Ottawa Principles on Anti-terrorism and Human Rights

Final 1.4, February 8, 2007
Original: October 2006

Introduction

In June 2006, experts on human rights and terrorism met in their individual capacities at the Faculty of Law, University of Ottawa, Ottawa, Canada to develop the following Principles on Anti-terrorism and Human Rights. They shared a common view that the preservation of human rights – not least the right to life – is the central motivator of anti-terrorism. They also believed that human rights constitute an elemental and immutable constraint on how anti-terrorism is conducted. The struggle for collective security must not be an assault on the individual's life, liberty and security of the person. This document is the product of their deliberations.

Part 1: General Principle on Anti-terrorism and Human Rights

Principle 1.1: Right to non-discrimination and respect for the Rule of Law

1.1.1 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

1.1.2 All measures taken by states to fight terrorism must respect human rights and the rule of law, while excluding any form of arbitrariness as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

1.1.3 State activities to prevent, investigate or prosecute acts of terrorism must not involve discrimination based on race, color, sex, sexual orientation, language, religion, political or other opinion, national or social origin, nationality, property, birth, immigration status, or other status.

1.1.4 In particular, state activities to prevent, investigate or prosecute acts of terrorism must not subject particular groups to increased scrutiny or differential treatment on the basis of their status or personal characteristics. State officials must not use race, ethnicity or other personal characteristics as the basis for stopping, searching, detaining or in other ways restricting the rights and freedoms of affected individuals, except in relation to a specific suspect description, relevant to a particular offence, place and time.

Part 2: Anti-Terrorism, Human Rights and the Criminal Law

Principle 2.1: Application of principles of criminal law and procedure; enactment of specific terrorism offences

2.1.1 States should use the existing criminal law to respond to terrorism and, in doing so, states have a continuing obligation to ensure that their criminal justice systems embody the highest standards of procedural and substantive fairness. These standards include principles of legality, non-retroactivity, non-discrimination, proportionality, proof of individual fault and responsibility, and the presumption of innocence.

2.1.2 States should only enact specific terrorism offences and procedures to the extent strictly necessary because of demonstrable inadequacies in existing criminal law and procedures. Terrorist offences should be defined domestically to respect the principle of legality by including a narrow and precise definition of terrorism that should be no broader than: "any action intended to cause death or serious harm to civilians with the purpose of intimidating a population or compelling a government or political or international organization to do, or abstain from doing, an act." Definitions of terrorism should recognize that state actors can also commit terrorist offences.

Commentary: In many countries, existing criminal law adequately addresses terrorist acts and omissions. The danger of creating new criminal law provisions to respond to terrorism is that they will be redundant, vague and overbroad. As well, they have the potential to unduly complicate the application of the criminal law and to undermine important criminal law principles and democratic values. Moreover, whether terrorism is addressed through an expansive interpretation of the ordinary criminal law, or whether it is addressed through a legislative scheme specifically aimed at terrorist acts, we have seen throughout history that these responses will seep into the ordinary criminal law and become generalized in their application.

There is also the risk that, contrary to the principle of restraint in using the criminal law power, states may amend their general criminal law provisions to provide for the aggressive prosecution of inchoate acts, or the creation of broad financing and association-based offences so that those states will have the tools they believe are required to address the risk of terrorist attack. This can cause the net of criminal law to be cast too widely. States should therefore use the utmost care and restraint in creating or amending offences because of perceived inadequacy in existing criminal law. Any new criminal law initiatives taken in response to the threat of terrorist attack should respect the highest standards of procedural and substantive fairness, and avoid the pitfalls identified above.

Recognizing that some states have or will enact provisions aimed specifically at terrorist acts, those provisions must be confined to the purposes for which they are intended. Where terms such as "terrorism" are employed, they should be defined so as to satisfy the principle of legality. The definition should avoid making motive an element of offences, and in particular religious or political motive. If religious or political motive were to be included in the definition, this could unduly restrict political and religious expression and make evidence about the accused's political

and religious beliefs admissible regardless of its prejudicial effects on the trier of fact. Nevertheless, terrorism can be distinguished from ordinary crime by requiring that terrorist acts be committed with the intent to intimidate a population or compel a governmental, political or international organization to behave in a certain manner. This purpose element is important, because without it, the definition of terrorism could cast the net too wide. Finally, the definition of terrorism in the domestic criminal law should be such that terrorism can apply to both state actors as well as non-state actors, since states, like individuals, can commit terrorist acts.

