosure of information arising from a judicial proceeding provided that "such disclosure is not injurious to international relations or national defence or security". Subsection 38.13(1) allows the attorney-general to issue a certificate ordering non-disclosure at any time "for the purpose of protecting international relations or national defence or security". Subsection 38.13(2) requires that in cases involving the

²⁴⁸ For a detailed discussion of the human rights impact of the act, see: Amnesty International Canada, "Protecting Human Rights and Providing Security: Amnesty International's Comments with Respect to Bill C-36", 6 November 2001.

²⁴⁹ Anti-Terrorism Act, clause 145.

²⁵⁰ Anti-Terrorism Act, clause 4

²⁵¹ Investigative hearings are subject to a sunset clause in five years unless both houses of parliament agree to renew them for another five years.

²⁵² Criminal Code 83.28(10): "No person shall be excused from answering a question or producing a thing under subsection (8) [which requires a person to comply with the orders of an investigating judge] on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but (a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136 [prosecution for witness perjury/giving contradictory evidence]; and (b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136".

²⁵³ Anti-Terrorism Act, clause 34.

²⁵⁴ Anti-Terrorism Act, clause 43.

National Defence Act, the attorney-general can only order non-disclosure with the approval of the Minister of National Defence.

While restrictions on public access to judicial proceedings are permitted under international human rights law, those restrictions are well established and narrowly defined. Public order, national security and the interests of justice are accepted grounds for limiting public access subject to necessity. Where the necessity of restrictions on public access is in doubt, there is always a presumption in favour of such access. Yet subsection 38.06(1) appears to create a presumption against public access, permitting a judge to order disclosure only when satisfied that there is no threat to international relations, national defence or security. By reversing the presumption in favour of public access, clause 43 appears to contravene fair trial standards.

Kosovo

In December 2001 and again in August 2002, troops from the NATO-led Kosovo Force (KFOR) detained foreign nationals in the province of Kosovo on suspicion of links to terrorist organizations. As with arrests carried out by NATO forces in Bosnia, there were concerns as to the legal basis of the detentions, the conditions under which the detainees were held, and about potential violations of their due process rights. The detentions were part of a wider pattern of extra-judicial detentions carried out in Kosovo by KFOR since 2001, the vast majority of which were unrelated to the September 11 attacks in the United States.

On 14 December 2001, KFOR raided the offices of an Islamic non-governmental organization in the Kosovo towns of Pristina and Djakovica and arrested several people.²⁵⁵ According to news sources and Amnesty International, three men were arrested, at least two of whom were from the Middle East.²⁵⁶ The detainees were held at Camp Bondsteel, a US military base in southern Kosovo, until 21 January 2002, when they were released without charge. Amnesty International reported that one of the detainees was ill-treated by Italian KFOR soldiers while in detention.²⁵⁷ KFOR failed to respond to a letter from the NGO requesting clarification of the men's status and treatment.²⁵⁸

²⁵⁵ KFOR News Release, "KFOR Search Operations Combat International Terrorism", 14 December 2001: http://www.nato.int/kfor/press/pr/releases/2001/nrel_011214.htm.

²⁵⁶ Amnesty International, *Concerns in Europe (July – December 2001)*, EUR 01/002/2002, May 2002. *Associated Press*, "NATO frees 2 Algerians suspected of terrorism in Kosovo", 18 September 2002. Amnesty International reports that two of the men were Iraqi citizens, and a third was a Swedish citizen, employed by a different organization. AP reports that all three were of "Middle Eastern origin".

²⁵⁷ Amnesty International, *Concerns in Europe (July – December 2001)*, EUR 01/002/2002, May 2002.

²⁵⁸ Amnesty International, *Concerns in Europe (January – June 2002)*, EUR 01/007/2002, September 2002.

On 21 August 2002, KFOR announced that it had arrested five Algerian nationals in Kosovo over the prior two weeks in what it termed “two separate intelligence led operations”.²⁵⁹ The statement indicated that the men were being held at Camp Bondsteel, and that the Algerian Embassy had been informed. The men were employees of humanitarian organizations in Kosovo. NATO announced on 17 September 2002 that two of the detainees had been released without charge.²⁶⁰ The other three men are presumed to remain in NATO custody.

The legal basis for the detentions is unclear. NATO argues that the detentions are justified under powers granted under UN Security Council Resolution 1244 which gives NATO peacekeepers a mandate to maintain peace and security in the province.²⁶¹ The words “detention” and “arrest” do not appear in resolution 1244.²⁶² Moreover, although KFOR had de facto responsibility for law enforcement functions during the initial period of the international administration of the province, since April 2000, the United Nations CIVPOL (civilian police), backed by local police units, have full responsibility for all law-enforcement functions in the province.²⁶³ Kosovo also has a nascent but functioning internationally-backed judicial system, supported by international judges and prosecutors. The assertion that law enforcement functions fall under KFOR’s mandate is therefore highly questionable. UNMIK has not commented publicly on any of the arrests.

As in Bosnia, the lack of due process rights accorded to suspects while in detention is particularly troubling. Persons have been detained without charge or access to counsel and denied the right to habeas corpus. These concerns are shared by the OSCE Mission in Kosovo (OMiK). An April 2002 review of the criminal justice system by OMiK concluded that “OSCE continues to view KFOR’s detention authority and practices as a violation of two basic guarantees against arbitrary detention enshrined in Article 5 of the European Convention: the right to be informed of the reasons for detention upon apprehension, and the right to be brought promptly before a judicial official”.²⁶⁴

²⁵⁹ KFOR Press Release, “KFOR Detains Five Algerians”, 21 August 2002: <http://www.nato.int/kfor/press/pr/pr/2002/08/27-08.htm>.

²⁶⁰ “NATO frees 2 Algerians suspected of terrorism in Kosovo”, *Associated Press*, 18 September 2002.

²⁶¹ See, for example, KFOR Press Release, “KFOR Detains Five Algerians”, 21 August 2002, at <http://www.nato.int/kfor/press/pr/pr/2002/08/27-08.htm>.

²⁶² United Nations Security Council Resolution 1244, S/RES/1244 (1999), 14 June 1999.

²⁶³ UN Civilian Police mandate, available at <http://www.civpol.org/unmik/mandate.htm>.

²⁶⁴ OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, *Kosovo: Review Of The Criminal Justice System (September 2001 - February 2002)*, April 2002, p.49.

United Kingdom

The immediate response of the UK government to the September 11 attacks was a pledge of solidarity with the United States. The UK government's practical response, however, was to introduce new anti-terrorism legislation necessitating a formal derogation from the UK's obligations under the ICCPR and the ECHR²⁶⁵, and to arrest and keep in detention without charge dozens of people on suspicion of links to terrorist groups. The measures have eroded due process rights, particularly for foreign nationals, a number of whom face indefinite detention without trial. There are also concerns about the detention conditions for persons suspected of links to terrorism, and the compatibility of detention conditions with international human rights standards.

Despite having recently introduced comprehensive anti-terrorism legislation in the form of the Terrorism Act 2000, the UK government rushed new anti-terrorism legislation through parliament in the wake of September 11. The Anti-Terrorism, Crime and Security Act 2001 (ATCSA) was passed by parliament on 14 December 2001. Part 4 of the law raised serious issues about its compatibility with human rights standards. The UK Home Secretary is empowered under part 4 to certify any foreign national as a "suspected international terrorist" if he "reasonably (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist".²⁶⁶ Other than the general common-law requirement of "reasonableness", (which suggests that an "unreasonable" certification would be amenable to judicial review), the standard of proof is not enumerated in the act, leaving the matter to the discretion of the home secretary.

A certification under the act that a person is a "suspected international terrorist" permits the home secretary to detain the person without charge, by categorizing him or her as someone that the UK intends to deport or to extradite, even where it is not actually possible to deport or extradite the person on the grounds that he or she would face torture if removed.²⁶⁷ The effect of the measure was to permit indefinite detention without charge of foreign nationals.

Article 5(1)(f) of the ECHR permits detention without charge of a person "against whom action is being taken with a view to deportation or extradition". However, the European Court of Human Rights has ruled that detention without charge under article 5(1)(f) is only justified

²⁶⁵ See also discussion in the chapter on derogations.

²⁶⁶ Anti-Terrorism, Crime and Security Act 2001, part 4, section 21.

²⁶⁷ The right under article 5(3) of the European Convention to be brought promptly before a judge and tried or released within a reasonable time only applies where a person is detained under article 5(1)(c) on "reasonable suspicion of having committed an offence".

where deportation proceedings are prosecuted with “due diligence”.²⁶⁸ Indefinite detentions are contrary to article 5(1)(f). In order to implement part 4 of ATCSA permitting detention without charge even where there is no reasonable prospect of deportation or extradition, the UK government derogated from article 5(1)(f) of the European Convention on 18 December 2001. Moreover, since the entry into force on 2 October 2000 of the Human Rights Act 1998, the European Convention has been incorporated into domestic UK law.²⁶⁹ In order to make part 4 of the ATCSA compatible with existing domestic law, the UK parliament also passed an order formalizing the UK government’s intention to derogate from article 5(1)(f).²⁷⁰

Part 4 of the ATCSA also necessitated derogation from article 9 of the ICCPR. On 18 December 2001, the UK authorities informed the UN Secretary General that “a public emergency within the meaning of Article 4(1) of the Covenant exists in the United Kingdom”.²⁷¹ Acknowledging that the extended powers of detention in part 4 of ATCSA might be “inconsistent” with article 9 of the ICCPR, the UK government stated that it had “decided to avail itself of the right of derogation” from article 9 “until further notice”. The UK government informed the OSCE on 4 January 2002 that a public emergency had been declared in the UK, in keeping with its obligation under paragraph 28.10 of the Moscow document.²⁷²

Despite the government’s claims that “a terrorist threat to the United Kingdom” exists which endangers “the national security of the United Kingdom” and is, therefore, sufficient to constitute a public emergency within the meaning of article 4(1) of the ICCPR and article 15(1) of the ECHR, it is not clear that the derogations from article 9 of the ICCPR and article 5(1)(f) of the ECHR, or the measures introduced under article 4 of the ATCSA, are in fact justified by the exigencies of the situation. Derogations under article 4 of the ICCPR and article 15 of the ECHR require that there is a public emergency threatening the life of the nation; that the measures are strictly required by the exigencies of the situation and that the measures are not inconsistent with other obligations under international law.²⁷³

²⁶⁸ *Chahal v. United Kingdom*, para. 113.

²⁶⁹ Human Rights Act 1998.

²⁷⁰ The Human Rights Act 1998 (Designated Derogation) Order 2001 [Statutory Instrument 2001, No. 3644]

²⁷¹ Text of notification available at http://193.194.138.190/html/menu3/b/treaty5_asp.htm.

²⁷² OSCE Moscow document, para. 28.10: “When a state of public emergency is declared or lifted in a participating State, the State concerned will immediately inform the CSCE Institution of this decision, as well as of any derogation made from the State’s international human rights obligations. The Institution will inform the other participating States without delay”.

²⁷³ For a detailed discussion on article 15, see Clare Ovey & Robin White, *Jacobs & White: European Convention on Human Rights*, 3rd ed. (Oxford: 2002), Chapter 21: “Derogation in Emergency Situations”; see also chapter on derogations.

The European Court of Human Rights has defined a public emergency as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed”.²⁷⁴ In *Ireland v. United Kingdom*, the court made clear that states are to be given a wide margin of appreciation in determining whether such a state of emergency exists.²⁷⁵ Even where such a state of emergency does exist, however, the court’s judgment in the case of *Aksoy v. Turkey* makes clear that in order to justify such a derogation, a state must demonstrate that judicial measures such as arrest and trial are insufficient.²⁷⁶

It is far from clear that the UK criminal justice system is incapable of responding adequately to the current threat posed to the UK by terrorism, given its long experience with domestic terrorist groups and pre-existing powers under the Terrorism Act 2000. The Council of Europe’s Human Rights Commissioner Alvaro Gil-Robles appears to share this concern, commenting that “[e]ven assuming the existence of a public emergency, it is questionable whether the measures enacted by the United Kingdom are strictly required by the exigencies of the situation”.²⁷⁷

The commissioner’s comments point to a further difficulty, namely whether applying the test in *Ireland v. United Kingdom* the security situation in the UK merits designation as a state of emergency at all. The legitimacy of the derogation has been reviewed by Special Immigration Appeals Commission (SIAC, a special tribunal established in 1997 to consider appeals in relation to immigration and asylum cases involving national security) and on appeal to the Court of Appeal. In October 2002, the Court of Appeal upheld the SIAC’s finding that a genuine threat to national security does exist.²⁷⁸ Lawyers for the detainees have appealed to the House of Lords.²⁷⁹ The SIAC had access to intelligence information not available to the public. Nonetheless, both Amnesty International and the UK civil liberties organization

²⁷⁴ *Lawless v. Ireland*, para. 28

²⁷⁵ *Ireland v. United Kingdom*, para. 207.

²⁷⁶ *Aksoy v. Turkey*, para. 78. See also International Commission of Jurists, *Terrorism and Human Rights*, pp. 227-228.

²⁷⁷ Council Of Europe, Opinion 1/2002 of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles On Certain Aspects Of The United Kingdom 2001 Derogation From Article 5 Par. 1 Of The European Convention On Human Rights, [CommDH(2002)7], 28 August 2002, p.7.

²⁷⁸ *A, X and Y and others v. Secretary of State for the Home Department* [2002] EWCA Civ 1502, 25 October 2002, para. 34.

²⁷⁹ Liberty, “Press release: Discriminatory internment of “terrorist suspects”: Home Office wins appeal”, 25 October 2002, at <http://www.liberty-human-rights.org.uk/press/press-releases-2002/discriminatory-internment-of-terrorist-suspe.shtml>.

Liberty have expressed doubts as to the magnitude of the threat.²⁸⁰ The European Court of Human Rights has not yet had an opportunity to rule on the legitimacy of the UK's derogation as domestic remedies have yet to be exhausted. Should the House of Lords uphold the Court of Appeal's decision or refuse the detainees leave to appeal, an application to the court is virtually certain.

The UK government used its new powers under the ATCSA and existing authority under the Terrorism Act 2000 to detain at least several dozen suspects in the months following September 11. According to Home Office Minister Lord Rooker, 144 persons were arrested under the Terrorism Act 2000 between the time that the act entered into force in January 2002 and 7 May 2002, of whom 46 had been charged with offences.²⁸¹ Lord Rooker also stated that as of 7 May 2002, "there have been no convictions for terrorist offences to date but 10 people are undergoing or awaiting trial for such offences".²⁸² Amnesty International estimates that 25 persons were arrested under the Terrorism Act subsequent to the events of September 11.²⁸³

Lord Rooker confirmed that there had been eleven detentions under the ATCSA. He stated on 7 May 2002 that "eight [persons] were detained in December 2001, one in February 2002 and two in April 2002. Of the total detained, two have voluntarily left the United Kingdom; the other nine remain in detention".²⁸⁴ According to Amnesty International, as of 18 December 2002, ten suspects were in detention at high security prisons, and the eleventh had been transferred to a high-security psychiatric hospital.²⁸⁵ On 24 January 2003, the Home Secretary released a statement indicating that fifteen suspects had been arrested, of whom two had voluntarily left the UK.²⁸⁶ No information is available as to the identity of the additional suspects not identified by Amnesty International.

According to Amnesty International, at least two of the ATCSA detainees were initially denied access to legal counsel for more than a week. The detainees were initially subjected to

²⁸⁰ Amnesty International, *Rights Denied: the UK's Response to 11 September 2001*, 5 September 2002; Liberty, "Press release: Internment of "terrorist suspects" is discriminatory, breaches Human Rights Convention – SIAC judgment today", 30 July 2002, <http://www.liberty-human-rights.org.uk/mpress133.html>.

²⁸¹ Hansard, HL, vol. 634, column WA160, 7 May 2002.

²⁸² Ibid.

²⁸³ Amnesty International, *Rights Denied...*, p. 5.

²⁸⁴ Hansard, HL, vol. 634, column WA160, 7 May 2002.

²⁸⁵ Amnesty International, *UK: Internment one year – no hope in sight*, 18 December 2002; "Judges Back Anti-Terror Law", *BBC News Online*, 25 October 2002; Amnesty International, *Rights Denied...*, p. 5.

²⁸⁶ 10 Downing Street, "Press Release: Government seeks to extend powers of detention", 24 January 2003, at <http://www.number-10.gov.uk/output/Page1120.asp>

harsh treatment in detention, including frequent strip searches, and restrictions on religious freedom, and were held in detention in a maximum security wing at Belmarsh Prison (although they were later moved to a standard risk wing).²⁸⁷ The detainees are not segregated from convicted prisoners and have been subject to verbal abuse from guards and inmates.²⁸⁸ The treatment of unconvicted detainees as if they had been convicted of the most serious violent offences and the denial of their right to consult a lawyer breaches international human rights standards.

Questions about the suspects' treatment prompted a five day visit to the UK in February 2002 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.²⁸⁹ The committee's findings and the UK government's response to it were published in February 2003.²⁹⁰ The committee's report identifies a number of problem areas, including: initial restrictions on access to a lawyer "for up to a week or more" for "most of the detainees"; verbal abuse from guards; the absence of specific guarantees in ATCSA regarding "the right to notification of custody and to the rights of access to a lawyer and to a doctor"; the absence of work, educational and cultural activities for detainees; restrictions on the detainees' out-of-cell time resulting from "operational requirements" that fall below the one-hour minimum and; restrictions on visits by family and friends (generally limited to one visit every two weeks). The UK government's response rejects these criticisms.²⁹¹

Those detained under the ATCSA are entitled to challenge the legal basis upon which detention is justified, namely the certification that a person is a "suspected international terrorist", is subject to appeal within three months of the initial determination, and subsequent periodic review. The arrest itself cannot be appealed. Appeals and reviews are carried out by the Special Immigration Appeals Commission. The SIAC has access to classified material to which the detainees and their designated legal representatives do not, although detainees are also represented at SIAC hearings by "special advocates" appointed by the attorney-general

²⁸⁷ Amnesty International, *Rights Denied...*, pp. 6 – 13.

²⁸⁸ Audrey Gillan, "No names, no charges, no explanations: the plight of Britain's interned 'terrorists'", *Guardian*, 9 September 2002.

²⁸⁹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, "Press Release: Council of Europe's Anti-Torture Committee visits suspected international terrorists detained in the U.K.", 22 February 2002.

²⁹⁰ *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 21 February 2002*, CPT/Inf (2003) 18, 12 February 2003; *Response of the United Kingdom Government to the report of European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 17 to 21 February 2002*, CPT/Inf (2003) 19, 12 February 2003.

²⁹¹ *Response of the United Kingdom Government*, CPT/Inf (2003) 19, 12 February 2003.

who themselves have access to the classified material.²⁹² The SIAC can cancel a certificate if it considers there are no reasonable grounds for believing or suspecting that the person is a “suspected international terrorist”.²⁹³ Appeals to the Court of Appeal (the second highest court in England and Wales) are on points of law only. Since the SIAC reviews depend on secret evidence, it is difficult to assess whether the rights of ATCSA detainees to challenge their detention are sufficient to meet the habeas corpus requirements under article 5(4) of the ECHR.

The SIAC is also empowered by the ATCSA to consider the lawfulness of any derogation from the ECHR and Human Rights Act arising from the detentions under the ATCSA. On 30 June 2002, the SIAC heard an appeal on the lawfulness of the derogation from article 5(1)(f) and its application to the detention of persons certified as “suspected international terrorists”. While the SIAC accepted that the government is within its right to conclude that there is a public emergency threatening the life of the nation, it also held that article 4 of the ATCSA is discriminatory in that it applies only to foreign nationals and not to UK nationals.²⁹⁴ The SIAC therefore concluded that the ATCSA is incompatible with article 14 of the ECHR, which prohibits discrimination.

In October 2002, the Court of Appeal reversed the SIAC’s decision on appeal, finding that there was no incompatibility between the ATCSA and the ECHR (subject to the UK’s derogation under 5(1)(f)), on the basis that UK nationals who are never liable to deportation are not in an analogous situation to foreign nationals who may (at least theoretically) be deported, that international law permits limited state discrimination against foreign nationals – especially in times of emergency – and that the class of foreign nationals to whom the act applied was sufficiently small that any derogation could be justified by the exigencies of the situation.²⁹⁵

Notwithstanding the Court of Appeal’s ruling, the detention of the suspects under the ATCSA is hardly compatible with human rights law. As in the United States, the categorisation of terrorist suspects as immigration detainees appears intended merely to by-pass due process standards applicable to those charged with a crime.

²⁹² Special Immigration Appeals Commission Act 1997, section 6.

²⁹³ Anti-Terrorism, Crime and Security Act 2001, part 4, section 25.

²⁹⁴ Liberty, “Press release: Internment of “terrorist suspects” is discriminatory, breaches Human Rights Convention – SIAC judgment today”, 30 July 2002, at <http://www.liberty-human-rights.org.uk/mpress133.html>.

²⁹⁵ *A, X and Y and others v. Secretary of State for the Home Department* [2002] EWCA Civ 1502, 25 October 2002.

Detention powers under ATCSA are set to expire in March 2003.²⁹⁶ On 23 January 2003, the UK government laid a draft order before parliament to renew the powers of detention under the act for a further twelve months.²⁹⁷

United States

The United States responded quickly and broadly to the September 11 attacks. Regrettably, many of the measures undertaken by the US government served to undermine freedom rather than protect it. This was particularly true in the area of detentions. The US sought to create a parallel system of justice to detain and try individuals suspected of terrorist links, designating US nationals as enemy combatants not entitled to constitutional rights, and establishing military commissions with fewer protections than regular courts. Hundreds of foreign nationals inside the United States were detained on immigration charges or material witness warrants in order to circumvent due process requirements. Hundreds more were held at the US naval base in Guantanamo Bay, Cuba, placing them entirely outside the protection of the US courts.

On 26 October 2001, the new anti-terrorism legislation called the USA PATRIOT Act was signed into law. The new law amends the Immigration and Nationality Act, permitting the attorney-general to certify foreign nationals as “suspected terrorists”.²⁹⁸ The attorney-general is required to detain anyone so certified. Suspects can be detained for seven days without charge, after which they must either be charged, released or deportation proceedings commenced.²⁹⁹ Certification decisions are subject to judicial review. The act requires that the Justice Department report to the Congress on the use of certification every six months. Perhaps because of the safeguards, the attorney-general failed to certify a single person under the act between October 2001 and April 2002.³⁰⁰ There are no public reports of certifications since April 2002.

²⁹⁶ ATCSA, section 29(1): “Sections 21 to 23 shall, subject to the following provisions of this section, expire at the end of the period of fifteen months beginning with the day on which this Act is passed”.

²⁹⁷ 10 Downing Street, “Press Release: Government seeks to extend powers of detention”, 24 January 2003, at <http://www.number-10.gov.uk/output/Page1120.asp>.

²⁹⁸ USA PATRIOT Act, Sec. 412. Mandatory Detention Of Suspected Terrorists; Habeas Corpus; Judicial Review.

²⁹⁹ For more information, see Lawyers Committee for Human Rights, “A Year of Loss: Reexamining Civil Liberties Since September 11”, September 2002, p.30, at http://www.lchr.org/us_loss/loss_main.htm.

³⁰⁰ Tom Brune, “U.S. Evades Curbs in Terror Law”, *Newsday.com*, 26 April 2002, cited in Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, August 2002, p. 48.

A more significant legal change came earlier on 17 September 2001, when Immigration and Naturalization Service (INS) issued a regulation doubling the period for which the INS could detain a person without charge from 24 to 48 hours.³⁰¹ While such an increase is not incompatible with human rights, the regulation contains an additional provision that permits the INS “in the event of an emergency or other extraordinary circumstance” to detain someone for an additional “reasonable period of time”. No criteria are provided as to what constitutes an “emergency” or “extraordinary circumstance” that would warrant continued detention, nor how long a “reasonable” period of time might be. The effect of the regulation is to permit the INS to detain foreign nationals indefinitely without charge, in contravention of international human rights standards.³⁰² Persons held in INS custody are not subject to the protections afforded to those detained in connection with a criminal offence. There is no automatic review of the lawfulness of the detention unless and until the person is charged with an INS violation or criminal offence. Those held in INS detention without charge can apply to an immigration judge for release on bond or file a habeas corpus petition in federal court.³⁰³ Unlike criminal defendants, INS detainees have no right to a state-appointed lawyer, leaving some unrepresented. Moreover, in practice many detainees have been denied access to counsel for extended periods, including during interrogations.³⁰⁴

In contrast with the detention measure under the PATRIOT Act, the INS regulation was used with alarming frequency. Of the 1,182 foreign nationals detained after September 11, 752 were held on immigration charges, designated “special interest” detainees by the Department of Justice.³⁰⁵ Most of the “special interest” detainees were men from South Asia, the Middle East and North Africa. According to Human Rights Watch, as of July 2002, none of the 752 had been indicted for terrorist activity and most had been deported for visa violations (the original ground for their detention).³⁰⁶ According to the US Department of Justice, as of 3 July 2002, 81 individuals remained in detention on immigration charges.³⁰⁷ Thirty-six of the detainees were held for more than 28 days before being charged.³⁰⁸ Extended detentions occurred even when judges issued a release order or granted permission for release on bond and the bond was posted.

³⁰¹ 8 CFR 287, INS No. 2171-01.

³⁰² The UN Human Rights Committee and Inter-American Commission on Human Rights have condemned indefinite detention without charge as contrary to human rights law. See International Commission of Jurists, “Terrorism and Human Rights”, pp. 222-228.

³⁰³ Human Rights Watch, *Presumption of Guilt...*, p. 53.

³⁰⁴ *Ibid.*, pp. 41-46.

³⁰⁵ Dan Eggen and Susan Schmidt, “Count of Released Detainees is Hard to Pin Down”, *Washington Post*, November 6, 2001, cited in: Human Rights Watch, *Presumption of Guilt...*, p.18.

³⁰⁶ *Ibid.*, p.3.

³⁰⁷ Lawyers Committee for Human Rights, *A Year of Loss*, p. 27.

³⁰⁸ *Ibid.*, p. 87.

Conditions of detention for INS detainees are frequently inconsistent with US obligations under the ICCPR. Many “special interest” detainees have been held in solitary confinement or housed with convicted prisoners, with restrictions on communications with family, friends and lawyers, and have had inadequate access to facilities for exercise and for religious observance, including facilities to comply with dietary requirements. Some told human rights groups they were denied medical treatment and beaten by guards and inmates. The scale of the allegations led the Department of Justice in April 2002 to announce a probe into conditions in custody for INS detainees.³⁰⁹

- An Egyptian national arrested on 12 September 2001 was held in INS detention for 73 days. During his detention he was held in solitary confinement – under constant video surveillance – in a cell where the lights were kept on for weeks at a time; forced to undergo body cavity searches in the presence of a large group of officials; made to eat pork despite his religious beliefs as a Muslim; and denied access to counsel for almost a month.³¹⁰ In October 2002, he filed a lawsuit in Louisiana alleging that his detention rose to the level of torture.
- An Indian national arrested in September 2001 and held in INS detention described being held in shackles in solitary confinement, physically assaulted during interrogations, and denied access to a lawyer for 54 days.³¹¹ He was later charged with credit card fraud, and deported after serving his sentence.
- A Palestinian man interviewed by Human Rights Watch spent 66 days in solitary confinement in a cell he described as “freezing”. He was only allowed out of his cell for half-an-hour between 6.30 and 7.00 a.m. three times a week.³¹²

Federal court challenges to the practice of secret INS detentions have had mixed results. In August 2002, a unanimous federal appeals court in Cincinnati ruled that deportation hearings must be conducted in public.³¹³ The judgment of the court observed that “democracies die

³⁰⁹ Human Rights Watch, *Presumption of Guilt*, p. 68, referenced at fn 269.

³¹⁰ Matthew Brzezinski, “Hady Hassan Omar’s Detention”, *New York Times Magazine*, 27 October 2002.

³¹¹ Rama Lakshmi, “A ‘Long Night of Terror’ After 9/11 – Deported to India, Muslim Decries Treatment in U.S. Suspect in Attacks”, *Washington Post*, 10 January 2003.

³¹² Human Rights Watch, *Presumption of Guilt*, p. 70.

³¹³ Adam Liptak, “Court Backs Open Deportation Hearings in Terror Cases”, *New York Times*, 27 August 2002.

behind closed doors”.³¹⁴ On 17 September 2002, a federal court ordered the Department of Justice to grant a new detention hearing in public to a Lebanese man held as an INS detainee for nine months on suspicion of links to terrorism.³¹⁵ In October, a majority federal appeals court in Philadelphia ruled that secret hearings were lawful, reversing a Newark federal district judge.³¹⁶ The judgment conflicts with the August ruling from the Cincinnati appeals court, leaving the state of the law unclear.

A smaller number of foreign nationals were detained as “material witnesses”. The US government will not provide statistics on the number of such persons, but as of 24 November 2002, at least 44 people had been detained on such warrants, of whom at least 29 were later released.³¹⁷ Periods of detention are unknown. At least seven of those detained are known to be US citizens. Among those held as material witnesses were Zacarias Moussaoui and James Ujaama, both later indicted by a US federal court on terrorism charges, and Joseph Padilla, a US national later designated as an “enemy combatant” who continues to be held without charge (see below).

The fact that prominent terrorist suspects were initially held as material witnesses suggests to some observers that material witness warrants are used as a form of preventive detention when federal authorities lack sufficient evidence that an individual committed a crime or immigration violation.³¹⁸ Twenty of the 44 material witness detainees were never brought before a grand jury, according to their lawyers.³¹⁹ There have been two challenges to the use of material witness warrants as a form of preventive detention in the same federal district court. In the first case in April 2002, the use of such warrants was held to be unlawful, while in the second in July 2002 their use was upheld.³²⁰

Other foreign nationals were held on criminal charges. At least 129 of the 1,182 foreign nationals known to have been detained in relation to the September 11 attacks have been

³¹⁴ Ibid.

³¹⁵ Steve Fainaru, “Detainee to Get Open Immigration Hearing”, *Washington Post*, 26 September 2002.

³¹⁶ Adam Liptak, “Citing 9/11, Appeals Court Upholds Secret Hearings”, *New York Times*, 9 October 2002.

³¹⁷ Steve Fainaru and Margot Williams, “Material Witness Law Has Many in Limbo – Nearly Half Held in War on Terror Haven’t Testified”, *Washington Post*, 24 November 2002.

³¹⁸ Lawyers Committee for Human Rights, *A Year of Loss*, p. 26.; Human Rights Watch, *Presumption of Guilt*, p. 60.

³¹⁹ Steve Fainaru and Margot Williams, “Material Witness Law Has Many in Limbo”.

³²⁰ *United States of America v. Osama Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. April 2002).; *In re the Application of the United States for a Material Witness Warrant*, 2002 U.S. Dist. Lexis 13234. (S.D.N.Y. July 11, 2002).

charged with a crime. According to Justice Department figures, 76 suspects remained in custody as of 3 July 2002.³²¹ Among them were several high profile suspects, including Moussaoui and Richard Reid, charged with attempting to blow up an American Airlines flight from Paris to Miami in December 2001. In contrast to those held on immigration charges or material witness warrants, foreign nationals charged with criminal offences have thus far been subject to prosecution in civilian courts with the regular protections accorded to all criminal suspects under the US constitution. Reid received a life sentence following his conviction in Boston federal district court on 30 January 2003.³²² Moussaoui's trial was halted in February 2003 when the Justice Department appealed a ruling by a US district judge that his defence team be given access to Ramzi Binalshibh, a senior Al Qaida operative being held by the CIA in an undisclosed location.³²³ Federal officials indicated that the ruling might force the Justice Department to abandon the trial and to transfer the case to a military tribunal.³²⁴

The treatment of US citizens suspected of terrorism has been mixed. The first US national charged with offences related to September 11, John Walker Lindh, was prosecuted in a civilian court (the case was later settled when Lindh plead guilty to lesser charges). Seattle-resident James Ujaama was indicted by a federal grand jury in August 2002 for conspiring to provide support to terrorists. Ujaama plead not guilty in Seattle federal court on 9 September 2002, but at the time of this writing the start of the trial had twice been postponed and he remained in custody.³²⁵ On 21 October 2002, a federal grand jury indicted six Buffalo-residents on charges of providing material support to a terrorist organization.³²⁶ The charges are based on the men having allegedly spent time during 2001 in a "terrorist training camp" in Afghanistan. The six were arrested in September 2002.³²⁷

By contrast, Joseph Padilla and Yasser Hamdi have been designated as "enemy combatants" by the US government, and placed in detention in military prisons, outside the protection of

³²¹ Lawyers Committee for Human Rights, *A Year of Loss*, p.27.

³²² Pam Belluck, "Unrepentant Shoe Bomber Sentenced to Life", *New York Times*, 31 January 2003.

³²³ Jerry Markon, "Justice Dept. Wants Moussaoui Trial Put on Hold", *Washington Post*, 7 February 2003.

³²⁴ Philip Shenon, "Moussaoui Case May Have to Shift from U.S. Court to Tribunal", *New York Times*, 7 February 2003.

³²⁵ Mike Carter, "Thin, quiet Ujaama pleads not guilty to weapons and conspiracy charges", *Seattle Times*, 10 September 2002. CNN, "Judge orders Ujaama held until trial", *CNN.com*, 13 November 2002, at <http://www.cnn.com/2002/LAW/11/13/ujaama.detention/>.

³²⁶ Mark Santora, "6 Indicted on Charges of Providing Material Aid to Terrorist Group", *New York Times*, 22 October 2002.

³²⁷ CNN, "Buffalo men charged with aiding terrorists", *CNN.com*, 14 September 2002, at <http://europe.cnn.com/2002/US/09/14/buffalo.terror.arrests/index.html>;

Jeff Flock and Susan Candiotti, "Sixth man charged in Buffalo terror probe", *CNN.com*, 18 September 2002, at <http://europe.cnn.com/2002/LAW/09/16/buffalo.terror.arrests/index.html>.

civilian courts. Neither has been charged with a crime.³²⁸ Padilla was denied access to a lawyer for six months following his designation in June 2002 as an “enemy combatants”. Padilla’s lawyers filed a writ of habeas corpus the same month and sought to challenge his lack of access to counsel. On 4 December 2002, a federal district judge ruled that Padilla’s detention as an illegal combatant was not unlawful “*per se*”, but that he was entitled to consult his lawyers, albeit under strictly controlled conditions.³²⁹ Government lawyers have appealed the ruling on access to counsel.³³⁰

Hamdi has been unable to consult with a lawyer since his designation as an “enemy combatant”. In August 2002, a federal district court ordered the US to disclose the grounds for Hamdi’s detention, but the order was overturned on appeal.³³¹ On 8 January 2003, a federal appeals court in Virginia issued a far-reaching decision on the lawfulness of Hamdi’s detention, accepting the government’s arguments that as an enemy combatant Hamdi could be indefinitely detained and denied access to a lawyer.³³² While retaining a limited right for civilian courts to consider habeas corpus in such situations, the court held that “the Constitution does not entitle [Hamdi] to a searching review of the factual determinations underlying his seizure” and dismissed his lawyers’ submissions that the Geneva Conventions required that a tribunal determine whether Hamdi was a lawful combatant.

Hamdi and Padilla are being denied the rights accorded to either criminal suspects under US and human rights law or to prisoners of war under humanitarian law. They are being subjected to indefinite detention imposed without trial. The International Commission of Jurists has commented that the effect of the Hamdi ruling is to place all terrorist suspects so designated “beyond the protection of the law”.³³³

On 13 November 2001, President Bush signed an order establishing military commissions to try foreign nationals accused of “violations of the laws of war or other offences triable by

³²⁸ The designation appears to be based upon a novel interpretation of international humanitarian law as well as on a much criticized 1942 Supreme Court judgment concerning the trial of Nazi saboteurs in the United States. Human Rights Watch has questioned the application of humanitarian law to terrorist suspects. See Human Rights Watch, *Presumption of Guilt*, p. 65, footnote 250.

³²⁹ *Padilla v. Bush, Rumsfeld and Marr* (U.S. District Court) Opinion and Order (02 Civ. 4445) (before Michael B. Mukasey, U.S.D.J.), 4 December 2002; via findlaw.com, at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush120402opn.pdf>.

³³⁰ Benjamin Weiser, “Lawyers Renew Plea to Meet Terror Suspect in Navy Brig”, *New York Times*, 14 January 2003.

³³¹ Kevin Drew, “Terror trial test U.S. legal foundation”, *CNN.com*, 11 September 2002, <http://europe.cnn.com/2002/LAW/09/11/ar911.prosecution/index.html>.

³³² Neil A. Lewis, “Detention Upheld in Enemy Combatant Case”, *New York Times*, 9 January 2003.

³³³ International Commission of Jurists, “U.S. Court Ruling Places Terrorist Detainees Beyond Protection of the Law”, 10 January 2003.

military commission”.³³⁴ The “other offences” were later specified to include being “members of Al Qaida, involved in acts of international terrorism against the United States” and “harbour[ing] such terrorists”.³³⁵ The intention of the commissions appeared to be the creation of a parallel system of justice with far fewer protections than regular civilian courts or US military courts-martial. Among the most troubling aspects of the order was the fact that commission members were to be appointed by the executive, that there was no right of appeal to an independent court, that the standard of evidence was lower than in either civilian courts or US military courts-martial, that only a two-thirds majority was required for a guilty verdict and judgments were to be submitted for approval to the president or secretary of defence. What is more, hearsay and secret evidence were admissible. The order left unanswered key questions as to the composition of the commissions.

The use of such commissions rather than regular military courts-martial to try prisoners of war would breach the Geneva Conventions.³³⁶ Furthermore, the use of special commissions to try civilians (non-combatants) would violate international human rights standards. The Inter-American Court of Human Rights has concluded that the use of military tribunals to prosecute civilians violates fair trial principles, and the Inter-American Commission on Human Rights has held that where a military tribunal is subordinate to the executive branch it can be neither impartial nor independent.³³⁷ The use of special tribunals to try only non-US citizens also breaches the principles of non-discrimination and equality before the law contained in US domestic law and international human rights law.

Fierce criticism of the commissions from inside and outside the US led to a revision and clarification of their structure.³³⁸ On 21 March 2002, the secretary of defence issued detailed guidelines on the functioning of the military commissions. While the regulations were an improvement over the original order, considerable defects remain.³³⁹ The new guidelines

³³⁴ Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”, 66 F. R. 57833, 16 November 2001.

³³⁵ US Department of Defence, “Fact Sheet: Department of Defence Order on Military Commissions”, 21 March 2002.

³³⁶ Article 102 of Geneva Convention III requires that prisoners of war be tried according to the same rules as US soldiers.

³³⁷ International Commission of Jurists, “Terrorism and Human Rights”, p. 234. In the case of *Incal v. Turkey* (Judgment of 9 June 1998, Report 1998-IV), the European Court of Human Rights went further, holding that the right to an independent and impartial tribunal is already violated by the mere fact that some members of the State Security court were military men.

³³⁸ Critics included the American Bar Association, the American Civil Liberties Union, the Cato Institute, and conservative columnist William Safire, who said that the order “turns back the clock on all advances in military justice, through three wars, in the past half-century”. William Safire, “Kangaroo Courts”, *New York Times*, 26 November 2001.

³³⁹ Department of Defense, Military Commission Order No.1 (DoD MCO No.1), 21 March 2002.

allow for public trials, the same standard of proof as in US civilian courts and military courts-martial, cross-examination of witnesses and the presumption of innocence. Hearsay and secret evidence are still admissible, however, and defence lawyers are either to be appointed by the military or subject to the commission's approval if appointed by the defendant.³⁴⁰ Moreover, the US government may still detain suspects indefinitely even after acquittal by a commission, rendering due process safeguards irrelevant if the US government so decides. As of this writing, military commissions had yet to try a single suspect.

In addition to detaining foreign nationals inside the US on immigration and criminal charges and material witness warrants, US authorities have detained hundreds of foreign nationals at the US naval base in Guantanamo Bay, Cuba since September 11. The first suspects were transferred to the base from Afghanistan in January 2002. As of 16 September 2002, there were 598 prisoners from 43 countries held at the base.³⁴¹ Many of the suspects are suspected Taliban and Al Qaida members detained in Afghanistan, although some suspects were detained in third countries and transferred by the US to Guantanamo Bay. The prisoners are subject to indefinite detention. None have been charged with any crime. As of this writing, only five prisoners were known to have been released. (Yasser Hamdi was transferred to the US when it was determined that he was a US citizen, where he remains in detention without charge as an "enemy combatant".)

Initial concerns about the Guantanamo Bay prison focused on detention conditions. The first prisoners were housed in small metal cages open to the elements and kept in shackles even when inside the cages. The International Committee of the Red Cross (ICRC) subsequently negotiated unfettered access and made its first visit on 18 January 2002.³⁴² Conditions improved considerably thereafter, although the prisoners' uncertain status contributed to an increase in cases of mental illness and several suicide attempts.³⁴³

The legal status of the detainees remains highly problematic. The US government initially designated the prisoners at Guantanamo as "unlawful combatants" (a phrase similar to the "enemy combatant" label applied to Padilla and Hamdi) arguing that they were not entitled to

³⁴⁰ Amnesty International, "USA – Military Commissions: second class justice", 22 March 2002; Human Rights Watch, "U.S.: Commission Rules Meet Some, Not All, Rights Requirements", 21 March 2002. See also: Lawyers Committee for Human Rights, *A Year of Loss*, pp. 51-53.

³⁴¹ Katharine Q. Seelye, "Guantanamo Bay Faces Sentence of Life as Permanent U.S. Prison", *New York Times*, 16 September 2002.

³⁴² ICRC, "First ICRC visit to Guantanamo Bay prison camp", (Press Release 02/03), 18 January 2002.

³⁴³ Katharine Q. Seelye, "Guantanamo Bay Faces Sentence of Life as Permanent U.S. Prison", *New York Times*, 16 September 2002. Julian Borger, "Rights flouted at Guantanamo Bay", *Guardian*, 9 September 2002.

the protections under the Geneva Conventions.³⁴⁴ The government revised this position in February 2002, stating that members of the Taliban detained in Guantanamo were protected by the conventions, but were not prisoners of war, while members of Al Qaida were not subject to protection under the conventions.³⁴⁵

The US government's reading of the Geneva Conventions is widely disputed. Firstly, the term "unlawful combatant" does not occur anywhere in the Geneva Conventions. There are only two types of status for prisoners under the conventions: prisoners of war and civilian non-combatants.³⁴⁶ The distinction is important because civilians are protected by a separate regime (under the Fourth Geneva Convention) and can be tried for acts of belligerence (including terrorism) in civilian courts. Prisoners of war by contrast can only be tried for war crimes and crimes against humanity (which would include terrorist acts targeting civilians), but not for simply participating in the conflict. Secondly, notwithstanding the US government position that there is no doubt as to the status of the prisoners at Guantanamo Bay, the Geneva Conventions require that the status of a prisoner is determined by a competent tribunal.³⁴⁷ Until the status of a prisoner has been so determined, there is a presumption that the detainee is a POW and must be treated as such.

The US government has failed to bring the detainees before a competent tribunal to determine their status and has failed to accord the detainees the POW status they are presumed to have until such a tribunal has determined otherwise.³⁴⁸ Moreover the government continues to detain persons it regards as not subject to the Geneva Conventions, including individuals detained outside Afghanistan, when those persons should properly be considered civilian non-combatants under the Fourth Geneva Convention who should either be tried in civilian courts or released.

³⁴⁴ Lawyers Committee for Human Rights, *A Year of Loss*, p. 47.

³⁴⁵ White House, "Fact Sheet: Status of Detainees at Guantanamo", 7 February 2002. "The President has determined that the [Third] Geneva Convention applied to the Taliban detainees but not the al-Qaida detainees.... Under the terms of the [Third] Geneva Convention, however, the Taliban detainees do not qualify as POWs [prisoners of war]. Therefore neither the Taliban nor al-Qaida detainees are entitled to POW status".

³⁴⁶ Amnesty International, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, 29 January 2002, pp.2-3.

³⁴⁷ Human Rights Watch, "U.S. Officials Misstate Geneva Convention Requirements", 28 January 2002.

³⁴⁸ On 12 March 2002, the Inter-American Commission on Human Rights urged the US government "to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal", Cited in American Society of International Law, International Law Brief, 19 March 2002, at <http://www.asil.org/ilib/ilib0503.htm#J2>. This view is echoed by the UN Human Rights Commission's Working Group on Arbitrary Detention in its *Legal Opinion Regarding the Deprivation of Liberty of Persons Detained in Guantanamo Bay*, E/CN.4/2003/8, 16 December 2002.

The only logical explanation for the conduct of the US government toward the detainees held at Guantanamo Bay is that it seeks to place them outside the law, holding them outside the jurisdiction of US civilian courts and denying them protection under the Geneva Conventions, so as to justify their indefinite detention without trial.³⁴⁹ When relatives of detainees and others have sought to challenge the detentions in US courts, those courts have so far accepted the arguments of government lawyers that US courts lack jurisdiction because Guantanamo Bay is not sovereign US territory.³⁵⁰ There is no doubt however that the detainees are subject to protection under the Geneva Conventions, at least until a competent tribunal determines otherwise. Moreover, a prominent international lawyer has argued that the US may be bound by its treaty obligations over any territory over which it exercises its control, including territory sovereign to other states.³⁵¹ According to that view, the US government is bound by its obligations under the ICCPR to provide due process and fair trial rights to individuals under its control even outside US territory, and not to arbitrarily detain them.

³⁴⁹ On 6 November 2002, the British Court of Appeal criticized the status of Feroz Abassi, a British man detained at Guantanamo Bay as “legally objectionable” and commented that “Mr. Abassi is at present arbitrarily detained in a legal black hole”. The finding came in a judgment that the court lacked jurisdiction to compel the British Foreign Secretary to intervene in Abassi’s case. *The Queen (on the application of Abassi and another) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, 6 November 2002 ([2002] EWCA Civ. 1598).

³⁵⁰ Lawyers Committee for Human Rights, *A Year of Loss*, p.50.

³⁵¹ Stefan Trechsel, *Jurisprudence and War: The International Critique of American Policy*”, (unpublished speech, February 2002), pointing to the judgment of the European Court of Human Rights in the case of *Bankovic & others v. Belgium & 16 other contracting states*, decision of 12 December 2001. The court stated “that it had recognised only exceptionally extra-territorial acts as constituting an exercise of jurisdiction, when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation ...exercised all or some of the public powers normally to be exercised by that Government”. Registrar of the ECHR, “Press Release: *Bankovic and Others v. Belgium and 16 Other Contracting States Declared Inadmissible*”, 19 December 2001.

Hate Crimes and Discriminatory Policies

*“[J]ustice does not mean only punishment of the guilty. It must also mean fair treatment of the innocent. Let us, therefore, be careful not to place whole communities under suspicion, and subject them to harassment, because of the acts committed by some of their members”.*³⁵²

The attacks against the World Trade Center and the Pentagon shocked and angered people all over the world. This public fear and outrage also added fuel to prejudices and hostility against those perceived to be associated with the perpetrators. A xenophobic backlash occurred in many OSCE member states after September 11, and an increasing number of incidents of harassment and violent attacks were reported against people of Muslim faith or Arabic appearance. After several months, the level of violence abated, but in many cases it remained at a considerably higher level than prior to September 11.

The governments in countries experiencing such backlashes have typically condemned all forms of “revenge” against Muslims, the vast majority of whom are peaceful, for the acts of a few Islamic terrorists. However, a number of national political leaders have also exploited public indignation and encouraged public bias when they have made reference to security concerns to justify the adoption of new policies that disproportionately affect Muslims and other minority groups. In some cases, governments have carried out highly discriminatory measures in the name of national security that have served to aggravate intolerance and foster the perception that all ordinary Muslims, Arabs and members of other minority communities are potential terrorists.

Relevant International Standards

The Universal Declaration of Human Rights establishes that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law”.³⁵³ Similarly, article 2 of the ICCPR obliges all state parties to respect the rights set forth in the covenant of everyone within their territory “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.³⁵⁴ Under strictly defined circumstances, the ICCPR allows derogation from certain

³⁵² UN Secretary General Kofi Annan quoted in: UN Press Release, “Secretary-General to Commission on Human Rights: Human Rights Must not be Sacrificed to Counter-Terrorism”, 4 April 2002.

³⁵³ UDHR, article 7.

³⁵⁴ Compare article 14 of the ECHR and article 1 of the ACHR.

rights during a state of emergency.³⁵⁵ However, the ICCPR specifically prohibits derogations that involve “discrimination solely on the ground of race, colour, sex, language, religion or social origin”.³⁵⁶ Furthermore, the ICCPR requires state parties to ensure that their laws “guarantee to all persons effective protection against discrimination”³⁵⁷ and to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.³⁵⁸

The International Convention on the Elimination of all Forms of Racial Discrimination (CERD)³⁵⁹ specifically lists a number of rights that states are obliged to guarantee to everyone without distinction as to race, colour, national or ethnic origin, including the right “to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institution”. Those states that are party to this convention have also undertaken to “[...] review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists”.³⁶⁰

The OSCE member states committed themselves at the 1990 Human Dimension Meeting in Copenhagen to take effective measures to protect persons or groups who may be threatened or subjected to discrimination, hostility or violence as a result of their racial, ethnic, cultural, linguistic or religious identity, and to protect their property.³⁶¹ They also agreed to take effective measures to promote tolerance and understanding.

At the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in August-September 2001 the participating states concluded that “Racism, racial discrimination, xenophobia and related intolerance condoned by governmental policies violate human rights and may endanger friendly relations among peoples, cooperation among nations and international peace and security”.³⁶²

³⁵⁵ See the chapter on derogations for a discussion of the conditions under which derogation is allowed.

³⁵⁶ ICCPR, article 4.

³⁵⁷ ICCPR, article 26.

³⁵⁸ ICCPR, article 20.

³⁵⁹ CERD, adopted by General Assembly Resolution 2106 (XX) of 21 December 1966, at http://www.unhchr.ch/html/menu3/b/d_icerd.htm, article 5b.

³⁶⁰ CERD, article 2c.

³⁶¹ OSCE Copenhagen document, para. 40.

³⁶² Durban Declaration, article 85.

Human Rights Concerns

United States

The most serious xenophobic backlash following the September 11 events has taken place in the United States, where a greater number of violent attacks and more widespread abuse has occurred than in any other country.

During the period September 2001 – March 2002, the Council on American-Islamic Relations (CAIR) registered a total of 1,717 anti-Muslim acts. By contrast, the organization registered a total of about 360 such incidents during the period mid-2000 to mid-2001.³⁶³ According to CAIR, Muslims and people mistakenly identified as Muslims – in particular Sikhs³⁶⁴ – experienced increased harassment across the country in the wake of the terror attacks, with the abuses ranging from verbal assaults, death threats, arson and other property damage, to physical assaults and murder.³⁶⁵

The incidents registered by CAIR include 11 cases of murders allegedly motivated by hatred against Muslims or Arabs. In almost all of these cases the victims were attendants of convenience stores or gas stations – professions in which Arabs or South Asians are often clustered – and in a majority of the cases no perpetrator has been identified.³⁶⁶ As of late 2002, only two of the cases had resulted in convictions, while the trial against a third individual was pending. The following two cases have received wide media attention:

- On 15 September 2001, Balbir Singh Sodhi, an Indian Sikh, was shot to death as he was planting flowers outside the family's gas station in Mesa, Arizona.³⁶⁷ According to police reports the man who has been charged with murdering Sodhi, Frank Roque, shouted: "I'm a patriot. I'm an American. I'm a damn American all the way!" when he was arrested.³⁶⁸ A few days before the shooting he had allegedly bragged at a local

³⁶³ Council on American-Islamic Relations (CAIR), *The Status of Muslim Civil Rights in the United States 2002 – Stereotypes and Civil Liberties*, at <http://www.cair-net.org/civilrights2002/>.