2.1.3 Offences involving terrorism should require that the state prove beyond a reasonable doubt that the defendant intended to cause the specified harm.

2.1.4 Any person accused, arrested or detained in relation to the commission of a terrorist offence has, at a minimum, the following rights:

a) the right not to be arbitrarily detained or imprisoned;
b) the right to be presumed innocent;
c) the right to be promptly informed, in a language that the person can understand, of the reason for arrest or detention and the right to a translator when one is required to understand and participate in the hearings;
d) the right to be informed without delay of the offence charged;
e) the right to prompt access to legal counsel of choice and to be informed of this right;
f) the right to have the lawfulness of detention determined as soon as possible;
g) the right to pre-trial release unless the state has just cause to deny such release;
h) the right not to have adverse inferences drawn from pre-trial silence;
i) the right to a fair public trial within a reasonable time before an independent, impartial and regularly constituted tribunal;
j) the right to full disclosure of the state's case and to adequate time to prepare a defence;
k) the right not to be a witness in proceedings against oneself;
l) the right to examine prosecution witnesses and call defence witnesses;
m) the right to appeal the decision of the tribunal; and
n) the right not to be tried again for an offence following either an acquittal or finding of guilt and punishment.

2.1.5 Secret detention centres for persons suspected, charged or convicted of terrorist offences should be prohibited under international law and states that have secret detention centres should be subject to sanction. The international community must declare all secret detention centres illegal. Detainees should be held in places that are publicly recognized and there must be proper registration of the names of detainees and places of detention.

2.1.6 When releasing a person whom the state has arrested and detained in relation to the commission of a terrorist act, the state must use the means that are least restrictive of

rights while consistent with the protection of the public and must in no case limit rights in a manner inconsistent with international human rights law.

Commentary: Conditions imposed on persons released from arrest of detention should limit rights only on credible public safety grounds. Further, in no circumstance should they limit rights in a manner not anticipated by the *International Covenant on Civil and Political Rights* (ICCPR), including the requirement that permissible derogations from that instrument be justified by a *bona fide* threat to the life of the nation as set out in a formal statement to that effect. Specific attention must be drawn to the absolutely non-derogable nature of some ICCPR rights. These non-derogable rights may never be abridged as part of conditions on release from detention.

2.1.7 The state must disclose all relevant evidence in its possession to a person accused of committing a terrorist act so as to ensure that the defendant can prepare a full and effective defence, and to ensure that the defendant has a fair trial.

2.1.8 An exception to Principle 2.1.7 is permissible if the state can demonstrate that non-disclosure is necessary to protect national security. To justify non-disclosure, the state must:

a) permit defence counsel with the appropriate security clearance and undertakings with respect to non-disclosure to review the evidence; or
b) permit an independent advocate with the appropriate security clearance and undertakings with respect to non-disclosure to review the evidence and challenge it; and
c) either way, demonstrate to a tribunal in an adversarial process that:
    i. the refusal to disclose the evidence is a proportionate limit on the accused's right to disclosure that is necessary to protect the legitimate national security interests of the state, including the safety of sources and the exchange of information between states; and
    ii. the refusal to disclose is consistent with a fair trial. If a fair trial is not possible because the defendant has not received sufficient disclosure, the appropriate response will be the termination of the proceedings.

Principle 2.2: Application of human rights standards

2.2.1. Any measures, criminal, quasi-criminal, or otherwise, taken by or on behalf of a state to prevent terrorism, must comply with international human rights standards.

2.2.2 Expression may only be subject to criminal sanction on grounds of terrorism if it constitutes incitement of terrorism (as described in Principle 2.1.2) with the intent and likelihood that a terrorist offence will be committed. In particular, publication of information issued by, or about, groups that have been labelled as terrorist, or by or about any of their members, should not be criminalized. Attempts to justify terrorist acts in writing or speech should also not be criminalized.

Principle2.3: Departures from ordinary criminal law principles and human rights standards

2.3.1 Any departures from ordinary principles of criminal law and procedure or derogable international human rights standards must be strictly necessary to prevent the identified harm and be rationally connected to the achievement of this goal; they should infringe the rights of those subject to the law as little as possible; and their effectiveness should be weighed against the degree of rights infringement that they permit. Any such departures must also be reviewable on this basis by a regularly constituted court or tribunal.

2.3.2 Any law enacted to deal with a threat from terrorism, war, invasion, general insurrection, disorder, natural disaster or other public emergency:

a) must only apply prospectively;
b) must be subject to strict and express time limits that are determined in accordance with the principles of necessity and proportionality; and
c) must not indemnify the state or any person in respect of an unlawful act.

Principle 2.4: States of emergency and derogations

2.4.1 Any state of emergency must be prescribed by the law of the state and officially declared. A state of emergency must be understood as an exceptional measure to which resort may be made only in situations of a genuine threat to the life of the nation, its independence or its security. In proclaiming a state of emergency, a state must articulate in detail the nature of the threat, as well as the scope of any derogation taken and the reason(s) for which this derogation is deemed necessary.

2.4.2 A declaration of a state of emergency will be effective only if:

a) it applies prospectively;
b) it is subject to strict and express time limits that are determined in accordance with the principles of necessity and proportionality; and
c) it is subject to legislative ratification as soon as practicable after it has been proclaimed.

2.4.3 Renewal of a declaration of a state of emergency must be:

a) preceded by a public debate in a democratically-elected assembly; and
b) adopted by a greater majority of a democratically-elected assembly than was required to ratify the initial declaration of a state of emergency.

2.4.4 If a state declares a state of emergency, any law that the state enacts in consequence of this declaration must meet the following conditions:

a) the law must only apply prospectively;
b) the law must be subject to strict and express time limits that are determined in accordance with the principles of necessity and proportionality;
c) the law must be strictly necessary to achieve the legitimate aim of the state in declaring the state of emergency;
d) the law must be consistent with the state's obligations under international law applicable to states of emergency;
e) the law must not indemnify the state or any person in respect of an unlawful act;
f) the law must be made public promptly after enactment; and
g) the law must only infringe rights in a way that is strictly necessary and proportional to the harm to be avoided.

2.4.5 The declaration of a state of emergency must be capable of being challenged before an independent and impartial tribunal, which will determine:

a) the validity of a declaration of a state of emergency;
b) the necessity of extending a declaration of a state of emergency; or
c) the validity of any law enacted or action taken in consequence of the declaration.

2.4.6 In enacting a law in consequence of a declaration of a state of emergency, derogations from the human rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR) must comply with Article 4 of that convention, and in particular, may not extend to the following rights:

a) life;
b) security of the person, including:
    i. freedom from torture or cruel, inhuman or degrading treatment or punishment, and freedom from medical or scientific experimentation to which the person has not freely consented;
    ii. freedom from slavery;
    iii. freedom from servitude;

c) the right not to be discriminated against, at the very least, on the basis of:
    i. race;
    ii. ethnicity;
    iii. place of origin;
    iv. citizenship status; or
    v. religion;
d) freedom of thought, conscience and religion. This right includes freedom to have, to adopt or to refuse a religion or belief of a person's

choice, and freedom, either individually or in community with others and in public or private, to manifest this religion or belief in worship, observance, practice and teaching. Freedom to manifest one's religion or beliefs must only be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others;

e) the right not to be found 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 it was committed;
f) the right to be protected against arbitrary deprivations of liberty;
g) the right to a fair trial, including the presumption of innocence and habeas corpus/recurso de amparo;
h) the right to the judicial guarantees essential for the protection of non-derogable rights.

Commentary: Additional state obligations may be non-derogable if they are needed to protect the non-derogable rights listed above. The United Nations Human Rights Committee used this reasoning to extend protection to certain procedural rights in its General Comment 29 on States of Emergency (Article 4) of the *International Covenant on Civil and Political Rights* (U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)).