³⁶⁴ Men of Sikh faith, a religion originating from 16th century India and with more than 20 million followers worldwide, have been among the most frequent targets during the backlash. This is most likely due to the visibility of Sikh men, most of whom wear long beards and Turbans. Some may have the mistaken impression that Sikh men resemble Al Qaida members who have often appeared in the media since September 11.

³⁶⁵ CAIR, *The Status of Muslim Civil Rights...*

³⁶⁶ CAIR, *American Muslims one year after 9/11, September 2002*, at <http://www.cair-net.org/911report>.

³⁶⁷ Adam Klawonn, "Still left with pieces, one year on", *Telegraph*, 10 September 2002.

³⁶⁸ Holly Hollman, "Local man faces hate crime trial", *Decatur Daily*, 3 January 2002.

bar that he intended to “kill the ragheads responsible for September 11”.³⁶⁹ Roque has also been charged with shooting at a Lebanese clerk working at another gas station and into a home occupied by a family from Afghanistan after driving away from the parking lot where Sodhi was killed. Nobody was injured in those incidents.³⁷⁰ The trial had initially been scheduled to begin in mid-November 2002, but was postponed in order to allow time for an examination of Roque’s mental health. If found guilty of murdering Sodhi, but declared insane at the time of the crime, Roque could not be given the death penalty as demanded by the prosecution.³⁷¹

- On 4 October 2001, Mark Stroman shot and killed Vasudev Patel, an Indian of Hindu faith, in the gas station he owned in Mesquite, Dallas. Stroman later said in a televised interview that he killed Patel, who he believed was Muslim, to take revenge for the September 11 attacks. According to Stroman: “We’re at war. I did what I had to do. I did it to retaliate against those who retaliated against us”. In April 2002, Stroman was convicted of murdering Patel and sentenced to death.³⁷² Stroman has also confessed to killing Waquar Hassan, a Pakistani grocery store owner, near Dallas, Texas, on 15 September 2001. Charges were brought against him in this case but were dropped after he was convicted for Patel’s murder.³⁷³

The CAIR statistics further include 289 cases of physical assault and property damage. Among these are several cases of life-threatening attacks against individuals as well as dozens of cases of aggravated vandalism, bomb attacks and arson targeted at mosques, Muslim community centres and stores and other businesses owned by Muslims or people perceived to be Muslims. In addition to actual attacks, CAIR registered 56 cases of death threats and 16 cases of bomb threats.³⁷⁴ The following are only a few such examples:

³⁶⁹ Human Rights Watch, *We are not the enemy* – *Hate crimes against Arabs, Muslims, and those perceived to be Arab or Muslim after September 11*, November 2002, on the basis of interview with Sergeant Mike Goulet of the Mesa police department, at <http://www.hrw.org/reports/2002/usahate/>.

³⁷⁰ Holly Hollman, “Local man faces hate crime trial”, *Decatur Daily*, 3 January 2002.

³⁷¹ “Prosecutors seek death for Sikh’s murder”, *Tribune*, 8 November 2001; “American who killed Sikh faces death penalty”, *Sify News*, 9 November 2001. Beth De Falco, “Trial postponed in shooting of Sikh in post Sept. 11 shooting”, *Associated Press*, 6 November 2002. Although the IHF is of the opinion that all perpetrators of hate crimes should be brought to justice, it does not support the death penalty in any case.

³⁷² “11 September revenge killer guilty”, *BBC News*, 3 April 2002; “Death for 11 Sept revenge killer”, *BBC News*, 5 April 2002,

³⁷³ Stroman’s confession regarding the murder of Hassan was used by the prosecution in the trial in the Patel case. Information from: Human Rights Watch, “We are not the enemy”, on the basis of telephone interview with Zahid Ghani, brother-in-law of Waquar Hassan.

³⁷⁴ CAIR, statistics from February 2002; CAIR, *American Muslims...*

- On 16 September 2001, Prime Tires, an auto mechanic shop owned by a Pakistani Muslim was set on fire in Houston, Texas. As a result the shop burned down. Shortly before the blaze the son of the shop owner had received racist threats and the incident was investigated as a possible hate crime. However, as of this writing, police had not found the perpetrator(s).³⁷⁵
- On 30 September 2001, two men attacked Swaran Kaur Bhullar, a Sikh woman, as she sat in her car at a traffic light in San Diego, California. The two men drove up next to her on a motorcycle, opened the door of her car and shouted: “This is what you get for what you've done to us!” One of them also allegedly threatened to slash her throat before they stabbed her twice in the head. When another car approached the two men fled. Bhullar, who had to be treated in hospital for the injuries she sustained, believed that she would have been killed if the other car had not appeared. Police have not been able to identify the men who attacked Bhullar.³⁷⁶
- In October 2001, John Bethel attacked Karnail Singh, a Sikh man, in his motel in SeaTac, Washington. Bethel, a local vagrant who from time to time would visit the motel for coffee and food, shouted at Bethel: “You still here? Go back to Allah!” before hitting him with a metal cane. As a result of the attack, Singh was badly injured on his head and received ten stitches at the hospital. On 28 May 2002, the King County Court sentenced Bethel to almost two years in prison for assaulting Singh with a deadly weapon.³⁷⁷
- On the morning of 30 December 2001, it was discovered that the Islamic Center in Columbus, Ohio, had been seriously vandalized. The vandals had inter alia clogged the sinks in one of the bathrooms of the building and caused them to overflow; torn religious pictures and posters off the walls; turned over the pulpit; cut the wires of loud speakers and amplifiers; ripped down curtains and drapes; and thrown about a hundred of copies of the Quran onto the floor. The damages were estimated to

³⁷⁵ “Fire at Pakistani shop may be hate-fueled arson officials say”, *Houston Chronicle*, 17 September 2001; and supplemental information from Human Rights Watch.

³⁷⁶ “San Diego woman says she was attacked in hate crime”, *Associated Press*, 9 October 2001; Human Rights Watch, “We are not the enemy”, on the basis of telephone interview with Swaran Kaur Bhullar.

³⁷⁷ Human Rights Watch, *We are not the enemy...*, on the basis of telephone interview with Karnail Singh.

amount to approximately \$379,000. As of late 2002, local police and FBI were still investigating the incident.³⁷⁸

Moreover, CAIR reports 315 cases of hate mail, 372 cases of harassment in public places, and 240 cases of discrimination in the work place and in schools.³⁷⁹ According to a survey released by CAIR in August 2002, 57 percent of American Muslims had experienced discrimination or bias since the September 11 attacks, while 87 percent of the respondents knew at least one other Muslim who had experienced discrimination.³⁸⁰ During the eight months immediately following September 11, the Equal Employment Opportunity Commission received a record number of complaints of employment discrimination from Muslims. Most of the complaints concerned discriminatory firings.³⁸¹

The surge in hate crimes against Muslims and Arabs occurred during the first six months following September 11, after which the number of such crimes dropped sharply. However, the number of hate crimes being reported remained higher than prior to September 11. During the period March-September 2002, CAIR registered some 300 anti-Muslim acts, which represented a 30 percent increase from the same period the previous year.³⁸²

The trend revealed by the CAIR statistics is also supported by official figures. On the basis of information voluntarily submitted by law enforcement authorities across the country, the Federal Bureau of Investigation (FBI) reported a significant increase in hate crimes motivated by religious bias against Muslims in 2001.³⁸³ While there were 28 such hate crimes reported in 2000, 481 were reported in 2001, representing an increase of 1,600 percent. Among the anti-Muslim incidents registered during 2001, there were 123 cases of vandalism, destruction or damage to property; 27 cases of aggravated assaults; and 18 cases of arson. The FBI also reported a marked upsurge in the number of incidents involving hate crimes motivated by national or ethnic bias. Excluding hate crimes targeting Hispanics, the number of such incidents increased from 354 in 2000 to 1,501 in 2001. This number included 143 cases of aggravated assaults. The FBI concluded that the great increases in hate crimes against

³⁷⁸ Ibid., on the basis of telephone interview with Siraj Haji, member of the Islamic Center; CAIR, *American Muslims...*

³⁷⁹ CAIR statistics February 2002.

³⁸⁰ CAIR, Islam-Infonet mailing list, 21 August 2002.

³⁸¹ CAIR, *American Muslims...*

³⁸² Ibid.

³⁸³ Federal Bureau of Investigation, *Hate Crimes Report 2001*, at <http://www.fbi.gov/ucr/01hate.pdf>.

Muslims and ethnic and national minorities “presumably” were due to the terror attacks of September 11.³⁸⁴

Both CAIR and Human Rights Watch have observed that local and federal authorities have acted with resolve to investigate and prosecute crimes related to September 11.³⁸⁵ Although not all incidents that have been reported to the police have resulted in prosecution, the proportion of cases where legal proceedings have been initiated does not vary significantly from the normal rates of indictment and trial for other types of crime. The reported backlash incidents have not always been investigated and/or prosecuted as hate crimes. However, the primary reason for this does not appear to be any reluctance on the part of law enforcement authorities to take bias motives seriously, but rather that they have applied varying standards for classifying crimes as hate crimes and in some cases have experienced difficulties in finding sufficient evidence to prove bias motivation.³⁸⁶

As regards preventive action, police stepped up deployment around mosques and other Islamic institutions as well as in Muslim communities across the country after September 11.³⁸⁷ However, the rapidity and scope of these and other efforts to protect vulnerable groups from hate crimes varied among different states and different cities. Human Rights Watch has also concluded that law enforcement authorities in many places were not adequately prepared for the post-September 11 backlash.³⁸⁸

The unprecedented nature of the September 11 events and the fear and anger these attacks provoked in wide segments of the population certainly contributed to a significant increase in anti-Muslim crimes. However, Muslim and civil liberties groups have also criticized the Bush administration for failing to make a clear distinction between terrorists and Muslims in the policies pursued in the wake of the attacks.³⁸⁹

In the immediate aftermath of September 11, the Bush administration emphasized that the “war” on terrorism was not a “war” against Islam. For example, in a speech to the Congress on 20 September 2001, President Bush said: “The enemy of America is not our many Muslim friends. It is not our many Arab friends. Our enemy is a radical network of terrorists and

³⁸⁴ Ibid.

³⁸⁵ CAIR, *American Muslims...*; Human Rights Watch, *We are not the enemy...*

³⁸⁶ Human Rights Watch, *We are not the enemy...*

³⁸⁷ CAIR, *American Muslims...*; Human Rights Watch, *We are not the enemy...*

³⁸⁸ Human Rights Watch, *We are not the enemy...*

³⁸⁹ CAIR, *The Status of Muslim Civil Rights in the United States 2002 – Stereotypes and Civil Liberties.*

every government that supports them”.³⁹⁰ Despite such assurances, the anti-terrorism campaign pursued by the Bush administration in the wake of September 11 has, in fact, involved a range of abusive measures particularly targeting Muslims and Arabs.

Since September 11, thousands of immigrants, primarily citizens of Middle Eastern, South Asian and North African countries, have been interrogated, arrested, convicted for immigration violations and deported outside due judicial control;³⁹¹ Muslim homes and businesses have been raided and several Muslim charities have had their funds frozen on the basis of unsubstantiated evidence;³⁹² and thousands of visitors have been subjected to intrusive security checks or rude treatment at airports because their profiles have matched certain ethnic or religious criteria.³⁹³ These highly discriminatory policies, which have lumped together the small minority who commit violent acts in the name of Islam with the vast majority of Muslims and Arabs who have no connection whatsoever to terrorism, have undoubtedly fostered prejudice toward these groups.

United Kingdom

The post-September 11 backlash in the United Kingdom is the most serious one that has occurred in Europe. In September 2002, the British Islamic Human Rights Commission reported that it had registered a total of more than 670 anti-Muslim incidents since the devastating terror attacks. This figure includes 344 cases of physical assaults and attacks on property, 188 cases of verbal and written abuse and 108 cases of psychological pressure and harassment.³⁹⁴ About two-thirds of the incidents occurred during the four months immediately following the September 11 attacks, when the number of incidents was more than 10 times higher than in a typical year.³⁹⁵ Most worrying, although most of the incidents have taken place in public, people witnessing violence or harassment have rarely intervened.³⁹⁶

³⁹⁰ “Address to joint session of Congress and the American People”, 20 September 2001, at <http://www.milparts.net/bushcongress.html>.

³⁹¹ See the chapter on arrest.

³⁹² See the chapter on financial measures.

³⁹³ See Chapter on Asylum, Immigration and Border Control Policies (chapter on asylum).

³⁹⁴ Islamic Human Rights Commission, *The hidden victims of September 11: the backlash against Muslims in the UK*, September 2002.

³⁹⁵ Comments on statistics compiled by Islamic Human Rights Commission in Ian Herbert and Ian Burrell, “Dossier reveals a massive rise in attacks on British Muslims”, *Independent*, 4 January 2002. Confirmed by the director of research of the Islamic Human Rights Commission, Arzu Merali, in e-mail of 11 December 2002.

³⁹⁶ Reference to information from the Islamic Human Rights Commission in Ian Herbert and Ian Burrell, “From arson to vicious assaults: the reality of daily life for Muslims”, *Independent*, 4 January 2002.

Among the physical assaults registered by the Islamic Human Rights Commission are a great number of cases where Muslims or people believed to be Muslims³⁹⁷ have been pushed, shoved, spat at, hit with umbrellas or pelted with eggs or rotten fruit. In a particularly humiliating manner, many Muslim women have had their headscarves forcibly pulled off or had alcohol thrown at them. Several cases involving grave violence, such as attacks with bats or other sharp objects, have also occurred and resulted in victims being hospitalised.³⁹⁸ These are two of the worst cases:

- On 16 September 2001, three men attacked a 28-year-old Afghani taxi driver, Hamidullah Gharwal, in Twickenham.³⁹⁹ After provoking an argument about the terror attacks in the United States, the three men kicked and hit Gharwal so viciously with a bottle that he was left paralysed from the neck down.⁴⁰⁰ Shortly after the attack, three men were arrested on suspicion of grievous bodily harm.⁴⁰¹ As of this writing charges had reportedly been brought against the men, but the trial had not yet begun.⁴⁰²
- In late September 2001, a man attacked an Asian woman with a hammer on a train from Manchester to Bury. The man allegedly shouted: “You should die! You want killing for what you did in America!” The police reportedly initiated investigations into the case, but as of this writing the perpetrator had reportedly not been identified.⁴⁰³

Attacks on property have ranged from graffiti and petty vandalism to bomb attacks and arson targeted at mosques, other Islamic institutions and Muslim homes.⁴⁰⁴ The following is one such example:

- On the evening of 17 September 2001, the Jamia Alavia mosque in Bolton was subjected to a bomb attack. As a small group of people were inside the mosque praying, a homemade bomb that had been left in a bag outside the building exploded,

³⁹⁷ As in the United States, Sikh men have often been targeted during the post-September 11 backlash in the United Kingdom. European Monitoring Centre on Racism and Xenophobia (EUMC), Anti-Muslim reactions within the European Union after the acts of terror against the USA – synthesis report, May 2002, at http://www.eumc.at/publications/terror-report/Synthesis-report_en.pdf.

³⁹⁸ Islamic Human Rights Commission, *The hidden victims...*, September 2002.

³⁹⁹ Ian Herbert and Ian Burrell, “From arson...”, *Independent*.

⁴⁰⁰ “Muslim and Sikhs feel terrorised in Britain”, *IPS News*, 18 September 2001.

⁴⁰¹ “Arrests over Afghan attack”, *BBC News*, 18 September 2001.

⁴⁰² Information from Arzu Merali, 12 February 2003.

⁴⁰³ “Hammer attack on Asian woman”, *Guardian*, 28 September 2001.

⁴⁰⁴ Islamic Human Rights Commission, *The hidden victims...*, September 2002.

causing the windows of the mosque to break and a small fire to break out. All those in the mosque were safely evacuated.⁴⁰⁵ As of this writing, the police reportedly had not been able to identify those responsible for the attack.⁴⁰⁶

As regards verbal abuse, Muslim women and children have been particularly frequent targets of slurs and insults shouted out in public. A considerable number of intimidating phone calls, hate messages and written death threats have also been reported. Among the cases of psychological pressure and harassment that the Islamic Human Rights Commission have received reports about are numerous cases where Muslims have been ostracized or treated suspiciously by non-Muslims as well as cases where Muslims have felt pressure to act contrary to their religious beliefs in order to avoid physical or verbal harassment, such as to shave their beard or to stop wearing a headscarf.⁴⁰⁷ According to Inayat Bunglawala of the Muslim Council of Britain, Muslims “feel like outsiders, like fifth columnists” as a result of the increase in everyday harassment and discrimination.⁴⁰⁸

The Islamic Human Rights Commission is concerned that a considerable number of abuses, including serious physical abuses, have not been reported to the police because victims have lacked confidence in the police and their ability to deal effectively and efficiently with their cases.⁴⁰⁹ Arzu Merali, the commission’s director of research, stresses in particular that many Muslims felt that the police failed to respond adequately to the first wave of hate attacks after September 11, which negatively influenced their perception of police practice and impartiality as well as their readiness to turn to the police.⁴¹⁰ Moreover, the Islamic Human Rights Commission is concerned that victims who have contacted the police to report so-called low-level abuses, such as verbal harassment in public places, have sometimes been given the advice to “stay at home” in order to avoid such harassment.⁴¹¹

In the immediate aftermath of the terror attacks in the United States, the British government spoke out against holding Muslims collectively responsible for the attacks. Taking the lead, Prime Minister Tony Blair wrote a series of articles for distribution among the country’s Muslim press. In these articles he stated inter alia that “[b]laming Islam is as ludicrous as blaming Christianity for loyalist attacks on Catholics or nationalist attacks on Protestants in

⁴⁰⁵ “Plea for calm after attack on mosque”, *Lancashire news*, 18 September 2001.

⁴⁰⁶ Information from Arzu Merali, 12 February 2003.

⁴⁰⁷ Islamic Human Rights Commission, *The hidden victims...*

⁴⁰⁸ Inayat Bunglawala quoted in Ian Herbert and Ian Burrell, “Dossier reveals a massive rise in attacks on British Muslims”, *Independent*, 4 January 2002.

⁴⁰⁹ Islamic Human Rights Commission, *The hidden victims...*

⁴¹⁰ Comments by Arzu Merali, per e-mail 11 December 2002 and 12 February 2003.

⁴¹¹ Islamic Human Rights Commission, *The hidden victims...*

Northern Ireland” and that “[t]hose responsible [for the September 11 attacks] are not communities or religions but fanatical individualists”.⁴¹²

In a positive development, the government proposed that incitement to religious hatred be created as a new offence when it introduced draft anti-terrorism legislation in the autumn of 2001.⁴¹³ Given the fact that the country’s hate crime legislation does not currently cover religious hatred, Muslim organizations as well as many others warmly welcomed this proposal.⁴¹⁴ However, due to concerns raised about the possible impact of such legislation on freedom of expression, the proposal was not approved by the parliament. As adopted, the Anti-terrorism, Crime and Security Act 2001 only establishes religious hatred as a possible aggravating factor for a number of crimes.⁴¹⁵

Moreover, as Muslim and rights groups have pointed out, the Blair government has helped fuel hostility and mistrust against Muslims by adopting a number of measures particularly targeting them, contrary to its initial call for tolerance after September 11.⁴¹⁶ In a measure the justification for which has been widely questioned both nationally and internationally, the United Kingdom declared a public emergency in the wake of the terror attacks to introduce indefinite detention without charge of foreign nationals who are suspected of involvement in terrorism but cannot be removed from the country.⁴¹⁷ All 11 persons who have been detained under this clause since it entered into force are Muslim.⁴¹⁸ In addition, a considerable number of people, most of whom are Muslim, have been arrested under other legislation on what appears to be very vague terrorism allegations.⁴¹⁹ After September 11, the British government also initiated new asylum regulations that inter alia make it easier to detain as well as to deport asylum seekers.⁴²⁰ By placing heavy emphasis on the need to control the entry and stay of asylum seekers in the country, the new regulations inevitably encourage negative

⁴¹² Patrick Wintour and Helen Carter, “No 10 moves to stamp out anti-Muslim backlash”, *Guardian*, 19 September 2001.

⁴¹³ The Commission for Racial Equality, *Anti-Islamic reactions within the European Union after the acts of terror against the USA – the United Kingdom*, EUMC, May 2002, at <http://www.eumc.at/publications/terror-report/collection/UK.pdf>.

⁴¹⁴ See for example “Muslims welcome hate crime review”, *BBC News*, 3 October 2001.

⁴¹⁵ The Commission for Racial Equality, *Anti-Islamic reactions...*

⁴¹⁶ Islamic Human Rights Commission, *The hidden victims...*

⁴¹⁷ For more information see the chapter on arrest.

⁴¹⁸ Report to the Islamic Human Rights Commission by Natalia Garcia, Tyndallwoods solicitors, on the detentions under the Anti-terrorism, Crime and Security Act 2001, September 2002.

⁴¹⁹ For more information see the chapter on arrest and the Chapter on Extraditions, Expulsions and Deportations (chapter on extraditions).

⁴²⁰ For more information see the chapter on asylum.

stereotypes toward this group and other immigrants, in particular of Muslims who have been criticized by members of the government for their tendency to “isolationism”.⁴²¹

Canada

A wave of hate crimes against Muslims and Arabs was also documented in Canada in the aftermath of September 11. People belonging or believed to belong to these groups were insulted, threatened and subjected to bias and intolerance in schools, at the workplace and in other public places. Physical assaults as well as acts of vandalism and attempted arson against mosques and other Islamic institutions also took place.⁴²² During the first two months after September 11, the Canadian Council of American-Islamic Relations (CAIR) registered a total of 110 incidents, including ten death threats, 13 cases of physical harassment, 19 cases of attacks on personal property on Muslim institutions and 33 cases of verbal harassment.⁴²³

For example, Riad Saloojee, executive director of Canadian CAIR, described cases in which Muslim students were bullied by their professors for allegedly being “Taliban”, Muslims received anonymous phone calls by persons vowing “we’re gonna’ get you, we’re gonna’ kill you”; glass windows and doors of Islamic centres were smashed; Muslims were beaten up or almost run over by cars and mosques were set on fire. Most of the incidents occurred in the country’s major cities, including Toronto, Montreal, Calgary and Ottawa.⁴²⁴

After mid-November 2001, the number of anti-Muslim incidents decreased rapidly, but for many months remained at a slightly higher level than normal.⁴²⁵ According to survey results released by Canadian CAIR in May 2002, 60 percent of Canadian Muslims had experienced bias or discrimination following September 11, while 82 percent knew of at least one fellow Muslim who had experienced intolerance since that time.⁴²⁶

⁴²¹ Such criticism has been voiced by Home Secretary David Blunkett and Europe Minister Peter Hain. Jackie Ashley and Patrick Winfour, “End asylum soft touch says Hain”, *Guardian*, 13 May 2002; and David Pallister, “Anger at new advice to Asians”, *Guardian*, 16 September 2002.

⁴²² Council on American-Islamic Relations Canada (CAIR Canada), “CAIR-CAN releases interim report card on anti-Muslim hate, warns of racial profiling under Bill C-36”, 20 November 2001, and Canadian Arab Federation, “Arab Canadians condemn the attacks on the United States and are alarmed by hateful incidents and Arab and Muslim Bashing”, September 2001, at <http://www.caf.ca/newsrelease/hatefulincidents.htm>.

⁴²³ CAIR Canada, “CAIR-CAN releases interim report card...”.

⁴²⁴ Information from the executive director of CAIR Canada, Riad Saloojee, per telephone, 4 March 2003.

⁴²⁵ *Ibid.*

⁴²⁶ CAIR Canada, “Survey: more than half of Canadian Muslims suffered post 9/11 bias”, 9 May 2002.

No official nationwide figures on crimes related to September 11 are available. However, police in various cities in the country have reported a considerable increase in hate crimes after the terror attacks in the United States. According to the Hate Crime Unit of the Toronto Police Service, the total number of hate crimes in the Toronto area rose from 204 in 2000 to 338 in 2001. Out of the latter, 121 were directly related to September 11, which is equal to 90 percent of the total increase from the previous year. The most frequently reported backlash crimes were threats (48), mischief (39), and assaults (16), but there were also bomb threats (4) and one case of arson.⁴²⁷

According to Riad Saloojee, police in some areas took a highly pro-active stance in the wake of September 11 and engaged in dialogue with local Muslim communities to develop and implement measures to protect Muslims against abuse. However, in other areas, such measures were completely lacking. Saloojee also notes that a vast majority of all anti-Muslim incidents that occurred after September 11 were never reported to the police. This was due to a number of reasons, including a lack of confidence in the police. However, Saloojee stressed that this was not the primary reason. Furthermore, Saloojee notes that no standard definition for hate crimes exists in the country. Accordingly, the number of hate crimes that were officially registered in different areas following September 11 may also have varied because police used different criteria to investigate and prosecute incidents as hate crimes.⁴²⁸

Shortly after September 11, Canadian Premier Minister Jean Chretien strongly condemned intolerance and hatred and stated that the full force of Canadian legislation would be used against such expressions.⁴²⁹ The Anti-terrorism Act that was adopted in December 2001 also introduced amendments to strengthen the country's legislation on hate crimes, including by creating a new criminal offence of mischief against property primarily used for religious worship out of racial or religious bias, prejudice or hate.⁴³⁰

However, independent rights and anti-racism groups have criticized the government for engaging in activities that have reinforced negative attitudes toward people of Arab descent

⁴²⁷ Toronto Police Service Hate Crime Unit, 2001 Hate Bias Crime Statistical Report, at <http://www.torontopolice.on.ca/publications/hatebiascrime/2001.pdf>.

⁴²⁸ Information from the executive director of CAIR Canada, Riad Saloojee, per telephone, 4 March 2003.

⁴²⁹ Amnesty International Canada special 11 September coverage, at <http://www.amnesty.ca/sept11/index.html>

⁴³⁰ See Amnesty International Canada, *Protecting Human Rights and Providing Security – Comments with respect to Bill C-36*, at <http://www.amnesty.ca/sept11/brief.PDF>.

and Muslim faith.⁴³¹ Following September 11, the Canadian authorities increased the use of racial profiling to single out Muslims and Arabs for interrogations and security checks because of their ethnicity and religion.⁴³² According to Canadian CAIR, the police have also used questionable methods on occasion when interrogating people found to match profiling criteria, including by visiting them at their places of work and by denying them the right to be accompanied by a lawyer. In addition, the organization has expressed fear that the problematic provisions related to due process that were introduced by the December 2001 Anti-terrorism Act⁴³³ will disproportionately affect the country's Muslim and Arab communities.⁴³⁴ It is clear that the measures adopted by the Canadian authorities in the wake of September 11 have fuelled anti-Muslim sentiment and strengthened the perception that Muslims and Arabs are more likely than others to pose a security threat to society.

Denmark

Denmark also experienced a significant increase in attacks on Muslims and members of other minorities after September 11. During the period between the terror attacks and late November 2001, the Danish Central Intelligence Service registered a total of 52 racially motivated incidents. In comparison, a total of 48 such incidents were registered during the first nine months of that year. The post-September 11 incidents included 17 cases of vandalism, 16 cases of arson, five cases of grave threats and four cases of physical attacks. The available statistics indicate that racially motivated incidents became not only more frequent in Denmark but also more serious in the wake of the September 11 attacks. The Central Intelligence Service has registered several cases in which windows of businesses owned by non-native Danes were smashed, prominent Muslims received death threats, drivers deliberately tried to run over minorities and houses mainly inhabited by foreigners were set on fire.⁴³⁵

⁴³¹ The Canadian Arab Federation, the Muslims Lawyers Association and the National Anti-racism Council of Canada, "Arab, Muslim and Anti-racism groups call for an end to discrimination", 9 September 2002.

⁴³² See, for example, National Anti-Racism Council of Canada, *Racial Discrimination in Canada – The Status of Compliance by the Canadian Government with the International Convention on the Elimination of All Forms of Racial Discrimination*, July 2002.

⁴³³ See the chapter on arrest for more information on these provisions.

⁴³⁴ CAIR Canada, "Muslims call for investigation of 'coercive' police questioning", 20 February 2002, at <http://www.caircan.ca/cgi-bin/pressreleases/viewnews.cgi?newsid1014229987,38072>.

⁴³⁵ Danish Board for Ethnic Equality, *Anti-Islamic Reactions in the EU after the Terror Attacks against the USA: Denmark*, EUMC, May 2002. It should be noted that the Danish Board for Ethnic Equality, which was previously the national EUMC focal point (the board was abolished as of January 2003), entrusted the Documentation and Advisory Centre on Racial Discrimination (DACRD) with preparing the report.

According to Danish NGOs, the figures compiled by the Central Intelligence Service do not give a full picture of the post-September 11 backlash. This is because they do not cover all incidents registered by the local police and many so called low-level abuses were never reported to the police, including incidents where Muslims were spat at, had their headscarves ripped off or had hateful comments hurled at them in the street.⁴³⁶

In some places police reportedly stepped up measures to protect members of ethnic minorities after September 11. For example, the Copenhagen Metropolitan Police increased patrolling in neighbourhoods with large minority populations and regularly visited businesses owned by minorities.⁴³⁷ However, the Documentation and Advisory Centre on Racial Discrimination (DACRD) stressed that it is difficult to evaluate the police response to the backlash since no centralized system for collecting data on prosecutions and convictions related to alleged hate crimes exists in the country⁴³⁸ and NGOs do not have sufficient resources to monitor such developments.⁴³⁹ In at least one case, which was widely covered by the media, local police were reluctant to take action to investigate alleged hate speech following September 11. This case is described in more detail below.

Shortly after September 11, the social-democratic government then in office in Denmark, as well as most opposition parties, called for a distinction to be made between ordinary Muslims and terrorists acting in the name of Islam. However, Danish NGOs have stressed that the political debate that took place during the campaign leading up to the early parliamentary elections in mid-November 2001 helped worsen attitudes toward Muslims and other minorities.⁴⁴⁰ One of the major themes discussed during the pre-election campaign was the perceived failure of non-native Danes to integrate with the rest of the Danish population and the dangers considered to arise from this lack of integration. DARCD has concluded that the parties that were most successful in the elections were the ones that proposed measures to reduce the inflow of “foreigners” and to limit the rights of those “foreigners” who are already living in Denmark.⁴⁴¹ The Liberal Party scored the greatest gains in the elections, from 24 to

⁴³⁶ Jacob Elkjaer and Pernille Tranberg, “Flere racistiske overgreb”, *Politiken*, 12 December 2001; and Rikke Egelund and Wenche Hugaas Jensen, “Meget racisme after terror”, *Politiken*, 23 May 2002.

⁴³⁷ Danish Board for Ethnic Equality, *Anti-Islamic Reactions...*

⁴³⁸ The Central Intelligence Service collects data on alleged hate incidents with the purpose of identifying possible patterns behind such incidents. For this reason the service focuses solely on the occurrence of hate incidents and does not monitor subsequent developments regarding prosecution and conviction.

⁴³⁹ Comments by Matt Bourne, DACRD, per telephone, 7 February 2003.

⁴⁴⁰ *Ibid.*

⁴⁴¹ The term “foreigners” was used to collectively depict asylum seekers, refugees, immigrants and members of ethnic minorities. Danish Board for Ethnic Equality, *Anti-Islamic Reactions...*

31 percent of the vote; the far-right People's Party made the second largest gains, from 7 to 12 percent.⁴⁴²

During the electoral campaign, members of the People's Party lashed out repeatedly against Muslims while advocating tougher immigration policies. During the party's annual meeting in Vejle in late September 2001, the chair of the youth branch of the party, Kenneth Kristensen, stated: "Just as we Danes share a firm belief in the democratic society, Arab Muslims share a firm hatred of the Western World and democracy", while another party member, Michael Rex, concluded: "Islam is not a religion in the proper sense. It's a terrorist organization that strives to obtain world supremacy by the use of violence".⁴⁴³ Yet a third party member, Member of the European Parliament Mogens Camre, was quoted as saying: "All countries of the western world are infiltrated by Muslims. Some of them speak politely to us, whilst they wait until they are enough to kill all of us".⁴⁴⁴ The leader of the People's Party, Pia Kjaersgaard, later confirmed that all statements made at the meeting were in accordance with party policies.⁴⁴⁵

Following the meeting, Kristensen, Rex and Camre were all reported to the police for allegedly violating paragraph 266b of the country's criminal code, which prohibits hate speech.⁴⁴⁶ Initially the local police in Vejle refused to open an investigation into the case, arguing that the nature of what can be expressed freely had changed after September 11. However, after an intervention by DACRD, the public prosecutor ordered the Vejle police to carry out an investigation.⁴⁴⁷ In October 2002, it was announced that charges would be brought against Kristensen and Rex, and that the European Parliament would be requested to relinquish Camre's parliamentary immunity in order to allow him to be prosecuted.⁴⁴⁸ In January 2003, a Vejle court acquitted Kristensen and Rex.⁴⁴⁹ While noting that representatives of the People's Party have engaged in offensive rhetoric for many years already, the DARCD concluded that this ruling sets a new mark for what is tolerable under

⁴⁴² "Folketingsval 2001: Resultat" (special report published on-line), *Politiken*, November 2001.

⁴⁴³ "Politi afviser racismemesager mod DF", *Politiken*, 26 Oktober 2001.

⁴⁴⁴ This quote is from a copy of his speech that Camre distributed to the press following the meeting. During the meeting he reportedly used a slightly different wording. Christian Hüttemeier, "Camre: Islam truer Danmark", *Politiken*, 16 September 2001.

⁴⁴⁵ Ibid.

⁴⁴⁶ Paragraph 226b prohibits public or other statements that serve to "threaten, deride or disparage a group of persons on account of their race, skin colour, national or ethnic origin, faith or sexual orientation".

⁴⁴⁷ Danish Board for Ethnic Equality, *Anti-Islamic Reactions...*

⁴⁴⁸ "DFU'ere domt for racisme", *Politiken*, 11 October 2002. (In October 2002, the youth branch of the People's Party was convicted of spreading hate propaganda for distributing a poster during the 2001 elections campaign that was highly offensive to Muslims.)

⁴⁴⁹ "DF-politikere frifundet for racisme", *Politiken*, 13 January 2003.

the country's criminal code provision on hate speech.⁴⁵⁰ The IHF is concerned that the ruling communicates that it is acceptable for public figures to depict Muslims as prone to violence, religious extremism and terrorism, even though such statements may incite hostility against people belonging to that faith, in violation of article 20 of the ICCPR.

After the elections the Liberal Party formed a minority government in coalition with a smaller conservative party. Although the People's Party was not included in the new government, it has been able to influence the government's policies considerably. In particular, the government was dependent on support by the People's Party when it introduced new restrictive asylum and immigration legislation in the spring of 2002.⁴⁵¹ This legislation reinforces the perception that that the presence of "foreigners" in Denmark is something primarily negative, and possibly dangerous, that needs to be restricted and controlled. Thus, by enforcing the legislation and by dismissing the international criticism caused by it, the government has undoubtedly further inflamed sentiment against Muslims and other minority communities in the country.⁴⁵²

Germany

In Germany hostility against Muslims increased considerably during the months following September 11. According to the European Forum for Migration Studies the backlash involved a series of cases of vandalism and bomb threats targeted at mosques, a number of violent attacks on individuals and some cases where Muslim leaders received death threats.⁴⁵³

However, the most significant increase in anti-Muslim hostility occurred at the level of verbal abuse and everyday harassment. The European Forum for Migration Studies has concluded that the general attitude toward Muslims deteriorated and that a climate of heightened mistrust against Muslims and people perceived as Muslim developed after September 11. For example, Muslim women, and men with turbans or long beards were insulted and harassed in the street, Muslim employees were pressed by fellow employees or their employers to justify their religion from an ethical perspective and distance themselves from extremist opinions, and Muslim children were bullied as "terrorists" by classmates.⁴⁵⁴

⁴⁵⁰ Comments by Matt Bourne, DACRD, per telephone, 7 February 2003.

⁴⁵¹ For more information see the chapter on asylum.

⁴⁵² The law has inter alia been criticized by UNHCR. See "UNHCR's comments on Denmark's draft bill on foreigners", 11 April 2002.

⁴⁵³ European Forum for Migration Studies, *Anti-Islamic reactions within the European Union after the acts of terror against the USA: Germany*, EUMC, May 2002.

⁴⁵⁴ European Forum for Migration Studies, *Anti-Islamic Reactions...*

Some Muslims also reported being discriminated against because of their religion when they applied for a job or sought to rent an apartment in the wake of September 11. In addition, Muslim organizations criticized the media for contributing to growing prejudice toward members of the Islamic faith by failing to make a clear-cut distinction between ordinary Muslims and Islamic fundamentalists in its post-September 11 reporting.⁴⁵⁵

No official nation-wide figures of the backlash are available. However, police authorities at the state level registered a total of 19 offences related to the terrorist attacks from 11-31 September 2001. The offences, which occurred in ten states, included insults, slander and incitement to violence, in the form of graffiti, letters and other forms of written messages.⁴⁵⁶

Immediately after September 11, a number of leading German politicians publicly condemned intolerance and hostility against Muslims. For example, in late September 2001, Chancellor Gerhard Schröder emphasized that the campaign against terrorism must not be allowed to develop into a campaign against Islam when he met with representatives of the Protestant Church, the Catholic Church, the Jewish community and the Muslim community in Germany. During this meeting he also emphasized that all the country's religions are "free and protected".⁴⁵⁷

However, Muslim organizations have been very critical of the anti-terrorism campaign the German government waged after September 11 and the impact this campaign has had on Muslims living in the country. According to the Central Council of Muslims, the authorities have used security considerations to justify a range of measures that are clearly out of proportion to the aim of enhancing national security. Since September 11, thousands of Muslims have had their personal data screened because their profiles matched certain basic criteria, foremost of which is an affiliation with Islam.⁴⁵⁸ In addition, many Muslims have had their houses searched and been interrogated and arrested, often with little or no cause, other than that they fit the profile criteria, and sometimes involving police brutality. Muslims have, for example, been awakened from their sleep and taken in for interrogations in the middle of the night. Police have also showed disrespect for mosques as sacred places by, for example, storming them during Friday prayers and using wet dogs to search them.⁴⁵⁹

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ "Schröder warnt vor Kampf gegen Islam in Deutschland", *Die Welt*, 22 September 2001.

⁴⁵⁸ See the Chapter on Interference with the Right to Privacy (chapter on privacy) for more information on the legal basis of the screenings.

⁴⁵⁹ Information from Dr. Nadeem Elyas, chair of the Central Council of Muslims in Germany, per telephone 10 March, 2003. See also comments by the Council in: Ruth Ziesinger and Jost Müller-

The Central Council of Muslims has stressed that the post-September 11 campaign against terrorism has had the effect of placing all Muslims under suspicion, thereby encouraging prejudice and hostile attitudes toward this group. At the same time, Muslims have become less confident in the rule of law in Germany and in the impartiality and efficiency of the law enforcement authorities, as a result of the measures undertaken in the course of the campaign. There is also reason to believe that this development has contributed to a greater reluctance of Muslims to report hate crimes to the police.⁴⁶⁰

Moreover, the Central Council of Muslims is not satisfied with how the police handled the increase in anti-Muslim incidents following September 11. In an attempt to prevent abuses, police in some areas stepped up patrolling around mosques and offered Muslim leaders protection. However, it appears that police did not adequately investigate some reports of abuse, and closed cases prematurely without having made sufficient efforts to identify the alleged perpetrators.⁴⁶¹

Adding to these concerns, the Anti-terrorism Law that was adopted by the German parliament in December 2001 introduced a number of changes that reinforced the perception that Muslim and other non-citizens are more likely than nationals to engage in activities endangering national security. These amendments included provisions that extend the grounds for banning associations in which the members are predominantly foreigners,⁴⁶² provisions foreseeing an expansion of the information retained in the national Foreigners' Register⁴⁶³ and provisions extending the grounds on which foreigners may be denied entry into or expelled from the country.⁴⁶⁴

The chair of the Central Council of Muslims, Nadeem Elyas, has concluded that the post-September 11 fight against terrorism has resulted in a highly tense situation for the Muslim community in Germany. If this situation is allowed to prevail, Elyas believes it will foster increasing alienation and disappointment among the country's Muslims. He therefore calls on the German authorities to carefully re-evaluate the methods used to counteract terrorism and

Neuhof, "Die Leute werden nachts aus den Betten geholt", *Der Tagesspiegel*, 16 October 2001; and "Intergration in Gefahr", *Die Tageszeitung*, 16 October 2001

⁴⁶⁰Information from Dr. Nadeem Elyas, 10 March, 2003.

⁴⁶¹ Ibid.

⁴⁶² For more information see the chapter on terrorism definitions.

⁴⁶³ For more information see the chapter on privacy.

⁴⁶⁴ For more information see the chapter on asylum.

to cooperate with Muslim organizations when they adopt measures that primarily target members of the Islamic faith.⁴⁶⁵

Italy

The post-September 11 xenophobic backlash in Italy evolved according to a slightly different pattern than in other EU countries. According to the NGO Co-operation for the Development of Emerging Countries (COSPE), during the first few weeks after September 11, there was no noticeable upsurge in attacks on Muslims, Arabs or other minority members. However, around October 2001, following a period of heightened anti-Islamic and anti-immigration rhetoric (see discussion below), there was a noticeable increase in hostility toward these groups, and an increasing number of cases of verbal abuse, physical attacks and attacks on property motivated by Muslim and racist bias were reported.⁴⁶⁶ These are two of the more serious incidents registered by COSPE:

- In October 2001, a homemade bomb, consisting of a plastic tube filled with gunpowder, was thrown at the house of a local Imam [Muslim leader] in Motta di Livenza. The police reportedly investigated the case, but as of this writing no information on any prosecution in the case was available.⁴⁶⁷
- Also in October 2001, a student of North African descent was beaten up by two fellow students, who shouted: “You are like Osama, look at you, you are just like him. Go back to your country, terrorist, Muslim piece of sh...”, in Vigevano. The incident was reportedly never brought to the knowledge of the police.⁴⁶⁸

While Muslims were already among the least accepted in the Italian society,⁴⁶⁹ opinion polls indicate that public attitudes toward those of the Islamic faith deteriorated further in the autumn of 2001.⁴⁷⁰

⁴⁶⁵ Information from Dr. Nadeem Elyas, 10 March, 2003.

⁴⁶⁶ The Co-operation for the Development of Emerging Countries (COSPE), *Anti-Islamic Reactions in the EU after the Terror Attacks against the USA: Italy*, EUMC, May 2002, at <http://www.eumc.at/publications/terror-report/collection/Italy.pdf>.

⁴⁶⁷ Information from *Il Gazzettino* 19-20 October 2001 as well as from Udo C. Enwereuzor, European Racism and Xenophobia Network (RAXEN), coordinator with the COSPE branch in Florence, per e-mail, March 2003.

⁴⁶⁸ Information from *Corriere Della Sera* 25, 28 and 29 October 2001 as well as from Udo C. Enwereuzor, March 2003.

⁴⁶⁹ Open Society Institute, EU Accession Monitoring Programme, *The situation of Muslims in Italy, 2002*, at http://ftp.osi.hu/euaccession/2002_m_italy.pdf.

⁴⁷⁰ COSPE, *Anti-Islamic Reactions...*

Udo C. Enwereuzor, coordinator on racism and xenophobia issues with COSPE, reported that most who suffered abuses in the wake of September 11 never reported their experiences to the police. The victims apparently lacked confidence in the police and feared that they would not be taken seriously. This was at least in part due to the fact that there have been numerous incidents of police abuse and discrimination against these groups in recent years.⁴⁷¹ According to Enwereuzor, the police also failed to thoroughly investigate and prosecute many abuses that were brought to their knowledge in the aftermath of September 11.⁴⁷² In August 2001, the UN Committee Against Racial Discrimination expressed concern that the Italian authorities sometimes fail to take effective measures to prevent and punish racially motivated acts of violence.⁴⁷³

COSPE emphasizes that the increase in anti-Muslim sentiments occurred after a period of heightened anti-Islamic and anti-immigration rhetoric among the political elite in country.⁴⁷⁴ The Italian government's first reaction to the September 11 attacks was to express solidarity with the American people. However, a number of politicians soon began to exploit the sense of vulnerability and insecurity brought about by the attacks on the United States to engage in rhetoric that increased intolerance and hatred against Muslims.⁴⁷⁵

At a press conference in Berlin in late September 2001, Prime Minister Silvio Berlusconi was quoted as saying: "We should be conscious of the superiority of our civilisation, which consists of a value system that has given people widespread prosperity in those countries that embrace it, and guarantees respect for human rights and religion.... This respect certainly does not exist in Islamic countries".⁴⁷⁶ Berlusconi later claimed that his words had been "twisted" and "taken out of context" and apologized if he had offended his "Arab and Muslim friends".⁴⁷⁷

The Northern League and the National Alliance parties, both coalition partners of Berlusconi's Forza Italia Party, publicly linked heightened security concerns to the presence of Muslims in Italy. In particular, the Northern League repeatedly used fierce and hateful

⁴⁷¹ Information from Udo C. Enwereuzor, March 2003.

⁴⁷² Ibid.

⁴⁷³ Committee on the Elimination of Racial Discrimination, *Concluding observations: Italy*, 8 August 2002, at

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/861d431780daa473c1256aa40029f36d?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/861d431780daa473c1256aa40029f36d?Opendocument).

⁴⁷⁴ COSPE, *Anti-Islamic Reactions...*

⁴⁷⁵ Ibid.

⁴⁷⁶ John Hooper and Kate Connolly, "Berlusconi breaks ranks over Islam", *Guardian*, 27 September 2001.

⁴⁷⁷ Philip Willan, "Italian PM says sorry for attack on Islam", *Guardian*, 29 September 2001.

language against Muslims, thus effectively victimizing this group. For example, while lending support to a colleague who had proposed that the government, as a security measure, stop issuing visas to Muslims, party leader and Minister of Reforms Umberto Bossi said: “There is a war going on; if the situation gets worse, if we risk a disaster, if we risk dying of Ebola, it is wise to stop new Muslim immigrants from entering [our country]”. In a related move, the party’s parliamentary group prepared a publication outlining potential dangers that were considered related to increasing numbers of Muslims in Western Europe.⁴⁷⁸

After September 11, local and regional representatives of the Northern League, as well as some other political movements, also repeatedly made use of security arguments to call for measures to restrict the inflow of Muslims into the country and to enhance control of those Muslims living in the country. As regards the negative impact these anti-Muslim campaigns had on popular attitudes, COSPE has observed that most of the attacks against Muslims and other minority members that were recorded during the post-September 11 xenophobic backlash occurred in those parts of the country where the most vocal political xenophobia was heard.⁴⁷⁹

In a June 2001 report, the European Commission against Racism and Intolerance (ECRI) voiced serious concern about the exploitation of racism and xenophobia in Italian politics. Concluding that the Northern League and a number of other openly racist political parties routinely use “stereotyped, stigmatising and humiliating” language when they refer to non-EU immigrants, ECRI was alarmed by the “negative consequences that such propaganda has on the perception of non-EU immigrants by the majority population and at the climate of general intolerance and xenophobia that it fosters”. ECRI also expressed fear that the anti-immigration propaganda used by parties such as the Northern League could encourage mainstream political actors to attempt to boost their political support by increasingly renouncing their commitment to justice and by supporting the adoption of measures violating the principle of equality before the law.⁴⁸⁰ In the context of the post-September 11 developments outlined above, the concerns raised by ECRI are more relevant than ever.

⁴⁷⁸ COSPE, *Anti-Islamic Reactions...*

⁴⁷⁹ COSPE, *Anti-Islamic Reactions...*

⁴⁸⁰ European Commission Against Racism and Xenophobia, *Second Report on Italy*, adopted on 22 June 2001 and made public on 23 April 2002, at http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/Italy/CBC2-Italy.asp#TopOfPage.

Summary and Conclusions

In the aftermath of September 11, hostility toward Muslim and other minority communities increased rapidly in a number of OSCE member states and often remained at an unusually high level for many months after the terror attacks. The worst xenophobic backlash – in terms of its scope and level of violence – occurred in the United States. However, several other West European countries also experienced an increase in hate crimes, with people being attacked simply because they were or were thought to be Muslim or Arab.

The full scope of this backlash is not known since a considerable number of abuses appear never to have been reported to the police. As many observers have noted, there are, of course, different reasons why victims of abuses refrained from reporting their experiences to the police. However, in several countries it appears that one significant reason was that victims lacked confidence that the police would deal effectively and impartially with their cases. There are also reports indicating that the police in these countries did not always respond adequately to investigate and prosecute abuses brought to their knowledge. Moreover, the police were often not sufficiently prepared for the sudden increase in anti-Muslim and other forms of racist harassment and violence that occurred after September 11.

In Denmark and, in particular, in Italy, the xenophobic backlash that occurred after September 11 was clearly intertwined with an upsurge in anti-immigration and anti-Islamic rhetoric on the part of the political elite. In most other countries experiencing such a backlash, the political leaders took a firm stand against bigotry and intolerance directed at minorities. However, in several countries, the governments subsequently embarked upon a political course in striking contrast to their own message. By introducing legislation and engaging in practices particularly targeting migrants and minority communities, these governments have violated the fundamental principle of equality before the law and the right not to be discriminated against. In addition, by adopting measures based on the assumption that people of certain backgrounds are more likely to be terrorists than others, they have bestowed legitimacy to prejudice and encouraged hostility based on racial, ethnic and religious characteristics. Noting that several Western countries have initiated “legislative and security measures that discriminate against Muslims and Arabs, whether or not they are citizens of the country concerned” since September 11, the UN Special Rapporteur on Torture, Doudou Diène, has concluded that “[i]f similar changes to legislation and regulations were to be made

around the world there would be a considerable decline in rule of law at the international level”.⁴⁸¹

As many commentators have pointed out, since September 11, there has been a growing climate of suspicion against asylum seekers, migrants and even Muslim citizens in general, who have been expected to prove that they do not hold “extremist” views and that they respect the rules and customs of the countries where they seek protection, undertake a visit or permanently reside.⁴⁸² Most worrying, there is a great danger that this climate, especially if it is supported by official action, will become institutionalised and bring about an ever greater alienation of migrant and minority communities in European and North American OSCE countries. Such a development would not only overshadow efforts of goodwill⁴⁸³ but also further resentment and frustration within the affected groups.

⁴⁸¹ UN Commission of Human Rights, *Situation of Muslim and Arab peoples in various parts of the world in the aftermath of the events of 11 September 2001*. Report by Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, submitted pursuant to Commission on Human Rights resolution 2002/9 (E/CN.4/2003/23), 3 January 2003.

⁴⁸² A parallel has also been drawn between this climate and the climate faced by enemy combatants in many countries during and after World War II. Compare Liz Fekete, *Racism: the hidden cost of September 11*, European Race Bulletin nr. 40/2002, published by Institute of Race Relations; Irene Khan, Secretary General of Amnesty International, “Universality of human rights”, *Amnesty International Annual Report 2002*; The Canadian Arab Federation, Muslim Lawyers Association and National Anti-Racism Council of Canada, “Arab, Muslim and Anti-racism groups call for an end to discrimination”, 9 September 2002.

⁴⁸³ It should be noted that there are also many examples of politicians and common people offering support and friendship to Muslims and other minority communities following September 11. For example, a survey conducted by CAIR in July-August 2002 not only showed that a majority of US Muslims have experienced intolerance after September 11, but also that 79 percent of US Muslims had experienced kindness and support from friends and colleagues of other faiths after the terror attacks. CAIR: “Poll: Majority of US Muslims suffered post 9/11 bias”, 21 August 2002.

Inadequate Safeguards in the Use of Financial Measures to Fight Terrorism

OSCE member states and others have long recognized that finance is a prerequisite to any terrorist action and that inhibiting the flow of money to groups engaged in terrorist activities therefore has the potential to disrupt terrorism. As in other areas of counter-terrorism, September 11 gave new impetus to efforts by the United Nations and member governments to identify individuals and groups suspected of funding or carrying out acts of terrorism. The United Nations committee charged with blocking funding to Osama Bin Laden, Al Qaida and the Taliban increased its efforts to create a comprehensive list of persons and groups linked to them, in order to enable concerted international financial action. But little effort was made to ameliorate the negative impact of asset freezing for those included on the UN list: the process and criteria used to add names to the list lacked transparency, individuals and organizations were immediately named publicly without any opportunity to review their inclusion, mechanisms to apply for the emergency release of funds were inadequate, and until August 2002 there was no mechanism to appeal inclusion on the list.

In addition to implementing financial measures against individuals and groups on the UN list, OSCE member states sought to take action against others suspected of funding and carrying out terrorism. The European Union created a parallel list of proscribed terrorist organizations subject to community-wide asset freezing measures. OSCE states also enacted domestic legislation enabling them to take action against the assets of persons and groups suspected of ties to terrorism. Some states sought to ensure that laws and financial measures against terrorism were in full compliance with their obligations under human rights and domestic law. Others have frozen the assets of individuals and groups without providing adequate procedural safeguards, in violation of international human rights standards.

The global freezing of assets of designated individuals and organizations on suspicion of involvement in the funding of international terrorism can have severe consequences for those who are designated. Where individuals and organizations are listed on the basis of secret evidence, challenging their inclusion may be extremely difficult. Even where those erroneously designated may eventually succeed in being removed from the lists, the consequence to their reputation of being identified by the United Nations, the EU or a western government as a terrorist financier may be highly damaging, and in the case of a charitable organization could be fatal. With mechanisms for the release of emergency funds largely inadequate (with the exception of such procedures in one or two states), organizations may be

left for months unable to pay wages, or office expenses, while individuals could lose their homes and businesses. Adequate procedural safeguards are vital to avoid serious harm to those wrongly included on such lists.

Relevant Legal Standards

The right to own and enjoy property is contained in the First Protocol of the ECHR and the ACHR.⁴⁸⁴ The right is also found in the OSCE Copenhagen Document.⁴⁸⁵ According to these international standards, the enjoyment of property is a qualified right, subject to legitimate restriction by the state under certain circumstances. A person may be deprived of his property where the “public interest” (ECHR/OSCE) or “public utility or social interest” (ACHR) require it and the restriction is carried out in accordance with the law.⁴⁸⁶ Protocol 1 of the ECHR contains a second paragraph which allows states to “control the use of property in accordance with the general interest” (or for tax collection). The case law of the European Court of Human Rights makes clear that freezing (as opposed to permanent seizure) of assets constitutes “control” of property rather than deprivation of it.⁴⁸⁷ It is important to note that the ECHR explicitly states that property rights are enjoyed by “every natural or *legal* person” (emphasis added). Corporations and associations considered legal persons under the law are therefore entitled to property rights under the ECHR.

When property rights are suspended or taken away by a state, it should be done in accordance with the rule of law. It is important to emphasize that the deprivation of such rights must be in the public interest. Restrictions on individual property rights that are not in the interest of society are disproportionate and hence impermissible. The right to a fair and public hearing by a competent and impartial court or tribunal is central to the rule of law, for both criminal and civil matters, and is enshrined in international human rights law.⁴⁸⁸ The OSCE standards

⁴⁸⁴ ECHR Protocol 1(1); ACHR, article 21(1). The ICCPR makes no mention of property rights.

⁴⁸⁵ OSCE Copenhagen document, para. 9.6.

⁴⁸⁶ ECHR Protocol 1(1); ACHR, article 21(2); OSCE Copenhagen document, para. 9.6. The ECHR and OSCE Copenhagen document have an additional requirement that it must be in accordance with international law.

⁴⁸⁷ That is true even where the assets are frozen with a view to their subsequent forfeiture. e.g. European Court of Human Rights, *Handyside v. United Kingdom*; European Court of Human Rights, *Air Canada v. United Kingdom*, Judgment of 5 May 1995, series A, no. 316-A. It has been suggested that deprivation requires an “extinction” of property rights. See Ovey & White, *European Convention on Human Rights*, p. 310.

⁴⁸⁸ ICCPR, article 14(1); ECHR, article 6(1); ACHR, article 8(1)&(5). (NB: Due process rights in relation to civil matters do not include the presumption of innocence, which applies only to those charged with a crime.)

also include a right to redress against administrative decisions [i.e. those taken by a public body without the involvement of a court].⁴⁸⁹

The enjoyment of property rights also requires that persons whose property is subject to control or forfeiture must have a right of redress through the courts. The Inter-American Human Rights Commission discussed the right to property in a recent report on terrorism and human rights:

As with other fundamental rights, effective protection of the right to property necessitates ensuring that the right to use and enjoy property is given effect through legislative and other means, and that simple and prompt recourse is available to a competent court or tribunal for protection against acts that violate this right.⁴⁹⁰

The right to privacy and a family life is also relevant to the use of financial measures against terrorism.⁴⁹¹ The right includes freedom from interference in a person's home. Freezing a person's assets may interfere with these rights, particularly where there is no provision allowing for basic household and family needs to be met. The prohibition against state interference in the right to privacy and a family life is subject to narrow exceptions. International human rights law allows restrictions in accordance with law, but the state must establish that the restrictions are not arbitrary (in the case of the ICCPR and ACHR), or that they are strictly necessary on national security or other narrow grounds (ECHR).⁴⁹²

Where financial measures are applied against non-governmental organizations, they may also constitute interference with freedom of association, protected under the ICCPR, ECHR, ACHR and OSCE standards.⁴⁹³ Freedom of association may only be restricted under international human rights law where the restrictions are strictly necessary for national

⁴⁸⁹ OSCE Copenhagen document, para. 5(10).

⁴⁹⁰ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, part III, section G(2), "Rights to Property and Privacy".

⁴⁹¹ ICCPR, article 17; ECHR, article 8(1); ACHR, article 11(2); OSCE Moscow document, para. 24.

⁴⁹² ICCPR, article 17(1) ("unlawful" restrictions are also forbidden); ACHR, article 11(2) (also prohibits "abusive" interference); ECHR, article 8(2) – the full grounds are "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." OSCE standards permit restrictions only where lawful and in accordance with international human rights standards. See OSCE Moscow document, para. 24.

⁴⁹³ ICCPR, article 22(1); ECHR, article 11(1); ACHR, article 16(1), OSCE Copenhagen document, paras. 7.6, 10.3.

security, public safety, public order, crime prevention, public health or protecting the rights of others.⁴⁹⁴

Human Rights Concerns

UN Sanctions Committee on Afghanistan

Less than two weeks after the September 11 attacks, the UN Security Council adopted resolution 1373.⁴⁹⁵ The resolution required that all states “prevent and suppress the financing of terrorist acts” including by “freez[ing] without delay funds and other financial assets or economic resources of persons who commit or attempt to commit, terrorist acts,” and those acting on behalf or at the direction of such persons.⁴⁹⁶ While resolution 1373 encompassed measures against terrorist acts in general, financial measures by the United Nations and its member states against terrorism since September 11 have largely focused on Osama Bin-Laden, Al Qaida and those associated with them.

The principal UN mechanism for adopting financial measures against terrorism is the Sanctions Committee on Afghanistan. The committee was established in 1999 by the Security Council to monitor implementation of sanctions on the Taliban authorities in Afghanistan, including the freezing of funds and other financial resources controlled by or benefiting the Taliban.⁴⁹⁷ In December 2000, the Security Council adopted resolution 1333, broadening the scope of freezing measures to include Osama Bin-Laden “and those individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization”.⁴⁹⁸

Resolution 1333 also requested the committee to maintain “an updated list, based on information provided by states and regional organizations” of individuals and entities so designated.⁴⁹⁹ As of 28 January 2003, 236 individuals and 92 organizations were listed.⁵⁰⁰ A further four individuals and nine organizations were noted as having been removed from the

⁴⁹⁴ ICCPR, article 22(2) and ACHR, article 16(2) both add “public health or morals or protection of rights and freedoms of others”. ECHR, article 11(2) adds “for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”

⁴⁹⁵ UN Security Council Resolution 1373 (2001) of 28 September 2001, S/RES/1373 (2001).

⁴⁹⁶ *Ibid.*, para. 1

⁴⁹⁷ UN Security Council Resolution 1267/1999 of 15 October 1999, S/RES/1267 (1999), para. 6 (establishes committee), para. 4 (requires that states freeze of Taliban-related assets).

⁴⁹⁸ UN Security Council Resolution 1333/2000 of 19 December 2000, S/RES/1333 (2000).

⁴⁹⁹ *Ibid.*, para. 8(c).

⁵⁰⁰ UN Security Council, New Consolidated List Pursuant to Security Council Regulations 1267 (1999), 1333 (2000), 1390 (2002) (last updated 28 January 2003), at <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

list. The list is published on the United Nations website as soon as it is updated. The US government is the source of much of the information. The obligation of states to freeze the assets of persons and entities included on the committee's list was underscored on 16 January 2002, when the Security Council passed a further resolution requiring that all states "freeze without delay the funds and other financial assets or economic resources" of those on the list.⁵⁰¹

In November 2002, the Sanctions Committee issued new guidelines on the operation of the list which for the first time included a requirement that states submitting names to the committee should include "to the extent possible, a narrative description of the information that forms the basis or justification for taking action".⁵⁰² There is no mention of what criteria should be applied and the nature of the evidence required. In a welcome development, the guidelines refer to "proposed additions" from member states, suggesting that the committee itself now exercises the discretion as to whether an entity should be listed. Prior to the introduction of the guidelines, there was no requirement that names were reviewed by the committee or the council prior to their addition to the list.

There are several difficulties related to the work of the Sanctions Committee. The main problem relates to the mechanism for individuals and entities designated by the committee to challenge their inclusion on the list, or the consequent freezing of their assets. Prior to August 2002 there was no mechanism for challenging a listing decision. On 15 August 2002, the Sanctions Committee announced that it had established a "de-listing procedure" allowing any individual or entity on the list to "petition the government of residence and/or citizenship to request review of the case".⁵⁰³ The de-listing procedure was subsequently formalized in November 2002 guidelines on the committee's operation.⁵⁰⁴ The guidelines make clear that the de-listing procedure depends largely on bilateral negotiations between the government that has been petitioned and the government that initiated the listing process. The guidelines encourage joint de-listing requests to the committee from the two governments. Requests by the petitioned government alone are permitted only where there are no objections from other members, which presumably allows the listing government to block de-listing. Removal from the list requires consensus from the committee, failing which the matter can be referred to the

⁵⁰¹ UN Security Council Resolution 1390/2002 of 16 January 2002, S/RES/1390/2002, para. 1(a).

⁵⁰² UN Security Council, Sanctions Committee, "Guidelines of the Committee for the Conduct of its Work", (adopted 7 November 2002), available at http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf.

⁵⁰³ UN Security Council, "Statement of Chairman of 1267 Committee on De-Listing Procedures", (16 August 2002), SC/7487.

⁵⁰⁴ UN Security Council, Sanctions Committee, "Guidelines of the Committee for the Conduct of its Work", (adopted 7 November 2002).

Security Council. Those removed from the list are noted on subsequent lists as having been removed. However, there appears to be no remedy for those included on the list at the behest of their own governments.

Despite the introduction of the November guidelines and greater review by the committee of proposed inclusions on the list, the criteria and evidence are not publicly available, leaving it unclear which criteria are used and whether they are applied consistently. This lack of clarity contravenes international due process standards and is likely to make it extremely difficult effectively to challenge a decision to list either an individual or an entity. Moreover, the “de-listing” procedure does not address fully the concerns about the need for due process before the inclusion on the list of any individual or organization. Since the names of entities are made public as soon as they are listed, there remains no opportunity to ameliorate the potential damage to an individual or organization’s reputation or livelihood that results solely from being wrongly identified in public as a terrorist financier.⁵⁰⁵ While the effective enforcement of asset freezing measures certainly requires that those subject to them do not receive advance warning (which might enable them to transfer or otherwise dispose of the assets), a requirement that governments share and act upon that information confidentially for an initial period would give those wrongly designated an opportunity to challenge inclusion before their names were made public without interfering in enforcement.

A second difficulty relates to the inadequacy of safeguards allowing for basic needs to be met where a person is included on the list and his/her assets subsequently frozen. Resolution 1267 allows the release of frozen funds for humanitarian needs on a case-by-case basis.⁵⁰⁶ This mechanism is regarded by some states, notably Switzerland and Sweden, as ineffectual.⁵⁰⁷ Swiss authorities have allowed the release of limited funds to several Swiss nationals included on the list to meet their basic needs (with no apparent breach of committee rules).⁵⁰⁸ It was reported in August that the United States was circulating a proposal to address the shortcomings in humanitarian access to frozen funds.⁵⁰⁹ The November 2002 guidelines,

⁵⁰⁵ This problem is well illustrated by the experiences of three Swedish nationals added to the UN list in November 2001 at the behest of the United States. Although the Swedish government intervened with the US government on their behalf, they did so only following a public outcry and after the assets had been frozen in Sweden. The US subsequently admitted that their inclusion on the list was a preventive measure. The three were later removed from the list.

⁵⁰⁶ S/RES/1267 (1999), para. 4.

⁵⁰⁷ Letter dated 19 September 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) addressed to the President of the Security Council containing the Second Report of the Monitoring Group pursuant to resolution 1390 (2002), S/2002/1050, para. 42.

⁵⁰⁸ Second Report of Monitoring Group, S/2002/1050, para. 42.

⁵⁰⁹ Edith Lederer, “UN agrees on procedure for return of assets because of alleged terrorist links”, *Associated Press*, 16 August 2002.

however, contain no reference to humanitarian provisions. On 4 December 2002, the committee's monitoring group reported that the committee was "considering guidelines to handle requests for exemptions, on humanitarian grounds".⁵¹⁰ At the time of this writing, no guidelines had been introduced.

EU Financial Measures against Terrorism

European Union member states have adopted a common approach to the use of financial measures against terrorism. The approach has two limbs. The first limb concerns implementation of measures against individuals and groups included on the UN Sanctions Committee list. In May 2002, the Council of the European Union (a ministerial body also known as the Council of Ministers) adopted a regulation⁵¹¹ committing its member states to freeze "all funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee".⁵¹² The EU maintains a list mirroring the UN Sanctions Committee list, which the council updates periodically as the Sanctions Committee list is amended.⁵¹³ There is no explicit provision in the EC regulations implementing the Sanctions Committee list for those on the list to petition either the EU as a whole or individual member states for removal from it, nor to request the release of limited funds on humanitarian grounds.

In addition to implementing the UN Sanctions Committee list, the council decided in December 2001 to establish a separate list of proscribed groups subject to similar financial measures.⁵¹⁴ This second list is not limited to persons and groups with links to the Taliban and Al Qaida.⁵¹⁵ An EU "common position" adopted by the council on the same date laid down the principles by which the list is compiled.⁵¹⁶ Those subject to listing are: "persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts" and groups and entities owned or controlled directly or

⁵¹⁰ Letter dated 16 December 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) addressed to the President of the Security Council containing the Third Report of the Monitoring Group pursuant to resolution 1390 (2002).

⁵¹¹ EC regulations are directly effective, that is legally binding in all EU member states without national implementing legislation.

⁵¹² Council Regulation (EC) 881/2002, 27 May 2002.

⁵¹³ E.g., on 25 October 2002, the UN Sanctions Committee added the organization Jemaah Islamiyah to its list, and on 29 October 2002, the council adopted Council Regulation (EC) 1935/2002 updating the EU list accordingly.

⁵¹⁴ Council Regulation (EC) 2580/2001, 27 December 2001.

⁵¹⁵ As of 28 October 2002, the list included Aum Shinrikyo, Hamas-Izz al-Din al-Qassem (armed wing of Hamas), the Kurdish Workers Party (PKK) and the Revolutionary Armed Forces of Colombia (FARC).

⁵¹⁶ Common Position 2001/931/CFSP, 27 December 2001 ("Common Positions" are binding on member states by virtue of article 15 of the Treaty of the European Union).

indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities...”.⁵¹⁷ The common position employs the same definitions of terrorism as the EU framework decision on terrorism, which has been subject to criticism on the grounds of its breadth and imprecision (see chapter on terrorism definitions).⁵¹⁸

The EU process contains greater safeguards than those required by the UN Sanctions Committee. According to regulation 2580/2001, names can only be added to the list by unanimity, and are to be reviewed regularly or at least every six months.⁵¹⁹ There is also a presumption against retaining names on the list: under the terms of the common position, the names and entities on the list “shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list”.⁵²⁰ EU member states are entitled under the regulation to unfreeze funds and make funds available to persons or entities on the list upon request, subject to the requirement that they notify other member states, the council and the European Commission and take on board timely comments from them.⁵²¹ Member states are also permitted under the regulation to release funds on humanitarian grounds upon request.⁵²² As with the UN sanctions committee’s list, however, there are still inadequate safeguards for challenging inclusion on the list prior to its being made public.

Bulgaria

On 13 June 2002, the Bulgarian Council of Ministers (executive) approved the Bill on Measures Against Financing Terrorism. The draft law was submitted to the National Assembly (parliament) on 27 June 2002, and passed its first reading in the assembly on 26 September. As of early February 2003, the bill had yet to have a second reading. The legislation permits the “blocking of funds, financial assets and property of natural persons and legal entities that have been included in a special list”.⁵²³ The list is to be maintained by the Council of Ministers based on recommendations by the minister of interior and prosecutor-general.⁵²⁴ The list is to include three categories of persons: 1) persons listed by the UN

⁵¹⁷ Article 2, Common Position 2001/931/CFSP.

⁵¹⁸ Article 1, Common Position 2001/931/CFSP.

⁵¹⁹ As of this writing, the most recent version of the list was adopted by the council on 28 October 2002 by Council Decision 2002/848/EC.

⁵²⁰ Article 2(3), Council Regulation (EC) 2580/2001.

⁵²¹ Article 6, Council Regulation (EC) 2580/2001.

⁵²² Article 5, Council Regulation (EC) 2580/2001.

⁵²³ Article 3(1), Draft Law on Measures Against Financing Terrorism (draft of 5/4/02). Unofficial translation by Centre for the Study of Democracy, Sofia, Bulgaria www.csd.bg.

⁵²⁴ Article 5(1), Draft Law on Measures Against Financing Terrorism (draft of 5 April 2002).

Security Council as associated with terrorism; 2) persons sentenced for committing, threatening or inducing acts of terrorism as defined by the Bulgarian Penal Code; 3) persons under preliminary investigation for committing, threatening or inducing such acts.⁵²⁵ The third category is problematic since it potentially establishes a very low threshold for inclusion on the list. All persons under preliminary investigation for terrorism by the Bulgarian authorities are liable to have their assets frozen.

The list is subject to several safeguards. Persons listed who fall under the second or third categories (i.e. those listed at the initiative of the Bulgarian authorities) “can appeal their inclusion by the Council of Ministers on the list before the Supreme Administrative Court”.⁵²⁶ The bill is silent on the question of which party will bear the burden of proof. In addition, the list is subject to review every six months, although there is no presumption against inclusion on the list.⁵²⁷ The draft law also contains a provision permitting the minister of finance to authorize discretionary payments out of blocked funds for “urgent humanitarian needs”, and for the payment of salaries in the case of organizations.⁵²⁸ It is not clear whether third parties who use assets owned by persons and entities on the list will also have the right to petition for the release of funds for humanitarian purposes or the payment of salaries. Authorisation will be on a case-by-case basis, and refusal may be appealed to the Supreme Administrative Court.⁵²⁹

Canada

Canada amended its criminal code in December 2001 permitting the Governor in Council (head of government) to create and maintain a list of individuals and groups subject to asset freezing measures.⁵³⁰ “Entities” (which may be either persons or organizations) are added to the list on the recommendation of the Canadian Solicitor-General if the Governor in Council is satisfied that there are reasonable grounds to believe that (a) the entity has carried out, attempted to carry out, participated in or facilitated terrorist activity; or (b) the entity is acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a)”.⁵³¹ The definition of “facilitation” in the amended criminal code is highly problematic, since it applies “whether or not (a) the facilitator knows that a particular terrorist activity is

⁵²⁵ Ibid., article 5(2).

⁵²⁶ Ibid., article 5(4).

⁵²⁷ Ibid., article 5(5).

⁵²⁸ Ibid., article 6(4).

⁵²⁹ Ibid., article 6(4) and 6(6).

⁵³⁰ The criminal code was amended by the Anti-Terrorism Act, passed by the House of Commons on 28 November 2001 and by the Senate on 18 December 2001. For more information on the act, see chapter on arrest.

⁵³¹ Section 83.05(1), Canadian Criminal Code.

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”.⁵³² According to the Canadian authorities, as of 21 August 2002, there were seven entities listed, six of which were also included on the UN Sanctions Committee list.⁵³³

Persons or groups included on the list are entitled to petition the solicitor-general for removal from the list, and the solicitor-general “must give notice without delay to the applicant of any decision taken”.⁵³⁴ If the request for removal is refused, the applicant has 60 days to apply to a judge for judicial review of the decision. Powers granted to a judge where such an application is made include the right to “order that the applicant no longer be a listed entity” if the decision is found not to be reasonable.⁵³⁵ In determining whether the decision is reasonable, the judge is entitled to examine “any security or criminal intelligence reports considered in listing the applicant”. De-listing orders must be published in the Official Gazette of Canada.

The list is subject to review every two years by the Solicitor-General, at which time it must be determined whether there are still reasonable grounds for continuing to list the entity.⁵³⁶ Given the financial consequences of inclusion on the list (namely freezing of all assets and other financial resources), a two year gap between such reviews seems unduly long, despite the individual right of an entity to apply for a review of the decision to include it on the list.

Canada’s Charities Registration Act was also amended in December 2001.⁵³⁷ The amended law permits the minister responsible for overseeing charities or the minister for national revenue to issue a certificate that a charity or individual has provided resources, directly or indirectly to a proscribed organization listed under section 83.01(1) of the criminal code for supporting terrorism (and subject to asset freezing measures).⁵³⁸ In the case of a charity, the effect of the certificate is to revoke the organization’s charitable status.⁵³⁹

⁵³² Ibid., section 83.01(2).

⁵³³ Letter to the International Helsinki Federation from Lawrence T. Dickenson, Assistant Secretary to the Cabinet, Security and Intelligence, Government of Canada, dated 21 August 2002.

⁵³⁴ Section 83.05(2) & 83.05(4), Canadian Criminal Code.

⁵³⁵ Ibid., section 83.05(5).

⁵³⁶ Ibid., section 83.05(9).

⁵³⁷ Amended by the Anti-Terrorism Act, passed by the House of Commons on 28 November 2001 and the Senate on 18 December 2001.

⁵³⁸ Section 4 (1), Charities Registration Act. The act does not specify which minister is responsible for overseeing charities. Section 1(c) states that minister “means Minister of the Crown designated by the Lieutenant-Governor in Council...”.

⁵³⁹ Ibid.

Certification is subject to review in federal court under section 6 of the act, where a judge will determine whether the certificate is “reasonable” and should either be upheld or quashed.⁵⁴⁰ Section 6 gives the judge access to the security or criminal intelligence materials on which the certification is based, and permits the charity to make representations to the court. The judge’s decision is final.⁵⁴¹ In order to protect the reputation of a certified individual or charity prior to judicial review, an individual or charity may apply to a judge for an order preventing the disclosure of their identity, and that any documents filed in connection with the review remain confidential.⁵⁴² Both the UN and EU listing procedures would benefit from such a safeguard.

Although the process does contain safeguards, there is a real risk to the reputation of organizations and individuals wrongly certified under the act. The act is silent on whether the initial certificate will be publicized prior to judicial review, but the existence of the mechanism in section 4(3) allowing a charity to apply for its identity to be shielded during the review suggests that charities and individuals subject to initial certificates may be publicly named. The effect on a charitable organization of certification that it is linked to “terrorists” and subject to the revocation of its charitable status may be fatal to that organization, even where the certificate is quashed following judicial review. While alerting an organization that it is likely to be certified is unrealistic (since it would allow organizations genuinely involved in terrorist financing to dispose of assets and documents and put contingency plans into place), publicizing the existence of a certificate prior to judicial review effectively circumvents the safeguard that that review is supposed to provide. It also constitutes an interference with the right to a fair hearing.

Switzerland

Financial measures by the Swiss authorities against entities suspected of funding or carrying out terrorist acts predate the September 11 attacks. The Swiss Federal Council had already adopted a decree on 2 October 2000 implementing UN Security Council Resolution 1267 (the Sanctions Committee process) in relation to the Taliban. Following the adoption of UN Security Council Resolution 1333, the decree was extended to those connected to Osama Bin-Laden and Al Qaida. The decree was originally to have expired in October 2002 but was extended until the end of February 2003.⁵⁴³

⁵⁴⁰ Ibid., section 6(1).

⁵⁴¹ Ibid., section 6(2).

⁵⁴² Ibid., section 4(3).

⁵⁴³ Swiss Helsinki Committee, “Anti Terrorism Measures in Switzerland” (unpublished note), 22 October 2002.

Additional provisions were added in May 2002, including a ban on travel to, or passage through, Switzerland for those on the list (from which Swiss nationals are presumably exempt). The UN Sanctions Committee list is annexed to the decree. Those on the list are subject to an “arms embargo, financial sanctions, as well as travel restrictions” by Swiss authorities.⁵⁴⁴ Several Swiss nationals were placed on the list in November 2001. The decree permits the State Secretariat for Economic Affairs to grant exemptions in case of hardship, and funds were released to two Swiss nationals on the list after they petitioned the Swiss government.

According to the Swiss Helsinki Committee, the Swiss government proposed amendments to the criminal code in September 2002, penalizing the financing of terrorism as well as acts of terrorism themselves.⁵⁴⁵ At present, the criminal code does not explicitly mention “terrorism”. The government also sought ratification of the UN resolutions concerning terrorism and terrorist funding, including 1267, 1333 and 1373, placing them on a permanent footing. On 23 September 2002, the National Council (lower house) declined to ratify the criminal code amendments requesting further information. The criminal code amendments had yet to be discussed in the Council of States (upper house) by March 2003. Ratification of the UN resolutions was subsequently approved by the National Chamber. As of March 2003, the Council of States had yet to vote on the ratification but the council was expected to approve the measure.

United Kingdom

The UK government moved quickly to ensure that individuals and organizations included on the UN sanctions committee, EU and US government lists with assets in the UK were subject to freezing measures, and imposed criminal penalties on anyone making funds available to listed persons or organizations. The UK Treasury (finance ministry) announced in October 2002 that the UK had frozen the assets of “over 100 organisations and over 200 individuals” linked to terrorism.⁵⁴⁶ The UK government showed less enthusiasm for ensuring that entities wrongly named had an opportunity to challenge their designation, or permitting the release of limited frozen funds to avoid hardship.

⁵⁴⁴ E-mail communication to International Helsinki Federation from Julie-Antoinette Stadelhofer, state secretariat for economic affairs, World, Export Controls and Sanctions, Switzerland, 14 August 2002.

⁵⁴⁵ Swiss Helsinki Committee, “Anti Terrorism Measures in Switzerland”.

⁵⁴⁶ UK Treasury, “Combating the Financing of Terrorism: A Report on UK Action”, October 2002. http://www.hm-treasury.gov.uk/mediastore/otherfiles/combat_terrorism.pdf.

In October 2001, the UK government introduced the Terrorism (United Nations Measures) Order 2001.⁵⁴⁷ The order implements UN Security Council Resolution 1373. It allows the UK Treasury to issue a direction freezing the assets of “any person who commits, attempts to commit, facilitates or participates in the commission of acts of terrorism”.⁵⁴⁸ The order contains a three-part definition: 1) the act must involve serious violence against a person, a risk to life, health or safety of the public, or seriously to interfere with or disrupt an electronic system; 2) the act must be designed to “influence the government or to intimidate the public” and 3) the act must be made for “the purpose of advancing a political, religious or ideological cause”.⁵⁴⁹ Acts involving firearms and explosives need not be designed to influence the government or intimidate the public to meet the definition. The order imposes criminal penalties on anyone who makes funds available to such a person without a licence from the UK Treasury to do so.⁵⁵⁰ It is used to freeze assets of persons and organizations identified by the UK government and US Office of Foreign Asset Control and those included on the EU supplementary list. The names of those designated entities are maintained on a consolidated list published on the website of the Bank of England together with names of those subject to sanctions for reasons unrelated to international terrorism.⁵⁵¹

Under the order, the decision by the Treasury to issue a direction (i.e. to list an organization or individual as subject to asset freezing) is amenable to judicial review.⁵⁵² The consolidated list does not indicate the reason for inclusion or which organization recommended or ordered it, creating evidential difficulties to those who wish to challenge inclusion on it. In November 2001, Yassin Kadi, a Saudi national was given permission to bring an action for judicial review challenging the decision by the Treasury to include him on the Bank of England list.⁵⁵³ The action failed and Kadi’s name remained on the list as of November 2002. There is no mention in the provision of a mechanism for the release of limited funds for humanitarian purposes, but the Treasury is given discretion to grant licences permitting the release of funds that would otherwise be blocked.⁵⁵⁴

⁵⁴⁷ Statutory Instrument 2001 No.3365 [enacted 9 October 2001; entered into force 10 October 2001].

⁵⁴⁸ SI 2001 No.3365, para. 4.

⁵⁴⁹ *Ibid.*, para. 2.

⁵⁵⁰ *Ibid.*, para. 3.

⁵⁵¹ <http://www.bankofengland.co.uk/sanctions/main.htm>.

⁵⁵² SI 2001 No.3365, para. 7. Judicial review allows a challenge to the decisions of public authorities in the UK on the grounds that the decisions are either illegal, procedurally improper or irrational.

⁵⁵³ See for example: Jimmy Burns, “UK court backs challenge to assets freeze”, *Financial Times*, 12 November 2001; Press Association, “Saudi Fights Asset Freeze”, *Guardian*, 13 November 2001.

⁵⁵⁴ SI 2001 No.3365, para. 12.

In January 2002, the UK government also updated a pre-existing order relating to sanctions against the Taliban in accordance with UN Security Council Resolution 1390, extending the measures to Al Qaida and entities linked to it.⁵⁵⁵ The order is used to freeze assets of persons and organizations included on the UN Sanctions Committee list. These names are also included on the Bank of England consolidated list. There is no provision for the release of funds for humanitarian purposes, but again the Treasury has discretion to grant licences permitting the release of funds that would otherwise be blocked.⁵⁵⁶ The order does not provide any mechanism for challenging inclusion on the list (perhaps logically given the list is maintained by the UN Sanctions Committee) so those wishing to challenge inclusion on the list must address the UN Sanctions Committee directly (as they may also do to request release of funds on humanitarian grounds).

Further powers to take financial measures were delegated to the Treasury under the Anti-Terrorism Crime and Security Act passed by parliament on 14 December 2001.⁵⁵⁷ Part II of the act permits the Treasury to make freezing orders against assets belonging to foreign nationals and governments, if it believes that “action has been taken to the detriment of the United Kingdom’s economy” or “action constituting a threat to the life of one or more nationals of the United Kingdom or residents of the United Kingdom has been taken or is likely to be taken”.⁵⁵⁸ The effect of a freezing order is to prohibit persons present in the UK, UK nationals outside the UK and organizations incorporated in the UK from making funds available to individuals and governments specified in the order. There is no mechanism in the act for appealing such a freezing order, although decisions by the Treasury, like those of other public authorities in the UK, are at least theoretically amenable to judicial review.

United States

Less than two weeks after the September 11 attacks, President Bush issued executive order 13224 empowering the US Treasury Department (finance ministry) to take financial measures against persons and organizations associated with terrorism. While US domestic sanctions regulations include avenues for challenging designation as an entity subject to freezing measures, the method by which individuals and organizations are added to the list is far from transparent (in some cases based on secret evidence difficult to defend against in court) and there is no method for challenging designation prior to that information being made public.

⁵⁵⁵ The Al-Qaida and Taliban (United Nations Measures) Order 2002, SI 2002, No. 111 [enacted 24 January 2002; entered into force 25 January 2002] [as amended by the SI 2002, No. 251 (correcting a drafting error) implementing UN Security Council Resolution 1390.

⁵⁵⁶ SI 2002, No. 111, para. 8.

⁵⁵⁷ For more information on the act, see chapter on arrest.

⁵⁵⁸ Anti-Terrorism, Crime and Security Act 2001, part II, section 4.

The Office of Foreign Asset Control (OFAC) within the Treasury Department oversees financial measures and other sanctions. OFAC designates individuals and organizations as having links to terrorism, and maintains a consolidated list of proscribed organizations on its website.⁵⁵⁹ OFAC designation is particularly important since the US provides the majority of the information to the UN Sanctions Committee list. In June 2002, the US Treasury Department indicated that it had frozen \$34.3 million in assets from 210 individuals, organizations and entities since the September 11 attacks.⁵⁶⁰

Executive Order 13244 blocks “all property and interests in property” belonging to specified persons and organizations.⁵⁶¹ The property must either be located in the United States or in the possession or control of persons or entities in the United States. Four categories of entities can be specified as subject to asset blocking: the first two categories are foreign entities listed in the annex to the order, or determined by the secretary of state “to have committed or to pose a significant risk of committing acts of terrorism...”.⁵⁶² The third category covers any entities (foreign or domestic) owned or controlled by, or acting on behalf of those entities otherwise subject to the order.⁵⁶³ The fourth category covers those who assist, sponsor or otherwise support acts of terrorism or entities covered by the order.⁵⁶⁴ There is no information in the order about the method by which the 27 entities were included in the annex on the date the order was issued, but the annex is regularly updated to include any entity designated by the Treasury Department as a Specially Designated Global Terrorist (SDGT).⁵⁶⁵ The order also prohibits US persons or groups from making donations to entities subject to asset blocking.⁵⁶⁶

The Code of Federal Regulations permits persons and organizations included on the OFAC list to apply directly to OFAC for a specific license that allows a transaction that would

⁵⁵⁹ The list includes individuals and organizations subject to international sanctions regimes unrelated to the September 11 attacks (e.g. related to the former Yugoslavia, Angola and North Korea).

⁵⁶⁰ Jeff Shields, Christy McKerney and Tanya Weinberg, “Terrorism links, frozen assets put Muslim charities in dilemma”, *Florida Sun-Sentinel*, 19 June 2002, <http://www.sun-sentinel.com/templates/misc/printstory.jsp?slug=sfl%2Dcharity061902>.

⁵⁶¹ Executive Order 13224 of 23 September 2001 “Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism”, *Federal Register*, vol. 66, no. 186, 25 September 2001, section 1.

⁵⁶² Executive Order 13224, section 1(a) and (b).

⁵⁶³ *Ibid.*, section 1(c).

⁵⁶⁴ *Ibid.*, section 1(d).

⁵⁶⁵ Entities listed in the original annex to the order include, Al Qaida, Osama Bin-Laden, the Armed Islamic Group (GIA), Islamic Army of Aden and Al-Jihad (Egyptian Islamic Jihad).

⁵⁶⁶ The Treasury Department issued guidelines in November 2002 to facilitate legitimate charitable donations. (U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities), at <http://www.ustreas.gov/press/releases/po3607.htm>.

otherwise be prohibited.⁵⁶⁷ An application form for that purpose is available on the OFAC website.⁵⁶⁸ The code does not specify the range of circumstances under which a license may be granted, but at least one blocked organization in the US has been able to secure a license to cover office expenses and staff salaries. There is also a provision under the code for designated entities to apply to OFAC to have their designation rescinded (in essence, a de-listing procedure).⁵⁶⁹ At least twelve entities were removed from the list during 2002.⁵⁷⁰

The US State Department also maintains a list of “Foreign Terrorist Organizations” (FTOs). The FTO list predates the September 11 attacks.⁵⁷¹ As of October 2002, 35 organizations were designated as FTOs.⁵⁷² It is a criminal offence for a person or group present in the US, or subject to its jurisdiction, to provide support or resources to an FTO. Any US financial institution that is aware that it holds funds for an FTO must freeze the funds and report the matter to OFAC.⁵⁷³ FTOs are also subject to monitoring by the US government. FTO members who are foreign nationals are prohibited from entering the United States.

The designation of US-based Muslim non-governmental organizations as terrorist organizations subject to asset blocking has proved particularly controversial. Three of the largest organizations, the Benevolence International Foundation, the Global Relief Foundation, and the Holy Land Foundation for Relief and Development, have had their assets frozen. Each had its assets frozen in December 2001 while the Treasury Department began an investigation into their financial affairs on suspicion that the organizations had funded individuals and groups engaged in acts of terrorism. The head of Benevolence International Foundation, Enaam Arnout, and the director of the Global Relief Foundation, Rabih Haddad, are both currently in detention. Arnout is charged with conspiracy to provide funding to Al Qaida, and Haddad is in custody for visa violations.⁵⁷⁴

⁵⁶⁷ Code of Federal Regulations 31 CFR Sec. 501.801(2),

⁵⁶⁸ <http://www.ustreas.gov/offices/enforcement/ofac/legal/forms/license.pdf>.

⁵⁶⁹ Code of Federal Regulations 31 CFR Sec.501.807.

⁵⁷⁰ OFAC, Recent OFAC Actions: 2002 Cumulative, (no date), at <http://www.ustreas.gov/offices/enforcement/ofac/actions/2002cum.html>.

⁵⁷¹ Designated in accordance with criteria laid down in section 219 of the Immigration and Nationality Act (as amended by the USA PATRIOT Act of 2001). In November 2001, all FTOs were also designated as SDGTs.

⁵⁷² Source: US Department of State, Office of Counter-Terrorism, Fact Sheet: “Foreign Terrorist Organizations”, 23 October 2002, at <http://www.state.gov/s/ct/rls/fs/2002/12389pf.htm>.

⁵⁷³ For more information on criminal sanctions relating to support for FTOs, see “U.S. Reply to the U.N. Counter-Terrorism Committee”, 14 June 2002, S/2002/674, p.7.

⁵⁷⁴ Arnout, was arrested on 30 April 2002 for perjury, and subsequently charged on 9 October 2002 for conspiracy to provide funding to Al Qaida. Carla Baranaukas “Leader of Islamic Charity Charged with Funding Al Qaeda”, *New York Times*, 9 October 2002. Haddad was detained on 14 December 2001, the same day as Global Relief Fund’s assets were frozen. US authorities want to deport Haddad to Lebanon but he applied for political asylum at an immigration hearing on 23 October 2002. He was

The Treasury Department permitted the limited release of funds to Benevolence International Foundation in March 2002 to cover salaries and expenses. On 11 November 2002, it was formally listed as a SDGT. Global Relief Foundation was formally designated by OFAC on 18 October 2002 as a SDGT.⁵⁷⁵ The organization filed a law suit challenging the freezing of its accounts, but a federal judge upheld the decision in June 2002. The organization is appealing the decision but has been hampered by the Justice Department's insistence on the use of secret evidence to which defence lawyers have no access (purportedly on security grounds).⁵⁷⁶ On 4 January 2003, a three-judge US federal appeals court upheld the use of secret evidence as a basis for freezing Global Relief Foundation's assets.⁵⁷⁷

The Holy Land Foundation filed suit in March 2002 to force the release of funds. The Justice Department again relied on secret evidence, making an effective legal challenge difficult. A federal judge ruled on 8 August 2002 that the asset freeze was lawful, although she allowed a challenge to the December 2001 seizure of the organization's physical property by federal agents who entered without a search warrant to go to trial.⁵⁷⁸ The judge accepted government arguments that the organization provided direct funding to Hamas.

denied bail on 24 October 2002. He has not been charged with any criminal offence. "Bail Denied For Islamic Detainee", *Associated Press*, 24 October 2002.

⁵⁷⁵ Treasury Department Statement Regarding the Designation of the Global Relief Foundation, 18 October 2002, at <http://www.ustreas.gov/press/releases/po3553.htm>.

⁵⁷⁶ "U.S. Defends Secret Evidence in Charity Case", *Associated Press*, 30 October 2002.

⁵⁷⁷ Josh Meyer, "Court Upholds Terrorism Law Secrecy", *Los Angeles Times*, 1 January 2003.

⁵⁷⁸ John Mintz and Neely Tucker, "Judge backs U.S. on Assets Seizure", *Washington Post*, 10 August 2002.

Asylum, Immigration and Border Control Policies

“Any discussion of security safeguards should start from the assumption that refugees are themselves escaping persecution and violence, including terrorism, and are not themselves the perpetrators of such acts.”⁵⁷⁹

The attacks on New York and Washington, DC on September 11 fuelled anxiety about national security and prompted many governments to consider new strategies for preventing terrorists from accessing their territories. As a result, since September 11, asylum, immigration and border control policies have been prominently linked to security concerns. With reference to the fight against terrorism, a number of OSCE member states have introduced new asylum and immigration measures that further curtail the rights of asylum seekers, refugees and migrants.

During the last two decades, strict asylum and immigration policies have become increasingly common in the western countries of the OSCE region. In particular, the West European countries – individually and jointly through the EU process – have adopted measures that make the criteria for refugee status more restrictive, limit access to asylum procedures and step up border control so as to prevent undocumented migrants from reaching their territories. Through this process, western countries in the OSCE region have made it increasingly difficult for individuals to obtain protection from persecution. At the same time, these countries have imposed ever greater obstacles to residing and working legally in their territories.⁵⁸⁰ In a new trend after September 11, governments in Western Europe and North America have used security concerns to justify further steps aimed at tightening asylum and migration policies, which risk undermining their obligations under international human rights and refugee law.

The OSCE member states clearly have a legitimate interest in controlling entry to their territories and in preventing abuse of their asylum and immigration systems. However, in pursuing this interest states must respect international human rights standards. Under international human rights and refugee law, states have a fundamental duty to offer protection to those fleeing persecution and to treat all asylum seekers, refugees and migrants in a fair, non-discriminatory and humane way. After September 11, it is more important than ever that

⁵⁷⁹ UNHCR press release, “Ten refugee protection concerns in the aftermath of Sept. 11”, 11 December 2002.

⁵⁸⁰ See discussion in UNHCR, *The State of the World’s Refugees 2000 – Fifty years of humanitarian action*, at <http://www.unhcr.ch/pubs/sowr2000/sowr2000toc.htm>.

states show commitment to these obligations. By failing to do so they not only allow the fight against terrorism to further victimise asylum seekers, refugees and migrants but also to weaken the system of international refugee and human rights law that has been so painstakingly developed since World War II.⁵⁸¹

Relevant Legal Standards

All persons have the right to seek asylum. According to article 14 of the UDHR, “everyone has the right to seek and enjoy in other countries asylum from persecution”. The right of asylum is also generally considered to be customary law.⁵⁸²

The 1951 Convention relating to the Status of Refugees (1951 Convention or Refugee Convention), as modified by the 1967 Protocol relating to the Status of Refugees (1967 Protocol), establishes that a refugee is someone who:

- owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,
- is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;
- or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.⁵⁸³

In order to exercise the right to seek asylum, an asylum seeker must be able to obtain an individual examination of his or her claim for asylum. Such an examination should involve a thorough assessment of the merits of his or her claim and be conducted in a fair procedure that safeguards basic procedural rights, such as the right to legal counsel, the right to be heard and the right to appeal.⁵⁸⁴

Non-refoulement – the right of refugees not to be returned to any territory where their life or freedom would be threatened – is a fundamental principle of refugee law, as well as customary international law. Article 33 of the UN Refugee Convention states: “No

⁵⁸¹ Compare discussion in UNHCR press release, “Ten refugee protection concerns ...”.

⁵⁸² The OSCE member states formally recognised the right to seek asylum in The Charter on European Security, Istanbul document (1999), para. 22.

⁵⁸³ UN Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, article 1, as modified by the Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267.

⁵⁸⁴ ICCPR, article 14; ECHR, article 6; OSCE Vienna document, para. 13.9; and the OSCE Copenhagen document, para. 5.

Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.⁵⁸⁵ When government restrictions impede access to fair and impartial asylum procedures, this violates the right to seek asylum and may in certain circumstances also violate the prohibition against refoulement.

The right to asylum is valid irrespective of how an individual enters the country, i.e. whether in a regular or irregular way. Article 31 of the Refugee Convention specifically prohibits states from imposing penalties “on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1 [of the Convention], enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.⁵⁸⁶ The UNHCR has also pointed out that “the summary rejection of asylum seekers at borders or points of entry may amount to refoulement”.⁵⁸⁷

No asylum seeker may be discriminated against and deprived of the right to a satisfactory asylum process on the basis of race, religion or country of origin. This follows from the general ban on discrimination that is established by human rights law⁵⁸⁸, but is also specifically set out in the Refugee Convention.⁵⁸⁹ The UNHCR has expressed concern that, in the aftermath of September 11, states may implement policies or carry out their asylum review procedures in a manner that discriminates against individuals because of their religion, ethnicity, national origin or political affiliation by making unwarranted links between asylum seekers and terrorism. “Equating asylum with the provision of a safe haven for terrorists is not only legally wrong and unsupported by facts, but it vilifies refugees in the public mind and exposes persons of particular races or religions to discrimination and hate-based harassment”.⁵⁹⁰

⁵⁸⁵ UNHCR, *Refugee Protection Law – A Guide to International Refugee Law*; chapter 5 (Providing Alternatives to Detention and Protecting Refugees Against Discrimination), December 2001.

⁵⁸⁶ 1951 Refugee Convention, article 31.

⁵⁸⁷ UNHCR, *Addressing Security Concerns without Undermining Refugee Protection – UNHCR’s perspective*, October 2001.

⁵⁸⁸ ICCPR, article 26. Compare also OSCE Vienna document, para. 13.7 ; OSCE Copenhagen document, para. 5.9 ; OSCE Istanbul document, para. 2.

⁵⁸⁹ Article 3: “The Contracting States shall apply the provisions of the Convention without discrimination as to race, religion or country of origin”. Although the Refugee Convention does not explicitly cover asylum seekers, all provisions that are not specifically linked to legal residence may be interpreted to apply to asylum seekers. See UNHCR, *Recommendations as regards harmonisation of reception standards for asylum seekers in the European Union*, July 2000.

⁵⁹⁰ UNHCR press release, “Ten refugee protection concerns ...”.

The 1951 Convention sets out certain circumstances in which individuals may be excluded from refugee protection when there are serious reasons to believe that they have perpetrated heinous acts or serious common crimes, or to safeguard the receiving country from persons who present a security threat.⁵⁹¹ However, exclusion is exceptional in nature and should be strictly applied. UNHCR has noted that “in view of the seriousness of the issues and the consequences of an incorrect decision, the application of any exclusion clause should continue to be individually assessed, based on available evidence, and conform to basic standards of fairness and justice” and “should be located within the refugee status determination process, albeit taking place in specially tailored procedures for exclusion”.⁵⁹² Although exclusion proceedings are not equivalent to a full criminal trial, in the view of UNHCR, such proceedings nevertheless require a high evidentiary threshold. Furthermore, as regards exclusion because of involvement in terrorism, UNHCR has concluded that “exclusion requires individual liability, that is the personal and knowing involvement of the individual in acts of terrorism”.⁵⁹³

Article 32 of the 1951 Convention also provides that a refugee may be expelled from a country of asylum for national security purposes.⁵⁹⁴ However, an expulsion decision must be reached in accordance with internationally recognized procedural protections. UNHCR has emphasized that the danger the individual poses to the security of the country of refuge “should outweigh the danger of return to persecution”, and therefore “expulsion decisions must be reached in accordance with due process of law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations”.⁵⁹⁵ What is more, in general, refugees may not be sent directly or indirectly to a place where their life or freedom is in jeopardy in violation of the fundamental principle of non-refoulement.

The 1951 Convention provides that a refugee can be expelled to a country in which his or her life or freedom is in jeopardy in only one circumstance: when there are reasonable grounds

⁵⁹¹ Article 1(F)(a-c) states that “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

⁵⁹² UNHCR, *Addressing Security Concerns without Undermining Refugee Protection: UNHCR’s Perspective*, Geneva, November 2001, para. 16. See also UNHCR Executive Committee, Note on the Exclusion Clauses (EC/47/SC/CRP.29), 11 December 2002.

⁵⁹³ UNHCR, *Addressing Security Concerns without Undermining Refugee Protection*, para. 17.

⁵⁹⁴ Article 32(1) of the 1951 Convention states: “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order”.

⁵⁹⁵ UNHCR, *Addressing Security Concerns without Undermining Refugee Protection*, para. 21.

for regarding the refugee “as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.⁵⁹⁶ For this provision to be applicable, a direct link must be shown between the presence of a refugee in the territory of a particular country and a national security threat to that country.⁵⁹⁷ Even in such an exceptional circumstance, a person can never be sent to a country where he will be subjected to particularly serious types of abuse. The prohibition against refoulement is absolute, for example, when a person risks torture or ill-treatment.⁵⁹⁸ The Human Rights Committee has noted that, with regard to torture and ill-treatment, the principle of non-refoulement is inherent in article 7 of the ICCPR.⁵⁹⁹ In its General Comment 20 (1992), the committee said: “In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”. Similarly, the European Court of Human Rights has interpreted article 3 of the ECHR to prohibit signatories from returning any person to a place where he/she would be “subjected to torture or to inhuman or degrading treatment or punishment”.⁶⁰⁰

As a general principle, asylum seekers should not be detained while their asylum claims are being considered.⁶⁰¹ As noted above, article 31 of the 1951 Convention prohibits states from imposing penalties on refugees solely because they illegally enter or are illegally present in a country. States may detain asylum seekers only under exceptional circumstances, which must be prescribed by law. These circumstances include situations in which there is evidence that the individual is likely to pose a threat to national security.⁶⁰² The Refugee Convention also prohibits states from arbitrarily restricting the freedom of movement of asylum seekers.⁶⁰³

⁵⁹⁶ 1951 Refugee Convention, article 33(2).

⁵⁹⁷ See Human Rights Watch, “Human Rights Implications of European Union Internal Security Proposals and Measures in the Aftermath of the 11 September Attacks in the United States”, November 2001, at <http://www.hrw.org/press/2001/11/eusecurity.htm>.

⁵⁹⁸ The UN Convention against Torture, article 3; as well as the ICCPR, article 7. See also the UN Declaration on the Protection of All Persons from Enforced Disappearance, article 8; and the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 5.

⁵⁹⁹ Article 7 states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...”

⁶⁰⁰ European Court of Human Rights, *Soering v. United Kingdom*, Judgment of 7 July 1989, series A no.161, para. 88.

⁶⁰¹ UNHCR, *Refugee Protection Law – A Guide to International Refugee Law*; Chapter 5 (Providing Alternatives to Detention and Protecting Refugees Against Discrimination), December 2001.

⁶⁰² If an asylum seeker is detained, the detention must be imposed in a non-discriminatory manner and for the minimum period necessary. *Ibid.*

⁶⁰³ Article 26: “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances”. In addition, as regards asylum seekers that have illegally entered the territory of a state, article 31 (2) states: “The Contracting States shall not

The UNHCR has emphasized that asylum reception standards are closely related to the quality of asylum procedures and must be based on the principle that asylum seekers should enjoy an adequate standard of living throughout the asylum process. “It is essential to enable asylum seekers to sustain themselves during the asylum process, not only out of respect for their rights, but also to ensure a fair and effective asylum procedure”.⁶⁰⁴ According to the UNHCR, the adequacy of an asylum seeker’s standard of living should be assessed in light of the conditions prevalent in the country where asylum is being sought.⁶⁰⁵

The Refugee Convention establishes that refugees should be assured “the widest possible exercise of [...] fundamental rights and freedoms”⁶⁰⁶ and requires states to provide refugees lawfully residing in their territory the same treatment as nationals with regard to elementary education⁶⁰⁷, labour laws and regulations related to remuneration⁶⁰⁸ and social security⁶⁰⁹.