Part 3: Anti-Terrorism, Human Rights and the Use of Force

Principle 3.1: Exceptional nature of the use of military force

3.1. As a general rule, terrorist acts are criminal acts subject to applicable domestic, transnational and/or international criminal law enforcement measures. The international use of armed force by states in response to terrorist acts is only permissible in accordance with international law regulating such use of force.

Principle 3.2: International rules on the use of force continue to apply

3.2.1 Anti-terrorism goals do not change the international rules on the use of force by one state against another or within the territory of another: use of military force must comply with the requirements of the United Nations Charter in being either explicitly authorized by the UN Security Council or a *bona fide* exercise of collective or individual self-defence within the constraints of Article 51.

3.2.2 Self-defence justifies the use of force against a state or within the territory of that state only in response to an act of terrorism that:

a) rises to the level of an "armed attack" within the meaning of international law;
b) has already occurred or is evidently about to occur; and
c) is properly attributable, as a matter of international law, to the state against which the act of self-defence is directed.

3.2.3 The force used in self-defence must be necessary and proportionate in accordance with international law.

3.2.4 In accordance with Article 51 of the UN Charter, all uses of force in self-defence must be immediately reported to the UN Security Council and may continue only until the Security Council has taken measures necessary to maintain international peace and security.

3.2.5 "Pre-emptive self-defence" – the use of force in response to a feared security threat that is not evidently about to occur – is a violation of international law and is not a legitimate basis for use of military force.

Principle 3.3: International humanitarian law and human rights law

3.3.1 In any situation of armed conflict, applicable customary and treaty-based international humanitarian law is to be observed by the combatants.

3.3.2 In a situation of armed conflict, international human rights obligations remain in force except where recognized international derogation provisions such as Article 4 of the ICCPR apply. International human rights and international humanitarian law are complementary and mutually reinforcing, and should be interpreted in light of each other.

Part 4: Prevention of and Responses to the Use of Torture

Principle 4.1: The absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment

4.1.1 No person, including those suspected or convicted of terrorist related offences, shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

4.1.2 Principle 4.1.1 is a peremptory norm of international law (*jus cogens*). No circumstances whatsoever, including a state of war, a threat of war, a threat to national security, an emergency threatening the life of the nation, internal political instability or any other public emergency, may be invoked by a state as a justification for torture or cruel, inhuman or degrading treatment or punishment.

Principle 4.2: Obligations to respect and ensure the right to be free from torture and cruel, inhuman or degrading treatment or punishment

4.2.1 States shall take all necessary effective legislative, administrative, judicial or other measures to prevent torture and cruel, inhuman or degrading treatment or punishment. Without limitation, these shall include the establishment of a system

of regular visits undertaken by international and national independent bodies to all places where people are deprived of their liberty, in order to prevent torture and cruel, inhuman or degrading treatment or punishment.

4.2.2 States shall prohibit by law torture and cruel, inhuman or degrading treatment or punishment and make any violations of such prohibitions subject to appropriate sanctions, including criminal penalties.

4.2.3 States shall ensure that complaints and reports of torture or cruel, inhuman or degrading treatment or punishment are promptly, effectively and impartially investigated. States shall ensure, including through cooperation with other states, that persons against whom there is sufficient evidence of having committed torture or cruel, inhuman or degrading treatment or punishment are prosecuted.

4.2.4 States shall take all necessary steps to ensure that they do not aid or assist in the commission of torture or cruel, inhuman or degrading treatment or punishment.

4.2.5 No state shall transfer any person, or aid or assist another state to transfer any person – no matter what her or his status or suspected crime – to another state where there are grounds for believing that the individual would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment in that State.

4.2.6 States may only transfer persons to other states pursuant to a legal process that accords with internationally recognized standards of legality and fairness. Without limitation, such processes must include the opportunity for individuals to interpose claims against transfer on the basis that they fear torture or cruel, inhuman or degrading treatment or punishment upon transfer and an opportunity for effective, independent and impartial review of the decision to transfer.

4.2.7 Diplomatic assurances against torture and other cruel, inhuman or degrading treatment or punishment shall not be relied upon to effect transfers. Such assurances do not provide an effective safeguard against such abuse and they are legally insufficient to overcome the transferring state's obligation to refrain from transferring an individual to a known risk.