Non-citizens who are legally present in a country but are not refugees are also entitled to wide human rights protection. Commenting on the rights of non-citizens under the ICCPR, the UN Human Rights Committee has stressed that “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and [legally resident] aliens”.⁶¹⁰ The right to vote, to be elected as a popular representative and to have access to public service, all of which are laid down in article 25 of the covenant, apply only to citizens. Article 13 again explicitly prohibits arbitrary expulsion of aliens. All other provisions set out in the covenant apply equally to citizens and aliens who have been allowed to enter the territory of a state. The Human Rights Committee pointed out in particular that “The[se] rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant”.⁶¹¹ In the UN Declaration of the Human Rights of Individuals who are not Nationals of the Country in which They Live, the UN General Assembly recognizes that “the protection of human rights and fundamental freedoms provided for in

apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country”.

⁶⁰⁴ In line with article 25 of the UDHR: “Everyone has the right to a standard of living adequate for the health and well-being of him/herself and his/her family ...”.

⁶⁰⁵ UNHCR, *Recommendations as regards harmonisation of reception standards for asylum seekers in the European Union*, July 2000.

⁶⁰⁶ See the preamble of the Refugee Convention.

⁶⁰⁷ Refugee Convention, article 22(1).

⁶⁰⁸ *Ibid.*, article 24(a).

⁶⁰⁹ *Ibid.*, article 24(b).

⁶¹⁰ UN Human Rights Committee, *General Comment No. 15 – the rights of aliens under the ICCPR*, adopted at the 26th session in 1986.

⁶¹¹ *Ibid.*

international instruments should also be ensured for individuals who are not nationals of the country in which they live”.⁶¹² The declaration specifically mentions, among other rights, the right of a legally resident alien to protection against arbitrary or unlawful interference with privacy, family, home or correspondence and the right of the spouse and dependent children of a legally resident alien to join and stay with him/her.

Individuals who have entered a country illegally or are illegally present in the country and who are not asylum seekers are nevertheless entitled to fundamental human rights protection. Article 2 of the ICCPR states that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction [emphasis added] the rights recognized in the present Covenant...”.⁶¹³ Thus, even those whose legal status is irregular have inter alia a right to equality before the law⁶¹⁴, the right not to be discriminated against⁶¹⁵, the right not to be arbitrarily detained⁶¹⁶, the right to enjoy minimum procedural guarantees⁶¹⁷ and the right not to be subjected to torture or inhuman, cruel or degrading treatment and punishment⁶¹⁸. States also have an obligation to treat every one in their territory, including undocumented migrants, with respect for their integrity and personal dignity.⁶¹⁹ The Special Rapporteur on Migrants, appointed by the UN Commission on Human Rights, has reminded states that “international human rights instruments constitute a legal framework for the protection of migrants and [...], in this connection, the status of illegal migrants should not be used as a justification for the violation of their rights”. She has also stressed that “Effective protection for the human rights of migrants should be ensured at every stage of migration management procedures”.⁶²⁰

⁶¹² See preamble of the Declaration of the Human Rights of Individuals who are not Nationals of the Country in which They Live (G.A. Res. 40/144), adopted in 1985, at <http://www1.umn.edu/humanrts/instree/w4dhri.htm>.

⁶¹³ See also ECHR, article 1, which states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

⁶¹⁴ ICCPR, article 26, OSCE Copenhagen document, para. 5.9

⁶¹⁵ ICCPR, article 26, ECHR, article 14 with regard to the rights set out in the convention, OSCE inter alia principle VII of the 1975 Helsinki Declaration on Principles Guiding Relations Between Participating States.

⁶¹⁶ ICCPR, article 9, ECHR, article 5, OSCE Vienna document, para. 23.1 and OSCE Moscow document, para. 23.1.

⁶¹⁷ ICCPR, article 14, ECHR, article 5 and 6, OSCE Vienna document, para. 13.9 and OSCE Copenhagen document, para. 5.

⁶¹⁸ ICCPR, article 7, ECHR, article 3, OSCE Copenhagen document, para. 16.3.

⁶¹⁹ UDHR, article 1: “All human beings are born free and equal in dignity and rights.” OSCE Budapest document, para. 40: “[The participating States] will [...] refrain from degrading treatment and other outrages against personal dignity”.

⁶²⁰ *Report on Human Rights of Migrants*, prepared by Gabriela Rodriguez Pizarro, Special Rapporteur of the UN Commission on Human Rights (A/57/292), 9 August 2002.

At the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban the participating states adopted an action programme requesting all states to “promote and protect fully the human rights and fundamental freedoms of all migrants, in conformity with the UDHR and their obligations under international human rights instruments, regardless of the immigrants’ immigration status”.⁶²¹ The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which was adopted by the General Assembly in 1990 and is due to enter into force in 2003, explicitly recognizes a number of fundamental rights of undocumented migrants. Among these rights are the right of undocumented migrants to be treated with humanity, dignity and respect for their cultural identity if they are deprived of their liberty, and their right to be expelled only in accordance with a lawful decision made by a competent authority that has examined their cases individually.⁶²²

Human Rights Concerns

European Union

For a number of years now, the EU member states have been in the process of establishing common policies in the field of asylum, immigration and border control. Unfortunately the process has been characterized to a large extent by efforts to impose increasingly more severe restrictions on foreigners - asylum seekers, refugees, migrants and others. Since September 11, this trend has intensified with EU leaders now directly linking common policies related to asylum seekers, migrants and refugees to security concerns.

With the entry into force of the Amsterdam Treaty in May 1999, asylum, immigration and border control policies became a full community responsibility of the EU.⁶²³ Although the treaty requires the member states to adopt common policies on a number of asylum-related

⁶²¹ Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, August-September 2001: para. 26. The action programme can be found at <http://193.194.138.190/html/racism/Durban.htm>.

⁶²² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly Resolution 45/158, 18 December 1990: articles 17 and 22. In December 2002 the convention received its 20th ratification, which will allow it to enter into force in mid-2003. The convention can be found at http://193.194.138.190/html/menu3/b/m_mwctoc.htm.

⁶²³ Prior to the Amsterdam Treaty joint action in the fields of asylum, immigration and border control policies were generally agreed on through intergovernmental agreements. The Amsterdam Treaty upgraded these fields to “first pillar” issues, where the commission has the sole right to propose legislation and decisions can be made by qualified majority vote in the council. However, during a transitional period of five years from the entry into force of the Amsterdam Treaty both the commission and council can make proposals and decisions are still made unanimously in the council.

topics by May 2004, progress in this area has been slow.⁶²⁴ As of the end of 2002, the EU Council had only reached agreement on two pieces of common asylum legislation: directives on minimum standards regarding temporary forms of protection⁶²⁵ and on the reception of asylum seekers.⁶²⁶ In a worrying trend, the standards related to the reception of asylum seekers were considerably watered down during the last stages of the negotiations. Thus, the version of the directive that was finally approved leaves wide discretion to the member states regarding the implementation of several key provisions, including provisions regulating the right of asylum seekers to have access to benefits such as health care, housing, and education for children.⁶²⁷ Concerned about this outcome, the European Council on Refugees and Exiles (ECRE) – a coalition of 73 refugee organizations working in 30 European countries – has warned the EU member states not to allow the harmonization of asylum policies to occur on the basis of the lowest common denominator but to “develop a harmonised approach to the benefits for asylum seekers based on international standards and best national practice”. “The Council of the European Union should finally agree on the protection instruments that are at its table, ensuring that their content is not only formally, but most importantly, effectively respectful of international obligations towards refugees and other persons in need of international protection. If it doesn’t, Member States will lose credibility in their repeatedly expressed commitment to support, promote and protect human rights within its borders and in the world”.⁶²⁸

Security concerns have featured prominently in the negotiations on common asylum policies that have taken place in the wake of September 11. Already prior to the terror attacks on the United States, the European Commission had proposed a number of measures raising serious concern about refoulement of bona fide refugees. Among these proposals were, for example, measures to allow asylum review procedures at the border and to deal with “manifestly

⁶²⁴ According to article 63 of the EU Treaty, as amended by the Amsterdam Treaty, the EU Council shall within a period of five years from the entry into force of the treaty adopt legislation on criteria and mechanisms for determining which member state is responsible for considering an asylum application; minimum standards on the reception of asylum seekers; minimum standards with respect to qualification for refugee status, subsidiary forms of protection and temporary protection, and minimum standards for asylum procedures.

⁶²⁵ Legislation on minimum standards regarding “temporary protection” was adopted in July 2001.

⁶²⁶ Legislation on minimum standards regarding the reception of asylum seekers was adopted in December 2002.

⁶²⁷ European Council on Refugees and Exiles, “Press Statement-- Justice and Home Affairs Council 19 December – EU Asylum Policies”, December 2002, at <http://www.ecre.org/press/recepdir.shtml>.

⁶²⁸ ECRE, “Taking stock of the harmonisation process at the end of the Danish Presidency: The European Union must make decisions to preserve the integrity of its asylum policies”, December 2002, at <http://www.ecre.org/policy/statements.shtml>.

unfounded” asylum applications in accelerated procedures.⁶²⁹ However, in the new security climate that has evolved since September 11, the EU Council has considered new problematic proposals that had not previously been discussed and that, if adopted, would create increasing obstacles to those in need of protection. As ECRE has concluded: “The events of 11 September have cast a shadow over the EU’s discussions on asylum”.⁶³⁰ For example, during post-September 11 negotiations on common procedures for examining asylum applications, the Austrian government has advocated that an EU-wide list of “safe third countries” be drawn up,⁶³¹ while the German government has called for measures to check all asylum seekers for potential involvement in terrorism.⁶³² The Danish government has proposed that a draft directive on minimum standards for determining who qualifies for refugee status be amended so as to extend the grounds for excluding individuals from refugee status beyond the grounds laid down in article 1(F) of the Refugee Convention.⁶³³

⁶²⁹ It should be noted that these proposals served to consolidate practices already applied in many EU member states. See European Commission, Proposal for a council directive on minimum standards on procedures in member states for granting and withdrawing refugee status (COM 578/2000), 20 September 2000, at http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0578.pdf.

⁶³⁰ ECRE, “Taking stock ...”.

⁶³¹ The Austrian government presented this proposal in October 2002. See EU Council, Austrian Delegation to Strategic Committee on Immigration, Frontiers and Asylum, Safe third countries, 28 October 2002 (13510/02), at <http://register.consilium.eu.int/pdf/en/02/st13/13510en2.pdf>. Already in late November 2002, the EU states adopted a statement according to which the ten countries that are due to join the EU in 2004 will be considered “safe third countries” as of the date they sign their accession treaties. In effect, asylum claims from asylum seekers who have passed through any of these countries on their way to an EU state will automatically be dismissed as “inadmissible”. See EU Council (Justice and Home Affairs), Safe third countries – Council statement, 3 December 2002 (15067/02), at <http://register.consilium.eu.int/pdf/en/02/st15/15067en2.pdf>. The presumption that the ten accession countries will be “safe” to automatically return asylum seekers as of the date they sign their accession treaties is highly questionable. Serious shortcomings persist in the asylum systems in these countries, including in terms of safeguards against refoulement. The IHF is also concerned that asylum procedures involving the application of lists of countries that are generally considered “safe” may violate the right of asylum seekers to a full and fair examination of their asylum claims.

⁶³² Germany proposed this measure at the Home and Justice Affairs Council meeting on 14-15 October 2002. See “Deutschland ruft EU zum härteren Kampf gegen Terrorismus”, *Der Standard*, 16 October 2002. It should also be noted that a December 2001 EU Council common position on combating terrorism contains a provision which suggests that the member states have already agreed to conduct a security screening of all asylum applications. Article 16 of this common position reads: “Appropriate measures shall be taken in accordance with relevant provisions of national and international law, including international standards of human rights, before granting refugee status *for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts* [...]” [emphasis added], at <http://ue.eu.int/Newsroom/makeFrame.asp?MAX=1&BID=75&DID=69068&LANG=1&File=/pressData/en/misc/DOC.69068.pdf&Picture=0>.

⁶³³ According to documents leaked from secret negotiations held in December 2002, the Danish government had proposed that the grounds for excluding individuals from refugee status be extended to two groups of individuals not covered by the Geneva Convention article 1(F): 1) persons who have committed cruel crimes with an allegedly political objective and 2) persons who have instigated or participated in activities listed in the Geneva Convention article 1F. See Statewatch, “All refugee status to be temporary and terminated as soon as possible”, December 2002, at <http://www.statewatch.org/news/2002/dec/05refugee.htm>.

In contrast to its asylum policies, EU policies to combat illegal immigration have been adopted in rapid succession in the aftermath of September 11. Illegal immigration has been upgraded to a security concern of prime importance, and new policies aimed at further controlling entry into the EU territory have been elaborated with great speed. In particular, a wide-ranging package of measures was agreed on at the June 2002 European Council Summit in Seville.⁶³⁴ These measures included the rapid introduction of a common database for personal data, including biometric information, on all applicants for visas to EU states.⁶³⁵ This raises serious concern that the millions of people who annually apply to the EU for a visa will soon be subjected to undue infringement of their right to privacy.⁶³⁶ The EU member states also agreed to establish a new body to coordinate the development of common border management policies and to launch joint operations at external borders by the end of 2002.⁶³⁷ When communicating its views on how to implement such policies in May 2002, the European Commission concluded that “democratic [...] control of all these activities must be ensured”.⁶³⁸ However, the member states failed to lay down any clear procedures or guidelines that would ensure the new body’s accountability and transparency. Given the broad authority that has been envisaged for this new body⁶³⁹, NGOs have expressed concern that it will not be subject to judicial oversight.⁶⁴⁰

⁶³⁴ Presidency Conclusions from the Seville European Council 21 and 22 June 2002, at <http://a140.g.akamai.net/7/140/6631/967ef662ad1482/multimedia.ue2002.es/infografiasActualidad/20020622/2265Ing.pdf>.

⁶³⁵ Paragraph 30 of the Seville Conclusions. See also European Commission communication on a common policy on illegal immigration (672/2001), November 2001, at http://europa.eu.int/eur-lex/en/com/pdf/2001/com2001_0672en01.pdf; and action plan on illegal immigration agreed by the EU Council in February 2002 (6621/1/02), at <http://register.consilium.eu.int/pdf/en/02/st06/06621-r1en2.pdf>.

⁶³⁶ It should be noted that the EU member states had already agreed to start fingerprinting all asylum seekers and undocumented migrants older than 13 years of age and submit the data to a common database. This system (known as “EURODAC”), which entered into force as of mid-January 2003, is aimed at preventing asylum seekers from applying for asylum in more than one country. See Council Regulations EC 2727 of 11 December 2002 and EC 407/2002 of 28 February 2002.

⁶³⁷ Paragraph 32 of the Seville Conclusions. See also European Commission communication on management of external borders (233/2002), May 2002, at http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0233en01.pdf; and action plan on management of external borders agreed by the EU Council in June 2002 (10019/02), at <http://register.consilium.eu.int/pdf/en/02/st10/10019en2.pdf>.

⁶³⁸ Article 20 of European Commission communication on management of external borders (233/2002).

⁶³⁹ When proposing the establishment of the new body, the European Commission recommended that it initially function within the framework of article 66 of EC Treaty, which grants the EU Council, and bodies subordinated to it, powers only to coordinate joint action and not to decide on new policies. However, the commission also believed that the powers foreseen under this article “rapidly would prove insufficient” and concluded that “It is necessary therefore that, for the exercise of at least some of its functions, [the new coordinating body] should progressively extend its activities beyond Article 66”. Article 29 of European Commission communication on management of external borders (233/2002).

⁶⁴⁰ See Statewatch analysis of the European Commission communication on management of external borders, at <http://www.statewatch.org/news/2002/may/06Aborder.htm>.

The EU leaders also decided in Seville to speed up the process of concluding agreements with third countries for the readmission of persons who reside illegally in the EU.⁶⁴¹ The EU intends to conclude readmission agreements with inter alia Russia, Ukraine, Pakistan, China, Turkey and Algeria in the near future.⁶⁴² What is more, in the future all cooperation and association agreements with the EU will include a clause on compulsory readmission of illegal immigrants.⁶⁴³ Any country entering into such an agreement with the EU will be required to take back its own citizens who reside illegally in the EU, as well as illegal migrants from other countries who can be shown to have passed through the country on their way to the EU.⁶⁴⁴ ECRE has expressed serious concern about such readmission schemes and in particular has criticized the intention of the EU to implement common polices on compulsory returns before any common asylum system has been put in place. ECRE has stressed: “At present, as fair and effective asylum procedures and the application of a full and inclusive definition of a refugee cannot be guaranteed across the EU, there is a risk that returns without consent may lead to refoulement. Until effective asylum procedures with fair access to protection can be guaranteed across the EU, the risk of refoulement remains”.⁶⁴⁵ ECRE has also emphasized that all forms of mandatory return “should take place in a humane manner with full respect for fundamental human rights including, the principle of family unity, and without excessive use of force”.⁶⁴⁶

Before the Seville Summit, some EU member states also urged that development aid be cut to third countries that do not cooperate on illegal immigration. Although ultimately this policy was not adopted, it was agreed that a systematic evaluation of relations with such countries be carried out and that common measures be adopted to put pressure on any third country that has shown “an unjustified lack” of cooperation in the joint management of migration flows.⁶⁴⁷

⁶⁴¹ Paragraph 30 of the Seville Conclusions. See also European Commission Green Paper on community return policy of illegal immigrants (175/2002), April 2002, at http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0175en01.pdf.

⁶⁴² See Road map for the follow-up to the conclusions of the European Council in Seville – Asylum, immigration and border control, 2 July 2002, at <http://register.consilium.eu.int/pdf/en/02/st10/10525en2.pdf>.

⁶⁴³ Seville Conclusions, para. 33.

⁶⁴⁴ *Ibid.*, para. 34.

⁶⁴⁵ European Council on Refugees and Exiles, *Comments on the Commission Green Paper on a Community Return Policy on Illegal Residents*, August 2002, at <http://www.ecre.org/statements/returns.shtml>.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ Seville Conclusions, para. 36.

European Union Member States

Because common EU policies on immigration and asylum have not yet been fully developed, member states are still able to pursue independent, national policies in this area.⁶⁴⁸ Since September 11, a number of EU member states have adopted new restrictive measures, arguing that these are necessary to ensure the security and credibility of their immigration and asylum systems. The post-September 11 developments discussed below are among those of greatest concern in the EU region.

Greece

In an attempt to step up its efforts against illegal migrants, the left-wing Greek government signed a protocol with Turkey in November 2001 on the reciprocal return of illegal immigrants. According to the protocol, Greece and Turkey will each return undocumented third-country nationals who arrive on their territory via the other country. The Greek government stated that the protocol would not be applied to persons seeking asylum. However, soon after the protocol entered into force, there were reports that Greece had forcibly returned some undocumented migrants arriving by sea from Turkey without giving them an opportunity to file an asylum application or, in some cases, even refusing to accept asylum applications that individuals attempted to file. These returns were in flagrant violation of the right to seek asylum and possibly the principle of non-refoulement.⁶⁴⁹ According to the Greek Helsinki Committee, hundreds of persons fleeing persecution may have been forcibly turned back to Turkey, and from Turkey deported to their countries of origin, since November 2001.⁶⁵⁰

In early December 2001, Amnesty International and the World Organization Against Torture expressed concern that the Greek authorities had forcibly returned a group of 34 Afghans and Iraqi Kurds to Turkey without having allowed them to file asylum applications. The group entered Greece illegally by boat on 17 November 2001 and were thereafter detained and held by police until they were expelled on 3 December 2001. Among those returned were people

⁶⁴⁸ It should be noted that protocols to the Amsterdam Treaty allow Denmark, Ireland and the United Kingdom to opt out from participation in common asylum, immigration and border control policies.

⁶⁴⁹ Amnesty International, *Annual Report 2002*, at <http://web.amnesty.org/web/ar2002.nsf/home/home?OpenDocument>.

⁶⁵⁰ It should be noted that Turkey, although a party to the Refugee Convention and its protocol, only recognizes refugees from Europe. The World Organization Against Torture also noted in December 2001 that: "In practice, refugees have often been forcibly returned to Turkey upon arriving at the Greek-Turkish border. The Greek Police frequently does not permit arriving refugees to apply for asylum, in violation of international standards, but instead serves them with administrative expulsion orders, according to reports". See the World Organization Against Torture, "The illegal deportation of 34 asylum seekers from Greece to Turkey", 7 December 2001, at <http://www.omct.org/displaydocument.asp?DocType=Appeal&Language=EN&Index=1362>.

who are known to have fled torture and persecution, including Abdulkader Aziz Mamakala, an Iraqi Kurd believed to be between 65 and 70 years of age, who according to the Greek Helsinki Committee had been subjected to grave torture in Iraq.⁶⁵¹ When he arrived in Greece, Mamakala still showed visible signs of torture on his hands, where the skin had been removed.⁶⁵²

After reviewing the Greek-Turkish protocol on the reciprocal return of third country nationals in February 2002, the Greek National Committee for Human Rights recommended that it be rewritten to include a reference to the Refugee Convention and called on the Greek government to ensure that no asylum seekers are forcibly returned before they have had their asylum claims assessed.⁶⁵³

In addition to the concerns noted above, there are credible reports that groups of undocumented migrants who have arrived in Greece by boat since September 11 have not only been denied the right to apply for asylum but also the right to adequate deportation procedures. A group of 45 human rights groups issued a statement on 15 June 2002 expressing concern about “the frequent and grave violations of the rights of thousands of foreigners who arrive or live in Greece”. The groups noted among other concerns that “the Greek authorities frequently fail to inform foreigners of their rights, refuse them asylum application forms or even provide misleading information. Undocumented migrants or asylum seekers have been tried without benefit of legal counsel and sentenced to imprisonment or deportation after trials lasting only a few minutes”.⁶⁵⁴

*Germany*⁶⁵⁵

In late 2001 the German Social Democratic-Green government pushed through a new Anti-Terrorism Law, which introduced a number of problematic changes to the Aliens' Law.⁶⁵⁶

⁶⁵¹ Amnesty International, “Fear of Forcible return”, 6 December 2001; and the World Organization Against Torture, “The illegal deportation of 34 asylum seekers from Greece to Turkey”, 7 December 2001.

⁶⁵² Reportedly Mamakala was hung up by his hands during interrogation in Iraq, during which time he was subjected to a special, extremely painful procedure by which the skin was removed from his hands. Greek Helsinki Committee, “Deportation of Kurd who had been skinned alive!”, 9 December 2001.

⁶⁵³ Kathy Tzilivakis, “Refugee Rule Revised”, *Athens News*, 8 February 2002.

⁶⁵⁴ Amnesty International, *Annual Report 2002*; and Human Rights Watch, “The Human Rights Dimension of EU Immigration Policy: Lessons from Member States”, April 2002, at <http://hrw.org/backgrounder/eca/eu-immigration.pdf>. See also appeal made by 45 NGOs in connection with the General Assembly of the Euro-Mediterranean Human Rights Network in June 2002, at <http://www.hrw.org/campaigns/migrants/docs/greece-detainees.pdf>.

⁶⁵⁵ See also the chapter on extraditions.

⁶⁵⁶ Gesetz zur Bekämpfung des Internationalen Terrorismus, at http://www.dbein.bndlg.de/schily/docs/terror_BGBL_nur lese.pdf.

According to the new provisions, non-citizens may be denied the right to enter and reside in the country *inter alia* if they are considered to pose a threat to the free and democratic constitutional order; advocate, threat to use or participate in violence in the pursuit of political aims; or belong to or support an association facilitating international terrorism (article 11 of the Anti-Terrorism Law). The terms of the amended law are vaguely formulated, presenting a risk of arbitrary enforcement.⁶⁵⁷ Non-citizens may also be expelled from the country if it is revealed that they would not have qualified for a visa or a residence permit for any of the reasons set out in article 11 of the law if such a law had been in force when they applied for permission to enter or reside in the country. Moreover, the Anti-Terrorism Law extended the powers of the German authorities to retain and access personal data on non-citizens residing in or visiting the country. The law requires, for example, that anyone who files an asylum claim or applies for a residence permit has their personal data registered in a national database (article 15) and that biometric features be included in visas and residence permits (article 13).⁶⁵⁸ These provisions raise concern that the state may unduly infringe the right to privacy.

*United Kingdom*⁶⁵⁹

In April 2002, the Social Democratic government of Tony Blair presented a new Nationality, Immigration and Asylum Bill that foresaw radical changes to the country's immigration and asylum systems.⁶⁶⁰ After being rushed through the parliament, the bill was finally approved in early November 2002.⁶⁶¹ British NGOs have voiced concern that a number of provisions of the new law seriously curtail the rights of asylum seekers.⁶⁶² The new law provides for the immediate deportation of asylum seekers whose claims are deemed "clearly unfounded" and who can be removed to countries considered "safe". These asylum seekers will, in theory, still have the right to appeal the decision in their case, but will have to do so from outside the country, a practice that undermines the right to an effective legal remedy and increases the risk that they may ultimately be refouled.

Moreover, under the new law, asylum seekers who do not file asylum applications "as soon as reasonably practicable" after entering the United Kingdom, will not be entitled to government

⁶⁵⁷ Compare with the discussion on Germany in the chapter on terrorism definitions.

⁶⁵⁸ Compare with the discussion on Germany in the chapter on privacy.

⁶⁵⁹ See also the chapter on extraditions.

⁶⁶⁰ UK Home Office, Immigration and Nationality Directorate, "Trust and confidence in our Nationality, Immigration and Asylum System – Bill published", 12 April 2002, at <http://www.ind.homeoffice.gov.uk/news.asp?month=4&year=2002&SectionId=1>.

⁶⁶¹ Nationality, Immigration and Asylum Act 2002, at <http://www.uk-legislation.hmso.gov.uk/acts/acts2002/20020041.htm>.

⁶⁶² British Refugee Council, "The Nationality, Immigration and Asylum Act 2002: changes to the asylum system in the UK", December 2002, at http://www.refugeecouncil.org.uk/infocentre/nia_act2002/intro_ed1.htm.

support during the period their asylum claims are considered. The British Refugee Council has expressed concern that the law does not define or give guidance as to what “as soon as reasonably practicable” means and is therefore concerned that this provision may be arbitrarily implemented to deny asylum seekers government assistance. These asylum seekers will then risk becoming destitute and homeless, which inevitably would jeopardize the effectiveness and fairness of their asylum procedure.⁶⁶³

The new law also provides for the establishment of special accommodation centres for asylum seekers, which will be located outside local communities. The children of asylum seekers who live in such centres will not be allowed to attend mainstream schools but will be given separate instruction in the centres. Although all pupils who are placed in separate schooling will be able to have their cases reconsidered after six months⁶⁶⁴, the measure is discriminatory on its face in violation of international law.⁶⁶⁵

Detention of asylum seekers remains a basic feature of the asylum process in the United Kingdom: asylum seekers may be detained at any stage of the asylum process and are typically detained due to fears that they will abscond or fail to show up for compulsory interviews.⁶⁶⁶ The new law abolishes the right of asylum seekers who are detained to have their case reviewed by a court. The British Refugee Council believes that this amendment is in violation of article 5 of the ECHR – which prohibits arbitrary deprivation of liberty – and fears that it will result in numerous cases where asylum seekers are detained for arbitrary reasons and are held for indefinite periods of time without any external scrutiny.⁶⁶⁷

Denmark

In Denmark the liberal-conservative minority government that took office after the November 2001 parliamentary elections pushed through a package of new asylum and immigration measures in May 2002.⁶⁶⁸ The package had been negotiated with the extreme right Danish

⁶⁶³ British Refugee Council, *The Nationality, Immigration and Asylum Act 2002: changes to the asylum system in the UK*, December 2002.

⁶⁶⁴ This was a concession made by the government in June 2002. UK Home Office, Immigration and Nationality Directorate, “Home Secretary announces further safeguards on education for asylum seekers”, 11 June 2002, at <http://www.ind.homeoffice.gov.uk/news.asp?NewsId=155&SectionId=1>.

⁶⁶⁵ See in particular article 2 of the UN Convention on the Rights of the Child (G.A. res. 44/25), 1989.

⁶⁶⁶ British Refugee Council, *Claiming asylum: common questions and the asylum process*, at http://www.refugeecouncil.org.uk/downloads/infoservice/claiming_as.pdf.

⁶⁶⁷ British Refugee Council, *The Nationality, Immigration and Asylum Act 2002*....

⁶⁶⁸ Law on amending the Aliens’ Act, the Marriage Act and other Acts (nr. 365/2002), signed by the Danish Queen on 6 June 2002.

People's Party, on whose parliamentary support the government is largely dependent. One of its major aims was to reduce the number of asylum seekers and immigrants in the country.⁶⁶⁹

Under the new law, asylum applications can be rejected as manifestly unfounded in an accelerated procedure not only if they are clearly fraudulent or fully unrelated to the criteria for refugee status but also if the merits of the information the asylum seeker provides are not considered to be credible. For example, an asylum application can be turned down as manifestly unfounded if the asylum seeker uses "changing, contradictory or improbable" explanations when citing his or her reasons for fearing persecution in the country he/she has fled. What is more, the law provides that the procedure for reviewing a manifestly unfounded application can be carried out in as little as one day. Commenting on the law, the UNHCR has stressed that asylum applications involving credibility issues require complex assessments that cannot be handled adequately in an accelerated procedure.⁶⁷⁰ Moreover, the UN Committee against Torture has noted that the fact that asylum seekers provide inconsistent and changing information when giving account of their experiences does not necessarily mean that they are lying but may just as well be due to post-traumatic stress. For example, in a communication on Sweden, the committee "reiterat[ed] its jurisprudence that complete accuracy is seldom to be expected from victims of torture".⁶⁷¹ Thus, the Danish amendments on manifestly unfounded asylum applications give rise to serious concern that asylum seekers will be deprived of the right to a full and fair asylum procedure and increase the risk that some asylum seekers may be removed from the country in violation of the principle of non-refoulement.

The law also increased the period that refugees and other non-citizens must remain in the country before they can receive a permanent residence permit from three to seven years. During these seven years, they are only entitled to reduced levels of welfare benefits and may have their residence permits withdrawn inter alia if the situation in the country they have fled is considered to have changed for the better. In order to be granted permission to bring their spouses to the country, refugees and immigrants must as a rule be able to guarantee that their family members will not become a burden to the country's social security system, including by paying a security deposit of 50,000 kroons (approximately €7,000) to cover possible public expenses caused by the spouses upon their arrival. Jointly, these amendments give rise to

⁶⁶⁹ Compare the Danish Centre for Human Rights, *Notat till Integrationsministeriet vedrorende forslag till lov om aendring av udlændingeloven og ægteskabsloven med flere love*, February 2002, at http://www.humanrights.dk/afdelinger/forskning/notat/alle/n02_10/.

⁶⁷⁰ UNHCR's comments on the Draft Bill on amending the Aliens' Act, the Marriage Act and other Acts, March 2002.

⁶⁷¹ The UN Committee against Torture, Communication No. 185/2001 – Sweden, 25 May 2001.

concern that a large number of refugees, as well as other legally resident non-citizens, will be treated as second-class residents, and that their integration will thereby be rendered very difficult. As the UNHCR has concluded, the primary effect of these and other provisions introduced by the new law is to “cast refugees and immigrants in a negative light”.⁶⁷²

Austria

The far-right Freedom Party, which together with the conservative People’s Party formed a coalition government after the 1999 parliamentary elections, has persistently advocated restrictive asylum and immigration policies. In the wake of September 11, the party stepped up its anti-immigration rhetoric with reference to the threat of terrorism⁶⁷³ and proposed a number of measures aimed at curtailing the right to seek asylum.⁶⁷⁴ Although these proposals did not result in any immediate reforms, the government began working on a radical overhaul of the country’s asylum system in the autumn of 2001. Among the measures that were considered in the course of this work was a drastic acceleration of the asylum process, which would allow asylum applications to be reviewed within as short a period as 48 hours.⁶⁷⁵

Moreover, in September 2002, after a split in the Freedom Party had resulted in the announcement of new parliamentary elections, the acting minister of interior, who represented the People’s Party, issued a controversial asylum policy directive. Already prior to September 2002, many asylum seekers were denied room in state accommodations.⁶⁷⁶ However, the new directive categorically barred some groups of asylum seekers from public support: asylum seekers from EU accession countries and the European Economic Area were deprived of the right to public assistance altogether, while asylum seekers from a number of other countries, including Russia, Azerbaijan, Turkey, Yugoslavia and Nigeria, lost the right to public assistance if their asylum applications were rejected in the first instance.⁶⁷⁷ As the directive entered into force immediately, hundreds of asylum seekers who were already living in state

⁶⁷² *UNHCR’s comments on the Draft Bill on amending the Aliens’ Act, the Marriage Act and other Acts*, March 2002.

⁶⁷³ Most controversially, the former party leader, Jörg Haider, proposed that asylum seekers from non-European countries not be allowed to wait for a decision on their asylum claims in the country in order to prevent terrorists from “infiltrating”. See “Asylwerber in Drittstaaten ‘deponieren’”, *Der Standard*, 28 September 2001.

⁶⁷⁴ These measures, which included a proposal to immediately deport all asylum seekers who were members of extremist organizations or had been sentenced to more than one year in prison for any criminal offence, were proposed as part of a counter-terrorism package. See “FPÖlegt Forderungen vor: Innenminister Strasser soll freiheitliches ‘Antiterrorpaket’ umsetzen”, *Der Standard*, 20-21 October 2001.

⁶⁷⁵ “Westenthaler und Strasser auf einer Linie: Verfahren beschleunigen, Meldepflicht für Asylbewerber“, *Der Standard*, 22 April 2002.

⁶⁷⁶ Under Austrian law asylum seekers do not have any general right to public assistance, and decisions whether to grant asylum seekers assistance or not have often been made on arbitrary grounds. This practice has been criticized by both local NGOs and the UNHCR.

⁶⁷⁷ Serbs from Kosovo, Chechens and Kurds from Turkey were exempted from the new rule. “Umstrittene neue Richtlinie”, *Der Standard*, 2 October 2002.

accommodations were evicted and per notice encouraged to return to their home countries during the following weeks.⁶⁷⁸ Among those evicted were sick people and mothers with infants.⁶⁷⁹ While some found shelter in temporary accommodations offered by local NGOs, others were forced to sleep in the street.⁶⁸⁰

As local NGOs have stressed, the new practice is both discriminatory and inhumane in character since it targets people solely because of their country of origin and denies them shelter while they are exercising their fundamental right to seek asylum.⁶⁸¹ In addition, the practice raises serious concerns regarding the right to a fair and effective asylum process for those asylum seekers covered by the directive. As Karola Paul, director of the UNHCR office in Vienna, has pointed out: “‘Park bench number 12’ is no delivery address. When asylum seekers become homeless they cannot be reached by the authorities”.⁶⁸² When the People’s Party and the Freedom Party formed a new coalition government at the end of February 2003, they reconfirmed their previous plans to drastically reduce the time for considering asylum claims.⁶⁸³ These plans raise serious concerns regarding the right of asylum seekers to a thorough examination of their asylum claims as well as the right not to be refouled to persecution.

Spain

Since September 11, the conservative Spanish government has stepped up efforts to control its borders and to expel migrants who have entered the country illegally.⁶⁸⁴ In a comment reflecting the government’s increasing focus on this policy area, Prime Minister Jose Maria Aznar described the fight against illegal immigration as “the most important question in European politics at the moment” at the June 2002 EU Summit in Seville.⁶⁸⁵ Given the problems that have been documented within the Spanish asylum and immigration system, this development gives rise to serious concern.

⁶⁷⁸ Irene Brickner, “Man kann doch Leute nicht so auf die Straße setzen”, *Der Standard*, 2 October 2002.

⁶⁷⁹ “Dramatische Flüchtlingssituation in Traiskirchen: Hunderte auf der Straße”, *Die Presse*, 27 September 2002.

⁶⁸⁰ “Flüchtlinge in Pfarrsälen”, *Die Presse*, 12 October 2002; “Notquartiere für Asylanten platzen aus den Nähten – Kriminalität droht”, *OÖ Nachrichten*, 12 October 2002.

⁶⁸¹ For example, SOS Mitmensch and the Austrian branch of Amnesty International have voiced these concerns.

⁶⁸² Florian Klenk, “Wie böse ist Strasser?”, *Falter*, No 41/2002, October 2002.

⁶⁸³ Information about plans announced by the new government in various policy fields in *Der Standard* 1-2 March 2003.

⁶⁸⁴ See, for example, Giles Tremlett, “Spain in hi-tech war on immigrants”, *Guardian*, 16 August 2002.

⁶⁸⁵ Migration Dialogue, *Migration News*, vol. 9, no. 7, July 2002.

Human rights groups have repeatedly criticized Spain for implementing its immigration laws in an inconsistent and unfair manner. For example, Human Rights Watch has criticized Spain's "arbitrary treatment of migrants", and noted that "problems associated with the arbitrary application of the law are exacerbated by serious violations of migrants' procedural rights, including their rights to legal assistance, translation services, individualized consideration of their cases, access to asylum determination procedures, and appellate review of decisions affecting their legal status in Spain".⁶⁸⁶ The situation is particularly acute in the Canary Islands where undocumented migrants who arrive by boat from the North African coast are regularly detained and deported without being informed of their rights, granted adequate translation or legal assistance or having their cases individually considered. For the same reasons, individuals who arrive in the islands without documentation face great barriers to accessing the asylum system. In addition, even if they are able to apply for asylum, individuals without adequate identification sometimes have their asylum claims rejected before they have been given a proper review, in violation of the right to a full and fair asylum process and possibly the principle of non-refoulement.⁶⁸⁷ In particular, asylum seekers who come from countries with which Spain has a readmission agreement⁶⁸⁸, including Morocco and Nigeria, are often arbitrarily denied asylum.⁶⁸⁹ In addition, asylum seekers unable to prove that they come from a country that has no readmission agreement with Spain have reportedly been deported to third countries with which they have no ties whatsoever, solely because Spain has a readmission agreement with these countries. For example, there have been reports that some Liberian asylum seekers have been deported to Nigeria (as noted above, a country with which Spain has a readmission agreement) because they could not prove that they were Liberian, not Nigerian.⁶⁹⁰

Since September 11, the number of people expelled from Spain has increased greatly. At the same time the number of people granted asylum in the country has fallen sharply. According to official information, 43,700 people were expelled from Spain during the period January-August 2002,⁶⁹¹ while only 4 percent of all asylum applications were approved during the first six months of 2002, as compared to a rate of 12 percent during the same period in 2001.

⁶⁸⁶ See Human Rights Watch, *Discretion without bounds – the arbitrary application of Spanish immigration law*, July 2002, p. 2 at <http://www.hrw.org/reports/2002/spain2/>.

⁶⁸⁷ Human Rights Watch, *Spain – the other face of the Canary Islands: Rights violations against migrants and asylum seekers*, February 2002.

⁶⁸⁸ The readmission agreements facilitate the deportation of illegal immigrants who arrive on the territory of one of the parties from the other party.

⁶⁸⁹ Human Rights Watch, *Spain – the other face of the Canary Islands...*

⁶⁹⁰ Information from Asociación Comisión Católica Española de Migración (Accem), per telephone 7 February 2003.

⁶⁹¹ Information from *El Pais*, 19 September 2002 and 4 November 2002.

However, no official statistics are available regarding the number of people who have been forcibly removed from the country for various reasons, and NGOs are prevented from monitoring the situation closely since they are denied the right to enter facilities where undocumented migrants and asylum seekers are held. It is therefore difficult to assess the exact scope of the problems outlined above, as well as whether and to what extent the situation has been aggravated in the wake of the terror attacks on the United States.⁶⁹² However, it is troubling that since September 11, the government has continued to deny that there are serious violations of the rights of asylum seekers and immigrants in the country,⁶⁹³ while intensifying its fight against illegal immigration under the pretext of enhancing national security.

United States

During the last two and a half decades, the United States has accepted more refugees for resettlement than all other countries put together, with an average of approximately 90,000 refugees admitted annually.⁶⁹⁴ In the immediate aftermath of September 11, the US administration under George W. Bush suspended its refugee admissions programme in order to put new security measures in place.⁶⁹⁵ The suspension affected some 20,000 refugees in different parts of the world who had already been cleared for resettlement in the United States, leaving them stranded in miserable conditions in refugee camps and vulnerable to further persecution. The admissions programme was resumed in late November 2001. However, the pace for admitting refugees remained slow and, as of September 2002, only a third of the quota of refugees set for the fiscal year 2001-2002 had been admitted, leaving the total number of accepted refugees at the lowest level since 1975. Reportedly a higher percentage of Muslims have remained on the waiting list for resettlement than refugees of any other category, raising concern that discriminatory practices may have been applied in the selection of refugees.⁶⁹⁶

⁶⁹² Ibid.

⁶⁹³ Following the publication of the Human Rights Watch report on abuses against migrants and asylum seekers in the Canary Islands in early 2002, the Spanish Ombudsman carried out an investigation into the situation and concluded that the concerns raised by Human Rights Watch were accurate. However, the government maintained that fundamental rights of migrants are not being denied in the Canary Islands. See Human Rights Watch, "Dialogue sought on migrant's rights – letter to Minister Mariano Rajoy and government delegate Fernandez-Miranda", 6 March 2002, at <http://www.hrw.org/press/2002/03/spainltr030702.htm>.

⁶⁹⁴ UNCHR, *The State of the World's Refugees 2000 – Fifty years of humanitarian action*; and Lawyers Committee for Human Rights, *A Year of Loss*, September 2002, at http://www.lchr.org/us_loss/loss_ch3a.htm.

⁶⁹⁵ International Refugee Council (IRC), "In crisis – U.S. refugee settlement", 6 February 2002.

⁶⁹⁶ Ibid; IRC, "2002 US refugee admissions will be the lowest in 25 years", 5 September 2002.

Since September 11, the US authorities have also enforced stricter policies regarding the detention and deportation of aliens who have violated immigration regulations. In a counter-terrorism drive that was initiated following the terror attacks, hundreds of non-citizens were detained on immigration charges, which often were of a minor character such as overstaying a visa. Many of these were subsequently tried in closed trials and deported from the country. The drive was characterized by numerous violations of due process standards, including denial of habeas corpus and access to legal counsel, and some of those detained were reportedly subjected to physical and verbal abuse by prison guards.⁶⁹⁷

Moreover, since September 11, the US authorities have changed their policies for issuing visas, with Washington assuming greater responsibility for reviewing certain types of visa applications. Consulates and embassies are now required to submit to Washington for review the visa applications of men between the ages of 16 and 45 who are citizens of 26 predominantly Muslim countries. Initially a time limit of 30 days was set for the review, but due to the heavy load of applications this scheme collapsed, resulting in a serious backlog of cases and extremely lengthy waiting times for visa decisions.⁶⁹⁸ These policies are clearly discriminatory in character and not proportionate to the aim of enhancing national security.

In another measure motivated by security concerns, the US authorities introduced new registration procedures for certain categories of visitors in the autumn of 2002. In accordance with these procedures, visitors from certain designated countries as well as visitors from other countries whose profiles are found to “indicate the need for closer monitoring” are subject to questioning under oath, photographing and fingerprinting upon arrival in the United States.⁶⁹⁹ Reportedly the registered information is entered into a specific computer system used to screen for terrorists.⁷⁰⁰ If the targeted visitors remain in the country more than 30 days they must report in person to the INS to provide additional information. Thereafter such individuals must report annually to the INS. Failure to comply with the registration requirements at any stage may result in deportation.⁷⁰¹ In September 2002, the INS announced the first group of countries whose citizens would be subject to these new procedures. According to this rule, citizens of Iran, Iraq, Libya, Sudan and Syria – all

⁶⁹⁷ For more information see the chapter on arrest.

⁶⁹⁸ Raymond Bonner, “New policy delays visas for specified Muslim men”, *New York Times*, 10 September 2002.

⁶⁹⁹ Department of Justice, Immigration and Naturalization Service, Registration and Monitoring of Certain Nonimmigrants – Final rule, 12 August 2002 (INS 2216-02).

⁷⁰⁰ Tom Ramstack, “Arab, Muslim visitors scrutinized by INS”, *Washington Times*, 10 April 2002.

⁷⁰¹ *Ibid.*

predominantly Muslim countries – are automatically subject to the special registration requirements (see also chapter on right to privacy).⁷⁰²

These new registration practices took effect on 11 September 2002 at all US airports. Two months later an additional order expanded the special registration requirements to male visitors from the five designated countries who are older than fifteen years and who entered the United States prior to the anniversary of the terror attacks. Under the threat of deportation, these men were required to register with the Immigration and Naturalization Service within 30 days.⁷⁰³ The order was subsequently extended twice to include 15 additional countries, most of which are also predominantly Muslim.⁷⁰⁴ Arab-American and civil liberties groups, among others, have criticized the new procedures as discriminatory since they apply to persons because of their place of birth rather than because of their behaviour.⁷⁰⁵ These organizations have also stressed that the new registration scheme will do little to enhance national security since terrorists are more than likely to find ways to circumvent it. Lucas Guttentag from the American Civil Liberties Union (ACLU) concluded: “It’s pretty obvious that this plan won’t work at anything except allowing the government to essentially ‘pick on’ people who haven’t done anything wrong but happen to come from the Administration’s idea of the wrong side of the global tracks”.⁷⁰⁶ In mid-December 2002, when the deadline for the first group of visitors to register was about to expire, hundreds of people who showed up to comply with the requirements were detained on minor immigration charges.⁷⁰⁷ Many of those detained were reportedly in the process of obtaining legal residency or extending their visas and some were believed not to have violated any immigration regulations whatsoever. In addition, detainees were allegedly subjected to unnecessarily harsh treatment and denied

⁷⁰² Department of Justice, Immigration and Naturalization Service, Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 6 September 2002 (INS 2232-02). It should be noted that citizens from all of the five designated countries except Syria also previously had been subjected to special registration at airports, although of a more limited kind.

⁷⁰³ Department of Justice, Immigration and Naturalization Service, Registration and Monitoring of Certain Nonimmigrant Aliens from Designated Countries – Notice, 6 November 2002 (AG Order 2626-2002).

⁷⁰⁴ In an order of 22 November 2002, the registration procedures were extended to male visitors over the age of 15 years from Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates and Yemen (AG Order 2631-2002). In an order of 18 December 2002, they were further extended to male visitors of the same age from Pakistan and Saudi Arabia (AG Order 2638-2002).

⁷⁰⁵ Arab American Institute, American-Arab Anti-Discrimination Committee, American Civil Liberties Union, Asian American Legal Defence and Education Fund, CAIR and Muslim Public Affairs Council to Attorney General, “Sign-on letter to Attorney General Ashcroft Requesting an Extension of the INS Registration Deadline”, 13 December 2002.

⁷⁰⁶ ACLU, “ACLU calls Immigrant Fingerprinting Plan Discriminatory and Ineffective”, 13 August 2002.

⁷⁰⁷ “The wrong way”, *Washington Post*, 29 December 2002; and Suzanne Travers, “Registration causing fear, confusion”, *Herald News*, 8 January 2002.

access to a lawyer. In some cases detainees were allegedly told that they would be deported before being granted any opportunity to see their families again.⁷⁰⁸ This new registration programme on its face and in its implementation is disproportionate and discriminatory in violation of international standards to which the United States is a signatory.

Summary and Conclusions

In the wake of September 11, efforts to limit asylum and immigration have gained a newfound legitimacy in the OSCE area. Illegal immigration and a lax control of the asylum regime are now commonly considered a security risk of prime importance, and states are shrewdly making use of security arguments when introducing new restrictive measures toward asylum seekers, refugees and migrants. While many of the security concerns raised by states may be legitimate, they do not justify some of the measures that have been adopted, which encourage racism and xenophobia, erode refugee protection and may result in violations of the prohibition against refoulement and other fundamental principles of human rights law.

Since September 11, many OSCE member states have applied increasingly tough border control policies and removed undocumented migrants, often without adequate procedural safeguards, at an increasing rate. Some of these measures may unduly block access to asylum procedures and increase the risk of refoulement, in violation of governments' obligation to provide protection to those fleeing persecution. The measures may be targeted against migrants who illegally enter a particular country solely out of economic motives, but they also affect bona fide refugees who turn to smugglers because they lack viable options for reaching a safe country. Without stronger safeguards, the intensification of efforts to combat illegal immigration may result in increasingly frequent violations of the rights of undocumented migrants to enjoy basic procedural guarantees and to be treated in a humane manner, whether or not they have any claim for asylum.

Moreover, some of the measures that have been initiated in OSCE countries since September 11 seriously jeopardise the right to a fair and satisfactory asylum process of asylum seekers that have been granted access to asylum mechanisms. These measures, which include fast track procedures for assessing asylum claims and deportation of asylum seekers whose asylum claims have been rejected but not yet heard on appeal, add to similar policies that have been previously introduced in the OSCE area. Ironically, measures such as these, which place excessive restraints on the right of asylum seekers to an exhaustive review of their

⁷⁰⁸ Amnesty International, "USA: special registration process must be reviewed", 10 January 2002.

asylum claims, are likely to drive increasing numbers of asylum seekers into the hands of traffickers and smugglers and are therefore inconsistent with the aim of counteracting illegal immigration.

As regards the treatment of asylum seekers whose asylum claims are being examined, certain policies employed in OSCE countries may be inconsistent with basic human rights principles.⁷⁰⁹ Since September 11, new problematic policies have been introduced, for example, to deny certain categories of asylum seekers room in state accommodations and to establish separate schooling for children of asylum seekers.

In the aftermath of September 11, several EU countries and the United States have also adopted measures pertaining to the treatment of recognised refugees, legal migrants and temporary visitors that may violate international human rights standards. Among the measures of concern are those that put refugees and migrants in a clearly inferior position to citizens as regards welfare benefits, establish harsh requirements for family reunification among refugees and migrants and subject migrants and temporary visitors to intrusive procedures for registering their personal data as well as to arbitrary security checks. By failing to respect basic principles of human rights law, such measures have a detrimental impact on the integrity of the entire human rights protection regime in the OSCE area.

⁷⁰⁹ Criticism relates inter alia to practices regarding detention, social assistance, health care, employment and education. See for example Caritas Europa, *Fair treatment for asylum seekers – Caritas Europa position paper on key standards for the reception of asylum seekers and for asylum procedures*, February 2001.

Extraditions, Expulsions, Deportations

Two weeks after the September 11 attacks in the United States, the UN Security Council adopted a sharply worded resolution on combating terrorism. In the resolution (1373/2001), the Security Council called upon all states to “[e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”.⁷¹⁰ The aim of the resolution may have been justified. However, in their efforts to prevent terrorist suspects from abusing protection regimes and from enjoying a “safe haven” within their territories in the aftermath of September 11, a number of OSCE member states have adopted measures that compromise their human rights obligations under international law, in particular the principle of non-refoulement.

Relevant Legal Standards

As noted in the previous chapter on the right to asylum, the principle of non-refoulement is a cornerstone of international law. This principle is set out in the 1951 Refugee Convention, article 33 (1) of which states that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion”.⁷¹¹ The convention does list a number of grounds on which a person may be refouled. According to article 33 (2), the ban on forcibly returning refugees to a country where they may face persecution does not apply to a refugee “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”. However, this provision is only valid under highly exceptional circumstances: for it to be applicable it must be proved that there is a direct link between the presence of a refugee in the territory of a particular country and a national security threat to that country.⁷¹²

⁷¹⁰ Security Council Resolution 1373/2001, adopted on 28 September 2001.

⁷¹¹ Convention Relating to the Status of Refugees, adopted on 26 July 1951, at <http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=basics>.

⁷¹² Human Rights Watch, “Human Rights Implications of European Union Internal Security Proposals and Measures in the Aftermath of the 11 September Attacks in the United States”, November 2001, at <http://www.hrw.org/press/2001/11/eusecurity.htm>.