Principle 4.3: Statements, evidence and information obtained under torture

4.3.1 States shall ensure that statements, evidence or other information obtained by torture or cruel, inhuman or degrading treatment or punishment cannot be used in any judicial, administrative or other proceedings, other than for the purpose of establishing the occurrence of the act of torture or cruel, inhuman or degrading treatment or punishment.

4.3.2 Information, data, or intelligence that has been obtained through torture or cruel, inhuman or degrading treatment or punishment may not be used as a basis for:

(a) the deprivation of liberty;
(b) the transfer, through any means, of an individual from the custody of one state to another;
(c) the designation of an individual as a person of interest, a security threat or a terrorist or by any other description purporting to link that individual to terrorist activities; or
(d) the deprivation of any other internationally protected human right.

Principle 4.4: Remedies and reparations

4.4.1 Each state shall ensure that victims of torture or cruel, inhuman or degrading treatment or punishment have equal and effective access to a judicial remedy and have an enforceable right to full and effective reparations, including the following:

(a) restitution;
(b) compensation;
(c) rehabilitation;
(d) satisfaction; and
(e) guarantees of non-repetition.

Reparations should be proportional to the gravity of the violations and the harm suffered.

4.4.2 States and their courts shall not apply or develop legal doctrine, including doctrines of judicial deference, that fail to give effect to the duty to ensure the right to be free from torture or cruel, inhuman or degrading treatment or punishment, including such doctrines as "act of state," "political questions," "non-justiciability," "comity," "state secrecy," "national security confidentiality" and the like.

4.4.3 A state that has engaged in, participated in, aided, assisted, been complicit in, or acquiesced to torture or cruel, inhuman or degrading treatment or punishment committed abroad must provide an enforceable right to compensation in its own courts against itself, its officials and any persons, including corporate actors and foreign state officials, with whom the state has been involved.

4.4.4 Each state has, at the very least, the international legal jurisdiction to provide access to its courts for purposes of adjudicating compensation claims for torture or cruel, inhuman or degrading treatment or punishment wherever it occurs in the world.

4.4.5 In view of the *jus cogens* nature of the duty to ensure the right to be free from torture and cruel, inhuman or degrading treatment or punishment, states and states' courts should modify or develop the law on state immunity so as not to

grant immunity to foreign states or persons who are or were officials of a foreign state from adjudicative jurisdiction over compensation claims for torture or cruel, inhuman or degrading treatment or punishment.

Part 5: Administrative and De Facto Detention and Other Practices

Principle 5.1: Administrative and de facto deprivation of liberty

5.1.1 Persons deprived of their liberty by a state are entitled, without delay, to a procedure that allows them, at a minimum and in accordance with due process guarantees under international human rights law, to challenge the legal basis for their detention and have an opportunity to have their detention independently reviewed by an independent and impartial court of law.

5.1.2. Every state with effective control over an individual deprived of his or her liberty must:

(a) ensure access by independent monitoring bodies to all detainees and places where persons are deprived of their liberty;
(b) ensure that the monitoring bodies have confidential access to the detainees;
(c) register all persons it detains; this registration must contain full details on the circumstances of the detention, the identity of the detainee, and information about any release or transfer of the detainee; and
(d) ensure that all facilities where individuals are deprived of their liberty meet internationally recognized principles for the treatment of prisoners and/or detainees.

5.1.3. Administrative measures must not be used to deprive an individual of his or her liberty without a proceeding that recognizes the individual's legal personality and complies with international human rights standards regarding due process. At a minimum, these procedures must comply with the following:

(a) the burden of proof on a balance of probabilities must always rest with the state;
(b) the person must have a right to effective independent counsel;
(c) the person must have a right to access to family members, consular officials (where the person is a foreign national) and to his or her counsel;
(d) the acts that lead to the administrative proceeding must be attributable to the person who is the subject of the proceeding;
(e) the individual must be provided with sufficient information to be able to know and meet the case against him/her;
(f) the proceeding must comply with principles of non-discrimination;

(g) in an immigration context, there must be a principle of presumptive release. Where detention is to secure removal, it cannot exceed a reasonable time and may only be effected where strictly necessary; and
(h) the deprivation of liberty must be for a reasonable period of time.

Principle 5.2: Enforced disappearances

5.2.1 States must not subject a person to enforced disappearance, nor assist nor aid in such an act. Enforced disappearance is a crime under international law and persons responsible for, or complicit in, the commission or attempted commission of enforced disappearance should be brought to justice.

5.2.2 States responsible for enforced disappearance must provide to victims a full and effective remedy and reparation, in accordance with international standards.

5.2.3 No state shall transfer a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

5.2.4 Enforced disappearance includes holding persons in secret, unacknowledged or inaccessible detention.

Principle 5.3: Transfer, immigration remedies and due process

5.3.1 Compliance with international legal obligations to prosecute or extradite individuals engaged or suspected of engaging in terrorist activities must be the preferred method of dealing with such individuals.

5.3.2 In circumstances where immigration remedies are pursued in relation to terrorism concerns, procedures must comply with international principles of non-discrimination and due process of law and:

a) the burden of proof on a balance of probabilities must always rest with the state;
b) sanctions should be strictly limited to cases where individual responsibility is established; and
c) consistent with penal principles of law, states must enact measures that provide fair and transparent procedures for recognizing rehabilitation in the immigration context.

5.3.3 More generally, any state effecting the transfer of a detainee to the jurisdiction or effective control of another state may only effect this in accordance with international due process norms and is under a continuing obligation to ensure that the receiving state respects international standards in respect of detention, including those set out above.

Principle 5.4: National and regional security lists

5.4.1 States should not create security lists except where there is a pressing and substantial security reason for doing so. Moreover, security lists should only include the names of persons or groups that present a real, substantial and established danger to the national security of the state or the international or regional collectivity creating the list. States must not adopt listings, made by other countries or entities, that do not meet this test, or use security lists for reasons not related to national security.

5.4.2 States should avoid using the terms "terrorist" or "terrorism" as a criterion for listing because of the definitional problems associated with the terms, but if they do, those terms must be precisely and narrowly defined by law (see Principle 2.1.2 above), so that they do not capture legitimate political activity, expression, association or insurgency.

5.4.3 The precise national security criteria for listing, and the consequences of listing, must be clearly prescribed by law and not subject to discretion.

5.4.4 The standard of proof for making a listing should be clear and convincing proof and, where criminalization is a consequence, the criminal standard of proof – beyond a reasonable doubt – should apply.

5.4.5 States must ensure that no evidence which may have been obtained through torture may be used to support a listing.

5.4.6 Due to the serious consequences of listing an individual or group, including infringements of constitutional and international human rights, affected parties must be afforded, at a minimum: a right to reasonable notice of the intent to list; a right to know the allegations and evidence offered in support of the listing; and a right to respond, including the right to call evidence and witnesses. Parties should also be afforded a right to a *de novo* appeal before an impartial judicial body with power to grant relief.

5.4.7 Each listing by a state should be reviewed on a yearly basis. States should also provide a mechanism by which individuals and groups may periodically seek delisting and call new evidence in support of their case. There should be automatic delisting after a reasonable period of time, subject to renewal through the same processes used in the initial listing.

5.4.8 The criteria states adopt for listing groups must also take into account the scope and degree of activity within the group which threatens national security. Where only certain individuals within a group are engaged in violent activity targeting civilians, the individuals and not the group should be listed.

5.4.9 If the legislative branch of government is called upon to ratify a state's listings, that ratification must take place on a case by case basis.

Commentary: Since the events of September 11, 2001, states have created a large number of security lists intended for a variety of purposes and using a variety of methodologies. Such lists include proscription lists, domestic and border watch lists, no fly lists, asset freezing lists, known terrorist lists, and lists of "potential" terrorists produced by highly questionable data mining programs. In most cases no due process is afforded to the affected individual or group before the listing takes place and no or minimal recourse is available to challenge the listing. These practices violate existing constitutional guarantees, human rights treaty obligations, criminal process rights and administrative law principles regarding due process.

Notably, the consequences of listing an individual as a security threat, terrorist, or terrorist supporter will almost invariably be the devastation of his or her livelihood and reputation, and the consequences of listing a group will be its destruction or criminalization (and a consequent infringement of its members' rights to association and expression). In these circumstances, due process protections are essential.