The principle of non-refoulement is also enshrined in a number of international treaties regulating terrorism and/or extradition.⁷¹³ For example, the European Convention on Extradition prohibits extradition in cases where a state party has “substantial grounds for believing that a request for extradition [...] has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons” (article 3.2).⁷¹⁴ The latter part of this provision may be understood, for instance, to cover cases where the person to be extradited would be deprived of internationally recognized rights of defence in the requesting state.⁷¹⁵ In specific guidelines on human rights and counter-terrorism measures that the Committee of Ministers of the Council of Europe adopted in July 2002 the standard is further elaborated: “When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition” (paragraph XIII 4).⁷¹⁶ According to international extradition standards, a state may also refuse extradition if the offence that is the basis for the extradition request carries the death penalty under the law of the requesting state, unless that state makes assurances that the death penalty will not be imposed or, if imposed, will not be carried out.⁷¹⁷ It should be noted here that those states that have ratified Protocol No. 6 of the ECHR have an obligation not to extradite any persons to a country where they may face the death penalty.⁷¹⁸ The July 2002 Council of Europe guidelines also list the use of the death penalty in a requesting state as a mandatory ground for refusing to extradite.⁷¹⁹

Furthermore, major human rights treaties prohibit the forcible return of persons to countries where they may be exposed to torture or cruel, inhuman or degrading treatment or

⁷¹³ See International Commission of Jurists, *Terrorism and Human Rights*, p. 246.

⁷¹⁴ The European Convention on Terrorism, adopted on 13 December 1957, at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>. See also UN Model Treaty on Extradition, General Assembly Resolution 45/116, at <http://www.un.org/documents/ga/res/45/a45r116.htm>.

⁷¹⁵ Council of Europe, *Explanatory Report on the European Convention on the Suppression of Terrorism*, (ETS no. 090), at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>, which contains a similar provision to that of the European Convention on Extradition, although it does not explicitly prohibit states from extraditing a person to a country where he/she may suffer due to his or her race, religion, nationality or political opinion but allows them to refuse extradition on such grounds.

⁷¹⁶ *Guidelines of the Committee of the Ministers of the Council on Europe on human rights and the fight against terrorism*, adopted on 15 July 2002, at [http://press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm).

⁷¹⁷ See for example, article 11 of the European Convention on Extradition, and article 4 of the UN Model Treaty on Extradition.

⁷¹⁸ Sixth Protocol to the European Convention on Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, adopted on 28 April 1983, at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

⁷¹⁹ *Guidelines of the Committee of the Ministers of the Council on Europe on human rights and the fight against terrorism*, para. XIII 2.

punishment. The UN Convention against Torture (CAT) states that “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” (article 3).⁷²⁰ According to the UN Committee Against Torture the term “another state” may refer to a state to which a person is returned in the first place as well as any state where he or she may subsequently be returned.⁷²¹ The ICCPR and the ECHR do not contain any explicit provisions on the topic. However, the UN Human Rights Committee and the European Court of Human Rights have interpreted the ban on refoulement as being inherent in those articles that prohibit torture and inhuman and degrading treatment and punishment (ICCPR, article 7; ECHR, article 3).⁷²² According to the European Court of Human Rights, transferring a person to a country where he or she risks treatment or punishment in violation of article 3 of the ECHR would be “contrary to the spirit and intention” of this article.⁷²³ Most importantly, derogation from article 3 of the CAT, article 7 of the ICCPR or article 3 of the ECHR is not allowed under any circumstances. In other words, the prohibition against returning someone to a state where there are substantial grounds to fear that he or she may be subjected to torture or cruel, inhuman or degrading treatment or punishment is absolute under these articles.

In line with the standards outlined above, the OSCE member states acknowledged at the 1990 Human Dimension Meeting in Copenhagen that “[...] no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” (paragraph 16.3). The principle of non-refoulement is also widely considered to be international customary law, which means that all states, whether or not they are a party to the human rights and/or refugee conventions incorporating the prohibition against refoulement, are obliged not to return or extradite any person to a country where the life or safety of that person would be seriously endangered.⁷²⁴

⁷²⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, adopted 10 December 1984, at http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

⁷²¹ Human Rights Watch, “Human Rights Implications of European Union Internal Security Proposals...”.

⁷²² International Commission of Jurists, *Terrorism and Human Rights*, p. 246.

⁷²³ European Court of Human Rights, *Soering v. the United Kingdom*.

⁷²⁴ UNHCR, *Refugee Protection: A Guide to International Refugee Law*, December 2001.

Human Rights Concerns

New Problematic Legislation and Opinions

United Kingdom, Germany

In the aftermath of September 11, some OSCE states have adopted legislation that weakens protection against refoulement for asylum seekers. For example, new anti-terrorism laws that have been passed in the United Kingdom and Germany introduce provisions that obscure the distinct categories for denial of protection that are set out in articles 33(2) and 1(F) of the Refugee Convention. Article 33(2) of the Refugee Convention lists grounds on which a person may be excluded from the protection of the principle of non-refoulement, while article 1(F) lists grounds on which a person may be excluded from refugee status and the scope of the convention.⁷²⁵ Thus, the two articles apply to two different groups of people: article 33(2) concerns persons who have already been recognized as refugees, and article 1(F) concerns persons who are currently in the process of having their claims for refugee status considered. The distinction between the two articles is of crucial importance because it is generally recognized that a fair asylum procedure requires that a decision to exclude a person from refugee status be made only after it has been determined whether he or she has well-founded fear of persecution (“inclusion before exclusion”). This also implies that the principle of non-refoulement is valid when an asylum claim is being examined.⁷²⁶

By blurring the distinction between article 33(2) and 1(F), the new provisions of the UK and German anti-terrorism laws undermine the scheme of “inclusion before exclusion” and raise concern that asylum seekers may be removed from the countries in question without having had their asylum claims fully and fairly assessed. The Anti-Terrorism, Crime and Security Act, which was adopted in the United Kingdom in December 2001, grants the secretary of state the power to certify that an asylum seeker is not entitled to protection against refoulement under article 33(1) of the Refugee Convention because article 1(F) or 33(2) applies to him or her.⁷²⁷ A person who has been certified in this way may have his or her asylum claim rejected before it has been considered on its merits. According to the legislative

⁷²⁵ According to article 1(F) the provisions of the convention do not apply to any person with respect to whom there are serious reasons for considering that a) He or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; b) He or she has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) He or she has been guilty of acts contrary to the purposes and principles of the United Nations.

⁷²⁶ Amnesty International, *A Human Rights Framework for the Protection of Security*, 26 November 2001, at <http://www.web.amnesty.org/ai.nsf/recent/IOR610052001?OpenDocument>.

⁷²⁷ Anti-terrorism, Crime and Security Act 2001, at <http://www.hmsso.gov.uk/acts/acts2001/20010024.htm>.

amendments enacted by the German December 2001 Anti-Terrorism Law⁷²⁸, the ban on refoulement as spelled out in the Refugee Convention does not apply to a person who meets the criteria that correspond to either article 1(F) or 33(2) of the convention. In essence, this provision makes it possible to deport an asylum seeker without first considering whether he or she qualifies for refugee status. Neither law makes any reference to international obligations other than those set out in the Refugee Convention. This is particularly disturbing because, as noted above, other international conventions – the CAT, the ICCPR and the ECHR – set out an absolute ban on refoulement to a state where a person is in danger of being tortured or subject to inhuman or degrading treatment or punishment.

European Union, Canada

In the wake of September 11, the European Commission and the Canadian Supreme Court, among others, have raised questions about the absolute nature of the ban on refoulement in circumstances where torture or cruel, inhuman or degrading treatment might arise. In late 2001, the European Commission published a working document on “the relationship between safeguarding internal security and complying with international protection obligations”, which it had been charged with preparing by the EU Council.⁷²⁹ In this document the commission noted that the European Court of Human Rights is of the opinion that there are no permissible exceptions to the ban on torture and inhuman or degrading treatment or punishment established by the ECHR. However, after acknowledging that the ban is absolute, the commission nevertheless made the comment that “Following the 11 September events, the [court] may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a ‘balancing act’ between the protection needs of the individual, set off against the security interests of the state”. In two related cases involving refugees, the Canadian Supreme Court concluded in January 2002 that “deportation to torture will generally violate the principles of fundamental justice”. However, the court maintained that deportation to torture is permissible in “extraordinary circumstances” in order to avoid a serious threat to national security.⁷³⁰

⁷²⁸ Terrorismusbekämpfungsgesetz, at http://www.dbein.bndlg.de/schily/docs/terror_BGBL_nur lese.pdf (in German).

⁷²⁹ Commission Working Document, *The relationship between safeguarding internal security and complying with international protection obligations*, 5 December 2001 (COM 743/2001), at http://europa.eu.int/eur-lex/en/com/wdc/2001/com2001_0743en01.pdf.

⁷³⁰ Amnesty International Canada, “Dangerous refugees can be deported”, 11 January 2002.

New Problematic Practices

Since September 11, a number of OSCE states have facilitated the transfer of terrorist suspects to countries where they may face unfair trials, be subjected to torture and cruel, inhuman or degrading treatment and/or be sentenced to death, in violation of the principle of non-refoulement and other international human rights standards.

Austria

In October 2001, Austrian police arrested an Egyptian asylum seeker, Muhammad 'Abd al-Rahman Bilasi-Ashri, on the basis of an extradition request by the Egyptian authorities. Six years earlier, Bilasi-Ashri had been sentenced in absentia in Egypt to 15 years of hard labour for involvement in an Islamic terrorist group. His trial had not met international fair trial standards.

In November 2001, Vienna's Higher Regional Court ordered Bilasi-Ashri's extradition to Egypt, despite compelling evidence that he faced an imminent risk of torture and ill-treatment if he were to be returned. According to Amnesty International, suspected members of Islamist groups are frequently subjected to abuse, inter alia in the form of electric shocks, beatings, burning and various forms of psychological abuse in Egypt.⁷³¹ Following the Vienna court decision, Bilasi-Ashri remained in detention pending deportation. However, in late August 2002, after he had spent ten months in detention, the Egyptian authorities withdrew their extradition request and he was released. The Egyptian authorities reportedly withdrew their request after the Austrian government asked for assurances that, among other things, Bilasi-Ashri would not be subjected to torture or sentenced to death. As of late 2002, Bilasi-Ashri's asylum claim was still pending, and he remained at risk of deportation if the Egyptian authorities should renew their extradition request.⁷³²

Sweden

Two Egyptian asylum seekers living in Sweden, Muhammad Muhammad Suleiman Ibrahim El-Zari and Ahmed Hussein Mustafa Kamil Agiza, were forcibly returned to Egypt in December 2001. The Swedish government had concluded that the two men had a well-founded fear of persecution but were not entitled to protection as refugees because they were

⁷³¹ Amnesty International, *Concerns in Europe (July-December 2001)*, at

<http://web.amnesty.org/ai.nsf/Index/EUR010022002?OpenDocument&of=COUNTRIES\AUSTRIA>.

⁷³² Information provided by Heinz Patzelt, director of the Austrian section of Amnesty International, by telephone in July 2002 and during a meeting in October 2002.

associated with Islamist groups responsible for acts of “terrorism”.⁷³³ This decision was based on secret evidence provided by the Swedish Security Police, to which the men and their lawyers were not granted full access.⁷³⁴ Under the procedure that was applied, the two men were not only deprived of a full and fair asylum process but were also denied the right to appeal the decision on their deportation.⁷³⁵

In view of the documented pattern of abuse against suspected members of Islamist groups in Egypt, the Swedish government claimed that it had received written guarantees from the Egyptian government that the two men would not be subjected to any human rights violations upon their return.⁷³⁶ However, when these “written guarantees” were made public, they amounted to a formal exchange of letters in which the Egyptian authorities had only committed themselves to treat the two men “in accordance with the Egyptian Constitution and Egyptian legislation”.⁷³⁷

In this case, the exchange of letters was a woefully inadequate means of protecting the two men from torture or ill-treatment. In general the value of written guarantees is questionable under international law. According to the jurisprudence of the European Court of Human Rights, assurances by a government that a person will not suffer mistreatment once returned to its territory do not constitute a sufficient guarantee of safety for that person if abuses contrary to article 3 of the ECHR – i.e. torture or inhuman or degrading treatment or punishment – are a persistent problem in the country.⁷³⁸ Moreover, when considering Sweden’s compliance with the ICCPR in April 2002, the UN Human Rights Committee expressed concern regarding the effect of the “campaign [against terrorism] on the situation of human rights in Sweden, in particular for persons of foreign extraction” and regarding “cases

⁷³³ The Swedish Aliens Act grants the government powers to decide on the expulsion of a foreign citizen who is considered a threat to national security, including an asylum seeker whose claim for asylum is currently under consideration.

⁷³⁴ Amnesty International, “Deportations leave men at risk of torture in Egypt”, 20 December 2001, at <http://web.amnesty.org/ai.nsf/Index/EUR420032001?OpenDocument&of=COUNTRIES\SWEDEN>.

⁷³⁵ A decision taken by the government to expel a foreign citizen believed to pose a threat to national security cannot be appealed and is immediately enforceable. This procedure has been criticized by the UN Committee Against Torture (CAT). See CAT, *Conclusions and Recommendations on Sweden*, May 2002, at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/85e766b76855b155c1256bd00055bb75?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/85e766b76855b155c1256bd00055bb75?Opendocument).

⁷³⁶ Swedish section of Amnesty International, “Avvisas från Sverige av säkerhetsskäl – trots risk för tortyr”, 20 December 2001, at <http://www2.amnesty.se/hem.nsf/d365a5f17867ca0dc1256acb004e9448/a0fc9346a2ef046cc1256b280041a3e6?OpenDocument>.

⁷³⁷ Swedish section of Amnesty International, “Sverige fick inga garantier från Egypten”, 17 January 2002, at

<http://www2.amnesty.se/hem.nsf/d365a5f17867ca0dc1256acb004e9448/8ea5b7a1b459a930c1256b4a00593f79?OpenDocument>.

⁷³⁸ European Court of Human Rights, *Chahal v. United Kingdom*.

of expulsion of asylum-seekers suspected of terrorism to their countries of origin". The committee concluded that even if countries of origin offer guarantees that the rights of returned persons will be respected, the personal safety and lives of those who are returned may be at risk, in particular in the absence of adequate efforts to monitor the implementation of the guarantees. As regards the last concern, the committee also noted that Swedish diplomats had visited the two men in detention in Egypt on only two occasions after they were deported in December 2001.⁷³⁹ While the Swedish ambassador who saw the two men in detention in late January 2002 claimed that they seemed to be doing relatively well, family members of Agiza reported that he bore visible signs of torture when they were permitted to visit him the same day.⁷⁴⁰

A year after the deportation was carried out, the fate of El-Zari and Agiza remained unclear. As of this writing, the Swedish minister for immigration affairs had not responded to an inquiry about the two men made by the Swedish section of Amnesty International in February 2002. In light of the significant risk that the two men might be subject to serious human rights violations upon their return to Egypt, the organization was alarmed at the Swedish government's apparent failure to seek clarification from its Egyptian counterparts on the status and treatment of the two men.⁷⁴¹

When sanctioning the deportation of El-Zari and Agiza, the Swedish government also decided to return Agiza's wife, Hanan Ahmed Fouad Abd al Khaleq, and her five children, to Egypt. As in the case of the two men, al Khaleq and her children were denied a full and fair asylum process as well as the right to appeal the deportation decision. The Swedish government claimed that al Khaleq did not risk torture in her native country as she had not been politically active there herself. However, gross abuses against female relatives of suspected Islamists have frequently been documented in Egypt. Following an application by al Khaleq to the UN Committee Against Torture, the committee intervened in the case and requested that the

⁷³⁹ UN Human Rights Committee, *Seventy Fourth Session: Consideration of reports submitted by state parties under article 40 of the Covenant, concluding observations on Sweden*, April 2002, at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/5d974f7dcf82864dc1256b960038d029?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/5d974f7dcf82864dc1256b960038d029?Opendocument).

⁷⁴⁰ Amnesty International Swedish Section, "De tva egyptierna riskerar fortfarande tortyr", 5 February 2002, at <http://www2.amnesty.se/hem.nsf/d365a5f17867ca0dc1256acb004e9448/2df49b32f903cef6c1256b57003694b5?OpenDocument>.

⁷⁴¹ On the anniversary of the extradition, Amnesty International sent another letter to the immigration minister asking for information on the two men and the efforts made by the Swedish government to ensure that they are treated according to international human rights standards. Swedish section of Amnesty International, "De avvisade egyptierna riskerar fortfarande övergrepp – vad gör Jan O Karlsson?", 18 December 2002.

deportation be put on hold until it had examined the case.⁷⁴² As a result, the deportation was stalled and as of this writing al Khaleq and her children remained legally in Sweden pending the outcome of the committee's examination.⁷⁴³

Bosnia and Herzegovina and Federation of Bosnia and Herzegovina⁷⁴⁴

On 6 October 2001, the authorities of the Federation of Bosnia and Herzegovina (hereafter the Federation) deported two men, Abdullah Essindar and Eslam Durmo (also known respectively as Al-Sharif Hassan Saad and Ussama Farag Allah), to Egypt.⁷⁴⁵ The men had had dual Bosnian and Egyptian citizenship, but their Bosnian citizenship was revoked by the Federation Ministry of Interior before they were extradited to Egypt. Reportedly the Egyptian authorities had requested the extradition of the two men, alleging that they had links to armed illegal groups in Egypt. However, no formal extradition proceedings were held in the Federation prior to their extradition.⁷⁴⁶ What is more, the Federation authorities took no measures to ensure that the two men would be protected against ill-treatment or torture upon their return to Egypt.⁷⁴⁷ The extradition of Essindar and Durmo under these circumstances is particularly troubling since the men, as persons alleged to be supporters of terrorist groups, were at great risk of being ill-treated and tortured in Egypt.⁷⁴⁸ An Egyptian Emergency Supreme State Security Court reportedly began hearing Durmo's case on 16 March 2002 in proceedings that fell far short of international fair trial standards. In court, Durmo claimed that he had been tortured while being held in incommunicado detention awaiting trial. No

⁷⁴² Swedish section of the Amnesty International, "Ännu en person avvisas från Sverige trots risk för tortyr", 11 January 2002, at <http://www2.amnesty.se/hem.nsf/d365a5f17867ca0dc1256acb004e9448/9d2d18aaac5034f6c1256b3e003ef7cb?OpenDocument>.

⁷⁴³ Swedish section of Amnesty International, "Avvisning tillfälligt stoppad", 23 January 2002; and information from Madelaine Selitz, responsible for refugee issues at the Swedish section of Amnesty International, per e-mail 20 December 2002.

⁷⁴⁴ Bosnia and Herzegovina is divided into two administrative units – the Federation of Bosnia and Herzegovina (which is dominated by Bosnian Muslims and Croats) and Republika Srpska (which is dominated by Serbs). The state government is responsible for foreign, economic and fiscal policies, while the two entities are in charge of other policy areas.

⁷⁴⁵ Amnesty International, *Concerns in Europe, (July-December 2001)*, at <http://web.amnesty.org/ai.nsf/Index/EUR010022002?OpenDocument&of=COUNTRIES\BOSNIA-HERZEGOVINA>.

⁷⁴⁶ At the time the men were extradited, criminal proceedings were pending against the two in Federation courts. The courts had ruled that the proceedings against the two men could not continue until their true identity could be determined: both men had allegedly presented falsified documents to obtain Bosnian identification papers.

⁷⁴⁷ *Ibid.*; and Amnesty International, "Bosnia-Herzegovina – Transfer of 6 Algerians to US Custody Puts Them at Risk", 17 January 2002, at <http://web.amnesty.org/ai.nsf/Index/EUR630012002?OpenDocument&of=COUNTRIES\BOSNIA-HERZEGOVINA>.

⁷⁴⁸ See discussion on the human rights record of Egypt in the sections on Austria and Sweden.

information is available about the fate and whereabouts of Essindar after he was returned to Egypt.⁷⁴⁹

Moreover, in a case that received much international attention, six men of Algerian origin, Bansayah Belkacem, Saber Lahmar, Mustafa Ait Idir, Hadz Boudellaa, Boumediene Lakhdar and Mohamed Nechle, were handed over from Bosnia and Herzegovina to the United States in January 2002.⁷⁵⁰ The six men were arrested by Federation police in October 2001 for allegedly plotting a terrorist attack against the US and UK embassies in Sarajevo. Following the arrests, the Federation authorities opened an investigation into the case on the basis of a criminal report from the US authorities. However, the investigation did not produce any evidence to support the allegations against the men. As a result, on 17 January 2002, the Federation Supreme Court ruled that the six men should be released from pre-trial detention. On the same day, the Human Rights Chamber for Bosnia and Herzegovina⁷⁵¹ ordered that the men not be forcibly taken out of the country pending a full examination of the complaint their lawyers had filed with the chamber. However, in violation of the two rulings and without any formal extradition procedures, the six men were transferred to US custody on 18 January 2002. The decision to hand the men over to the US authorities was reportedly made by the government of Bosnia and Herzegovina (hereafter BH), while the operation to transfer them was jointly conducted by police forces from BH and the Federation.⁷⁵² The US authorities subsequently took the men to the US military base at Guantanamo Bay in Cuba. In spite of the imminent danger that the six men would be subjected to military commission proceedings violating international due process standards⁷⁵³ and/or sentenced to death⁷⁵⁴, neither the BH

⁷⁴⁹ Amnesty International, *Concerns in Europe (January-June 2002)*, at <http://web.amnesty.org/ai.nsf/index/EUR010072002?Open&of=COUNTRIES\BOSNIA-HERZEGOVINA#BIH>.

⁷⁵⁰ This paragraph is based on information from the Helsinki Committee for Human Rights in Bosnia and Herzegovina; Amnesty International, "Transfer of six Algerians to US Custody puts them at risk", 17 January 2002, at <http://web.amnesty.org/ai.nsf/Index/EUR630012002?OpenDocument&of=COUNTRIES\BOSNIA-HERZEGOVINA>; Amnesty International, "Letter to the US Ambassador regarding six Algerian men", 18 January 2002, at <http://web.amnesty.org/ai.nsf/Index/EUR630032002?OpenDocument&of=COUNTRIES\BOSNIA-HERZEGOVINA>; Institute for War and Peace Reporting, Senad Slatina, "Islamists Furious over Arab Extradition", *Balkan Crisis Report*, no. 310, 18 January 2002; and Institute for War and Peace Reporting, Janez Kovac, "Extradition may threaten Council of Europe Membership", *Balkan Crisis Report*, no. 311, 23 January 2002.

⁷⁵¹ The Human Rights Chamber for Bosnia and Herzegovina is comprised of six Bosnian and seven international judges and enjoys powers under the Dayton Agreement to issue decisions binding on the state authorities (of Bosnia and Herzegovina) as well as on the two entities within the state (the Federation of Bosnia and Herzegovina and Republika Sprska).

⁷⁵² It should be noted that some of the men were Bosnian citizens when they were arrested but were deprived of their citizenship when the investigations against them started.

⁷⁵³ In November 2001, a new military order was introduced in the United States, which foresaw the establishment of so-called military commissions. The military commissions were empowered to try

authorities nor the Federation authorities sought any guarantees from the US government for the life and safety of the men prior to their transfer to US custody.

In October 2002, the Human Rights Chamber for Bosnia and Herzegovina ruled that the BH authorities and the Federation authorities had violated several articles of the ECHR and its additional protocols in the case of the six men.⁷⁵⁵ In particular, the chamber found that the transfer of the men to US custody violated their right not to be arbitrarily expelled (article 1 of ECHR Protocol No. 7⁷⁵⁶) and their right not to be subjected to the death penalty (article 1 of ECHR Protocol No. 6⁷⁵⁷). As regards the latter violation, the chamber argued that “the US criminal law most likely applicable to the applicants provides for the death penalty for the criminal offences with which the applicants could be charged. This risk is compounded by the fact that the applicants face a real risk of being tried by a military commission that is not independent from the executive power and that operates with significantly reduced procedural safeguards. Hence, the uncertainty as to whether, when and under what circumstances the applicants will be put on trial and what punishment they may face at the end of such a trial gave rise to an obligation of the respondent parties to seek assurances from the United States, prior to the hand-over of the applicants, that the death penalty would not be imposed upon the applicants”.⁷⁵⁸ The chamber ordered both the BH authorities and the Federation authorities to pay compensation to the men and to provide them with legal counsel while they are in US custody and in case legal proceedings are initiated against them. In addition, the chamber requested the BH authorities to use diplomatic channels to protect the rights of the men and to take “all possible steps” to prevent that the men are sentenced to death and that such

terrorist suspects in proceedings that fell short of a number of international due process standards. In response to massive criticism, detailed guidelines on the functioning of the military commissions that were issued a few months later remedied some of the most flagrant shortcomings. However, a number of serious concerns remained, including that the military commissions may admit hearsay and secret evidence and refuse to accept a lawyer chosen by the defendant. For more information see the chapter on arrest.

⁷⁵⁴ The Federation of Bosnia and Herzegovina and the Republic of Bosnia and Herzegovina have, as parties to the Human Rights Agreement (annex 6 to the General Framework for Peace in Bosnia and Herzegovina), undertaken to secure to all persons within their jurisdiction the rights established by Protocol No. 6 to the ECHR, which prohibits the death penalty.

⁷⁵⁵ Human Rights Chamber for Bosnia and Herzegovina, *Decision on admissibility and merits in the Cases of Hadz Boudellaa, Boumediene Lakhdar, Mohamed Nechle and Saber Lamar against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, 11 October 2002. It should be noted that only four of the six men that were transferred to US custody were applicants in the case.

⁷⁵⁶ “An alien lawfully resident in the territory of a state shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a) to submit reasons against his expulsion, b) to have his case reviewed, and c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.”

⁷⁵⁷ “The death penalty shall be abolished. No-one shall be condemned to such penalty or executed”.

⁷⁵⁸ See article 300 of the chamber decision.

sentences are executed. As of this writing, the six men remained in detention at Guantanamo Bay, without any charges having been brought against them.

Georgia

In August 2002, the Georgian authorities detained 13 Chechens who had illegally crossed the border from Chechnya. The Russian authorities soon requested that the men be extradited to Russia, claiming that they were suspected of involvement in militant activities.⁷⁵⁹ In early October 2002, the European Court of Human Rights intervened in the case by requesting that the Georgian authorities make no decision regarding the extradition until the court had conducted a more detailed examination of the case. The intervention came in response to an application the detainees had filed with the court, arguing that they risked treatment in violation of articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment) of the ECHR if they were extradited to Russia.⁷⁶⁰ In spite of this request by the European Court of Human Rights, five of the men were extradited to Russia on 4 October 2002, while the rest remained in detention in Georgia.⁷⁶¹ The day after the extradition Georgian President Eduard A. Schevarnadze bluntly stated: “International human rights commitments might become pale in comparison with the importance of the anti-terrorist campaign”. The local human rights community, as well as international organizations, expressed concern that such a public statement made by the president would influence pending cases and future decisions regarding the extradition of Chechen suspects to Russia.⁷⁶²

In contrast to its earlier request, on 26 November 2002, the European Court of Human Rights decided not to ask the Georgian authorities to further delay their decision regarding the extradition of those applicants still in detention in Georgia.⁷⁶³ The court based its decision on the fact that the Russian government had made a number of undertakings, one of which was to guarantee that the suspects would not face capital punishment and that their health and safety would be protected upon extradition.⁷⁶⁴ In light of the widespread pattern of torture and ill-treatment that has been documented in Russian pre-trial detention, in particular against

⁷⁵⁹ *RFE/RL Newslines*, 7, 8 and 9 October 2002; and “Extradition of Chechen suspects stir debate in Georgia”, *Civil Georgia On-Line Magazine*, 9 October 2002, at <http://www.civil.ge/cgi-bin/newspro/fullnews.cgi?newsid1033822273,84823>.

⁷⁶⁰ Press release issued by the Registrar of the European Court of Human Rights on the case of *Shamayev and 12 others v. Georgia and Russia*, (application no. 36378/02), 6 November 2002.

⁷⁶¹ *RFE/RL Newslines*, 7, 8 and 9 October 2002; and “Extradition of Chechen suspects stir debate in Georgia”, *Civil Georgia On-Line Magazine*, 9 October 2002.

⁷⁶² See IHF Statement, “Violations of the rights of Chechens in Georgia”, 23 December 2002, at <http://www.ihf-hr.org/appeals/021223Georgia.htm>.

⁷⁶³ At the same time the court decided that the main proceedings in the case would be given “priority”.

⁷⁶⁴ Press release issued by the Registrar of the European Court of Human Rights on the case of *Shamayev and 12 others v. Georgia and Russia*, (application No. 36378/02), 26 November 2002.

persons from the Caucasus, the pledge of the Russian government to protect the safety and health of those extradited is clearly not an adequate safeguard.

Only a few days after the decision of the European Court of Human Rights, the Georgian prosecutor-general ruled that three of the Chechens still in custody in Georgia should be extradited to Russia⁷⁶⁵, a ruling that was upheld by a Tbilisi district court upon appeal.⁷⁶⁶ However, on 25 December 2002, the Georgian Supreme Court ordered the district court to reconsider its ruling. The Supreme Court also decided that if the district court upon reconsideration would sanction the extradition of the three suspects, they would have another opportunity to appeal to the Supreme Court.⁷⁶⁷ As of this writing, the Tbilisi district court had yet to issue a new ruling. As regards the five other Chechens that remained in detention in Georgia, the Georgian authorities reportedly had determined that two of them are Georgian citizens and therefore cannot be extradited.⁷⁶⁸

*United States*⁷⁶⁹

In the immediate aftermath of September 11, law enforcement authorities in the United States initiated a process of questioning thousands of people suspected of involvement in terrorist activities. Those interviewed were often considered suspect because of highly questionable evidence, prompted for instance by reports of people who found that their Muslim neighbours behaved suspiciously.⁷⁷⁰ From this process approximately 1,200 non-citizens were detained, of which 752 were charged with immigration violations, such as overstaying a visa or working more hours than is permitted on a student visa.⁷⁷¹ Most of those charged with violating the country's immigration law were men from South Asia, the Middle East and North Africa.⁷⁷² There is no official information regarding how many of those charged with immigration violations were subsequently deported.⁷⁷³ However, it is believed that most have been deported, including to countries where they risk serious human rights abuses.⁷⁷⁴ This concern is substantiated by reports showing that the number of deportations from the United States of citizens of Tunisia, Morocco, Egypt, Yemen, Jordan, Lebanon, Pakistan, Algeria and

⁷⁶⁵ RFE/RL Newswire, 2 December 2002.

⁷⁶⁶ RFE/RL Newswire, 5 December 2002.

⁷⁶⁷ RFE/RL Newswire, 27 December 2002.

⁷⁶⁸ RFE/RL Newswire, 27 November 2002.

⁷⁶⁹ See also the chapter on arrest.

⁷⁷⁰ Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, August 2002, at www.hrw.org/reports/2002/us911/.

⁷⁷¹ Lawyers Committee for Human Rights, *A year of loss....*

⁷⁷² Human Rights Watch, *Presumption of Guilt....*

⁷⁷³ Amnesty International, *Concerns Regarding Post 11 September Detentions in the United States*, March 2002, at <http://www.amnestyusa.org/usacrisis/9.11.detentions2.pdf>.

⁷⁷⁴ Human Rights Watch, *Presumption of Guilt....*

Saudi Arabia – all countries with poor human rights records – soared after September 11: the number increased from 655 in 2001 to 1,627 in 2002.⁷⁷⁵ Adding to the concerns, those who were deported may have been targeted for deportation by national law enforcement authorities precisely because they had been singled out during the post-September 11 raids in the United States.⁷⁷⁶

United Kingdom

In the United Kingdom, the extradition of a terrorist suspect to the United States was stalled after a lengthy process. Lofti Raissi, an Algerian pilot, was arrested in the United Kingdom on a United States extradition warrant in September 2001. The United States alleged that he had trained those who hijacked and crashed planes during the September 11 attacks. However, while his picture was cabled around the world as a key suspect in the investigations, the extradition warrant was based only on charges that he had made a false statement when applying for a pilot's licence from the US Federal Aviation Authority.⁷⁷⁷ Moreover, during the five months Raissi was detained in the Belmarsh high-security prison in London, the US government did not present any evidence to substantiate the allegations of his involvement in the September 11 events.⁷⁷⁸ In February 2002, a district court judge released him on bail because the offences that formed the basis of the extradition request were of such a minor character and it appeared unlikely that the United States would bring any terrorism charges against him in "a near future".⁷⁷⁹ Two months later the extradition request was dismissed altogether.⁷⁸⁰ As the British NGO Liberty has noted, this case shows how essential it is that courts properly review the evidence in extradition cases before making a decision on any such request.⁷⁸¹

⁷⁷⁵ This number was reported by the *Atlanta Journal-Constitution* following a comprehensive computer analysis of Immigration and Naturalization Service records. See Mark Bixler: "U.S. Deportations to Muslim Nations Soar", *Atlanta Journal-Constitution*, 15 January 2003.

⁷⁷⁶ Compare Amnesty International, *Amnesty International: Concerns Regarding Post 11 September Detentions in the United States*, March 2002.

⁷⁷⁷ "Accused pilot released on bail", *BBC News*, 12 February 2002, at http://news.bbc.co.uk/1/hi/english/uk/england/newsid_1815000/1815903.stm.

⁷⁷⁸ "Freed", *Guardian*, 15 February 2002, at <http://www.guardian.co.uk/ukresponse/story/0,11017,650439,00.html>.

⁷⁷⁹ "Accused pilot released on bail", *BBC News*, 12 February 2002, at http://news.bbc.co.uk/1/hi/english/uk/england/newsid_1815000/1815903.stm.

⁷⁸⁰ "Pilot extradition bill fails", *Birmingham Post*, 24 April 2002, at <http://icbirmingham.icnetwork.co.uk/0100news/0200nationalnews/page.cfm?objectid=11817074&method=full>.

⁷⁸¹ Liberty, "Lofti Raissi bailed", 12 February 2002, at <http://www.liberty-human-rights.org.uk>.

Azerbaijan

According to official information, the Azerbaijani authorities have arrested more than 30 terrorist suspects and extradited them to foreign countries since September 11.⁷⁸² Among those extradited are eight Egyptians⁷⁸³ and at least two Saudi Arabians⁷⁸⁴. The Azerbaijani authorities reportedly did not seek any guarantees for the safety of the suspects before extraditing them, although both Egypt and Saudi Arabia have records of systematic torture and unfair court proceedings and actively apply the death penalty.⁷⁸⁵ Moreover, even if the Azerbaijani authorities had obtained such guarantees, it is unlikely that they would have provided sufficient protection to those extradited given the persistent pattern of torture and inhuman and degrading treatment and punishment that have been documented in the two countries in question.⁷⁸⁶ According to available information, in September 2002, an Egyptian military tribunal convicted one of the Egyptians extradited from Azerbaijan, together with several other suspects, for plotting assassination attempts against the Egyptian president and other high-ranking officials.⁷⁸⁷ The convicted men received sentences ranging from two to fifteen years in prison. Under Egyptian law, they have no right to appeal the decision to a higher tribunal. During the trial, several of the defendants claimed that they had been tortured during their interrogation.⁷⁸⁸ The Azerbaijani authorities have also extradited a number of Chechens suspected of terrorist activities to Russia since September 11.⁷⁸⁹ In light of the serious problems regarding ill-treatment and torture that have been documented in pre-trial detention in Russia, these extraditions also give rise to serious concern.

Summary and Conclusions

In their bid not to harbour terrorist suspects within their territories in the aftermath of September 11, a number of OSCE member states have been willing to abandon their international human rights obligations, and above all the principle of non-refoulement.

⁷⁸² “Azerbaijan arrested over 30 and helped arrest 5 international terrorists”, *Azer-Press*, 22 October 2002.

⁷⁸³ *Ibid.*

⁷⁸⁴ *RFE/RL Newslines*, 3 December 2001.

⁷⁸⁵ Information from the Human Rights Center of Azerbaijan. It should be noted that Azerbaijan ratified Protocol No. 6 to the ECHR, which prohibits the death penalty, only in April 2002. The protocol entered into force in the country as of 1 May 2002.

⁷⁸⁶ Compare the discussion on Sweden.

⁷⁸⁷ “Azerbaijan arrested over 30 and helped arrest 5 international terrorists”, *Azer-Press*, 22 October 2002.

⁷⁸⁸ Human Rights Watch, *World Report 2003*.

⁷⁸⁹ *Ibid.*; *RFE/RL Newslines*, 22 July 2002.

International human rights standards make clear that no one should be forcibly removed from a country without having had his or her individual case thoroughly examined – no matter how serious a crime they are suspected of or how politically expedient their removal may be. All asylum seekers are entitled to a full and fair assessment of their asylum claims and should not be removed from the country while the assessment is under way. Only if there are specific reasons for believing that an asylum seeker may have committed an offence of the kind listed in article 1(F) of the Refugee Convention is a subsequent consideration of his or her possible exclusion from refugee status justifiable. Such a consideration should involve an opportunity for the asylum seeker to challenge the evidence in his or her case and to appeal the decision. These requirements also apply in the extraordinary event that it is necessary to review the case of a recognized refugee in order to determine whether there are sufficient grounds for depriving him or her of protection under article 33 (1) of the Refugee Convention due to the reasons listed in its article 33 (2).⁷⁹⁰ Moreover, no extradition should be authorized before its admissibility has been exhaustively reviewed in light of international extradition norms, and it has been ensured that the extradition request is supported by sufficient evidence.

Even if, after an exhaustive consideration of the case, it is determined that a person is not entitled to protection and is removable from the country, he or she must never be sent to a country where there is a risk of being subjected to torture or inhuman or degrading treatment or punishment. Article 3 of the CAT, article 7 of the ICCPR and article 3 of the ECHR establish an absolute ban on refoulement to countries where there is significant danger of torture or cruel, inhuman or degrading treatment or punishment. This ban is therefore valid in the most exceptional of circumstances, including when a person is considered to constitute a serious threat to national security. The ban extends to the possible removal of a person to a third country. Under international extradition standards, extradition to a country applying the death penalty is permissible only if the requested state has received adequate guarantees that the requested person will not be exposed to capital punishment. However, in line with the position taken by the European Court of Human Rights and the UN Human Rights Committee, formal assurances offered by a state alone cannot be considered sufficient to protect a person against torture or cruel, inhuman or degrading treatment and punishment in a country where a consistent pattern of such abuse has been documented.

⁷⁹⁰ It should be noted that exclusion of a refugee from protection under article 33 (1) of the convention is not equal to cancellation of refugee status. In the understanding of the UNHCR, cancellation of refugee status is a separate procedure that normally follows the emergence of evidence of fraud or misrepresentations regarding facts crucial for the decision to grant refugee status. Thus, a refugee may have his or her status cancelled if it emerges that any of the grounds listed in article 1(F) would have applied had all the facts in the case been known. See UNHCR, *Addressing security concerns without undermining refugee protection*, November 2001.

Finally, it is important to note that respect for the principle of non-refoulement does not result in impunity.⁷⁹¹ If a state cannot send individuals suspected of serious crimes to a particular country due to the ban on refoulement, it has a duty either to prosecute such persons under its own legislation or to send them to another country where they can be prosecuted in accordance with due process standards, but will not face torture, ill-treatment or the death penalty. As regards crimes of a “most serious nature” that have been committed after 1 July 2002, a state may also refer them to the International Criminal Court if it is incapable of investigating or prosecuting them itself.⁷⁹²

⁷⁹¹ See International Commission of Jurists, *Terrorism and Human Rights*, p. 247.

⁷⁹² According to the Statute of the International Criminal Court, the court has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Interference with the Right to Privacy

The right to privacy underpins some of the most important protections in international human rights law. Sometimes described as the right to be left alone, privacy rights are interlinked with the freedoms of expression, association, movement, thought and religion, among others. Conversely, the absence of privacy almost invariably means the absence of freedom.

The September 11 attacks had a profound effect on the view of the governments within the OSCE region about the appropriate boundaries between personal privacy and state security. This new view was epitomized by the comments of Otto Schilly, the minister of interior of Germany, a country which, prior to the attacks, had among the strictest privacy standards in the region. Speaking in September 2001, Schilly argued that “the principles of protecting the peoples’ personal data must not stand in the way of fighting crime and terrorism”.⁷⁹³

This altered perception led to new legislation and proposals impacting privacy. Search and surveillance powers were enhanced and judicial oversight over them was weakened. Time limits for the retention of telecommunications traffic data were extended. Safeguards on the collection of and access to personal data were weakened, and schemes authorizing widespread government searches of personal data were developed. Government agencies demanded increasing amounts of personal data from airline passengers, foreign nationals, students and asylum seekers, but there was no corresponding increase in protections against its misuse. In addition, information gathered through the use of extraordinary powers granted for the conduct of terrorist investigations was not restricted to use in those investigations.

Relevant Legal Standards

The right to privacy is enshrined in international human rights law. The ICCPR protects an individual from state interference in his or her privacy.⁷⁹⁴ The ECHR and ACHR protect an individual against state interference with his or her private life.⁷⁹⁵ The relevant articles in

⁷⁹³ Quoted in Lee Dembart, “Privacy Undone: The E.U.’s internet plan takes liberties with personal rights”, *International Herald Tribune*, 10 June 2002.

⁷⁹⁴ ICCPR, article 17: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation”.

⁷⁹⁵ ECHR, article 8(1): “Everyone has the right to respect for his private and family life, his home and his correspondence”; ACHR, article 11(2): “No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence, or of unlawful attacks on his honour or reputation”. The concept of private life under the ECHR is broader than that of privacy under the ICCPR. The European Court of Human Rights has suggested that private life encompasses “to a certain degree the right to establish and develop relationships with other human beings”. *Niemetz v. Germany*, Judgment of 16 December 1992, series A, no. 251-B, para. 29. The European Court of

each convention also protect a person's family life, home and correspondence.⁷⁹⁶ The right to privacy was reaffirmed by OSCE member states in the 1991 Moscow document.⁷⁹⁷

Privacy rights are not absolute. Under the ICCPR, state interference with an individual's privacy is permitted provided that it is not "arbitrary or unlawful".⁷⁹⁸ The ECHR permits interference if it is necessary "in the interests of public security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of other".⁷⁹⁹ In cases involving surveillance, searches and other invasions of privacy undertaken or justified by states in the context of counter-terrorism, the European Court of Human Rights has tended to conclude that privacy rights under article 8(1) have been interfered with, but go on to accept that the measures are proportionate under article 8(2).⁸⁰⁰ In cases involving surveillance for general law enforcement purposes rather than counter-terrorism, the European Court of Human Rights requires greater administrative safeguards against abuses by states.⁸⁰¹ The ACHR permits interference provided it is not "arbitrary or abusive".⁸⁰² The OSCE Moscow document requires that state interference with privacy rights must be "prescribed by law" and be "consistent with internationally recognized human rights standards" so as to avoid "improper or arbitrary intrusion by the State into the realm of the individual".

The right to privacy also extends to personal data gathered by the state, including data held in electronic form. In May 2000, the European Court of Human Rights ruled in the case of *Rotaru v. Romania* that "public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities".⁸⁰³ In the earlier case of *Leander v. Sweden*, the court had held that the "storing and the release of information" relating to the applicant's private life by the state, together with the lack of opportunity for

Human Rights has also held that private life can include mental and physical integrity. See *Bensaid v. United Kingdom*, Judgment of 6 February 2001, Reports of Judgments and Decisions 2001-I.

⁷⁹⁶ ACHR also prohibits unlawful attacks on a person's honour or reputation.

⁷⁹⁷ OSCE Moscow document, para. 24.

⁷⁹⁸ ICCPR, article 17.

⁷⁹⁹ ECHR, article 8(2). (l).

⁸⁰⁰ See for example, *Murray v. United Kingdom*; European Court of Human Rights, *Klass and others v. Germany*, Judgment of 6 September 1978, series A, no. 28.

⁸⁰¹ European Court of Human Rights, *Malone v. United Kingdom*, Judgment of 28 August 1984, series A, no. 82; European Court of Human Rights, *Kruslin v. France & Huvig v. France*, Judgments of 24 April 1990, series A, no. 176-A and B. For further discussion of the court's approach, see Ovey & White, *The European Convention on Human Rights*, pp. 254-260.

⁸⁰² ACHR, article 11(3).

⁸⁰³ European Court of Human Rights, *Rotaru v. Romania*, Judgment of 4 May 2000, Reports of Judgments and Decisions 2000-V, para 43.

him to refute it “amounted to an interference with his right to respect for private life as guaranteed by article 8(1)”.⁸⁰⁴

The ICCPR, ECHR and ACHR make no mention of personal data as a subcategory of privacy rights. The OSCE Moscow document adds “electronic communications” to the categories protected under private and family life but does not refer to personal data.⁸⁰⁵ The European Parliament human rights committee has suggested that “the protection of personal data is not a specific right” under the ICCPR or regional conventions but is nevertheless “covered” by the right to privacy and family life.⁸⁰⁶

Data privacy is specifically protected by the 1981 European Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data.⁸⁰⁷ Moreover, the EU Charter of Fundamental Rights contains a specific article 8 protecting data privacy, separate from the article protecting family and private life.⁸⁰⁸ While the specialized convention and the inclusion of data privacy as a separate category of right in the EU Charter provide more detailed protection, it is clear that data privacy was already protected under international human rights law.

Human Rights Concerns

European Union

A number of measures adopted by the European Union following the September 11 attacks have undermined privacy rights, weakened long-standing EU standards in relation to data protection, and run counter to the spirit of the new EU Charter of Fundamental Rights. A July 2002 EU directive removed constraints on the ability of member states to require long-term retention of telephone and internet “traffic data” records by telecommunication companies

⁸⁰⁴ European Court of Human Rights, *Leander v. Sweden*, para. 48. The court went on to find that the interference was justified on the facts under article 8(2). The principle that article 8 includes personal data privacy was reaffirmed in European Court of Human Rights, *Amann v. Switzerland*, Judgment of 16 February 2000, Reports of Judgments and Decisions 2000-II, para. 65.

⁸⁰⁵ OSCE Moscow document, para 24. “The participating States reconfirm the right to the protection of private and family life, domicile, correspondence and electronic communications...”.

⁸⁰⁶ European Parliament, Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, “Freedom, Security and Justice: An Agenda for Europe,” (undated); at http://www.europarl.eu.int/comparl/libe/elsj/charter/art08/default_en.htm.

⁸⁰⁷ European Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (ETS 108). As of December 2002, the following states had ratified the convention: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

⁸⁰⁸ Charter of Fundamental Rights of the European Union, article 8. (Proclaimed by the European Council on 7 December 2000). NB: At the time of this writing, the Charter had no binding force.

and internet-service providers.⁸⁰⁹ Although “traffic data” does not include the content of e-mails, it can include telephone numbers, e-mail addresses and the unique identifying numbers of computers used by the sender or recipient.

Directive 2002/58/EC was originally intended to increase internet privacy by restricting the use of unsolicited e-mails (so-called “spam”) and “cookies” (computer code downloaded onto a user’s computer when accessing a website, which monitors and reports on websites the user subsequently visits). On 30 May 2002, however, the European Parliament approved an amendment to the directive, allowing EU member states to:

adopt legislative measures to restrict the scope of the rights and obligations provided for in...Directive 95/46/EC when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences...To this end, Member states may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph.⁸¹⁰

The new directive amends directive 95/46/EC, which prior to amendment had provided important safeguards against the misuse of personal data.⁸¹¹ The new directive also repeals directive 97/66/EC, which allowed data retention only for billing purposes, after which it had to be erased.⁸¹² The changes have been condemned by a spectrum of privacy and press-freedom advocates.⁸¹³

⁸⁰⁹ Directive 2002/58/EC of the European Parliament and of the EU Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. (*Official Journal* L201, 31/07/2002, pp. 37-47).

⁸¹⁰ Directive 2002/58/EC, article 15.

⁸¹¹ Directive 95/46/EC of the European Parliament and of the EU Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. *Official Journal* L 281, 23 November 1995, pp. 31-50.

⁸¹² Directive 97/66/EC of the European Parliament and the EU Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [now repealed]. Under article 6 of the directive: “processing [was] permissible only up to the end of the period during which the bill may lawfully be challenged or payment may be pursued”.

⁸¹³ On 22 May 2002, 40 civil liberties organizations wrote an open letter to the president of the European Parliament urging him and fellow MEPs to vote against the amendment to Directive 2002/58/EC. Among the signatories were the Global Internet Liberty Campaign, Statewatch, Privacy International, the Electronic Privacy Information Center, LIBERTY and the ACLU. Letter available at: http://www.gilc.org/cox_en.html. The International Federation of Journalists and Reporters Sans Frontières have both condemned the amendment.

While the new directive merely gives the member states the discretion to enact domestic legislation requiring data retention “for a limited period” on national security grounds, there were reports during 2002 that the EU Council was considering a Belgian proposal for an EU-wide Framework Decision that would require member states to retain traffic data for law enforcement purposes for 12 to 24 months.⁸¹⁴ An undated document purporting to be a draft framework decision that included such a provision was obtained by the organization *Statewatch* and disclosed on 21 August 2002.⁸¹⁵ The Danish Presidency of the European Union issued a statement on 22 August, dismissing both the document and media reports about it as “rumours” and asserting that the only data retention proposal under consideration by the council had been tabled by Denmark in June 2002 and “contain[ed] no detailed indications as to what the contents of such rules should be”.⁸¹⁶ Danish authorities unilaterally introduced amendments to their domestic data retention law in May 2002 requiring traffic data retention for 12 months for law enforcement purposes (see section on Denmark below).

Regardless of the document’s provenance, reports about the draft framework decision were sufficiently troubling to the European Union’s 15 data protection commissioners that they issued a joint statement on 11 September 2002, indicating that such retention “would be an improper invasion of the fundamental rights guaranteed to individuals by article 8 of the European Convention on Human Rights”.⁸¹⁷

Belarus

On 3 January 2002, “the Law of the Republic of Belarus on the Fight Against Terrorism” entered into force.⁸¹⁸ The new law seriously impinges on the privacy rights of the citizens of Belarus, as well as codifies an excessively broad definition of terrorism. Article 13 of the law permits security forces conducting “counter-terrorism operations” to:

enter citizens’ houses and other premises without hindrance and at any time, breaking locks if necessary, to enter citizens’ land plots, the offices and grounds of organizations

⁸¹⁴ See, for example, “Privacy fears over EU snooping plans”, *BBC News online*, 20 August 2002, at <http://news.bbc.co.uk/1/hi/technology/2204909.stm>; Will Knight, “EU plans to enforce electronic data storage”, *New Scientist*, 20 August 2002, at <http://www.newscientist.com/news/print.jsp?id=ns99992690>.

⁸¹⁵ Available at <http://www.statewatch.org/news/2002/aug/05datafd.htm>.

⁸¹⁶ Danish EU Presidency, “Press release on the retention of traffic data”, 22 August 2002, at http://www.eu2002.dk/news/news_read.asp?iInformationID=21663.

⁸¹⁷ Statement of the European Data Protection Commissioners, 11 September (via Foundation for Policy Research website, at <http://www.fipr.org/press/020911DataCommissioners.html>).

⁸¹⁸ The law was approved by the House of Representatives on 11 December 2002 and the Council of the Republic on 20 December 2001. Translation by Article 19 Belarus. Full text of law available on Article 19 Belarus website, at <http://www.article19.by/laws/terroriste.html>.

of all forms of ownership and to inspect them while pursuing persons suspected of having committed an act of terrorism and having substantial grounds to believe that a crime has been or is being committed there which would threaten citizens lives' or health, with a prosecutor to be informed within 24 hours...⁸¹⁹

These provisions can be carried out without the permission of a court (since only a prosecutor need be informed, and only after the violation has taken place). The absence of any review by the courts renders irrelevant the requirement that authorities must have a reasonable suspicion before invading a home or office. In effect, the article grants an extremely invasive power to security forces without creating any mechanism for checking or reviewing that power. It is hard to imagine a more transparent violation of privacy rights.

Article 13 does not stop there, however. It also permits those carrying out “counter-terrorist” actions to:

...conduct personal searches of citizens, to search their belongings, inspect vehicles and luggage, including by use of technical means, as citizens enter and exit the area of conduct of the counter-terrorist operation;⁸²⁰

This provision does not even contain the requirement of reasonable suspicion. Security forces need not inform a prosecutor at all. The lack of safeguards indicates that the measure falls outside the acceptable constraints placed on privacy under the ICCPR.⁸²¹

Article 13 goes on to permit security forces to commandeer vehicles belonging to citizens and organizations “in order to prevent an act of terrorism” as well as to pursue suspected terrorists and to convey the injured to hospital.⁸²² While making use of private vehicles in an emergency for medical or law enforcement purposes may well be reasonable (and echo existing practice in many states), the seizure of vehicles “to prevent an act of terrorism” is far too broad and open to abuse. While such action might best be seen as an interference with property rights, it could also constitute an interference with privacy rights, depending on the impact of the seizure on those deprived of their vehicles (e.g. inability to work, inability to visit family members).

⁸¹⁹ Law of the Republic of Belarus on the Fight Against Terrorism, article 13: Legal Order in the Area of Conduct of Counter-terrorism Operation.

⁸²⁰ Law of the Republic of Belarus on the Fight Against Terrorism, article 13.

⁸²¹ Belarus is not a signatory to the ECHR.

⁸²² Law of the Republic of Belarus on the Fight Against Terrorism, article 13.

The law contains a further provision in article 21 indemnifying “people involved in the fight against terrorism” from “responsibility for damage inflicted during the conduct of a counter-terrorism operation”.⁸²³ The article also states that those conducting such operations are permitted to “damage the lives, health and property of terrorists and other interests protected by the law”. It is not clear whether the article exempts the state from claims for compensation, or only the individual members of the security forces. What is clear is that security forces have the discretion to decide who is and who is not a terrorist, and to damage the lives, health and property of those individuals they decide are terrorists. Again, the article foresees no role for the courts, leaving the security forces accountable to no one for their actions. This clearly falls outside the range of lawful restrictions on privacy rights envisioned under the ICCPR. The right of security forces to “damage” the lives of suspected terrorists arguably amounts to a licence to carry out extra-judicial executions, a clear breach of the right to life.⁸²⁴

Canada

Canadian authorities introduced far reaching anti-terrorism legislation in the wake of the September 11 attacks. On 28 November 2001, the Canadian parliament passed the Anti-Terrorism Act (known as Bill C-36) which amended the country’s criminal code, Evidence Act, Official Secrets Act, and 17 other laws, despite criticism that it undermined due process rights, included excessively broad definitions of terrorism and contained insufficient safeguards in relation to freezing of assets linked to terrorism.⁸²⁵ A second measure, the Public Safety Act (Bill C-42) was introduced soon after.⁸²⁶ This bill contained wide-ranging proposals, from implementation of an international biological weapons convention, to amendments to existing pest control, shipping and import-export laws. Several provisions were controversial, including an amendment to the Aeronautics Act requiring airlines to provide passenger data to Canadian federal law enforcement agencies.⁸²⁷ Bill C-42 was

⁸²³ Law of the Republic of Belarus on the Fight Against Terrorism, article 21.

⁸²⁴ Article 6(1) of the ICCPR: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

⁸²⁵ For more information, see chapters on arrest; terrorism definitions; and financial measures.

⁸²⁶ Bill C-42 “An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety” (Short title: The Public Safety Act). Bill C-42 received its first, and only, reading before the Canadian House of Commons on 22 November 2001.

⁸²⁷ Bill C-42, section 4. 82. Other controversial provisions included giving the minister of defence the power to establish temporary military security zones to which public access is restricted. For more information, see David Goetz et al, “Legislative Summaries: Legislative History of Bill C-42”, Library of Parliament – Parliamentary Research Branch, 21 December 2001, at <http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/summaries/c42-e.pdf>.

withdrawn in 24 April 2002 following criticism from the Canadian Bar Association, the Federal Privacy Commissioner, Canadian MPs and others.⁸²⁸

An amended version of the legislation, Bill C-55, was introduced in the House of Commons five days later with expanded provisions for sharing of airline passenger data, including for general law enforcement purposes.⁸²⁹ In the face of fierce criticism from the privacy commissioner, Canadian Bar Association and others, Parliament failed to adopt Bill C-55 before the end of the parliamentary session on 16 September 2002, and the measure died.⁸³⁰

A third version of the Public Safety Act, Bill C-17, received its first reading in the House of Commons on 31 October 2002.⁸³¹ Under section 4.82 of the new bill, the Royal Canadian Mounted Police (RCMP) is permitted to obtain passenger data from airlines for transportation security purposes only.⁸³² Any collected data must be destroyed after seven days, unless it is reasonably required for the purposes of transportation security or the investigation of “threats to the security of Canada”.⁸³³ The RCMP is, however, permitted to disclose any information gathered for the purpose of identifying persons for whom an arrest warrant has been issued if it has reason to believe that the information would be useful for the execution of that warrant.⁸³⁴ The privacy commissioner pointed out that this enables the RCMP to match this information against a database of persons wanted on warrants and to use such matches to bring about arrests”, adding that the measure “has the same effect as requiring us to notify the police every time we travel, so that they can check whether we are wanted for something”.⁸³⁵ While restrictions on the right to privacy are envisioned in international human rights law, section 4.82 constitutes an arbitrary interference contrary to the ICCPR, since it grants Canadian authorities powers to interfere with privacy that are entirely unrelated to the

⁸²⁸ See for example: Canadian Bar Association “CBA Calls for Amendments to Bill C-42 Public Safety Act”, 24 March 2002, at http://www.cba.org/CBA/News/2002Archives/2002-03-22_safety.asp.

⁸²⁹ Bill C-55 “An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety” (Short title: The Public Safety Act).

⁸³⁰ Office of the Privacy Commissioner of Canada, News Release, 1 May 2002, at http://www.privcom.gc.ca/media/nr-c/02_05_b_020501_e.pdf; CBA Submission on Bill C-55, at http://www.cba.org/CBA/pdf/2002-07-02_c55-E.pdf.

⁸³¹ Bill C-17, “An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety” (Short Title: The Public Safety Act).

⁸³² For more information, see David Goetz et al, “Legislative Summaries: Legislative History of Bill C-17”, Library of Parliament – Parliamentary Research Branch, 15 November 2002, at <http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/summaries/c17-e.pdf>.

⁸³³ Bill C-17, section 4.82 (14).

⁸³⁴ Ibid., section 4.82 (11).

⁸³⁵ Office of the Privacy Commissioner of Canada, News Release, 1 November 2002, at http://www.privcom.gc.ca/media/nr-c/02_05_b_021101_e.asp.

section's stated purpose, namely counter-terrorism. Despite these concerns, the bill received its second reading on 20 November 2002.

Denmark

In May 2002, the Danish parliament approved a controversial anti-terrorism bill, amending a variety of existing laws. Originally introduced by the outgoing government in October 2001, the bill was intended as a response to the September 11 attacks and to implement UN Security Council Resolution 1373 on the prevention and suppression of terrorist acts.⁸³⁶ Critics of the bill, which became law on 6 June 2002, argue that it interferes with the privacy rights of Danish citizens and residents.⁸³⁷

The law amends existing telecommunications legislation concerning the retention of traffic data. Internet service providers and telecom companies are now required to retain traffic data for one year for law enforcement purposes (a move permitted under European Community law following directive 2002/58/EC). Reports of a similar EU-wide directive led EU data protection commissioners to issue a statement indicating that such a move would breach article 8 of the ECHR. By analogy, the new Danish data retention rules are also likely to be in breach of article 8 of the ECHR, as well as the European Data Protection Convention. Commenting on the measure, the Danish Center for Human Rights noted that the amendment was silent on safeguards for the privacy rights of persons not subject to criminal investigation, but who are in telephone or e-mail contact with a person who is subject to such an investigation.⁸³⁸

The new law also permits law enforcement agencies to install monitoring software on the computers of persons suspected of serious crimes (those punishable by prison terms in excess of six years) subject to the issue of an interception warrant.⁸³⁹ The requirement that a warrant be issued may be sufficient to render the measure compatible with ECHR as a proportionate interference with privacy rights.

⁸³⁶ For more information about UN Security Council resolution in connection with “freezing measures”, see chapter on financial measures.

⁸³⁷ Law Concerning the Change of Penal Code, Administration of Justice Act, Law of Competition and Consumer Regulation of the Telecommunications Market, Law of Small Arms, Law of Extradition and Law of Extradition of Criminals to Finland, Iceland, Norway and Sweden, Law No. 378, 6 June 2002.

⁸³⁸ Danish Center for Human Rights, comments on draft legislation [in Danish], 23 November 2001, at: http://www.humanrights.dk/afdelinger/forskning/notat/alle/n01_50/.

⁸³⁹ EPIC/Privacy International, *Privacy and Human Rights 2002*, 6 September 2002, p.164.

A further law amending the Law on Aliens, was approved on 6 June 2002.⁸⁴⁰ Among the amendments was a change to article 40 of the law, removing the requirement that court approval be obtained prior to the police use of the fingerprints and photographs of asylum seekers in criminal investigations (so-called “biometric data”).⁸⁴¹ The use of fingerprints and photographs are also no longer restricted to crimes carrying a prison sentence in excess of nine months and those where access to the data is seen as crucial to the investigation. Similar restrictions have also been removed on the release of such biometric data to foreign governments in response to international arrest warrants. The removal of the safeguards combined with the lowering of standards for use tip the balance from a legitimate restriction into a violation of privacy rights contrary to article 8 of the ECHR.

The law also introduces a new chapter 7a into the Aliens Law permitting the sharing of an asylum seeker’s personal data between government agencies without that person’s consent or a proper review of the purpose for which the requesting agency requires the information. The Danish Center for Human Rights has commented that the new provision lacks adequate safeguards and thus violates privacy rights.⁸⁴²

France

On 15 November 2001, a new Law on “Day-to-Day” Security (Loi sur la Sécurité Quotidienne, hereafter LSQ) entered into force. The LSQ was originally introduced prior to September 11 as a wide-ranging bill unrelated to terrorism.⁸⁴³ In early October 2001, however, after the bill had already passed the first reading in the parliament, the French government presented 13 amendments, all purportedly related to counter-terrorism, which were then approved by parliament.

⁸⁴⁰ Law no. 366/2002, Amending the Aliens’ Law (initiatives against terrorism in a follow-up to UN Security Council Resolution 1373 of 28 September 2001). The Aliens’ Law was superseded by consolidating legislation (Law no. 608/2002 Announcement of the Law on Aliens) adopted on 17 July 2002, which incorporates the changes introduced by 366/2002 together with earlier amendments.

⁸⁴¹ Biometric data encompasses any data unique to an individual, including fingerprints, voice and eye identification, and DNA. Biometric data is used to verify identity, although the reliability of some measures, such as facial recognition is disputed. For more information, see at <http://www.epic.org/privacy/biometrics/>.

⁸⁴² Danish Centre for Human Rights, Notat til Justitsministeriet og Indenrigsministeriet om lov om ændring af udlændingeloven (Initiativer mod terrorisme m.v. - opfølgning på FN’s Sikkerhedsråds resolution nr. 1373 af 28. September 2001 om bekæmpelse af terrorisme), November 2001.

⁸⁴³ According to the International Federation for Human Rights (best known by its French abbreviation FIDH), the original version of the law addressed matters including traffic laws, bank cards and dangerous animals. Driss El Yazami, secretary-general of FIDH, “Impact of the September 11 attacks on civil liberties in Europe”. Presented at International symposium on terrorism and human rights, Cairo, 26-28 January 2002, at <http://www.fidh.org/justice/lettres/2002/driss3101a.pdf>.

Two of the measures that most disturbed privacy advocates were a provision requiring internet service providers and telecommunications companies to retain data-traffic for one year for law enforcement purposes, and a provision requiring that the government be given access to cryptography keys upon request.⁸⁴⁴ Both require an implementing decree before entering into force, however, and at the time of this writing, no implementing decrees had been issued.

According to the International Federation for Human Rights (FIDH), the LSQ greatly broadens police powers in relation to searches, while weakening judicial oversight. Investigating magistrates are granted unlimited discretion to issue search warrants. The law also increases the power of private security firms and extends the powers of the police to retain DNA records for all crimes.⁸⁴⁵ In December 2001, French human rights and civil liberties groups petitioned the Constitutional Court, arguing that the new measures were unconstitutional.⁸⁴⁶ A group of some 300 Parisian lawyers denounced the law the same month.⁸⁴⁷

All of the anti-terrorism provisions of the legislation are subject to a time limit, and must be renewed by 31 December 2003. Despite this safeguard, some of the provisions contravene international privacy standards. The data retention provision, if implemented, may breach article 8 of the ECHR and the European Convention on Data Protection (although it will be compatible with Community law following directive 2002/58/EC). The weakening of judicial oversight over searches of private property undermines the safeguards against disproportionate violations of citizens' privacy, and may lead to breaches of article 8 of the ECHR. The widening of the powers of private security firms to conduct searches is also an alarming development, suggesting that the authorities are willing to rely on unaccountable non-state actors to carry out activities properly performed by the police and courts.

In August 2002, the government announced its legislation programme on internal security.⁸⁴⁸ The programme includes a measure giving police officers the right to remote access, monitor

⁸⁴⁴ EPIC/Privacy International, *Privacy and Human Rights 2002*, p.180.

⁸⁴⁵ International Helsinki Federation, *Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America, Report 2002 (Events of 2001): France*, 28 May 2002, p.129, http://www.ihf-hr.org/reports/AR2002/2_Country%20Issues/France.pdf.

⁸⁴⁶ Petition available (in French) at: <http://www.lsjolie.net/lsq/appel-saisine.pdf>; List of signatories at: http://www.lsjolie.net/article.php3?id_article=96.

⁸⁴⁷ International Helsinki Federation, *Human Rights in the OSCE Region...: France*, p.129.

⁸⁴⁸ The law concerning the general direction and programme planning of internal security (*Loi d'orientation et de programmation pour la sécurité intérieure*, LOPSI), published in the Official Journal, 30 August 2002.

and seize computers. Although the power is restricted to use in official investigations and requires the authorization of a magistrate, the press freedom group Reporters San Frontières (RSF) protested to the French interior minister that the law created “a universal climate of suspicion”, and could be used to breach the confidentiality of journalists’ sources.⁸⁴⁹

More detailed proposals were contained in the draft internal security law, presented to the French Senate on 23 October 2002.⁸⁵⁰ The measure passed the Senate on 19 November 2002, and the National Assembly on 12 February 2003. Privacy advocates fear the legislation will undermine privacy rights. According to Fédération Informatique et Libertés, an association of privacy and free expression groups, the law permits the development of national DNA databases of ordinary criminals, allows data sharing between security forces databases that is currently forbidden on privacy grounds, and gives foreign law enforcement agencies access to police data bases.⁸⁵¹ The National Advisory Commission on Human Rights (Commission nationale consultative des droits de l’homme) and the Human Rights League (Ligues des droits de l’homme, LDH) have also criticized the law.⁸⁵² The measures expire on 31 December 2005.

Germany

Prior to the September 11 attacks, German laws protecting personal privacy were among the strictest in Europe.⁸⁵³ In the aftermath of the attacks, federal authorities introduced a series of measures that seriously undermine privacy rights in Germany. A sweeping December 2001 anti-terrorism law permits personal and biometric data collection and sharing by government agencies to an unprecedented degree.⁸⁵⁴ An October 2001 agreement secured between federal and state (Land) authorities on the application of systematic screening (Rasterfahndung) methods to young Muslim men attending universities in Germany was equally troubling.⁸⁵⁵ In October 2001, the federal government also issued a regulation requiring telecommunications

⁸⁴⁹ RSF, “RSF warns interior minister of threat to internet freedom posed by new security law”, 30 July 2002, via IFEX website, at <http://www.ifex.org/alerts/view.html?id=11023>.

⁸⁵⁰ Draft law on internal security (Projet de Loi pour la Sécurité Interieure, PLSI). Legislative details (in French) on Senat website, at <http://www.senat.fr/dossierleg/pjl02-030.html>.

⁸⁵¹ FIL, PLSI: draft law on internal security – the age of suspicion”, 25 October 2002, via Statewatch website, at <http://www.statewatch.org/news/index.html>.

⁸⁵² See the press release on LDH website (in French), at http://www.ldh-france.com/actu_derniereheure.cfm?idactu=581.

⁸⁵³ EPIC/Privacy International, *Privacy and Human Rights 2002*, p.183.

⁸⁵⁴ The Second Anti-Terrorism Act [*Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz)*], Law on the fight against international terrorism (Counterterrorism law)] (in German), at

http://www.bmi.bund.de/Annex/de_15999/Terrorismusbekaempfungsegsetz_PDF-Datei.pdf.

⁸⁵⁵ See also chapter on terrorism definitions.

companies to install and maintain equipment allowing security agencies to monitor traffic data subject to court approval.

In December 2001, the German parliament approved the Second Anti-Terrorism Act, a wide-ranging bill amending more than a dozen existing laws.⁸⁵⁶ A month earlier, parliament had approved the First Anti-Terrorism Act broadening the powers under the criminal code to prosecute foreign nationals for terrorism and permitting the authorities to ban religious organizations linked to illegal activities.⁸⁵⁷ The first act also allows federal and state authorities to request personal data from social insurance institutions for Rasterfahndung screening.

The second act, which entered into force in January 2002, has also caused great alarm among privacy advocates. The act grants increased power to federal and state authorities to collect personal data. Article 1 of the act permits the Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz, BfV)⁸⁵⁸ to collect financial, postal and telecommunications data and to receive data on refugees and asylum seekers from the federal refugee agency. Agencies at the state level are also permitted to exercise similar powers. Although data collection must be approved by the head of the BfV, and the process is subject to some parliamentary scrutiny, those who are under surveillance need not be informed even after the surveillance has been concluded.⁸⁵⁹ Article 3 allows the Federal Intelligence Service access to financial records and telecommunications traffic data, subject to similar protections. Article 2 allows the Military Counter-Intelligence Service to obtain telecommunications traffic data. All three provisions contain a sunset clause, requiring them to be reviewed in five years with the possibility of renewal.

Article 10 removes the requirement that the Federal Criminal Police work through state police to collect private data from individuals and institutions. Article 13 allows federal and state

⁸⁵⁶ Amended laws include: Legislation on the Protection of the Federal Constitution; Law on Military Counter-Intelligence Service; Law on Federal Intelligence Service; Law on Protection of Federal Borders; Law on Passports; Law on Personal IDs; Law on Federal Criminal Police; Aliens' Law; Asylum Procedure Act; and Law on Central Aliens' Register.

⁸⁵⁷ Amnesty International, *Concerns in Europe (July-December 2001)*, 5 May 2002. The First Anti-Terrorism Act entered into force on 8 December 2001.

⁸⁵⁸ The Federal Office for the Protection of the Constitution is one of Germany's three federal security agencies, focussing on domestic intelligence gathering. The Federal Intelligence Service (*Bundesnachrichtendienst*) is responsible for international intelligence and the Military Counter-Intelligence Service (*Militärischer Abschirmdienst*) is responsible for security within the armed forces. For further information see: <http://www.verfassungsschutz.de/index.html>.

⁸⁵⁹ It should be noted that the European Court for Human Rights found that the absence of a notification requirement in an earlier German surveillance law did not constitute a disproportionate interference with article 8 of the ECHR (*Klass and others v. Germany*).

law enforcement agencies to simultaneously obtain personal data from the central aliens register, including aliases and last place of known residence, status of asylum proceedings and criminal records. Previously the latter two categories of information could only be obtained in a subsequent request if it could be demonstrated that the initial information was insufficient.

The act significantly increases the quantity and use of biometric data collected by federal and state agencies. Articles 7 and 8 authorize the addition of biometric data to passports and national ID cards, although no federal data base of such information is created, and the information can only be used to verify identity. Article 11 broadens the collection of biometric data from foreign nationals who require a permit for residence or temporary stay. All permits may now include finger prints and other biometric data, and permit applicants who are subject to fingerprinting and photograph verification may now also be subject to voice recording although they must be informed in advance. Despite the current safeguards against the use of such data in national databases or for criminal investigations, federal and state collection of biometric data inevitably raises concerns about future broadening of use and access in breach of privacy rights.

Article 12 permits voice recording of asylum seekers as a means of verifying nationality (photographic and fingerprint data is already collected) provided that the asylum seeker is informed prior to the recording. Article 15 allows collection of personal data from foreign nationals for inclusion in a national data base upon an application for residence permit, asylum claim or residence notification. ProAsyl, a German NGO, has commented that the database lacks safeguards to prevent the use of personal data beyond verifying identity.⁸⁶⁰ Data about religious affiliation can also be registered, subject to the individual's consent.

At the start of October 2001, federal and state interior ministries agreed on common screening criteria to search for terrorist "sleepers". Men between 18 and 40 years of age who were born in a Muslim country and have studied science or engineering are the primary targets. The process known as Rasterfahndung, is based on computer technology first developed in the 1970s to search for members of the Red Army Faction, a left-wing terrorist group.⁸⁶¹ The methods have been legally permitted with court approval since the adoption of the 1992 criminal procedure code. The October 2001 agreement marks the first time that such general

⁸⁶⁰ PRO ASYL, "Gläserne Flüchtlinge, verdächtige Ausländer - zum Terrorismusbekämpfungsgesetz", 26 November 2001, at http://www.dbein.bndlg.de/schily/docs/PRO_ASYL_Flugblatt_Terror.doc.

⁸⁶¹ Ian Johnson and David Crawford, "Germany's Terrorist Hunt Spurs Corporate Defiance", *Wall Street Journal*, 9 August 2002.

screening criteria have been used, bringing thousands of young men under suspicion largely as a result of their religious affiliation.

Using information obtained from universities, resident registration offices, health insurers, utility companies and, after December 2001, social insurance agencies and private companies, interior ministry computers screened almost 10,000 individuals.⁸⁶² The legality of the profiling was challenged in several court cases. On 15 January 2002, a Berlin court ruled that the screening violated state privacy laws. The court held that screening could not be justified simply “because the possibility of the existence of sleepers in Germany cannot be ruled out. That is not enough to use the data.”⁸⁶³ The decision, however, was reversed on appeal. The State Supreme Court in North Rhine Westphalia ruled on 8 February 2002 that profiling must be limited to foreign students.⁸⁶⁴ Most significant was the 6 February 2002 ruling by the Regional Court of Wiesbaden, which held that screening could only be used where there is an imminent threat, and that at the time of its decision there was no lawful basis for the use of Rasterfahndung in the state of Hessen. The court stressed that “[d]espite months of intensive investigation, the applicant [the state bureau of criminal investigations (Landeskriminalamt)] had been unable to produce anything more than suspicions” to support its case. The court found that:

The plaintiff’s assertion of a future danger has not been proven. The more time that has passed since the terror attacks of September 11, 2001, the clearer this becomes.... Although so-called “sleepers” have been discovered on the territory of the Federal Republic, there is no proof that they had advanced plans to carry out concrete attacks. It is also not evident that terrorist networks have been established that at any time would be able to quickly carry out attacks if given the appropriate orders.... All that remains is the possibility of terrorist attacks, which cannot be excluded, but this is not sufficient to meet the requirement of a present danger as required by [the law]. The fight against international terrorism through Rasterfahndung is ... legally defined. The mere possibility of terrorist attacks is not covered by [the law].⁸⁶⁵

⁸⁶² Some private employers refused to hand over employee data. Ibid.

⁸⁶³ John Hooper, “German Courts Put Terror Hunt in Doubt,” *Guardian*, 2 February 2002, <http://www.guardian.co.uk/international/story/0,3604,643720,00.html>.

⁸⁶⁴ Roland Eggleston “Germany: Businesses Refuse To Cooperate With Checks On Personnel Data” *RFE/RL Newslines*, 21 August 2002, at <http://www.rferl.org/nca/features/2002/08/21082002164923.asp>.

⁸⁶⁵ Unofficial translation of the decision of the Wiesbaden regional court, 4 T 707/01, 6 February 2002.

The court's decision was upheld on appeal by the Higher Regional Court in Frankfurt/Main on 21 February 2002, leaving Hesse as the only state exempt from the screening.⁸⁶⁶

Some of those identified through the profiles were subsequently interrogated or subjected to home searches. As of August 2002, however, the searches had reportedly been completed and no arrests had been made.⁸⁶⁷ Despite the apparent lack of success of Rasterfahndung, the German delegation to the European Union submitted a proposal to the EU Council on 8 March 2002 for "Europe-wide computerized profile searches".⁸⁶⁸

A new surveillance regulation approved by the federal cabinet on 24 October 2001 is designed to facilitate government surveillance of fixed-line and mobile telephone calls, e-mail, fax and SMS ("text messages").⁸⁶⁹ The origins of the measure, which arise from the Telecommunications Law, substantially pre-date the September 11 attacks. It requires telecommunication operators to install and maintain electronic bugging equipment that can be accessed by law enforcement agencies wishing to obtain traffic data relating to named individuals. Although a court order is required, the measure appears to be predicated on an assumption that law enforcement monitoring of traffic data will be commonplace. Privacy advocates have criticized the regulation, but telecommunications companies regard it as less intrusive than measures requiring wholesale data retention.⁸⁷⁰

Italy

On 18 October 2001, the Italian authorities adopted an emergency decree on "measures to fight against international terrorism".⁸⁷¹ The new law widens police powers in relation to terrorist investigations. Article 5 permits "preventive surveillance" of communications for up to 40 days when it is necessary in order to prevent a crime. With the approval of a magistrate, surveillance can be extended an additional 20 days, but in this case the police must give reasons as to why the operation is necessary. Preventive surveillance in the absence of any evidence of wrongdoing is a clear breach of privacy rights. Article 7 extends existing powers

⁸⁶⁶ Johnson and Crawford, "Germany's Terrorist Hunt ...".

⁸⁶⁷ Ibid.

⁸⁶⁸ Council of European Union, note from German delegation, "Europe-wide computerised profile searches", 6402/02, 8 March 2002, via http://www.heise.de/tp/english/inhalt/te/12274/12274_1.pdf.

⁸⁶⁹ Telecommunications surveillance regulation (*Telekommunikationsüberwachungsverordnung*), 24 October 2001.

⁸⁷⁰ Rick Perara, "Germany joins worldwide surveillance trend", *CNN.com*, 25 October 2001, at <http://www.cnn.com/2001/TECH/internet/10/27/germany.surveillance.idg/>.

⁸⁷¹ Decree-Law n. 374 "Emergency Measures to Fight against International Terrorism", 18 October 2001, [Enacted as Law No.438 of 15 December 2001 (Decree Law 374/2001)]. Text (in Italian), via <http://www.legislationline.org/get.php?id=2167&dots=3.11.0.&country=23&intst=0&topic=4&subtopic=106&subsubtopic=0>.

relating to anti-mafia investigations under the 1965 Anti-Mafia Act to those involving international terrorism. According to the Italian authorities, these powers include “the application of pre-emptive and preventive measures involving restrictions on personal freedom (internal exile, surveillance)”.⁸⁷² Article 7 provides no safeguards against abuse. The breadth of the measures under article 7 and lack of detailed safeguards pose a clear risk to privacy rights in Italy. Moreover, the decree permits police officers to use false identities and documents that would otherwise be contrary to Italian law in the course of undercover operations that have been previously authorized.⁸⁷³

A new immigration law passed by the Lower House in June and approved by the Senate in July, requires that all non-EU nationals residing in Italy be fingerprinted upon application or renewal of their residence permits.⁸⁷⁴ A December 2002 report to the UN indicated that those seeking residence permits are photographed in addition to being fingerprinted.⁸⁷⁵ These measures, which are not applied to the general population, constitute an interference with privacy rights that arguably strays beyond what is necessary either for the administration of foreign residents or public security. After protests during the summer of 2002 that the measure was discriminatory, the Italian authorities indicated they would widen the measure to include Italian and other EU nationals.⁸⁷⁶ However, Umberto Bossi, the minister of reform, later stated that the government had no plans to introduce legislation to include Italian and other EU nationals.⁸⁷⁷

Romania

The Romanian government adopted three emergency anti-terrorism ordinances in the wake of September 11.⁸⁷⁸ The first ordinance, no. 141, which entered into force on 31 October 2001,

⁸⁷² UN Security Council, “National report of the Republic of Italy pursuant to paragraph 6 of United Nations Security Council resolution 1373 (2001)”, S/2002/8, 2 January 2002.

⁸⁷³ Decree Law 374/2001, article 4.

⁸⁷⁴ CNN.com “Italy asylum bill racist, say MPs”, 4 June 2002; Immigrants’ Centre: “Senate approves Bossi-Fini law on immigration”, information republished from *AllianzaItalia* (AGI), 11 July 2002.

⁸⁷⁵ UN Security Council, “Supplementary report presented by Italy to the United Nations Security Council Counter-Terrorism Committee (CTC)”, S/2002/1390, 20 December 2002. “Foreign nationals requesting a residence permit or the renewal of an existing stay permit are now photographed and fingerprinted”.

⁸⁷⁶ According to Italian NGO, COSPE (Cooperazione per lo Sviluppo dei Paesi Emergenti) nationals from the U.S. citizens and other western industrialized countries were later exempted from the requirements, which underscores the criticisms of those who charge the measure is discriminatory.

⁸⁷⁷ Information from COSPE, March 2003.

⁸⁷⁸ Governments Emergency Ordinances No. 141/2001 (entry into force 31/10/01); No. 153/2001 (entry into force 3/12/01); No. 159/2001 (entry into 14/12/01). For more information see, UN Security Council, “National report of Romania submitted pursuant to paragraph 6 of United Nations Security Council resolution 1373 (2001) concerning counter-terrorism”, S/2001/1339, 31 December 2001.

contained the most problematic provisions. The ordinance lays down a more precise definition of terrorism (article 1) than had previously existed in Romanian law, criminalizes attempted terrorist actions in the same manner as those actually carried out (article 1(3)), increasing the maximum sentences for such offences by five years (article 1(2)).

Criticism of the ordinance focused primarily on article 7, which creates an obligation on the part of post and telecommunications operators to “immediately forward to the minister of communication and information technology, upon his or her written request, the information necessary in order to identify the persons who perpetrated the crimes included in the Emergency Ordinance”.⁸⁷⁹ As the Romanian Helsinki Committee has pointed out, the article gives the responsible minister the discretion to compel monitoring of post and telecommunications traffic of any person in Romania whom he suspects of involvement in terrorism, irrespective of the basis of that belief.⁸⁸⁰ There are no safeguards against misuse contained in the ordinance. Moreover, article 8 specifies that operators who fail to comply with such requests are subject to fines of between \$3,000 and \$15,000. As of October 2002, no fines had been levied against any operators. In the absence of any safeguards or judicial review, the measure constitutes a disproportionate interference in the privacy rights of Romanian residents.

Spain

In June 2002, Spain introduced new legislation to implement EU Directive 2002/58/EC, producing a law widely considered to be restrictive of free expression and privacy. The Law of Information Society Services and Electronic Commerce (Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico, LSSI) was approved by the parliament on 27 June 2002 and entered into force on 12 October 2002.⁸⁸¹

The law requires the mandatory registration of all websites from which the operator derives some income, with large fines for non-compliance. Many websites have reportedly shut down in protest rather than register.⁸⁸² Traffic data retention is covered by article 12 of the LSSI. It requires telecommunications network operators and internet service providers to retain traffic data for one year. The measure does contain some safeguards: the data must be retained

⁸⁷⁹ Article 7, Ordinance 141/2001. Unofficial translation by Romanian Helsinki Committee (APADOR-CH).

⁸⁸⁰ E-mail from the Romanian Helsinki Committee to the International Helsinki Federation, dated 7 October 2002.

⁸⁸¹ Text of law available (in Spanish), at <http://www.lssice.com/legislacion/lssice.html>.

⁸⁸² Daniel Woolls, “Spain’s new rules drive Web sites off the Internet”, *Associated Press*, 4 November 2002.

automatically and in a form to which the network provider does not have access, can only be accessed by law enforcement agencies if necessary for a criminal investigation, and must not be used for any other purpose. Despite these safeguards, the routine retention of all traffic data for use by law enforcement agencies arguably contravenes the presumption of innocence and may represent an unwarranted invasion of privacy.

An alliance of NGOs sought in July 2002 to challenge the LSSI in the Constitutional Court arguing that the law breached the presumption of innocence, free expression and privacy provisions in Spain's constitution.⁸⁸³ The motion was denied by the Ombudsman (El Defensor del Pueblo) on 2 October 2002.

United Kingdom

Anti-Terrorism Crime and Security Act 2001 (ATCSA), rushed through parliament in the aftermath of September 11, contains measures that significantly impact privacy rights in the United Kingdom (see also chapter on arrest). There are three primary areas of concern related to privacy: the law creates additional obligations to disclose personal data to security agencies, increases police powers to verify the identity of suspects by fingerprinting and conducting body searches without their consent and establishes additional requirements related to the retention of traffic data.

Part III of the act extends the obligation of public bodies to disclose personal data in their possession to law enforcement and security agencies. Section 17 requires that public authorities disclose to police and security services any personal information held by them "for the purposes of any criminal investigation whatever which is or may be carried out whether in the United Kingdom or elsewhere".⁸⁸⁴ Disclosure is also permitted for "the purposes of any criminal proceedings whatever which have been or may be initiated"⁸⁸⁵ or "to determine whether any such investigation or proceedings should be initiated or brought to an end".⁸⁸⁶ The NGO Liberty has noted: "the provision is not limited to investigations on acts of terrorism, but applies to any criminal investigation or proceeding".⁸⁸⁷ The breadth of disclosure is illustrated by schedule 4 of the act, which lists the 53 pieces of primary UK

⁸⁸³ For information on protests against the law, see EPIC's LSSI page, at <http://www.epic.org/privacy/intl/lssi.html>.

⁸⁸⁴ ATCSA 2001, section 17(2)(a)

⁸⁸⁵ ATCSA 2001, section 17(2)(b)

⁸⁸⁶ ATCSA 2001, section 17(2)(c)

⁸⁸⁷ Liberty, "Anti-terrorism Legislation in the United Kingdom", [undated], p.26. available at: <http://www.liberty-human-rights.org.uk/resources/publications/pdf-documents/anti-terrornew.pdf>.

legislation affected by section 17.⁸⁸⁸ The use of the phrase United Kingdom or elsewhere makes clear that any data obtained pursuant to section 17 may be disclosed to foreign governments, subject to the home secretary's discretion under section 18 to prohibit that disclosure.⁸⁸⁹

There are some safeguards contained in the measure. Section 17(5) states that "No disclosure of information shall be made by virtue of this section unless the public authority by which the disclosure is made is satisfied that the making of the disclosure is proportionate to what is sought to be achieved by it".⁸⁹⁰ The use of the term suggests that public authorities should assess requests for disclosure by reference to the right to privacy under article 8 of the ECHR. Moreover, public authority is defined by reference to the Human Rights Act (which incorporates the ECHR into domestic UK law and which requires that public authorities act in ways compatible with it). Nonetheless, the wide-range of circumstances in which disclosure can legitimately be requested, including investigations unrelated to national security, and the placing of the onus on public bodies to say no to such requests is likely to result in disclosure constituting a disproportionate interference with privacy rights.

Part 10 of the ATCSA increases police powers to forcibly fingerprint and conduct body searches to verify a person's identity. Section 89(4) amends the Terrorism Act 2000 in relation to the criminal procedure code in Scotland, permitting fingerprints obtained without consent from a terrorist suspect under the Terrorism Act in order to verify their identity to be used for "purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution".⁸⁹¹ Previously the fingerprints could only be used for the purpose of terrorist investigations.⁸⁹² This extension is unrelated to counter-terrorism and therefore unlikely to be proportionate under article 8 of the ECHR.

ATCSA also permits the police to take photographs of any person detained at a police station, without consent if necessary.⁸⁹³ Any headcovering that obstructs the photograph may be removed by force if necessary. The photographs may be retained indefinitely "to be used by,

⁸⁸⁸ ATCSA 2001, schedule 4. Acts include: National Savings Bank Act 1971; Consumer Credit Act 1974; National Health Service Act 1977; Civil Aviation Act 1982; Telecommunications Act 1984; Companies Act 1989; Pensions Act 1995; Data Protection Act 1998; Local Government Act 2000. A further 13 laws applicable in Northern Ireland are affected.

⁸⁸⁹ ATCSA 2001, section 18.

⁸⁹⁰ ATCSA 2001, section 17(5).

⁸⁹¹ ATCSA 2001 section 89(4), amending schedule 8, paragraph 20(3) of the Terrorism Act 2000.

⁸⁹² The use of such fingerprints in England and Wales continues to be confined to use "for the purpose of a terrorist investigation". Terrorism Act 2000, schedule 8, para. 14(2).

⁸⁹³ ATCSA section 92 (England and Wales), amending the Police and Criminal Evidence Act 1984 (PACE). There is a corresponding section for Northern Ireland (section 93).

or disclosed to, any person for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution". The act also gives the police new powers to force detainees to "remove disguises" that impede police identification.⁸⁹⁴ As Liberty has noted, "the powers extend beyond the response to a specific emergency, and certainly beyond the realm of terrorism". The introduction of these measures through emergency anti-terrorist legislation may explain the lack of adequate safeguards against the long-term retention of photographs of persons never charged with any crime.

ATCSA includes traffic data retention provisions, based on a voluntary code of conduct for network operators.⁸⁹⁵ Under the law, the home secretary will consult with telecommunications operators and internet service providers and the UK data commissioner.⁸⁹⁶ The UK government's interest in increased data retention is linked to its enhanced powers to obtain and review data given to law enforcement, security, customs and tax agencies by the Regulation of Investigatory Powers Act 2000 (RIPA).⁸⁹⁷ The act spells out that a code of conduct could eventually be developed to prescribe data retention for "the purposes of the prevention or detection of crime", as well as for national security purposes, a feature criticized by UK Information Commissioner Elizabeth France, who commented that "the potential for access, for these much wider purposes, to information that is on the face of it retained only for safeguarding national security, causes us real concern".⁸⁹⁸

In October 2002, the UK internet service providers association also expressed its opposition to a code of conduct.⁸⁹⁹ By March 2003, the Home Office had published a consultation paper on voluntary data retention but no agreement had been reached on a code of conduct.⁹⁰⁰

⁸⁹⁴ ATCSA, section 94 (removal of disguises, amending PACE). Liberty and others have noted that this measure could lead to the forcible removal of Muslim women's headscarves in circumstances likely to cause serious offence.

⁸⁹⁵ ATCSA, part 11. Section 102(4) of the act states: "A failure by any person to comply with a code of practice or agreement under this section which is for the time being in force shall not of itself render him liable to any criminal or civil proceedings".

⁸⁹⁶ ATCSA, section 103, "Procedure for Code of Practice".

⁸⁹⁷ Government efforts to extend similar data access to a wide range of government agencies in June 2002 were abandoned after widespread opposition. See: Stuart Millar, Lucy Ward and Richard Norton-Taylor, "Blunkett shelves plans to access data", *Guardian*, 19 June 2002, at <http://www.guardian.co.uk/internetnews/story/0,7369,739959,00.html>.

Foundation for Information Policy Research "Press Release - FIPR welcomes Government rethink on snooping powers", 18 June 2002, at <http://www.fipr.org>.

⁸⁹⁸ Information Commissioner, "News Release: Monitoring Must Be Justified, Says Information Commissioner", 10 July 2002, via <http://www.dataprotection.gov.uk/>.

⁸⁹⁹ BBC News online, "Internet intelligence plans hit hurdle", 22 October 2002, via http://news.bbc.co.uk/1/hi/uk_politics/2350059.stm.

⁹⁰⁰ Foundation for Information Policy Research, "FIPR Press Release - Home Office in two minds on snooping" 11 March 2002, at <http://www.fipr.org/press/030311snooping.html>.

Under section 104 of RIPA, the home secretary has the right to order the mandatory retention of data if he deems it “necessary to do so” after having reviewed the operation of a voluntary code of practice and agreements under it. Ordering the mandatory retention of data would be compatible with EC Directive 58/2002, but would arguably violate article 8 of the ECHR.⁹⁰¹

UK government efforts to introduce an “entitlement card” were widely seen by privacy advocates as a fresh attempt to introduce a national ID card.⁹⁰² Home Secretary David Blunkett indicated soon after the September 11 attacks that the government was giving serious consideration to the introduction of a national ID card, but plans were abandoned in October after widespread criticism.⁹⁰³ The nature of the information to be stored on the cards and central collection of that information are among the many privacy questions raised by the proposals. In July 2002, the Home Office introduced a consultation paper on a proposed national “entitlement card” that would be used in order to access public services, although it would not be compulsory to carry the card at all times. The proposal met similar opposition.⁹⁰⁴ The consultation concluded at the end of January 2003.⁹⁰⁵ More than 5,000 people contacted the Home Office to express their opposition to the cards.⁹⁰⁶ According to the Home Office website: “We are now in the process of carefully analysing all the responses received”.⁹⁰⁷

United States

The United States introduced a raft of legislative and administrative measures affecting privacy rights in the wake of the September 11 attacks. The passage of the USA Patriot Act significantly enhanced wiretapping and other surveillance powers of the FBI and undermined separation between law enforcement and intelligence functions within the Department of Justice. New rules were introduced requiring foreign nationals of 18 predominantly Muslim countries to register with the INS. Academic institutions accepting foreign students are now also required to register them with the INS.

⁹⁰¹ ATCSA, section 104.

⁹⁰² UK differs from most EU member states in lacking a national ID card.

⁹⁰³ “Compulsory ID cards ‘ruled out’”, *BBC News online*, 1 October 2001, at http://news.bbc.co.uk/1/hi/uk_politics/1572026.stm.

⁹⁰⁴ For more information on the debate, see Privacy International, UK National ID card webpage, at <http://www.privacyinternational.org/issues/idcard/uk/>.

⁹⁰⁵ “Doubts over ID card scheme”, *BBC News online*, 24 January 2003, at <http://news.bbc.co.uk/1/hi/technology/2688697.stm>.

⁹⁰⁶ See Stand website at: <http://www.stand.org.uk>

⁹⁰⁷ Home Office, Community Policy Directorate, Entitlement Cards Unit page, at <http://www.homeoffice.gov.uk/dob/ecu.htm>.

A proposal to use ordinary citizens to monitor the activities of others was withdrawn after widespread criticism, and some safeguards were introduced by the November 2002 Homeland Security Act (HSA),⁹⁰⁸ including the designation of a privacy officer within the new Homeland Security Department to ensure the department acts in accordance in the 1974 Privacy Act. The HSA also bans the introduction of national ID cards. The Senate voted to restrict “Total Information Awareness,” a new Defense Department program designed to establish a comprehensive “data mining” computer system to identify potential threats from among the population.

The USA Patriot Act was passed by congress and signed by the president little over a month after the September 11 attacks.⁹⁰⁹ According to the Congressional Research Service: “the Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes”.⁹¹⁰ Among the more controversial measures was the extension of the so-called “pen register” portion of federal wiretapping law to e-mail communication.⁹¹¹ Privacy advocates are concerned that the removal of the probable cause requirement for e-mail monitoring, coupled with the use of the FBI “Carnivore” search software will permit widespread and unrestricted monitoring of internet use by the federal government.⁹¹²

The act permits wiretaps authorized by a court in one jurisdiction to be used anywhere in the United States. Previously a wiretap could only be used in the jurisdiction in which it was issued. It also removes some existing restrictions on intelligence gathering within the United States, allowing courts to issue “roving wiretaps”, which apply to an individual rather than a particular communications device. Although some of the provisions in the act are subject to “a sunset clause” and will expire on 31 December 2005 unless renewed, the “pen-register” extension does not expire.⁹¹³

⁹⁰⁸ Public Law. 107-296. Homeland Security Act, signed into law by President Bush on 22 November 2002. available at <http://thomas.loc.gov/>.

⁹⁰⁹ Public Law 107-56, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), available at <http://www.cdt.org/security/usapatriot/011026usa-patriot.pdf>.

⁹¹⁰ Congressional Research Service “The USA PATRIOT Act: A Sketch”, 18 April 2002, available via <http://www.fas.org/irp/crs/RS21203.pdf>. A detailed 78 page CRS Legal Analysis of the act is available at <http://www.fas.org/irp/crs/RL31377.pdf>.

⁹¹¹ Pen registers and track and trace orders allow the source and destination calls to and from a particular telephone (i.e. traffic data) to be monitored without the need for a court order or “probable cause”.

⁹¹² EPIC/Privacy International, *Privacy and Human Rights 2002*, p.390.

⁹¹³ Section 224 “Sunset Clause” specifies that sections 203 (a) & (c), 205, 208, 211, 213, 216 (“pen register” extension), 219, 221 and 222 do not expire.

On 18 November 2002, US Foreign Intelligence Surveillance Court of Review (a special appeals court that had never previously sat) ruled that pursuant to the USA Patriot Act, criminal prosecutors are now free to participate in decisions regarding the use of intelligence wiretaps, an activity hitherto prohibited because of a separation between the criminal and intelligence branches of the federal government.⁹¹⁴ The act encourages cooperation between domestic law enforcement agencies and those involved in foreign intelligence gathering.⁹¹⁵ Separation between law enforcement and intelligence prior to the act reflected concerns that the lower standard of proof needed to authorize intelligence wiretaps compared to those in criminal investigations might lead prosecutors to mischaracterize the nature of criminal wiretaps in order to by pass evidential requirements.

In July 2002, the federal authorities announced a pilot scheme for Operation TIPS (Terrorism Information and Prevention System) to enlist public and private sector employees – including telephone, post office, cable television and delivery workers – to act as government informants, alerting authorities of suspicious activity. After criticism from congress and civil liberties groups, the scheme was withdrawn in August 2002 and later explicitly prohibited by the Homeland Security Act.⁹¹⁶

In August 2002, the INS introduced mandatory registration requirements for foreign visitors from Iran, Iraq, Libya, Sudan and Syria – countries designated by the US State Department as state sponsors or terrorism.⁹¹⁷ Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates and Yemen were subsequently added to the list of countries covered by the measures.⁹¹⁸ The so-called “Special Registration” is part of the National Security Entry-Exit Registration System (NSEERS) programme.⁹¹⁹

Persons subject to “special registration” are fingerprinted, photographed and required to provide information about their background and the purpose of their visit to the United States. According to the INS, “Such individuals are also required to verify periodically their location

⁹¹⁴ Neil Lewis, “Court overturns limits on wiretaps to combat terror”, *New York Times*, 19 November 2002.

⁹¹⁵ Congressional Research Service “The USA PATRIOT Act: A Sketch”, 18 April 2002.

⁹¹⁶ Homeland Security Act, section 770.

⁹¹⁷ “US migrant registry to be launched on September 11 anniversary”, *Agence France Press*, 13 August 2002. Mary Beth Sheridan, “U.S. wants printers of Muslim visitors: Arab rights groups denounce plan”, 7 November 2002, at <http://www.washingtonpost.com/ac2/wp-dyn/A19891-2002Nov6>.

⁹¹⁸ Detailed information about the Special Registration program is available on the INS website, at <http://www.ins.gov/graphics/lawenfor/specialreg/index.htm>.

⁹¹⁹ See also chapter on asylum.

and activities, as well as to confirm their departure from the United States”.⁹²⁰ A coalition of civil liberties and immigrants rights advocates wrote to President Bush on 9 January 2003 to protest the rule, noting that all but one of the countries on the list are majority Muslim countries and charging that the measure amounted to racial profiling.⁹²¹ The absence of safeguards on the use of any data collected also raises concerns about possible privacy rights violations.

Compulsory registration of foreign students began on 1 January 2003.⁹²² Under the Student and Exchange Visitor Information System, academic institutions are responsible for registering their foreign students. All existing foreign students must be registered by their schools by August 2003 and new students must be registered before they are allowed to enrol. In December 2002, six students in Colorado were arrested after they failed to sign-up for sufficient classes to meet their visa requirements.⁹²³ Given that all foreign students are already required to obtain visas in order to study in the United States, the registration scheme appears an unwarranted interference with the privacy of students and the confidentiality of student records.

The Homeland Security Act, signed into law by President Bush on 26 November 2002, also impacts privacy rights.⁹²⁴ Its primary purpose was to authorize the creation of a new Department for Homeland Security. The ACLU and others criticized the act’s “[o]verly broad intelligence information sharing provisions between the Homeland Security department and other agencies, such as the FBI or the CIA and even with foreign law enforcement agencies”.⁹²⁵ On the other hand, ACLU and EPIC note that the act bans the implementation of TIPS, and the introduction of a national identification system or card.⁹²⁶ Moreover, section 222 of the act creates a privacy officer within the new department, who is responsible for compliance with the Privacy Act, carrying out impact assessments for any measure the

⁹²⁰ INS Statement, “INS reminds certain temporary foreign visitors of eighteen countries of registration requirement”, 6 December 2002,

<http://www.ins.gov/graphics/publicaffairs/statements/ReminderState.htm>.

⁹²¹ Coalition Letter to President Bush Urging Elimination of the INS "Special Registration Program", available at: <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11557&c=206&Type=s>.

⁹²² INS, “Final Rule for Student and Exchange Visitor Information System Announced”, 11 December 2002, http://www.ins.gov/graphics/publicaffairs/newsrels/02.12FINALRU_NR.htm.

⁹²³ “Foreign students fret over INS tracking”, *CNN.com*, 10 January 2003, at <http://www.cnn.com/2003/EDUCATION/01/10/tracking.students.ap/>.

⁹²⁴ “Bush signs Homeland Security Bill”, *CNN.com*, 26 November 2002, <http://www.cnn.com/2002/ALLPOLITICS/11/25/homeland.security/>.

⁹²⁵ ACLU, “ACLU Hails Victories In New Homeland Security Bill: Operation TIPS, National ID Rejected By Congress”, 13 November 2002, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11295&c=206&Type=s>.

⁹²⁶ EPIC, “EPIC Alert, Volume 9.23”, 19 November 2002, at http://www.epic.org/alert/EPIC_Alert_9.23.html.

department proposes and providing annual reports to Congress on the department's privacy record.

The most disturbing post-September 11 development in relation to privacy in the US came with news of plans by the Pentagon (the US defence department) to develop a comprehensive data-mining system called "Total Information Awareness" that would collect and analyse vast quantities of public and privately-held personal data on US and foreign nationals in the hunt for information about terrorist suspects and activities.⁹²⁷ The plan was developed by the Pentagon's Defence Advanced Research Projects Agency (DARPA). A December 2002 ACLU report cited a DARPA document listing categories of information that could be searched: "Financial, Education, Travel, Medical, Veterinary, Country Entry, Place/Event Entry, Transportation, Housing, Critical Resources, Government, Communications".⁹²⁸ On 23 January 2003, the Senate voted unanimously to block all funding for the project within 60 days unless the Pentagon provided detailed information on the programme's impact on privacy and civil liberties, and to prevent its use in the United States unless and until Congress passes a new law authorizing it.⁹²⁹

A more limited but nonetheless troubling proposal was announced by the Department of Transportation and published in the Federal Register on 15 January 2003.⁹³⁰ Under the proposal (Computer Assisted Pre-Screening Program II, CAPPS II), airlines and shipping lines would be required to collect and submit to the government the name, date of birth, sex, passport number, home country and address of all passengers and crew members entering and leaving the US.⁹³¹ Most airlines reportedly already provide such data about people entering the US to authorities on a voluntary basis. Since the entry and departure of visitors is already recorded through visa requirements, the principle change, other than becoming mandatory in nature, would be the collection of data about the departure of US citizens and permanent

⁹²⁷ John Markoff, "Pentagon Plans a Computer System That Would Peek at Personal Data of Americans", *New York Times*, 9 November 2002, at <http://www.nytimes.com/2002/11/09/politics/09COMP.html>. See also William Safire, "You are a Suspect", *New York Times*, 14 November 2002.

⁹²⁸ Jay Stanley, "Is the Threat From 'Total Information Awareness' Overblown?", ACLU, <http://www.aclu.org/Privacy/Privacy.cfm?ID=11501&c=130&Type=s>.

⁹²⁹ Adam Clymer, "Senate Blocks Privacy Project", *New York Times*, 24 January 2003. A copy of the amendment introduced by Senator Wyden is available at <http://www.cdt.org/security/usapatriot/030117amendments.pdf>.

⁹³⁰ Ryan Singel, "More checks in U.S. passengers," *Wired News*, at <http://www.wired.com/news/privacy/0,1848,57354,00.html>. Federal Register notice available at <http://cryptome.org/tsa011503.htm>. For more information on CAPPS, see Jay Stanley & Barry Steinhardt, *Bigger Monster, Weaker Chains—The Growth of an American Surveillance Society*, ACLU, January 2003.

⁹³¹ David Johnston, "U.S. to make airlines give data on Americans going overseas", *New York Times*, 4 January 2003.

residents from the United States. On 13 March 2002, the Senate Commerce committee unanimously agreed on an amendment to the Air Cargo bill that would require the Transportation Security Administration (TSA) to report to congress on the privacy implications of CAPPS II.⁹³² By the end of March 2003, TSA had yet to implement CAPPS II.

⁹³² Source: EPIC Passenger Profiling page (also contains link to text of Senate Commerce Committee amendment), at <http://www.epic.org/privacy/airtravel/profiling.html>.

Interference with Freedom of Expression and Information

Freedom of expression is vital to democratic society and crucial to the enjoyment of other human rights. Central to that freedom is a thriving and independent news media able critically to investigate and report on domestic and world events without government interference. In times of crisis, the need for accurate and impartial information becomes all the more important. Regrettably some OSCE member states have drawn the opposite conclusion in the wake of the September 11 attack, and moved to restrict freedom of expression in general and freedom of the media in particular.

Some states have passed legislation permitting state interference in media organizations during anti-terrorism efforts. Others have put pressure on media outlets to refrain from critical reporting, and blocked or restricted journalists' access to prisoners, court proceedings and war zones. The public's right to know about the activities of its government has been curbed in several states. The inviolability of journalists' sources has been placed at risk both directly by new rules to compel witnesses to cooperate in terrorism-related investigations and indirectly by the introduction of new rules permitting greater retention of telecommunications traffic data and an easing of restrictions on government surveillance (see chapter on privacy).⁹³³

Relevant Legal Standards

Freedom of expression and information are widely protected by international human rights law. Article 19(2) of the International Covenant on Civil and Political Rights provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.⁹³⁴

The ECHR and the ACHR offer similar protections.⁹³⁵ The European Court of Human Rights has held that the importance of freedom of expression in a democratic society means it is to be accorded a special status within the ECHR.⁹³⁶

⁹³³ See in particular sections on EU, France, Spain, United Kingdom and United States.

⁹³⁴ ICCPR, article 19(2).

⁹³⁵ Article 10(1) of the ECHR: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers"; Article 13(1) of the ACHR: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart

The OSCE has made repeated declarations to underscore the importance of free expression and a free press.⁹³⁷ Free expression is guaranteed by paragraph 9(1) of the OSCE Copenhagen document, which provides that “everyone will have the right to freedom of expression including the right to communication”.⁹³⁸ Press freedom is underscored in the OSCE Moscow document, which states that “independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms”.⁹³⁹

Perhaps in recognition of the power of ideas, freedom of expression is subject to limitations under each of the major human rights treaties.⁹⁴⁰ Article 19(3) of the ICCPR provides:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

Freedom of expression is so important to democracy and to the enjoyment of other rights that limitations upon it cannot be justified lightly. The European Court of Human Rights, which has a well-developed jurisprudence on the subject, subjects limitations to free expression to scrutiny above and beyond that given to other qualified rights, and has held that any restriction must be established convincingly.⁹⁴¹ In order to be legitimate, a restriction must be

information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice”.

⁹³⁶ European Court of Human Rights, *Handyside v. UK*. In that case, the court stated that article 10 “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man”.

⁹³⁷ OSCE Copenhagen document, para. 9(1); OSCE Moscow document, para. 26-26.2; OSCE Budapest document, para. 36; OSCE Lisbon Summit Declaration (OSCE Lisbon document), 3 December 1996, para. 11; OSCE Istanbul document (Charter for European Security), para. 26.

⁹³⁸ OSCE Copenhagen document, para. 9(1).

⁹³⁹ OSCE Moscow document, para. 26.

⁹⁴⁰ ICCPR, article 19; ECHR, article 10(2); ACHR, article 13(2)&13(5); OSCE Copenhagen document, para. 9(1).

⁹⁴¹ European Court of Human Rights, *Sunday Times v. United Kingdom (No 2)*, Judgment of 26 November 1991, series A, no. 217.

lawful, based on pressing social need and the measure must be proportionate to its aim. The mere fact that something is offensive does not mean that restriction upon it can be justified.⁹⁴²

Assessing the legitimacy of limitations upon so-called hate speech – which purports to encourage hatred or incite violence – is more complex. The ICCPR clearly foresees some restrictions on such speech, since it specifically requires that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.⁹⁴³ The jurisprudence of the European Court of Human Rights indicates that under some circumstances hate speech may be subject to restrictions under article 10(2) of the ECHR.⁹⁴⁴ In *Sürek (No 1)*, a majority of the court held that Turkey was justified in prosecuting and fining a publisher following his decision to publish letters concerning the war in south-eastern Turkey that allegedly stirred up hatred among Kurds.⁹⁴⁵ By contrast, in *Jersild* the European Court of Human Rights held that the prosecution of a journalist and editor for the broadcast in a documentary of interviews in which racist views were expressed was a disproportionate response.⁹⁴⁶ In general, the court’s approach allows for far greater restrictions on free expression than are permitted under the first amendment of the US constitution, which allows limitations only when there is a clear danger of imminent violence resulting from the speech.

Reporting on court proceedings is generally guaranteed through the obligation that defendants be tried in public to ensure a fair hearing.⁹⁴⁷ As with the right to trial in public generally, media access to court proceedings is subject to some limitations, particularly in criminal proceedings.⁹⁴⁸ Restrictions may reasonably be placed on reporting that is likely to prejudice, whether intentionally or not, a person’s right to a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice.

⁹⁴² European Court of Human Rights, *Handyside v. UK*: Article 10 is “applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population”.

⁹⁴³ ICCPR, article 20(2). The UN Human Rights Committee has stated that article 20(2) is “fully compatible with the right of freedom of expression as contained in article 19.” (General Comment 11, Nineteenth Session 1983).

⁹⁴⁴ ECHR, article 17 is also relevant.

⁹⁴⁵ European Court of Human Rights, *Sürek v. Turkey (No 1)*, Judgment of 8 July, Reports of Judgments and Decisions 1999-IV. The lack of consensus among the justices in *Sürek* illustrates the contentious nature of the court’s finding in that case.

⁹⁴⁶ *Jersild v. Denmark*, Judgment of 24 September 1994, series A, no. 298.

⁹⁴⁷ ICCPR, article 14(1); ECHR, article 6(1); ACHR, article 8(5); OSCE Copenhagen document, para. 5.16.

⁹⁴⁸ See, for example, European Court of Human Rights, *Worm v. Austria*, Judgment of 29 August 1997, Reports 1997-V.

Licensing of broadcasting is permitted under article 10(1) of the ECHR provided the process amounts to a limitation only on the technical means of broadcasting and not upon content.⁹⁴⁹ Content restrictions are permissible only if they would also be justified under article 10(2). Neither the ICCPR nor OSCE standards refer to licensing.

A thriving and independent media is inextricably linked with free expression. In the 1991 Moscow document, OSCE member states reaffirmed “the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions”.⁹⁵⁰ The confidentiality of journalists’ sources – which is vital both to effective reporting and the safety of journalists – is therefore an important aspect of free expression.⁹⁵¹

Freedom to obtain information is crucial to the enjoyment of free expression and the work of the media.⁹⁵² The ICCPR explicitly includes a right to “seek” information as well as to receive and impart it.⁹⁵³ The linkage between access to information and free expression was underscored in the November 1999 joint declaration made by the UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression:

Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.⁹⁵⁴

By contrast article 10(1) of the ECHR does not include a right to “seek” information.⁹⁵⁵ Nonetheless, the court recognizes access to information as an important human right.

⁹⁴⁹ European Court of Human Rights, *Groppera Radio AG v. Switzerland*, Judgment of 28 March 1990, series A, no. 173.

⁹⁵⁰ OSCE Moscow document, para. 26.

⁹⁵¹ European Court of Human Rights, *Goodwin v. UK*, Judgment of 27 March 1996, Reports 1996-II. Reaffirmed in *Roemen & Schmidt v. Luxembourg*, Judgment of 25 February 2003. See also Council of Europe, *Recommendation No. 7 (2000) of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information*, 8 March 2000 at <http://www.humanrights.coe.int/media/>.

⁹⁵² For further discussion, see Toby Mendel, “Freedom of Information as an Internationally Protected Human Right,” ARTICLE 19, (undated) at <http://www.article19.org/docimages/627.htm>.

⁹⁵³ ICCPR, article 19(2).

⁹⁵⁴ Cited in Toby Mendel, “National Security vs. Openness”, ARTICLE 19, February 2003, at <http://www.maxwell.syr.edu/campbell/opengov/>.

⁹⁵⁵ ECHR, article 10(1)

Human Rights Concerns

Belarus

Anti-terrorism legislation introduced in Belarus in January 2002 served to weaken further freedom of expression in the country.⁹⁵⁶ Article 13 of “The Law of the Republic of Belarus on the Fight Against Terrorism” allows authorities engaged in anti-terrorist operations to “use for official purposes means of communication belonging to citizens, state agencies and organisations regardless of their form of ownership”. The law fails to define what is covered by “means of communication.” Free expression NGO Article 19, which maintains an office in Belarus, argues that it could be used to justify the seizing of television and radio stations or newspaper printing facilities by the authorities.⁹⁵⁷ Article 13 also gives the “Head of the Operational Headquarters” the power to “regulate the activities of media representatives in the area of the conduct of terrorist operations”. This provision appears to give authorities carte blanche to restrict media access on the pretext that it is necessary for an anti-terrorism operation.⁹⁵⁸ As Article 19 points out, what constitutes “an area” is not defined and could include the whole country.⁹⁵⁹

Article 15 of the law on “Informing the Public of an Act of Terrorism” places severe restrictions on what information can and cannot be published during the course of an anti-terrorism operation. Information “which serves as propaganda for or justification of terrorism” may not be published. What information should be made public is to be determined by “the Head of Operational Headquarters for the Management of Counter-terrorism Operations”. While the temporal restriction may appear reasonable, the law defines counter-terrorism operations only as “special measures aimed at suppressing an act of terrorism”. An “operation” as defined by the law could continue for days or even weeks. Commenting on article 15, the International Press Institute pointed out that “these provisions are broad and

⁹⁵⁶ The Law of the Republic of Belarus on the Fight Against Terrorism, approved by the House of Representatives on 11 December 2002 and the Council of the Republic on 20 December 2001. Translation by Article 19 Belarus. Full text of law available on Article 19 Belarus website at <http://www.article19.by/laws/terroriste.html>.

⁹⁵⁷ Article 19, “Belarus: Instruments of Control, A Collection Of Legal Analyses Of Freedom Of Expression Legislation”, April 2002, chapter 7, at <http://www.article19.by/publications/instrumentscontrol/index.html>.

⁹⁵⁸ Article 13, Law of the Republic of Belarus on the Fight Against Terrorism. Article 13 also permits gross interferences with privacy rights (see chapter on privacy).

⁹⁵⁹ Toby Mendel, “Consequences for Freedom of Expression of the Terrorist Attacks of 11 September: A Paper for the UNESCO Conference on Terrorism and Media,” Article 19, May 2002, available with other conference papers at http://www.comcentrum.ph/wpfd_proceedings/wpfd_proceed_inter_paper.htm.

could effectively be used to limit any debate about the war on terrorism carried out by the president's political opponents".⁹⁶⁰

Canada

The protection of journalists sources and freedom of information in Canada were both undermined by the November 2001 enactment of the Anti-Terrorism Act (also known as Bill C-36).⁹⁶¹ The legislation amended Canada's criminal code, evidence act, official secrets act and 17 other laws. The introduction of a new form of judicial inquiry known as the "investigative hearing" caused particular concern to journalists and news organizations. Under a new subsection of Canada's criminal code introduced by C-36, persons may be compelled to testify before an investigative hearing. Section 83.28 of the amended code allows a "peace officer" to apply to a judge to issue an order⁹⁶² against any person compelling that person either "to answer questions put to the person by or on behalf of the peace officer" or to "produce to the presiding judge things that the person was ordered to bring".⁹⁶³ The judge must only be satisfied that there are reasonable grounds that an offence has or will be committed and that the evidence sought might reveal the whereabouts of whomever is thought to be responsible.⁹⁶⁴ While there may be circumstances in which ordering disclosure might be the only means of preventing an attack or enabling the apprehension of a suspect, the danger is that such orders could be used to force journalists to reveal their sources related to any reporting on terrorism, which could interfere with their ability to report the story, make people less likely to confide in journalists, and could even put journalists' lives at risk from reprisals.⁹⁶⁵ As of March 2003, there were no reports of journalists being forced to testify at investigative hearings.

Bill C-36 also imposes restrictions on Canada's Access to Information Act (AIA). The AIA guarantees public access to information about the work of government and the state, including through a review by the information commissioner of any material requested under the act that the government seeks to withhold. Bill C-36 amends the Canada evidence act to permit Canada's attorney-general to issue certificates prohibiting the disclosure of information either on national security grounds or because it was obtained "in confidence from, or relation to" a

⁹⁶⁰ International Press Institute, *World Press Freedom Review 2002*, chapter on Belarus, March 2003 at <http://www.freemedia.at/wpfr/world.html>.

⁹⁶¹ For more information on C-36, see chapters on fair trial; terrorism definitions; and financial measures.

⁹⁶² Criminal Code, section 83.28(5) (as amended)

⁹⁶³ Criminal Code, section 83.28(8) (as amended)

⁹⁶⁴ Criminal Code, section 83.28(4) (as amended)

⁹⁶⁵ These concerns are noted by Canadian Journalists for Free Expression in their "Submission on Bill C-36," 13 November 2001, at <http://www.cjfe.org/releases/2001/anti-terrorismbrief.html>.

foreign entity (which can include a foreign terrorist group or any person related to it).⁹⁶⁶ Certificates last for 15 years.⁹⁶⁷ The act amends AIA specifically to exclude its application to information so certified by the attorney-general.⁹⁶⁸ Where the government's refusal to provide information requested by a member of the public is subject to a pending review by the information commissioner, certification has the effect of terminating that review.

It is important to note that the certification and the exemption from the AIA can apply to any information the withholding of which the attorney-general deems necessary for "the purpose of protecting national defence or national security" or "in relation to a foreign entity" – in other words to very broad categories of information. Certificates are subject to judicial review but only to the extent that the judge must be satisfied that a certificate relates to one of the categories above, which given their breadth is a relatively easy test for the government to satisfy.⁹⁶⁹ The Canadian Information Commissioner has expressed his dismay at changes, particularly the provision terminating investigations when a certificate is issued. Observing that many access requests are broad ranging, the commissioner noted that "if, during the commissioner's investigation, a secrecy certificate is issued with respect to even one record of all those covered by the access request, the commissioner's investigation is discontinued in its entirety".⁹⁷⁰ He concluded that "the federal government has given itself the legal tools to stop in its tracks any independent review of denials of access under the Access to Information Act".⁹⁷¹ As Canadian Journalists for Free Expression pointed out prior to the passage of the law, "the government already ha[d] sweeping powers to prohibit the release of sensitive information to protect Canada's international relations".⁹⁷² The real effect of the amendment is to weaken the information commissioners' oversight.

⁹⁶⁶ Canada Evidence Act, section 38.13 (1) (as amended): "The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security".

⁹⁶⁷ Canada Evidence Act, section 38.13(9) (as amended).

⁹⁶⁸ Access to Information Act, section 69.1 (1) (as amended).

⁹⁶⁹ Canada Evidence Act, section 38.131 (as amended). As the information commissioner noted in his Annual Report: "One would be hard pressed to imagine any operational information held by any of our investigative, defence, security, intelligence, immigration or foreign affairs institutions, which would not "relate to" one or more of these three broad categories".

⁹⁷⁰ Office of the Information Commissioner, Annual Report 2001-2002, Chapter 1(A)(III), 6 June 2002, at <http://www.infocom.gc.ca/reports/2001-2002t-e.asp>.

⁹⁷¹ Ibid.

⁹⁷² Canadian Journalists for Free Expression, Submission on Bill C-36, 13 November 2001 at <http://www.cjfe.org/releases/2001/anti-terrorismbrief.html>.

Russia

President Putin's vetoing of legislation that would have permitted draconian restrictions on media freedom did not prevent continued state interference in free expression in Russia: a general law against "extremism" banned the dissemination of "extremism" by the media, while the theatre siege in Moscow gave the government a new justification for restricting points of view critical of the authorities.

The July 2002 Federal Anti-Extremism Law places needless restrictions on freedom of expression.⁹⁷³ Extremism is defined very broadly and includes "carrying out terrorist activities".⁹⁷⁴ Article 11 of the law prohibits the "dissemination of extremism materials in mass media outlets" and permits a court to suspend publication or broadcast of an article or program containing such material.⁹⁷⁵ Where the authorities decide that a media outlet has "disseminated" extremism materials, the "founder" or editor-in-chief receives a written warning from the state body responsible for the media outlet's registration, or the federal media ministry or a federal prosecutor.⁹⁷⁶ The notification can include "measures for rectification". If the media outlet fails to take the steps prescribed in the notification, or there is another violation within 12 months, the media outlet "should be banned in accord with the rules of the current Federal Law of Russian Federation".⁹⁷⁷ There is a right of appeal, which, if it is successful, can prevent a ban.

The law gives the authorities the right to ban a newspaper, television or radio station if it twice publishes material the state considers extremist or fails to respond to state recommendations regarding such material. While restrictions on extremist speech are certainly permissible under the ECHR, the scope of the Russian provisions is insufficiently well-defined and open to misuse. In practice the Russian government has used the need to restrict extremist speech as a pretext for censoring news organizations critical of its policies, and has used its characterization of all Chechen separatists as terrorists to justify blocking free speech about the conflict in the Chechen Republic.

⁹⁷³ Federal Law on Counteraction to Extremism Activity, at <http://www.panorama.ru/works/patr/govpol/> (in Russian).

⁹⁷⁴ For a discussion of the Law on Countering Extremist Activities, see chapter on terrorism definitions.

⁹⁷⁵ Article 11, Federal Law on Counteraction to Extremism Activity (unofficial translation). Extremism materials are defined in article 1 as "documents or other media designed to be published and containing appeals for extremist acts or substantiating and justifying the necessity of carrying out such activities".

⁹⁷⁶ Article 8, Federal Law on Counteraction to Extremism Activity.

⁹⁷⁷ Article 8, Federal Law on Counteraction to Extremism Activity.

The Moscow theatre siege in October 2002 – in which authorities were broadly criticized for using poison gas in order to storm the building – provides an opportunity to view the Russian authorities approach to the publication of “extremism.” On 25 October, the Media Ministry complained to *Ekho Moskvy* (Moscow Echo) after the paper’s website published an interview with a Chechen rebel leader and threatened to close the website down until it removed the interview.⁹⁷⁸ A ministry spokesperson publicly warned that “if this is repeated we reserve the right to take all proper measures, up to the termination of the activity of those media”.⁹⁷⁹ The signal of the *Moskoviya* television station was blocked the same day by the Media Ministry, citing “gross violations” of the anti-extremism and anti-terror laws for the station’s coverage of the hostage crisis.⁹⁸⁰ The station was returned to the air following the end of the siege on 26 October. The signal of the independent television station *TVT* was also blocked.⁹⁸¹ On 1 November, the offices of the weekly newspaper *Versiya* were searched by police. While it might be argued that some of the actions taken by the Russian government are nominally compatible with permissible restrictions under human rights law on the ground of national security, they must be assessed against a backdrop of systematic state interference with free expression in Russia.⁹⁸² In that context, the response of the Russian authorities to reporting of the Moscow siege raises serious questions about its willingness to permit news organizations to report freely and critically on state actions against terrorism.

Free expression was brought further into doubt by amendments to the 1991 law on mass media and 1998 law on combating terrorism passed in the wake of the theatre siege. The amendments were approved by the Duma (lower house) on 31 October 2002 and Federation Council (upper house) on 13 November 2002. The amendment to the media law prohibits the use of the mass media “for conducting extremist activities”, while the amendment to the terrorism law contains detailed provisions on types of information “the dissemination of

⁹⁷⁸ “Government Pressures Media to Observe Law in Hostage Coverage”, *RFE/RL Newslines*, 26 October 2002; Steven Lee Myers, “Putin Vetoes Curb on News of Terrorism”, *New York Times*, 26 November 2002.

⁹⁷⁹ Media Ministry spokesperson Yuri Akinshin quoted by Interfax, cited in Committee to Protect Journalists, “CPJ concerned about government’s attempts to control coverage of conflict in Chechnya”, 5 March 2003.

⁹⁸⁰ “Government Pressures Media to Observe Law in Hostage Coverage”, *RFE/RL Newslines*, 26 October 2002; Committee to Protect Journalists, “CPJ concerned about government’s attempts to control coverage of conflict in Chechnya”, 5 March 2003

⁹⁸¹ Myers, “Putin Vetoes Curb...”.

⁹⁸² See for example, Human Rights Watch, *World Report 2003*, Russian Federation, at: <http://www.hrw.org/wr2k3/europe11.html> ; Reporters sans Frontieres, *World Report 2002*, Russia at: http://www.rsf.org/article.php?id_article=1799; International Press Institute, *World Press Freedom Review 2002*, Russia at: <http://www.freemedia.at/wpfr/world.html>

which is not allowed through the mass media”.⁹⁸³ Prohibited information includes any information “that hinders the conduct of a counter-terrorism operation” and any “that is used to propagate or justify extremist activity which also includes quoting individuals who oppose the conduct of the counter-terrorism operation”.⁹⁸⁴

While the amendment to the media law is unacceptably vague, the amendments to the terrorism law are particularly troubling since they would provide a justification for state interference in media coverage of counter-terrorism on the grounds that the reporting was interfering with an operation against terrorism. They also appear to sanction the banning of any interviews with anyone critical of the conduct of counter-terrorism operations or the government policy behind it, which presumably would include the large number of observers who criticized the use of poison gas to end the Moscow theatre siege.

Following criticism from domestic news organizations, international press freedom groups and the OSCE Representative on the Freedom of the Media, President Putin vetoed the amendments on 25 November 2002.⁹⁸⁵ As of March 2003, the Russian parliament had yet to vote on revised amendments to the laws.⁹⁸⁶

The danger to free expression posed by media restrictions justified in the name of counter-terrorism was underscored on 26 February 2003, when the Media Ministry sent an official warning to *Zavtra*, a Moscow-based newsweekly, following its publication of an interview with Akhmed Zakayev, an exiled Chechen separatist leader. The warning stated that the publication of the interview had incited ethnic hatred and justified extremist activity. In a March 2003 letter to President Putin protesting the warning, the Committee to Protect Journalists pointed out that other Russian newspapers had published interviews with Zakayev in December 2002 and March 2003 with no repercussions, raising the question of whether the

⁹⁸³ For a detailed analysis of the amendments, see Article 19, Memorandum on Amendments to the Russian Federal Laws on Mass Media and Combating Terrorism (Commissioned by the OSCE Representative on Freedom of the Media), November 2002.

⁹⁸⁴ Proposed amendment to article 15(2), Federal Law on Combating Terrorism of 25 July 1998.

⁹⁸⁵ OSCE Representative on Freedom of the Media, “OSCE Media Representative welcomes decision by Russian President to veto restrictive media amendments”, 26 November 2002; Myers, “Putin Vetoes Curb...”.

⁹⁸⁶ In February 2003, the International Federation of Journalists (IFJ) wrote to President Putin to protest ongoing efforts to amend the 1991 media law identifying “a number of fundamental problems in the text that conflict with international norms and standards concerning freedom of expression and the rights of journalists”. IFJ, “IFJ Condemns Draft Media Law in Russia as ‘Statement of Failure’ over Press Freedom”, 10 February 2003.

interview was merely a pretext for government pressure on *Zavtra*, a communist, ultra-nationalist publication that frequently criticizes the government.⁹⁸⁷

United Kingdom

The Anti-Terrorism Crime and Security Act (ATCSA) 2001, which was enacted in the wake of September 11 and rushed through parliament, introduced a measure that threatens the work of journalists.⁹⁸⁸ Section 117 of ATCSA adds a new section 38B to the Terrorism Act 2000, making it an offence to fail to disclose to the police “as soon as reasonably practicable” information that the person knows or believes “might be of material assistance” in preventing an act of terrorism or securing the “apprehension, prosecution or conviction” of a terrorist suspect.⁹⁸⁹ A person convicted of an offence under section 38B is liable to a prison sentence of up to five years.⁹⁹⁰ There is a defence of “reasonable excuse” for failing to disclose the information to the police within the requisite time.⁹⁹¹ Prior to amendment, the Terrorism Act 2000 already contained provisions making it an offence to fail to disclose information about terrorist finance.⁹⁹² Although there were no public reports of prosecutions of journalists under the act as of March 2003, the NGO Liberty pointed out that some journalists were prosecuted under provisions similar to section 38B in earlier anti-terrorism laws that were superseded by the Terrorism Act 2000.⁹⁹³ Despite the defence of “reasonable excuse”, there is a real concern that section 38B could make journalists less inclined to report on terrorism or interview suspected terrorists for fear of being forced either to disclose all their sources and information or face prosecution.

⁹⁸⁷ Committee to Protect Journalists, “CPJ concerned about government’s attempts to control coverage of conflict in Chechnya”, 5 March 2003. (*Kommersant* published an interview on 5 December 2002, and *Novaya Gazeta* published interviews on 9 December 2002 and 11 March 2003).

⁹⁸⁸ Anti-Terrorism, Crime and Security Act 2001. See more information on the full implications of the legislation see chapters on arrests; privacy; and financial measures.

⁹⁸⁹ Terrorism Act 2000, section 38B (1)& (2) (as amended by ATCSA s.117).

⁹⁹⁰ Terrorism Act 2000, section 38B (5) (as amended).

⁹⁹¹ Terrorism Act 2000, section 38B (4) (as amended).

⁹⁹² Terrorism Act 2000, section 19.

This section applies where a person- (a) believes or suspects that another person has committed an offence under any of sections 15 to 18 [terrorist fund-raising; use and possession; funding; money laundering], and (b) bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment.

(1) The person commits an offence if he does not disclose to a constable as soon as is reasonably practicable- (a) his belief or suspicion, and (b) the information on which it is based.

(2) It is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure.

⁹⁹³ John Wadham, The Anti-Terrorism, Crime and Security Act 2001, *Liberty* (undated) at <http://www.liberty-human-rights.org.uk/resources/articles/pdfs/the-anti-terrorism-crime-and-security-act-2001.pdf>.

The UK government also put pressure on the media to limit its coverage of the build-up to the war in Afghanistan and its reporting of the Taliban perspective during the war itself, and not to broadcast in full tapes from Osama Bin Laden.⁹⁹⁴ In some cases, these suggestions came from the office of the prime minister. While this pressure may fall short of breaching human rights standards, it indicates at the very least a less than firm commitment to freedom of the press on the part of the UK government.

United States

Free expression faced multiple threats in the United States following September 11. The ability of media organizations to report the news was undermined by access restrictions to prisoners held by the US government and by limited access to frontlines and troops during the Afghanistan war. Domestic and foreign news organizations came under pressure from the US authorities. Freedom of information was hampered by US administration actions to limit public access to government websites and government information.

Restrictions on media access to prisoners held by the US government is a key concern for freedom of expression in the US. Access to those detained on immigration charges has been particularly difficult.⁹⁹⁵ Following a 21 September 2001 order by the Chief Immigration Judge to close all immigration proceedings, media organizations have found it extremely difficult even to determine how many foreign nationals have been detained on immigration charges, let alone to discover their names or report on proceedings against them.⁹⁹⁶ Government arguments that the disclosure of the detainees' names would breach their privacy rights ring hollow when considered in the light of the absence of due process rights accorded to many of the suspects.

Challenges by news organizations to the blanket restrictions on reporting have met with some success. In August 2002, for example, a US Federal Court of Appeals (Sixth Circuit) upheld a lower court judgment criticizing the blanket restriction on public access to proceedings, noting that "democracies die behind closed doors". The suit was brought by the American Civil Liberties Union, the Detroit Free Press and a number of other newspapers after they were excluded from the deportation hearing of Rabih Haddad, the head of Global Relief

⁹⁹⁴ See: Reporters without Borders (RSF) Annual Report 2002, at http://www.rsf.org/article.php3?id_article=1782; and Toby Mendel, "Consequences for Freedom of Expression of the Terrorist Attacks of 11 September".

⁹⁹⁵ For more information on immigration detention, see chapter on arrests.

⁹⁹⁶ For a detailed account, see: Reporters Committee for Freedom of the Press, *Homefront Confidential* (Second Edition), September 2002, pp.18-26. See also: Human Rights Watch, *Presumption of Guilt...*

Foundation, an Islamic charity.⁹⁹⁷ In September 2002, a federal court ordered the Department of Justice to grant a new detention hearing in public to an INS detainee.⁹⁹⁸ In October, a majority federal appeals court in Philadelphia ruled that secret hearings were lawful, reversing a Newark federal district judge.⁹⁹⁹ The judgment conflicts with the August ruling from the Cincinnati appeals court, leaving the state of the law unclear.

The US authorities' commitment to free expression was also called into question during the war in Afghanistan. Several press-freedom organizations complained that the US government's purchase of the entire stock of war-time satellite images of Afghanistan taken by the Ikonos civilian satellite amounted to censorship, since it prevented news organizations from showing images of the bomb damage and fighting, and US military satellites were reported to offer images of far greater resolution.¹⁰⁰⁰ Media organizations also faced serious restrictions on access to US front-lines for most of the war in Afghanistan, although these restrictions eased towards the end of the conflict.¹⁰⁰¹

Media organizations have also had great difficulty obtaining access to prisoners held at the US military base in Guantanamo Bay, Cuba.¹⁰⁰² While there may be legitimate concerns about the need to comply with US obligations under the Third Geneva Convention to prevent prisoners of war from becoming objects of curiosity, the failure of the US government to bring the detainees before a competent tribunal to determine whether they should receive POW status as the Third Geneva Convention requires, and to accord detainees POW status until they have done so, calls into question its commitment to humanitarian law.¹⁰⁰³

In addition to access problems, media organizations also faced pressure from US authorities over content, particularly in the months immediately following the attacks. The US administration urged news organizations not to broadcast in full tapes of Osama Bin Laden, or the killing of *Wall Street Journal* reporter Daniel Pearl, while the FBI threatened several websites with obscenity charges if they did not remove the Pearl tape, which included anti-

⁹⁹⁷ See chapter on financial measures.

⁹⁹⁸ Steve Fainaru, "Detainee to Get Open Immigration Hearing", *Washington Post*, 26 September 2002.

⁹⁹⁹ Adam Liptak, "Citing 9/11, Appeals Court Upholds Secret Hearings", *New York Times*, 9 October 2002.

¹⁰⁰⁰ RSF, *Annual Report 2002* (chapter on United States) at http://www.rsf.org/article.php3?id_article=1421; International Federation of Journalists, *Journalism and the War on Terrorism*, 3 September 2002.

¹⁰⁰¹ Reporters Committee for Freedom of the Press, *Homefront Confidential*, pp.6-8.

¹⁰⁰² Reporters Committee for Freedom of the Press, *Homefront Confidential*, p.8

¹⁰⁰³ See chapter on arrests.

American and anti-Semitic propaganda prepared by Pearl's murderers.¹⁰⁰⁴ The US State Department urged radio station Voice of America not to broadcast an interview with Taliban leader Mullah Omar.¹⁰⁰⁵ The interview was eventually broadcast several days later after protests from station staff. Qatar-based Arabic language news channel Al Jazeera also came under pressure from the US government for its coverage of the war in Afghanistan and of Osama Bin Laden, including via US diplomatic pressure on Qatar's ruler.¹⁰⁰⁶ The pressure on Al Jazeera seems particularly short-sighted given its importance as an independent news source in the Middle East, and the stated commitment of the US to democracy in the region. As RSF noted, "the US criticism chimed with that from several authoritarian Arab regimes who feared the station for giving a voice to their domestic opponents".¹⁰⁰⁷

Freedom of information in the United States was curtailed after September 11 by the issuance of more restrictive guidelines on government compliance with freedom of information act requests and a resultant slowdown in the response to such requests, and by the removal of information from government websites. On 12 October 2001, Attorney-General Ashcroft issued a new policy for requests under the Freedom of Information Act, saying that the Justice Department would defend any federal agency that refused to grant an FOIA request provided that the refusal rested on a "sound legal basis".¹⁰⁰⁸ The new policy supersedes a 1993 Clinton administration directive which allowed the Justice Department to defend refusals only where the information requested would result in "foreseeable harm". The policy has had a significant effect on FOIA requests, which a federal judge reportedly characterized in February 2002 as moving at a "glacial pace".¹⁰⁰⁹

In March 2002, White House Chief of Staff Andrew Card issued a memorandum to federal agencies, which instructed them to withhold information that is sensitive for national security reasons even when the FOIA national security exemption does not apply.¹⁰¹⁰ Observers expressed scepticism as to how information could be both sensitive but unclassified.

¹⁰⁰⁴ Reporters Committee for Freedom of the Press, *Homefront Confidential*, p.28

¹⁰⁰⁵ For more information, see International Press Institute, "Open letter of support for VOA editorial staff", 2 October 2001, at http://www.freemedia.at/pr_voa02.10.01.htm; International Federation of Journalists, *Journalism and the War on Terrorism*, p. 35.

¹⁰⁰⁶ Toby Mendel, "Consequences for Freedom of Expression of the Terrorist Attacks of 11 September".

¹⁰⁰⁷ RSF, *Annual Report 2002* (chapter on United States).

¹⁰⁰⁸ For more detail, see Lawyers Committee for Human Rights, *A Year of Loss*, September 2002, pp. 10-12.

¹⁰⁰⁹ Toby Mendel, "Consequences for Freedom of Expression of the Terrorist Attacks of 11 September".

¹⁰¹⁰ Reporters Committee for Freedom of the Press, *Homefront Confidential*, p. 46.

Access to information via government websites was also restricted. The Nuclear Regulatory Commission removed its entire website shortly after September 11, although some of the material was later restored.¹⁰¹¹ At least sixteen other federal agencies followed suit by removing at least some of the content from their websites.¹⁰¹² Although in each case, the removal was justified on the grounds that the information might be useful to terrorists, only the Nuclear Regulatory Commission has developed clear public guidelines for the removal of information previously available to the public. In the absence of such guidelines, there is a danger of unwarranted secrecy.

¹⁰¹¹ Ibid., p.44.

¹⁰¹² The Department of Energy; the Interior Department's Geological Survey; the Federal Energy Regulatory Commission; the Environmental Protection Agency; the Federal Aviation Administration; the Department of Transportation's Office of Pipeline Safety and its Bureau of Transportation Statistics' Geographic Information Service; the National Archives and Records Administration; the NASA Glenn Research Center; the International Nuclear Safety Center; the Internal Revenue Service; the Los Alamos National Laboratory; and the National Imagery and Mapping Agency. (Source: OMB Watch, cited in *Homefront Confidential*, p.44).

Human Rights Abuses in Chechnya and Central Asia: The International Response after September 11

Since September 11, the international community has taken a growing interest in the predominantly Muslim countries of Central Asia – Kazakstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. The United States and the United Kingdom, as well as other countries active in the war in Afghanistan, have to an increasing extent treated the countries of Central Asia as important allies, in part because of their geographical proximity to Afghanistan and their willingness to allow the United States and others to use their airports and station troops on their territory.¹⁰¹³ The United States and other western governments have also worked to expand and improve their relations with Russia, which not only has important influence in the region but also a veto power as a permanent member of the UN Security Council.

The leaders of Central Asia have been quick to recognize the enhanced strategic importance of their countries and the benefits of actively contributing to the international counter-terrorism coalition. Similarly, the Russian government has not hesitated to call for a qualitative change in the evaluation of its military operations in Chechnya in exchange for its support of international counter-terrorism efforts.

These developments have had numerous implications for human rights throughout the region. Most unfortunately, the western governments have allowed their strengthened partnerships with the Central Asian and Russian governments to increase their tolerance for the country's poor human rights records. While the governments in the region have used the pretext of the fight against terrorism to continue and even step up their abusive policies, the United States and the West European countries have failed to address these developments adequately. Western governments clearly refrained from taking positions critical of the Central Asian and Russian governments during the first months after September 11, but more recently have started to voice concern again regarding the severe human rights violations occurring in Central Asia and Chechnya. However, in doing so, they have failed to attach consequences to their criticism. As a result, the governments of the region have grown ever more confident that they will face no significant repercussions for their repressive policies.

¹⁰¹³ It should be noted that Turkmenistan has not agreed to troops being stationed on its territory. For more information see below.

Relevant Human Rights Standards

In the 1975 Helsinki Final Act the OSCE participating states recognized “the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all states”.¹⁰¹⁴ The participating states also endeavoured “jointly and separately, including in co-operation with the United Nations, to promote universal and effective respect [for these rights and freedoms]”.¹⁰¹⁵

Moreover, at the meeting of the Human Dimension Conference in Moscow 1991 the OSCE states agreed that “issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern” and that commitments undertaken in the field of the OSCE human dimension are “matters of direct and legitimate concern to all participating states and do not belong exclusively to the internal affairs of the state concerned”.¹⁰¹⁶ In a similar vein the Charter for European Security that was adopted in Istanbul 1999 stresses that the OSCE states are “responsible to each other for their implementation of their OSCE commitments”.¹⁰¹⁷

Central Asia

During the decade since the fall of the Soviet Union, the countries of Central Asia have taken only minimal steps toward democracy and the rule of law. Although there are significant differences among the five countries, all remain authoritarian in character and restrict the basic political and civil rights of their citizens. The governments of the region initially justified the dire human rights situation as part of the Soviet legacy, and argued that they needed to carry out reforms incrementally in order not to jeopardize domestic stability. However, after some tentative steps toward more open political systems in some of the Central Asian countries during the immediate post-Soviet period, the governments of the region have adopted increasingly repressive policies in recent years, targeting in particular political opponents and those religious Muslims not under the centralized control of state religious departments. Thus, instead of progressing slowly and steadily, human rights protection has in fact deteriorated in the region during the last few years.

¹⁰¹⁴ Principle VII, para. 5, Declaration on Principles Guiding Relations Between Participating States, Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975.

¹⁰¹⁵ *Ibid.*, para. 6.

¹⁰¹⁶ OSCE Moscow document, preamble, paragraph 9.

¹⁰¹⁷ Paragraph 7 of the OSCE Charter for European Security, Istanbul, 19 November 1999.

Since September 11, repression and human rights violations have increasingly been depicted as a necessary component of the fight against terrorism in Central Asia. The governments of the region – and in particular of Uzbekistan – have justified abusive policies by referring to the need to undermine radical Muslim and other “extremist” forces seeking to destabilize their countries. By this, they have not only retained their steadfast grip on power, but also continued to curtail political and religious opposition, and placed ever more severe restrictions on independent media and civil society.

While it is true that radical Muslim groups exist and operate in Central Asia, the extent of the threat actually posed by such groups remains unclear. In any case, the struggle against these forces does not justify repressive campaigns such as those that are currently carried out by the governments in Central Asia, and that involve arbitrary detentions, unfair trials, torture and a host of other gross human rights abuses. It is also clear that by indiscriminately targeting people who are merely exercising their right to peacefully oppose government policies and subjecting them to the most egregious human rights violations, the governments of the region promote resentment and anger among their citizens and thereby help radicalise increasing segments of the populations.

The September 11 events triggered increased international involvement in Central Asia, in the form of military partnerships and economic assistance.¹⁰¹⁸ However, this involvement has not been accompanied by due attention to the dire human rights records of the governments in the region. In particular, during the first few months after the attacks on the World Trade Center and the Pentagon international criticism of the lack of democracy and rule of law in the region was feeble. The United States and its western allies single-mindedly pursued the support of the Central Asian governments for the fight against terrorism and were notably unwilling to raise human rights abuses in their dealings with them. More recently human rights have again featured more visibly in bilateral and multilateral relations with the countries of the region. However, while western governments have at times voiced strong criticism, they have failed to grasp opportunities to link improvement in the area of human rights to further bilateral or multilateral assistance. In addition, western governments have been prompt to laud the governments of the region for undertaking small-scale reforms that have lacked any

¹⁰¹⁸ Since September 11, the USA, the EU, the World Bank and individual foreign governments have all increased economic assistance to Central Asia. See for example, “Europe and Central Asia: World Bank Lends Record Amount”, 1 August 2002, at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20059550~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

fundamental impact and that have been dismissed as sheer window-dressing by local human rights activists.¹⁰¹⁹

If western governments continue to limit their criticism of the human rights situation in the Central Asian states and to applaud superficial reforms occurring there, while at the same time embracing the governments of the region as partners in the international counter-terrorism coalition, the IHF is concerned that the long-term consequence will be a further deterioration in human rights protection in Central Asia. As will be discussed in more detail below, the leaders of Central Asia have used security concerns with a new degree of shamelessness to justify repressive measures in the aftermath of the terror attacks in the United States. A continued lack of constructive criticism from the international community only strengthens the impression of the Central Asian governments that they have a *carte blanche* to curtail basic rights of their citizens as long as this is done under the pretext of counteracting terrorism.¹⁰²⁰ This is not only a policy devoid of any sincere commitment to international human rights standards, but it is also a policy guaranteed to increase the appeal of extremist philosophies in the region. By obstructing legitimate forms of political, religious and civil opposition, the governments of the region drive opponents underground and encourage their radicalisation.¹⁰²¹

Uzbekistan

Uzbekistan was the first of the Central Asian republics to allow the United States to use its airspace and airbases for the military campaign against Afghanistan. Following a bilateral meeting in early October 2001, Uzbek territory was made available to United States troops for the purpose of search-and-rescue operations as well as humanitarian relief efforts. Within a few days, some 1,000 US soldiers had arrived at Khjanabad, a military base located in southern Uzbekistan less than 200 kilometers from the Afghan border.¹⁰²² Uzbekistan's close cooperation with the United States in the fight against terrorism was accompanied by a

¹⁰¹⁹ See, for example, Sultan Jumagulov and Andrew Stroehlein, "Central Asians 'Victims' of War on Terror", *Reporting Central Asia* (Institute for War and Peace Reporting), no. 145, 10 September 2002.

¹⁰²⁰ Compare Bruce Pannier, "Central Asia: six months after – human rights seen as backtracking", *RFE/RL*, 12 March 2002. In this article a number of human rights advocates with regional expertise are quoted as saying that the Central Asian republics have interpreted their involvement in the international war on terrorism to mean that they enjoy new leeway in terms of their domestic policies. See also Yevgeniy Zhovtis, director of Kazakhstan International Bureau for Human Rights and the Rule of Law, "11th September: Consequences for Human Rights in Central Asia", January 2002. In this article the author discusses, in particular, how the Central Asian regimes have monopolized the right to define what extremist and radical activities are.

¹⁰²¹ Compare discussion in "Our Take: More of the Same", *Transitions on Line*, September 2002.

¹⁰²² "Uzbek territory available for search-and-rescue and humanitarian purposes", *RFE/RL Central Asia Report*, 11 October 2001; "Joint US-Uzbek statement announces "qualitatively new relationship", *RFE/RL Central Asia Report*, 18 October 2001.

weaker stance on the part of the US and other western governments regarding the Uzbek government's relentless campaign against so-called religious fundamentalists. As a result, the government of Uzbek President Islam Karimov appeared to perceive itself as having a green light to continue its repressive policies, now more solidly presented under the guise of an Uzbek contribution to the international anti-terror campaign.

Since 1997 the Uzbek government has waged a campaign of harassment against independent Muslims, those believers who are not affiliated with the state-funded and -controlled mosques or other religious institutions. This campaign grew particularly intense after 16 February 1999, when several bombs exploded in the capital of Tashkent, killing 16 people. The government later accused The Islamic Movement of Uzbekistan (IMU), an armed organization that seeks to overthrow the Uzbek government and is based primarily in Afghanistan, of being responsible for the 1999 attacks. The IMU carried out an armed incursion into Kyrgyzstan in 1999, and into Uzbekistan and Kyrgyzstan in 2000. During the later incident the organization was also involved in violent clashes with the Kyrgyz and Uzbek military.¹⁰²³

While the IHF acknowledges that the existence of the IMU represents a threat, it notes with utmost concern that the Uzbek government has not limited itself to arrests of those linked to the IMU or persons believed to be pursuing their goals by violent means. The government has in fact targeted primarily individuals who peacefully practice their religion beyond strict government control. In particular, members and supporters of Hizb-ut-Tahrir (Party of Liberation), a movement advocating the non-violent establishment of an Islamic Caliphate in Central Asia, have been targeted. The government has imprisoned thousands of peaceful Muslims – there are currently an estimated 7,000 religious and political prisoners in the country¹⁰²⁴ – after arbitrary or discriminatory arrests and unfair trials lacking any basic procedural guarantees. Torture has been routinely used to extract confessions, which regularly have been accepted into evidence and often have served as the sole basis for conviction. Those who have been convicted have been sentenced to lengthy prison terms on grounds such as membership in an illegal movement, distribution of illegal religious literature or “subversive” activities.¹⁰²⁵

¹⁰²³ Information provided by Acacia Shields, Central Asia researcher at Human Rights Watch. See also Human Rights Watch, *Press backgrounder on human rights abuse in Uzbekistan*, 26 September 2001, at <http://www.hrw.org/backgrounder/eca/uzbek092501-bck.htm>.

¹⁰²⁴ This estimate was made by the Independent Human Rights Organization of Uzbekistan in 2002.

¹⁰²⁵ See for example IHF, *Mission to Central Asia (Kazakhstan, Kyrgyzstan and Uzbekistan)*, 7-16 June 2001; Amnesty International, *No excuse for violating human rights violations*, 11 October 2001, at <http://www.amnesty.org/ai.nsf>.

Although the campaign against independent Muslims in Uzbekistan has been underway for several years, the government has clearly exploited the post-September 11 international environment to mute critics of if not gain supporters for its policies. The Uzbek authorities have retrospectively justified their crackdown on independent Muslims by referring to the “war” on terrorism and have attempted to depict Hizb-ut-Tahrir as a threat to the whole international community.¹⁰²⁶ In reality, however, the relentless campaign waged by the Karimov regime is motivated by a desire to eliminate the possibility of Islam as a competing ideology and Islamic leaders as rivals for popular loyalty and political power.¹⁰²⁷

Since September 11, the Uzbek government has carried out hundreds of new arrests of peaceful Muslims, charging them with “extremism”, “terrorism” and “wahhabism”. During this period pious women have increasingly been targeted.¹⁰²⁸ In a pattern persistent from previous years, the law enforcement authorities have made use of psychological and physical abuse to force detainees to cooperate, while the courts have continued to ignore allegations of forced confessions when handing out harsh prison sentences and even the death penalty.¹⁰²⁹ Deaths in custody due to torture remain a salient problem.¹⁰³⁰ The law enforcement authorities have also frequently used brutal force to prevent relatives of Muslims imprisoned on extremism charges from staging demonstrations to protest prison conditions and to demand the release of their loved ones.¹⁰³¹

¹⁰²⁶ For example, in an October 2001 trial, nine members of Hizb-ut-Tahrir were found guilty of “having connections to Osama Bin Laden”. No evidence of these charges was presented. Said Khojaev, “Tashkent cracks down on Islamists”, *Reporting Central Asia*, (Institute for War and Peace Reporting), no. 74, 12 October 2001.

¹⁰²⁷ Information provided by Acacia Shields, Central Asia researcher at Human Rights Watch.

¹⁰²⁸ Information from the Human Rights Society of Uzbekistan, an IHF cooperating organization; and Human Rights Watch, “Round-up of women linked to Islamic groups”, 1 May 2002, at <http://hrw.org/press/2002/05/uzbek-women.htm>.

¹⁰²⁹ For example, in November 2002, a Tashkent court sentenced Iskandar Khudoiberganov to death on charges of “religious extremism” and various anti-state activities, including terrorism. During the trial no concrete evidence to support the charges against Khuidoiberganov was presented, and the verdict against him was primarily based on a confession that he claimed had been extracted under torture. The judge entirely dismissed all allegations of torture and reportedly told Khuidoiberganov that the facilities of the Ministry of Interior, where he was held in pre-trial detention, are not “a holiday resort”. Information from the Human Rights Society of Uzbekistan. See also IHF, *Human Rights in Uzbekistan – A Record that Jeopardizes Security*, March 2003, at <http://www.ihf-hr.org/reports/Uzbekistan/Human%20Rights%20in%20Uzbekistan%20March2003.pdf>.

¹⁰³⁰ For example in August 2002, two men imprisoned for their religious activities died due to torture in the infamous Uzbek Jazlyk prison camp. One of the bodies had burns all over, apparently from immersion in boiling water. See IHF, “Death by torture in Uzbekistan”, 23 September 2002, at <http://www.ihf-hr.org/appeals/020923.htm>.

¹⁰³¹ Information from the Human Rights Society of Uzbekistan.

Moreover, in the wake of the terror attacks on the United States, the Uzbek government has increasingly sought to justify repression of dissidents and human rights defenders by pointing to the need to undermine “anti-state” forces, thus fostering the suspicion that its true aim is to silence all opposition. For example, the Human Rights Society of Uzbekistan, an IHF cooperating organization, has been labelled a terrorist organization with links to Osama Bin Laden, and its members have been subjected to persistent intimidation and harassment. In 2002, nine members of the organization were imprisoned or forcibly admitted to psychiatric hospitals.¹⁰³²

While human rights clearly were not a priority when western governments expanded cooperation with the Karimov government during the first phase of the post-September 11 counter-terrorism campaign, more recently some governments have again raised human rights concerns in their dealings with Uzbekistan. However, when doing so, they have often failed to link their concerns in any concrete way to terms for continued cooperation. In a welcome initiative to reverse this trend, the US Congress approved new legislation on economic aid to Uzbekistan in July 2002 that made spending conditional on the receiving country’s efforts to improve its human rights record and to undertake political and legal reforms.¹⁰³³ However, the initiative was, unfortunately, followed by a report from the US State Department that concluded that Uzbekistan is making “substantial and continuing progress” in terms of democracy and respect for human rights. This evaluation instantly released a new package of aid to the country. Commenting on the report, Human Rights Watch stressed that for each step of progress cited by the State Department the Uzbek government has adopted repressive measures that undermine its effects.¹⁰³⁴

In January 2003, EU leaders met with the Karimov government to discuss implementation of the EU-Uzbek Partnership and Cooperation Agreement that entered into force in 1999.¹⁰³⁵

¹⁰³² Ibid.

¹⁰³³ Human Rights Watch, “U.S. Strengthens Human Rights Efforts on Uzbekistan”, 2 August 200, at <http://hrw.org/press/2002/08/uzbek080202.htm>.

¹⁰³⁴ For example, the US State Department cited convictions of police and security officers for two deaths in custody in 2002. Yet there are many more cases of death in custody under suspicious circumstances that have not been properly investigated, and new deaths in detention continue to occur. The State Department also cited declining arrests of Muslims who practice their religion beyond state control. Yet the efforts of the authorities to arrest and convict Muslims accused of “extremism” have in no way abated, and thousands of Muslims who in previous years have been convicted because of their religious affiliation remain imprisoned. Human Rights Watch, “U.S. Rubberstamps Human Rights”, 9 September 2002, at <http://hrw.org/press/2002/09/uzbek0909.htm>.

¹⁰³⁵ This agreement also covers cooperation on matters relating to democracy and rule of law.

According to article 68 of the agreement “the parties shall cooperate on all questions related to the establishment or reinforcement of democratic institutions, including those required to strengthen the rule of law, and the protection of human rights and fundamental freedoms according to international law and OSCE principles”.

According to a statement issued after the meeting, “both sides affirm[ed] the vital necessity of respect for human rights and fundamental freedoms [...] in the fight against terrorism”. The statement also indicated that the EU had made a number of requests to the Uzbek government to improve its human rights record: the Uzbek government was asked to undertake impartial investigations into cases of deaths in custody; to implement recommendations made by the UN Committee Against Torture¹⁰³⁶ and the UN Special Rapporteur on Torture¹⁰³⁷; to fully implement its agreement with the International Committee of the Red Cross (ICRC) regarding monitoring of places of detention¹⁰³⁸; and to register more NGOs and political parties.¹⁰³⁹ These recommendations were most timely and welcome, and reflected a more pro-active approach by the EU toward the Uzbek government than at the 2002 meeting to discuss the Partnership and Cooperation Agreement.¹⁰⁴⁰ However, at the same time, it is regrettable that the EU leaders apparently failed to make further political and economic assistance to the Uzbek government conditional on compliance with the recommendations.

Kyrgyzstan

After the September 11 attacks on the United States, Kyrgyzstan also lent support to the international campaign against terrorism and agreed to host US and allied troops on its territory.¹⁰⁴¹ With the Manas airport in the Kyrgyz capital of Bishkek serving as the primary air base for the western troops involved in the operation in Afghanistan, and the Kyrgyz government being praised as an excellent partner in the international counter-terrorism

¹⁰³⁶ The UN Committee Against Torture reviewed the second periodic report submitted by Uzbekistan under the Convention against Torture in May 2002. In its final conclusions, the committee expressed concern inter alia about “the particularly numerous, ongoing and consistent allegations of particularly brutal acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel”. The committee also made a number of recommendations to the Uzbek government. See Conclusions and Recommendations of the Committee Against Torture: Uzbekistan, 6 June 2002.

¹⁰³⁷ In 2002 the Uzbek government finally agreed to invite the UN Special Rapporteur on Torture after refusing to do so for several years. It was expected that a report from the visit, which took place 24 November – 6 December 2002, be published in March 2003. See UN Press release, “Special Rapporteur on Torture Completes Mission to Uzbekistan”, 11 December 2002.

¹⁰³⁸ In January 2001 the Uzbek government agreed to grant representatives of the International Red Cross access to prison and detention facilities in the country. However, the government has restrained the work of the ICRC observers by only granting them limited access to detainees and inmates.

¹⁰³⁹ EU Council press release, “Fourth meeting of the Cooperation Council Between the European Union and Uzbekistan”, 27 January 2003.

¹⁰⁴⁰ According to a statement that was issued after this meeting, the two parties had agreed that Uzbekistan’s involvement in the international coalition against terrorism offers new opportunities for co-operation, including in terms of democratic norms, rule of law and respect for human rights. However, the statement did not elaborate on how this cooperation would be realized or identify any areas of particular concern that the EU Council would like to see Uzbekistan make progress on. See EU Council press release, “3rd Meeting of the Co-operation Council between the EU and Uzbekistan”, 29 January 2002.

¹⁰⁴¹ *RFE/RL Central Asia Report*, 27 December 2001.

coalition¹⁰⁴², the administration of President Askar Akaev has assumed a new boldness in its domestic policies. On the pretext of ensuring domestic stability, the authorities have taken further steps to stifle critics of government policies, sometimes using heavy-handed tactics previously unseen in the country.¹⁰⁴³ In March 2002, the police opened fire on a group of protestors in the southern district of Aksy, killing six persons and injuring 40 more.¹⁰⁴⁴ The protestors were demanding the release of Azimbek Beknazarov, a member of parliament who faced criminal charges because he had called for the impeachment of the president.¹⁰⁴⁵ These clashes have been followed by a number of other instances of undue police interference with peaceful protests.¹⁰⁴⁶ In September 2002, a climax was reached when hundreds of people set off on a protest march from the southern part of the country to Bishkek to demand the resignation of the president and the punishment of those responsible for the March killings. The authorities responded by arresting the coordinators of the march and using brutal force against some of the participants.¹⁰⁴⁷ However, the protest march was only dispersed after the government made a number of concessions to the participants, including a promise to bring those responsible for the bloodshed in Aksy to justice.¹⁰⁴⁸ In late December 2002, four local officials were sentenced to two to three year of imprisonment for abuse of power during the Aksy incident. The opposition criticized the trial as a show-trial and believed that the lenient sentences had been designed to fall under an amnesty law approved in the autumn 2002.¹⁰⁴⁹

Moreover, since September 11, the government has intensified its crackdown on peaceful Muslims because of their alleged involvement in the banned Hizb-ut-Tahrir organization, detaining, torturing and imprisoning scores of believers.¹⁰⁵⁰ The government has also accused the political opposition and human rights defenders of supporting extremism. In September 2002, for example, President Akaev suggested that an assassination attempt against the secretary of the National Security Council, a body that is at the forefront in the campaign against Islamic extremism, was linked to the climate of “confrontation” created by the

¹⁰⁴² For example, in February 2002, Bill Montgomery, commander colonel of the US troops based in Kyrgyzstan, said: “We [also] got a very positive and excellent relationship and extremely good support from the government of Kyrgyzstan.” Quote published by Radio Netherlands: “US Boosts Military Presence in Central Asia”, 15 February 2002.

¹⁰⁴³ Dmitry Kabak, “Public Defy Akaev”, *Reporting Central Asia* (Institute for War and Peace Reporting), no. 143, 3 September 2002.

¹⁰⁴⁴ Information from the Kyrgyz Committee for Human Rights, a member organization of the IHF.

¹⁰⁴⁵ The charges were related to his previous work as a prosecutor.

¹⁰⁴⁶ Information from the Kyrgyz Committee for Human Rights.

¹⁰⁴⁷ International Federation for Human Rights Press Release, 5 September 2002.

¹⁰⁴⁸ Kubat Otorbaev, “Opposition divided after failed march”, *Reporting Central Asia* (Institute for War and Peace Reporting), no. 149, 27 September 2002.

¹⁰⁴⁹ *RFE/RL Central Asia Report*, 2 January 2003.

¹⁰⁵⁰ Information from Kyrgyz Committee for Human Rights.

political opposition.¹⁰⁵¹ In another development that fosters the impression that the government is primarily using the fight against “extremism” to strengthen its own position, President Akaev submitted a draft law “on combating political extremism” to the Kyrgyz parliament in May 2002.¹⁰⁵² This law, the stated aim of which was to “nip in the bud extremist activity aimed at the application of illegal and violent methods to achieve political goals”, was largely considered to grant the authorities new opportunities to repress legitimate opposition to the regime.¹⁰⁵³ The Kyrgyz Committee for Human Rights was particularly concerned about a provision in the law that defines “public calls for measures to achieve political goals in unlawful ways” as “extremist activity” and feared that this provision could be used to target protestors who peacefully call for changes in government policies, including calls for the president’s resignation. The bill was due to be considered by the parliament during the 2003 spring session.¹⁰⁵⁴

While the human rights situation has continued to deteriorate in Kyrgyzstan since September 11, western governments have failed to respond adequately and use their intensified cooperation with the Kyrgyz government to push actively for an end to human rights abuses and accountability for the perpetrators of such abuses. In particular, the US government has granted record amounts of economic assistance to Kyrgyzstan since September 11. At the same time, human rights have played only a formal role in this new partnership. During a visit to Kyrgyzstan in July 2002, Secretary of the Treasury Paul H. O’Neill announced that an additional package of assistance would be allocated to the country. When asked on the same occasion about the politically unstable situation in the country, O’Neill said that he believed that “it’s not our [i.e. the US’] business to meddle in the internal businesses of a state”.¹⁰⁵⁵ Although this statement may not reflect established US policy, it came at a most unfortunate time as it allowed the Kyrgyz government to score indirect support for its repressive policies toward the opposition. Later, when President Bush and President Akaev met in Washington, DC in September 2002, the two leaders adopted a joint statement reaffirming their “mutual commitments to advance the rule of law and promote freedom of religion and other universal human rights as enshrined by the founding documents of the UN and the OSCE”.¹⁰⁵⁶

¹⁰⁵¹ *RFE/RL Newslines*, 13 September 2002.

¹⁰⁵² *Kyrgyzstan Daily Digest*, Eurasianet, 7 June 2002, at <http://www.eurasianet.org/resource/kyrgyzstan/hypermail/news/0009.shtml>.

¹⁰⁵³ *RFE/RL Newslines*, 10 June 2002.

¹⁰⁵⁴ Information from the Kyrgyz Committee for Human Rights.

¹⁰⁵⁵ US Department of State, “Press Conference in Kyrgyz Republic-- Paul H. O’Neill, Secretary of the Treasury”, Bishkek, Kyrgyzstan, 15 July 2002.

¹⁰⁵⁶ US Department of State, “The relationship between the US and the Kyrgyz republic, President George W. Bush joint statement with President Askar Akayev of the Kyrgyz republic”, Washington DC, 23 September 2002.

However, the US administration did not impose any requirements on the Kyrgyz government to take concrete measures to deliver on this pledge. Likewise the EU governments missed the opportunity to link further cooperation with the Kyrgyz government to conditions regarding improvements in the field of human rights during a joint meeting in July 2002. As a result, the reported agreement between the two parties that respect for democracy and human rights is an “essential condition” for EU-Kyrgyzstan cooperation remained fully declaratory in nature.¹⁰⁵⁷

Kazakhstan

Following the events of September 11, Kazakhstan expressed full support for the strikes against Afghanistan and offered to allow the United States to use its airspace and airbases.¹⁰⁵⁸ To cement the new relations between the two countries, US President George W. Bush and Kazakh President Nursultan Nazarbaev signed a pact of strategic partnership and cooperation in Washington DC in December 2001. While the agreed pact mentioned the need to advance democratisation and political reforms in Kazakhstan, Nazarbaev told the press that human rights had not been among the topics raised during his meeting with President Bush.¹⁰⁵⁹

It is true that, as the campaign against terrorism has evolved, western leaders have voiced strong concern regarding certain human rights developments in Kazakhstan. However, they have not taken the opportunity to make improvements in the human rights field a condition for continued cooperation. For example, during a meeting with the Kazakh government in July 2002 the EU reportedly highlighted that respect for democracy and human rights principles is an “essential condition” for EU-Kazakhstan cooperation.¹⁰⁶⁰ However, on this same occasion, the EU agreed to increase steel imports from Kazakhstan considerably, in spite of the documented pattern of serious violations of basic civil and political rights that have been documented in that country.¹⁰⁶¹

Emboldened by the failure of his western allies to effectively raise human rights problems in the context of the international coalition against terrorism, President Nazarbaev has gradually stepped up measures to secure his grip on power in the wake of September 11. Since the terror attacks on the United States pressure on independent media and political opposition has

¹⁰⁵⁷ EU Council press release, “Fourth meeting of the Cooperation Council between the European Union and Kyrgyzstan”, 23 July 2002.

¹⁰⁵⁸ *RFE/RL Central Asia Report*, 20 September 2001; *RFE/RL Central Asia Report*, 13 December 2001.

¹⁰⁵⁹ *RFE/RL Central Asia Report*, 27 December 2001.

¹⁰⁶⁰ EU Council press release, “Fourth meeting of the Cooperation Council Between the European Union and Kazakhstan”, 23 July 2002.

¹⁰⁶¹ European Commission press release, “New EU-Kazakhstan Steel Agreement opens way for increased steel imports from Kazakhstan”, 23 July 2002.

been reinforced in the country.¹⁰⁶² The presidential family continues to control the vast majority of all media, and journalists critical of government policies have increasingly faced intimidation, violent assaults and libel charges that appear politically motivated.¹⁰⁶³ New registration regulations for political parties¹⁰⁶⁴ severely impede the activities of opposition parties, and a new movement, the Democratic Choice of Kazakhstan (DCK), which was established by senior government officials and businessmen in November 2001 to call for political reforms, has been singled out for repression. In the summer of 2002, two leaders of DCK were charged with abuse of power and sentenced to long prison terms, in what was widely believed to be a politically motivated trial.¹⁰⁶⁵

In the name of counteracting a growing threat of terrorism, the Kazakh government has also initiated new security measures. February 2002 amendments to national counter-terrorism legislation introduced stricter penalties for terrorist offences and afforded the National Security Committee increased surveillance powers, which raises concern that this body may engage in increasingly abusive practices in the name of the fight against terrorism.¹⁰⁶⁶ In addition, the authorities have continued to persecute people peacefully practicing their religious beliefs through unregistered religious groups. In particular, the authorities have targeted those affiliated or allegedly affiliated with Hizb-ut-Tahrir, claiming that the movement – despite its non-violent nature – is one of the most dangerous elements threatening the country.¹⁰⁶⁷ Numerous people have been detained for supporting this movement and fined or sentenced to several years in prison or, if they are Uzbek citizens, extradited to Uzbekistan.¹⁰⁶⁸ Torture and other forms of cruel and inhuman treatment by law

¹⁰⁶² Eduard Poletaev, “Regime quashes dissent”, *Reporting Central Asia* (Institute for War and Peace Reporting), no. 143, 3 September 2002.

¹⁰⁶³ See Centre for Journalism in Extreme Situations, Weekly bulletin of events in the mass media of CIS states 2002, at <http://www.cjes.ru/bulletin/index-e.php>; and IHF, Statement on prevention of torture and other police misconduct to the OSCE Human Dimension Implementation Meeting in Warsaw in September 2002, at <http://www.ihf-hr.org/reports/osce02/IHF%20InterventionsOSCEWar02%20.pdf>.

¹⁰⁶⁴ In June 2002, the Kazakh Parliament approved new regulations according to which political parties must have at least 50,000 members in order to be registered. Only two currently registered parties, which are considered pro-governmental, have the required number of members. Bruce Pannier, “Opposition parties see draft bill as a possible death sentence”, *RFE/RL Weekday Magazine - Kazakhstan*, 26 June 2002.

¹⁰⁶⁵ See IHF, “Kazakh Convictions of Opposition Figures Part of a Larger Wave of Oppression -- Will the Community of Democratic Nations React?”, 8 August 2002, at <http://www.ihf-hr.org/appeals/020808b.htm>.

¹⁰⁶⁶ Information from the OSCE Delegation in Kazakhstan August 2002.

¹⁰⁶⁷ “Kazakh paper says no serious terrorist organizations, threat in country”, reprinted from BBC in *Kazakhstan Daily Digest*, 11 February 2002, at <http://www.eurasianet.org/resource/kazakhstan/hypermil/200202/0030.shtml>.

¹⁰⁶⁸ Human Rights Watch, *World Report 2003*.

enforcement officials remain a widespread practice in the country and members of religious minorities are among the most frequent victims.¹⁰⁶⁹

Tajikistan

Tajikistan was not as enthusiastic as some of its neighbours in its support for the international campaign against terrorism in the immediate aftermath of September 11, but did allow the United States and France to station troops on its territory.¹⁰⁷⁰ In return, there was greater international engagement with Tajikistan; international aid increased to the country, and several countries – the United Kingdom, France, and Japan – opened embassies in the capital Dushanbe. While international donors and political leaders visiting the country since September 11 have often taken the opportunity to praise the Tajik regime for its cooperation in countering the common threat of terrorism, they have failed to give due attention to the salient human rights problems that persist in the country.¹⁰⁷¹ In perhaps a typical reflection of the West's new relationship with the Tajik government, the United States announced in January 2002 that it would abolish its eight-year-old arms sales restrictions on Tajikistan with the argument that "Tajikistan has been cooperating closely with the US as a member of the international coalition against terrorism. We believe this cooperation and other changes in our relations merit removing Tajikistan from our proscribed countries list".¹⁰⁷²

Recognizing the opportunities created by its involvement in the international coalition against terrorism, the Tajik leadership soon made use of the threat of terrorism for its own political purposes. Referring to security concerns, the government of President Imomali Rakhmonov stepped up pressure on the Islamic Renaissance Party (IRP), which formed a key part of the United Tajik Opposition (UTO) during Tajikistan's 1992-97 civil war.¹⁰⁷³ In contrast to the other Central Asian republics, political parties based on religion are allowed to operate in Tajikistan; the government was pressed to make this concession during the peace negotiations that followed the civil war. However, in the wake of September 11, the president has accused the IRP of disseminating "extremist ideas", and party members have faced mounting harassment from the authorities. In a move that is unprecedented for post-Soviet Tajikistan,

¹⁰⁶⁹ For more information see IHF, *Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America. Report 2002 (events of 2001)*, at <http://www.ihf-hr.org/reports/AR2002/country%20links/Kazakhstan.htm>.

¹⁰⁷⁰ Vladimir Davlatov (pseudonym), "Dushanbe Finally Backs US Campaign", *Reporting Central Asia* (Institute for War and Peace Reporting), no. 74, 12 October 2001.

¹⁰⁷¹ Human Rights Watch, *World Report 2003*.

¹⁰⁷² Richard Boucher, Spokesman of the US State Department quoted in: Transcript of US Department of State Daily Press Briefings, 9 January 2002.

¹⁰⁷³ Vladimir Davlatov, "Pressure on Islamists", *Reporting Central Asia* (Institute for War and Peace Reporting), no. 143, 3 September 2002.

the authorities have closed down numerous mosques whose leaders have been accused of involvement in “extremist” activities.¹⁰⁷⁴ There are also indications that the Rakhmonov regime has used its involvement in the international counter-terrorism coalition as a pretext to arrest, convict and execute former civil war opponents at an increasing pace. Most worrying, those targeted have often been tortured and forced to confess to serious crimes, while the courts have routinely dismissed torture allegations when handing out harsh sentences, including the death penalty.¹⁰⁷⁵ In addition, the authorities have continued to arrest non-violent Muslims belonging to or alleged to belong to Hizb-ut-Tahrir. These individuals are convicted on charges of inter alia inciting religious hatred and attempting to overthrow the regime by violent means, and are sentenced to lengthy prison terms in trials that lack any semblance of fairness or procedural guarantees.¹⁰⁷⁶

Turkmenistan

Unlike the other Central Asian states, Turkmenistan refrained from taking any stand in the Afghanistan conflict and only agreed to let its territory be used as a base for non-military distribution of humanitarian aid.¹⁰⁷⁷ While the neighbouring states have experienced a rapid increase in international presence and engagement since September 11, Turkmenistan has remained isolated from the world. In power for more than 15 years, President Saparmurat Niyazov exercises close to complete control over common affairs in the republic, and the personality cult around him has grown to unprecedented levels. There is no opposition in the country, all expressions of critical thinking are punished and, with almost unlimited powers, the National Security Council carries out intense surveillance of its citizenry and keeps them in a state of fear.¹⁰⁷⁸

¹⁰⁷⁴ Human Rights Watch, *World Report 2003*, Nargiz Zakirova, “Tajikistan: Crackdown on Imams”, *Reporting Central Asia* (Institute for War and Peace Reporting), no. 147, 18 September 2002.

¹⁰⁷⁵ For example, in June 2002, two brothers who fought in the UTO opposition forces during the civil war were executed, although the UN Human Rights Commission had requested that the Tajik government stay the execution pending its examination of the case. The two brothers were sentenced to death in May 2001 on charges of attempting to assassinate the mayor of Dushanbe in a trial that raised serious due process concerns. In particular, the court failed to take into account allegations that the brothers had been tortured in pre-trial detention. Amnesty International, *Concerns in Europe (January-June 2002)*; Amnesty International, *Concerns in Europe and Central Asia (July December 2002)*; and Amnesty International, *Tajikistan: deadly secrets. The death penalty in law and practice*, September 2002, at

[http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/EUR600082002ENGLISH/\\$File/EUR6000802.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/EUR600082002ENGLISH/$File/EUR6000802.pdf).

¹⁰⁷⁶ Human Rights Watch *World Report 2002*; and Vladimir Davlatov, “Tajik Radicals Arrested”, *Reporting Central Asia* (Institute for War and Peace Reporting), no. 36, 16 January 2001.

¹⁰⁷⁷ Nazik Ataeva (pseudonym), “Niyazov Ponders War Options”, *Reporting Central Asia* (Institute for War and Peace Reporting), no. 72, 1 October 2001.

¹⁰⁷⁸ For more information on the human rights situation in Turkmenistan, see IHF, *Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America*, at <http://www.ihf-hr.org/reports/AR2002/country%20links/Turkmenistan.htm>; IHF, *The Human Rights and Security Situation in Turkmenistan – Report on a Meeting Organized by the IHF and Memorial in*

The exiled political opposition from Turkmenistan is scattered over several countries and has not been able to mount a united front against Niyazov. However, in late 2001 and early 2002, the exiled opposition gained strength as a result of the defection of a number of high-ranking officials. Watching this development with concern, the president initiated a purge among his officials and stepped up control of those believed to have contacts with exiled dissidents.¹⁰⁷⁹ In November 2002, an attempt was made to assassinate Niyazov. The presidential administration quickly denounced the attempt as a “terrorist act” and accused leading members of the exiled political opposition for masterminding it.¹⁰⁸⁰ In the following weeks, the Turkmen authorities reportedly detained hundreds of people, many of whom were believed to be targeted solely because they were relatives and friends of those accused of plotting the attempt on the president’s life. Numerous cases of torture of detainees were reported and dozens of people were tried in proceedings grossly violating due process and sentenced to lengthy prison terms for their alleged involvement in the assassination attempt.¹⁰⁸¹ Referring to the need to forestall the violent seizure of power in the country, the president also proposed the establishment of special settlements for dissidents of the regime and the creation of a new state institution to monitor foreigners visiting the country as well as those inviting them.¹⁰⁸²

Because the international community has been preoccupied with the post-September 11 campaign against terrorism, only limited attention has been paid to the abuses perpetrated by the increasingly Stalinist regime in Turkmenistan. However, never a fully cooperative ally in the operations against Afghanistan, and obstructive and unpredictable in other policy areas, Turkmenistan has been less successful than its neighbours in using the anti-terror campaign as cover for its abusive practices.

Vienna 8-10 June 2002, at <http://www.ihf-hr.org/reports/Turkmenistan/Introduction%20list.htm> and statements on Turkmenistan published at the IHF web page.

¹⁰⁷⁹ Nazik Ataeva (pseudonym), “Diplomatic Defection Sparks Turmoil”, *Reporting Central Asia* (Institute for War and Peace Reporting), no. 105, 19 February 2002.

¹⁰⁸⁰ “Turkmenistan’s Niyazov crushes opposition movement”, *Eurasianet*, 7 January 2003.

¹⁰⁸¹ Amnesty International, Human Rights Watch, IHF, International League for Human Rights, Memorial Human Rights Centre, “Turkmenistan: Turkmen leader should mark birthday by introducing rule of law”, 18 February 2002, at http://www.ihf-hr.org/appeals/2003en_pressrelease_turkmenistan_html.htm; IHF, “‘Totalitarian’ Repression in Turkmenistan”, 13 January 2002, at <http://www.ihf-hr.org/appeals/030113.htm>; Amnesty International, “Turkmenistan: government must seek justice not revenge”, 26 November 2002; Antoine Blua, “Observers denounce sentencings as pretext for crackdown”, *Eurasianet*, 4 January 2003.

¹⁰⁸² Arslan Atamanov (pseudonym), “Gulag Threat for Dissenters”, *Reporting Central Asia* (Institute for War and Peace Reporting) no. 175, 15 January 2003.

At the end of 2002, ten OSCE states invoked the so-called Moscow mechanism, which was agreed on by the OSCE Human Dimension Conference in 1991 and provides for the possibility of establishing ad hoc missions of independent experts to assist in the resolution of specific human dimension problems, in relation to Turkmenistan.¹⁰⁸³ The same ten member states subsequently appointed a special rapporteur to investigate developments following the assassination attempt against President Niyazov.¹⁰⁸⁴ After consulting with NGOs and other independent sources, the OSCE rapporteur published a report in March 2003, in which he outlined the large-scale violations of human rights that occurred in Turkmenistan after the assassination attempt and made a series of recommendations to the Turkmen government as well as to third states.¹⁰⁸⁵ The IHF welcomes this report, and calls on the international community to actively press for implementation of the recommendations included in it.

Russia (Chechnya)

Since September 11, relations between Russia and the West have reached new levels of accord, with Russia lending full support to the international counter-terrorism coalition, including the military deployment in Central Asia.¹⁰⁸⁶ In the context of this new cooperation, Russian President Vladimir Putin has repeatedly linked the Russian campaign in Chechnya to the international campaign against terrorism and portrayed Russia as a vanguard in the fight against Islamic extremism.¹⁰⁸⁷ Meanwhile gross violations of human rights have continued to occur in Chechnya. The federal forces have carried out numerous so-called mop-up operations. During these operations, the official aim of which is to root out rebel fighters, local residents have been looted and robbed, arbitrarily detained, ill-treated and summarily executed. Those detained have often been held in makeshift facilities, such as pits in the ground and oil tanks, and routinely subjected to torture, including electric shock treatment, mutilation and rape. Torture victims include women and children. Federal troops frequently have demanded that relatives pay ransom to obtain the release of family members who are detained. The number of “disappeared” residents has also continued to rise and it is believed

¹⁰⁸³ See IHF, “‘Totalitarian’ Repression in Turkmenistan”, 13 January 2002

¹⁰⁸⁴ The Moscow mechanism foresees that two rapporteurs be appointed. However, the Turkmen government failed to cooperate and did not appoint any second rapporteur. The Turkmen government also did not allow the OSCE rapporteur to visit the country.

¹⁰⁸⁵ ODIHR, *OSCE Rapporteur’s Report on Turkmenistan, by Prof. Emmanuel Decaux*, 12 March 2003 (ODIHR GAL/15/03).

¹⁰⁸⁶ Immediately after the September 11 events the Russian government expressed objection to the United States and its western allies deploying troops in the Central Asian republics, which it considers to belong to its own sphere of influence. However, the government soon changed its attitude. Bruce Pannier and Antoine Blua, “Central Asia: Six Months After – Alliances Shift with West, Russia”, *RFE/RL*, 12 March 2002.

¹⁰⁸⁷ See, for example, Igor Torbakov, “Moscow moves to wage its own war against terrorism”, *Eurasia Insight*, 27 September 2001, at <http://www.eurasianet.org/departments/insight/articles/eav092701.shtml>.

that many of the “disappeared” have been extra-judicially executed. Mutilated bodies of “disappeared” persons have been regularly found, some in graves and others left apparently to intimidate the population.¹⁰⁸⁸

Most worrying, the process of accountability regarding assaults on the civilian population in Chechnya remains highly ineffective: few cases are investigated, even fewer are prosecuted, and if sentences are handed out they are typically lenient. In early 2003, the only high-ranking military official that to date has been put to trial in connection with the federal campaign in Chechnya was acquitted on the grounds that he was “temporarily insane” when committing the abuses he was charged with.¹⁰⁸⁹ As a result of the prevailing climate of impunity, the security situation in Chechnya remains extremely precarious, in spite of Russian claims that it is returning to normal.¹⁰⁹⁰

In the aftermath of the October 2002 hostage taking in Moscow, when a number of armed Chechen fighters took hundreds of people hostage in a theatre, there were reports indicating increasing military activity and new waves of brutal mop-up operations in Chechnya.¹⁰⁹¹ In another step motivated by the hostage crisis, the Russian parliament approved new legislation that bans the government from returning bodies of “terrorists” killed in anti-terrorism operations to relatives and to inform the relatives where the bodies have been buried.¹⁰⁹² This measure is particularly problematic because it further impedes efforts to obtain independent forensic evidence that might assist efforts to obtain accountability for abuses committed by Russian forces. In late 2002, the Russian authorities intensified pressure on the displaced Chechens who reside in camps in Ingushetia to return to their home region, and reportedly

¹⁰⁸⁸ For more information on the situation in Chechnya see IHF 2002 and 2003 statements on Chechnya and IHF, *Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America. Report 2002 (events of 2001)*, at <http://www.ihf-hr.org/reports/AR2002/country%20links/Russia.htm>.

¹⁰⁸⁹ The military official, colonel Yurii Budanov, was charged with abducting and murdering a Chechen girl in 2000. The trial started in February 2001, but was subsequently postponed several times while the colonel underwent psychiatric examinations at the request of the court. In line with the last of these examinations, the court concluded in early 2003 that the colonel could not be held criminally accountable because he was “temporarily insane” at the time of the murder and therefore ordered that he be transferred to a psychiatric hospital. Local human rights organizations criticized the trial as unfair and unjust and the relatives of the murdered girl announced their intention to appeal the verdict. Amnesty International, “Russian Federation: Amnesty International is concerned about the climate of impunity prevailing in the Russian judicial system”, 2 January 2003; and Amnesty International, *Concerns in Europe (January-June 2002)*.

¹⁰⁹⁰ See also statement of IHF Mission, “Adequate Security Conditions Do Not Exist in Chechnya to Allow the Return of Displaced Persons – a Pattern of Increasing Disappearances ‘Bordering’ on Genocide”, July 2002, at <http://www.ihf-hr.org/appeals/020723.htm>; and IHF, *Annual Report 2002*.

¹⁰⁹¹ Amnesty International – EU section, “EU-Putin Summit and Chechnya: A Test of EU Credibility”, 8 November 2002; *RFE/RL Newslines*, 13 December 2002; and *RFE/RL Newslines*, 9 January 2003.

¹⁰⁹² *RFE/RL Newslines*, 27 November 2002.

announced that all camps would be closed down within the near future.¹⁰⁹³ Given the insecurity that prevails in Chechnya, these plans are highly alarming.

In the wake of September 11, the Russian government has also exercised increasing pressure on Georgia, which it accuses of harbouring Chechen rebels in the Pankisi Gorge. After a few months of rapidly escalating tensions between the two countries, President Putin sent a letter to the United Nations and the OSCE in early September 2002 to warn of a possible military action against Georgia. Applying the same rationale the United States has used to justify military strikes against Afghanistan and Iraq, President Putin stressed that Russia may need to act in self-defence if Georgia fails to neutralize the terrorist threat within its territory.¹⁰⁹⁴ After the October hostage crisis in Moscow, President Putin followed up on this statement by declaring his intention to expand the government's counter-terrorism efforts beyond Russia's borders, in order to target "all places where terrorists and their ideological supporters and financial backers are based".¹⁰⁹⁵

President Putin's attempts to convince the international community to take a more sympathetic view to the campaign in Chechnya met with evident response in the immediate aftermath of September 11. During a joint press conference with President Putin in Berlin in late September 2001 German chancellor Gerhard Schröder said: "As regards Chechnya, there will be and must be a more differentiated evaluation in world opinion".¹⁰⁹⁶ The Bush administration again seemed to agree with President Putin that the two countries now had a "common foe" to struggle against as it expressed concern about links between Chechen separatists and the Al Qaida network.¹⁰⁹⁷ During a visit to Moscow in late November 2001, NATO's secretary general, Lord Robertson, for his part noted that "We have certainly come to see the scourge of terrorism in Chechnya with different eyes".¹⁰⁹⁸

Although some governments gradually renewed their criticism of abuses taking place in Chechnya, the international community appears to have softened its attitude regarding the

¹⁰⁹³ Amnesty International, "Russian Federation: No forcible return of displaced Chechens to Chechnya until security is guaranteed", 29 November 2002.

¹⁰⁹⁴ Peter Baker and Susan B. Glasser, "Putin says Russians can attack in Georgia"; *International Herald Tribune*, 13 September 2002.

¹⁰⁹⁵ Richard Giragosian, "Moscow's Chechen Hostage Saga: Implications for the Caucasus", *RFE/RL Newline Endnote*, 4 November 2002; and Daan van der Schriek, "Moscow's Hostage Crisis Strengthens Azeri-Russian Relations", *Transitions on Line – Week in Review* 30 October – 4 November 2002.

¹⁰⁹⁶ Haig Simonian, "Putin tries to win softer line on Chechnya", *Financial Times*, 25 September 2001.

¹⁰⁹⁷ Ian Bremmer, "Defining the limits of terrorism: The United States, Russia and Chechnya", *Eurasia Insight*, 3 January 2002, at <http://www.eurasianet.org/departments/insight/articles/eav030102.shtml>.

¹⁰⁹⁸ Ian Traynor, "NATO pledges to reward Putin", *Guardian*, 24 November 2001.

Russian operation in the breakaway republic as a result of September 11. In the wake of the terror attacks on the United States, increased cooperation with Russia has offered new opportunities for governments and inter-governmental organizations to address the situation in Chechnya, but these opportunities have not been exploited. For example, NATO did not take into consideration that Russian operations in Chechnya violate the organization's core values¹⁰⁹⁹, when it decided in May 2002 to establish a new policy-making council where Russia will have an equal say with member states on a number of key topics, including the fight against terrorism.¹¹⁰⁰ As a Human Rights Watch representative has pointed out, other countries with similar shortcomings would not have been afforded such a high status in NATO.¹¹⁰¹ In another reflection of the post-September 11 climate, the United Nations Commission on Human Rights voted down a resolution condemning human rights violations in Chechnya during its 58th session in April 2002, although Russia had refused to comply with commission resolutions on Chechnya from the previous two years. Although the resolution was introduced by the EU, the EU representatives failed to make the necessary efforts to galvanize support for it prior to the vote.¹¹⁰² As a result, despite ongoing atrocities being committed by Russian forces in Chechnya, Russia was under no obligation to report to the 2003 session of the UN Commission on Human Rights about its conduct in Chechnya.¹¹⁰³

Admittedly, some bodies of inter-governmental organizations have engaged in important efforts to draw attention to the continued cycle of human rights violations occurring in Chechnya after September 11. However, while the value of these efforts should not be underestimated, they have not resulted in any effective measures being taken by the member states of the organizations in question to put pressure on Russia regarding its abusive policies in Chechnya. For example, in January 2002, the Parliamentary Assembly of the Council of Europe expressed concern regarding "the ongoing serious human rights violations in the Chechen republic, as well as the lack of progress in investigating past and present crimes and in prosecuting and punishing the perpetrators".¹¹⁰⁴ The PACE also called on the Russian government to take a number of steps aimed at promoting the process of accountability,

¹⁰⁹⁹ The core values of NATO include respect for democracy, human rights and the rule of law. See <http://www.nato.int>.

¹¹⁰⁰ Honor Mahony, "NATO brings Russia in from the cold", *EU Observer*, 29 May 2002, at <http://www.euobserver.com/index.phtml?print=true&sid=9&aid=6436>.

¹¹⁰¹ Tom Malinowski, Washington advocacy director of Human Rights Watch, "Beware, Moscow could contaminate NATO", *International Herald Tribune*, 28 May 2002.

¹¹⁰² Human Rights Watch, *World Report 2003*.

¹¹⁰³ Amnesty International, "UN Commission fails the victims of serious human rights abuses in Chechnya", 19 April 2002; and Human Rights Watch, "UN Chechnya vote assailed", 19 April 2002, at <http://hrw.org/press/2002/04/chechno041902.htm>.

¹¹⁰⁴ Parliamentary Assembly of the Council of Europe: Resolution 1270 (2002): Conflict in Chechen Republic, 23 January 2002.

including steps to provide the assembly with updated and detailed information about investigations into abuses perpetrated against civilians in Chechnya and to fully cooperate with the European Committee for the Prevention of Torture. Failing to comply with the recommendations, the Russian government submitted only limited information about its investigations into abuses by the April 2002 deadline and again refused to allow the CPT to publish its findings after visiting Chechnya in May 2002. In January 2003, the PACE again expressed its concern about the situation in Chechnya and renewed its requests to the Russian government¹¹⁰⁵, even though it rejected a proposal calling on the Russian authorities to postpone the March 2003 referendum on a draft constitution for Chechnya, in spite of the instability and insecurity prevailing there.¹¹⁰⁶ While the IHF welcomes the renewed criticism voiced by the PACE, it also calls on the Committee of Ministers of the Council of Europe to cooperate more closely with the PACE in following up on the requests imposed on the Russian government.

The monitoring mission of the OSCE in Chechnya continued its valuable efforts to monitor and provide information about human rights developments in the region until its mandate expired at the end of 2002. The mission's mandate was not extended because the OSCE refused to accept a demand by the Russian government that the political and human rights dimensions of the mission's work be abolished.¹¹⁰⁷ The IHF supports this firm stance by the OSCE, but also calls on member governments to exercise pressure on the Russian government to renew the Assistance Group's mandate.¹¹⁰⁸ Likewise the IHF calls on OSCE member states to make use of available information to actively challenge the Russian government regarding its Chechnya policies in light of OSCE and other international human rights standards.

The continued failure on the part of the international community to effectively hold Russia accountable for the atrocities its troops commit against civilians in Chechnya has serious implications. Interpreting the lack of powerful criticism as tacit endorsement of its policies,

¹¹⁰⁵ Parliamentary Assembly of the Council of Europe: Resolution 1315 (2003): Evaluation of the prospects for a political solution in the Chechen Republic, 29 January 2003.

¹¹⁰⁶ This proposal was made by Rapporteur Lord Judd, the Socialist group, who has been actively engaged in efforts to advocate a political solution to the conflict in Chechnya during his time as a member of the Parliamentary Assembly (since 1997). While failing to win acceptance for his opinion regarding the planned referendum in Chechnya from the Russian side, Lord Judd in protest resigned from the joint working group that the Parliamentary Assembly has established to facilitate a peaceful solution of the conflict in Chechnya. The joint working group is composed of representatives of the Council of Europe and representatives of the Russian Duma.

¹¹⁰⁷ Human Rights Watch, "Chechnya Monitoring Mission Closed", 1 January 2003.

¹¹⁰⁸ See also Amnesty International, Human Rights Watch and IHF, "Open Letter to President Putin Regarding the OSCE Assistance Group to Chechnya", 23 January 2003.

the Russian government may continue to wage its war on “terrorists” in Chechnya, and possibly neighbouring regions, in the same abusive manner as it has thus far. In particular, in the absence of a veritable impetus from the international community, the Russian government may continue to delay the creation of a credible process of accountability for abuses committed during the Chechnya operation, i.e. the process of investigating abuses and punishing those of its soldiers that are responsible for them. The prevalence of a climate of impunity undermines all prospects for the situation in the region to stabilize, including by fostering mistrust and hateful feelings toward the Russian government among the Chechen population.

Recommendations

Recommendations to International Organizations

The concerns outlined in this report make it clear that international oversight mechanisms are needed that are specifically tasked with systematically monitoring and investigating counter-terrorism measures taken in emergency situations (whether declared or not) in terms of their compliance with human rights standards. The IHF therefore joins calls that:

United Nations

- The Security Council should charge the Counter-terrorism Committee (CTC) with assessing how states comply with international human rights obligations when they implement counter-terrorism actions prescribed by the Security Council. In order to fulfil this task, the CTC should appoint a human rights expert or a group of experts to assist it. The CTC should also consult regularly and seek advice from the High Commissioner for Human Rights regarding additional measures that may be necessary to ensure that human rights norms are not weakened by the work of the CTC or the activities of the member states in the context of the fight against terrorism.
- The CTC should implement the Guidance Notes prepared by the Office of the High Commissioner on Human Rights.
- The UN should establish a mechanism, such as a special representative of the Secretary General or a special rapporteur of the Commission on Human Rights, to monitor counter-terrorism measures adopted by member states from a human rights perspective. Serious human rights violations that are identified through this mechanism should be condemned and concrete recommendations made to remedy abuses.

Council of Europe

- The IHF calls on the Committee of Ministers to ensure that existing monitoring mechanisms focus in particular on how the member states of the Council of Europe implement the guidelines on counter-terrorism and human rights that were adopted in July 2002.

Organization for Security and Cooperation in Europe

- The IHF urges the Ministerial Council to endorse the guidelines on counter-terrorism measures and human rights adopted by the Committee of Ministers of the Council of Europe and to actively advocate these guidelines among the OSCE member states. The IHF also calls on the Ministerial Council to monitor counter-terrorism efforts adopted by member states throughout the OSCE region with a view to ensuring that they respect the rule of law and human rights.
- In particular, the IHF is concerned that ODIHR's role as a "clearing-house for information on a state of emergency" within the context of the Moscow document obligations is not adequate given the present situation in the OSCE region. The IHF therefore calls on the OSCE to strengthen the role that ODIHR plays in terms of monitoring and reporting publicly on the measures that member states take in the context of the fight against terrorism and the extent to which they do or do not comply with OSCE obligations. ODIHR should be provided with adequate resources to fulfil this task.
- ODIHR reports on states' compliance should be taken up by the Permanent Council at regular intervals, with concrete recommendations being made regarding the steps states should take to improve their compliance.
- ODIHR should compile information on states' best practices – where member states were able to address their security concerns without encroachment on human rights and civil liberties and make these available to all member states.
- In addition, the IHF calls on the OSCE to ensure that its member states address the substantive recommendations outlined below:

Recommendations to the Member States

of the Organization for Security and Cooperation in Europe

- Under no circumstances should member states adopt measures that curtail non-derogable rights.
- All extraordinary measures adopted in the context of the fight against terrorism should be prescribed by law and strictly necessary in a democratic society. Such measures should be proportionate, should be interpreted strictly in favour of the rights at issue and be subject to periodic review to ensure that their continued application is strictly necessary. In all circumstances, states should be guided by the human rights principles contained in international law.

The Principle of Legality

- All criminal laws, including those adopted to deal with “terrorist acts” and “terrorist groups” should be as precise, unequivocal and unambiguous as possible regarding the conduct that is proscribed. Steps must be taken to ensure that such laws do not lend themselves to arbitrary or discriminatory enforcement infringing protected rights such as freedom of association, peaceful assembly, expression or manifestations of conscience or belief.
- Laws should exclude “guilt by association” for those who may share the views of or associate with people accused of being involved in terrorist activities.
- A judicial body should approve all sanctions foreseen for terrorist activities and those subjected to sanctions should have effective means to challenge them in a court of law.
- There should be a regular follow-up and parliamentary review of the implementation of terrorism definitions irrespective of whether a sunset clause, limiting the period of implementation, has been laid down in the relevant legislation or not. If there is any indication that a definition may have been applied arbitrarily it should be revised.

Non-discrimination and protection against racism

- States should ensure that any measure they adopt to counter terrorism fully respects the principle of equality before the law and does not amount to discrimination on grounds such as religion, nationality or ethnicity. States should instantly amend, rescind or nullify any laws and practices that have the effect of creating or perpetuating discrimination on such grounds.
- States should take effective measures to protect persons or groups who may be subject to discrimination, hostility or violence as a result of their religious, national or ethnic affiliation, including by ensuring that such abuses are effectively investigated, prosecuted and punished.
- States should take effective measures to promote tolerance among their citizenry and in their action consistently distinguish between those few individuals who commit terrorism in the name of a certain religious or other identity and the vast majority of peaceful representatives of such groups.

Detention/Due Process Protections

- States should ensure that all prisoners have the right to challenge the legal basis of their detention before an independent tribunal (habeas corpus).

- States should ensure that every prisoner has prompt access to counsel.
- States should ensure that every prisoner is charged and brought to trial within a reasonable time period or released.
- States should desist from using immigration detention, material witness warrants, and enemy/unlawful combatant designations in order to bypass the protections accorded to criminal suspects in domestic and international law.
- There should be a presumption in favour of public hearings and trials. Decisions to hold hearings and trials in secret should be made on a case-by-case basis by the judge in charge of the proceedings, and should be subject to review.
- The US government should determine without delay the status of the Guantanamo detainees before a competent tribunal, with a presumption that those who have yet to be adjudicated have POW status.

Torture and Ill-Treatment

- States should reaffirm that torture is prohibited under all circumstances and that all states have an obligation not only to refrain from torture or cruel, inhuman and degrading treatment, but also to prevent such abuse from occurring. Member states of the OSCE should take steps to remind all branches of law enforcement in their respective countries that any resort to torture or cruel, inhuman and degrading treatment or punishment, even in the fight against terrorism, is strictly prohibited and will be prosecuted to the full extent of the law.

Asylum

- All asylum measures should be based on the premise that everyone has the right to seek and enjoy in other countries asylum from persecution. The principle of non-refoulement must be strictly enforced.
- States should refrain from measures that unduly impede access to asylum procedures. In particular, states should make certain that measures adopted to combat illegal immigration do not undermine refugee protection.
- All asylum seekers should – without any discrimination on grounds such as religion, ethnicity or status – be granted an individual and thorough examination of their asylum claims. This examination should take place within a fair procedure that safeguards basic procedural rights such as the right to legal counsel, the right to be heard and the right to appeal.

Extradition, expulsion and deportation

- Any decision to extradite, expel or deport a foreign citizen must only be made after the case has been exhaustively reviewed in light of international human rights standards. The decision should be subject to appeal before the individual is forced to leave the country and should not be immediately enforceable.
- States are prohibited from expelling, deporting or extraditing any individual to a state where he or she has a reasonable fear of torture or cruel, inhuman or degrading treatment, including by removal to a third state. States should also refrain from measures and practices that weaken this prohibition.
- The IHF calls for a strict prohibition against any person being extradited or otherwise sent to a country where he or she risks torture or cruel, inhuman or degrading treatment or punishment unless the sending government agrees to strictly monitor the fate of the person being expelled or extradited EVEN IF the receiving government gives formal assurances that the person will not suffer mistreatment once returned to its territory. If torture or cruel, inhuman or degrading treatment or punishment is a persistent problem in a country such bilateral arrangements do not offer an individual sufficient protection against mistreatment.

Freezing Measures

- Criteria used for inclusion on UN Sanctions Committee, EU and other lists of individuals and organizations designated for asset freezing should be publicly available.
- Any decision to freeze the assets of persons or organizations in national jurisdictions should be subject to judicial review. Where possible counsel for such persons and organizations should be given access to the information on which the decision to freeze the assets is based.
- In order to protect the reputations of listed persons and groups, their names should be kept confidential until such time as they have had an opportunity to challenge the listing decision. The Canadian system could provide a model.
- Lists of persons and organizations subject to asset freezing should be subject to periodic review, and there should be a presumption against the re-inclusion of a name on the list in the absence of compelling intelligence or evidence.
- The UN Sanctions Committee on Afghanistan should introduce guidelines for applications for release of funds by listed entities on humanitarian or emergency grounds, if they have not already done so at the time of this publication.

- The right to apply for the release of funds on humanitarian grounds that exists in some national jurisdictions should be replicated in all member states which freeze funds.

Freedom of Expression and Information

- Media organizations must have full access to sources of information, including government officials, prisoners and conflict zones.
- There must be a presumption in favour of public and media access to court proceedings. Any exclusion must be decided on a case-by-case basis by the judge concerned and be strictly necessary.
- The work of journalists and news organisations must be explicitly exempted from surveillance and traffic data retention.
- The confidentiality of journalists' sources must be respected at all times.
- States must refrain from applying pressure, directly or indirectly, on media organisations to curb their reporting of events or refrain from criticism of government efforts against terrorism.

Privacy

- Surveillance and searches of private property should require court authorisation on a case-by-case basis.
- There should be a presumption against the retention of traffic data beyond any period required for billing purposes. Internet Service Providers should only be compelled to retain traffic data in relation to specific investigations and not on a wholesale basis.
- Personal data collected as a result of anti-terrorist operations through surveillance, data collection and traffic data retention should not be used for general law enforcement or any other purpose.
- Computerized data collection and screening initiatives should be carefully assessed against international privacy standards and domestic data protection laws to ensure full compliance both before introduction and during use.

Central Asia/Chechnya

- Member states should use their cooperation with the Central Asian republics on counter-terrorism issues as an opportunity to effectively hold these governments accountable for abuses of basic political and civil rights that they commit under the pretext of enhancing national stability and security.

- Member states and international organisations should effectively link economic and other assistance to the Central Asian republics to human rights concerns. This can be done by setting minimum requirements of progress that the governments must achieve in different fields of concern in order to continue to receive assistance. The requirements should include benchmarks aimed at ensuring that independent media can function, political opposition can be active, a true civil society can exist, citizens can peacefully exercise their religious beliefs, and the rule of law can prevail.
- Likewise member states should use their cooperation with Russia within the framework of the international counter-terrorism coalition as an opportunity to press for an end to the large-scale human rights violations occurring in Chechnya. In particular, the member states should strongly urge the Russian government to show commitment to its international human rights obligations by allowing international monitoring of the situation in Chechnya (including by renewing the mandate of the Assistance Group of the OSCE) and by adopting measures to improve the process of accountability for abuses committed by its troops.

Impunity

Compliance with international human rights and refugee norms need not result in impunity. Countries that are concerned about the possible impunity of terrorist suspects should:

- Prosecute such persons under their own legislation or send them to another country where they can be prosecuted in accordance with due process standards, but will not face torture, ill-treatment or the death penalty.
- As regards crimes of a “most serious nature” that have been committed after 1 July 2002, a state may also refer them to the International Criminal Court if it is incapable of investigating or prosecuting them itself. Therefore, all states should sign and ratify the Statute of the International Criminal Court and pass any necessary implementing legislation to make such referrals possible.

Appendix A:

Ratifications by OSCE member states of major international human rights/refugee conventions

OSCE Member States	ICCPR*	ECHR**	Refugee Convention and protocol ***	ACHR****
Albania	x	x	x	
Andorra	signed	x		
Armenia	x	x	x	
Austria	x	x	x	
Azerbaijan	x	x	x	
Belarus	x		x	
Belgium	x	x	x	
Bosnia and Herzegovina	x	x	x	
Bulgaria	x	x	x	
Canada	x		x	
Croatia	x	x	x	
Cyprus	x	x	x	
Czech Republic	x	x	x	
Denmark	x	x	x	
Estonia	x	x	x	
Finland	x	x	x	
France	x	x	x	
Georgia	x	x	x	
Germany	x	x	x	
Greece	x	x	x	
Holy See			x	
Hungary	x	x	x	
Iceland	x	x	x	
Ireland	x	x	x	
Italy	x	x	x	
Kazakhstan			x	
Kyrgyzstan	x		x	
Latvia	x	x	x	
Liechtenstein	x	x	x	
Lithuania	x	x	x	
Luxembourg	x	x	x	
Macedonia	x	x	x	
Malta	x	x	x	
Moldova	x	x	x	
Monaco	x		only Convention	
Netherlands	x	x	x	
Norway	x	x	x	
Poland	x	x	x	
Portugal	x	x	x	
Romania	x	x	x	
Russian Federation	x	x	x	
San Marino	x	x		
Serbia and Montenegro	x		x	
Slovak Republic	x	x	x	
Slovenia	x	x	x	
Spain	x	x	x	

Sweden	x	x	x
Switzerland	x	x	x
Tajikistan	x		x
Turkey	signed	x	x
Turkmenistan	x		x
Ukraine	x	x	x
United Kingdom	x	x	x
United States	x	only protocol	signed
Uzbekistan	x		

* International Covenant on Civil and Political Rights (adopted by the UN General Assembly on 16 December 1966; entered into force on 23 March 1976)

** European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted by the member states of the Council of Europe on 4 November 1950; entered into force on 3 September 1953)

*** Convention Relating to the Status of Refugees (adopted by a special conference convened by the UN General Assembly on 25 July 1951; and entered into force on 22 April 1954); and Protocol Relating to the Status of Refugees (adopted by the UN General Assembly on 16 December 1966; and entered into force on 4 October 1967)

**** American Convention on Human Rights (adopted by the member states of the Organization of American States on 22 November 1969; entered into force on 18 July 1978)