Principle 5.5: Listing pursuant to U.N Security Council Resolution 1267

5.5.1 States should call on the UN Security Council to adopt as quickly as possible a fair and clear procedure to govern the listing and de-listing of individuals and groups pursuant to Security Council Resolution 1267.

5.5.2 The procedure must stipulate the standard of proof required to list an individual or group. Given the serious consequences of listing for the party, the standard of proof should be higher than a balance of probabilities. The UN Security Council must also develop guidelines or jurisprudence regarding the weight to be given different kinds of evidence and must stipulate that no evidence which may have been obtained through torture can be used to support a listing.

5.5.3 States must respect and meet the standard of proof stipulated by the procedure when asking the 1267 Committee to list an individual or group, and must not seek listing for illegitimate reasons. States should be liable under their domestic law for negligently, maliciously or fraudulently seeking the UN listing of individuals and groups.

5.5.4 The procedure adopted must provide affected parties with a right to reasonable notice of the intent to list, a right to know the allegations and evidence offered in support of the listing, a right to respond, including the right to call evidence and witnesses, and a right to a *de novo* appeal before an impartial judicial or quasi judicial body with power to grant relief.

5.5.5 The procedure should include: yearly reviews of each listing; a mechanism by which individuals and organizations may periodically seek delisting and call new evidence in support of their case; and automatic delisting after a reasonable period of time, subject to renewal through the same processes used in the initial listing.

5.5.6 The procedure adopted must also ensure that listed individuals who have their assets frozen are not deprived of their livelihood by allowing specific exceptions or arrangements to be made by the Security Council, or the State freezing the assets, on humanitarian grounds.

5.5.7 The procedure should provide redress in the form of monetary compensation and other remedies to individuals and groups who have been wrongly listed.

5.5.8 Until a procedure, like that described above, is adopted by the Security Council, States have a duty to assist their citizens and residents in seeking delisting from the 1267 list. This duty includes helping the individual, or individuals belonging to a group, to ascertain the allegations made, and the evidence used in support of, the listing and appealing to the Security Council and the foreign state, if any, that put forward the listing.

5.6.9 No person should be detained as a result of listing on a United Nations or a domestic list of terrorists or terrorist groups.

Commentary: UN Security Council Resolution 1267 (as amended) provides for the listing of "members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them". The resolution calls on States to freeze the assets of, and prevent arms sales to, listed entities, as well as to deny listed individuals entry to, and transit through, their territory. In its 2005 World Summit Outcome document, the General Assembly called for the development of "fair and clear procedures" in respect of the 1267 list, and the 1267 Committee is currently examining a number of proposed reforms. In administering the 1267 list, the Security Council is bound by the U.N Charter and international customary law, including customary human rights norms. Due process is a principle of international customary law and the prohibition on torture is a customary human rights norm.

Part 6: Anti-Terrorism and Consular and Diplomatic Protection

Principle 6.1: Consular protection

6.1.1 A foreign state must:

(a) advise foreign persons, upon being imprisoned, placed in custody or detained, of their right to be in contact with the consular authorities of the state of nationality. Should the person request such contact then the foreign state shall notify, without delay, the consular post of the state of nationality;
(b) make arrangements for initial and ongoing contact between the person imprisoned, placed in custody or detained and the consular officials of the state of nationality;

(c) ensure that all communications between the consular authorities of the state of nationality and the person imprisoned, in custody or detained are confidential and conducted in private. Officials of the foreign state will not attend meetings between the consular authorities of the state of nationality and the person imprisoned, in custody or detained unless invited to do so by the consular authorities of the state of nationality; and
(d) permit the state of nationality to provide assistance and support to the person imprisoned, in custody or detained in accordance with Paragraph (a) above.

6.1.2 At the request of a national imprisoned or detained by a foreign state, the state of nationality should:

(a) contact in person, in writing and by electronic devices its nationals who have been imprisoned, held in custody or detained within 24 hours of the deprivation of their liberty;
(b) maintain contact, in person, in writing and by electronic devices, with its nationals who have been imprisoned, held in custody or detained on a basis to be determined by the state of nationality;
(c) communicate in private with persons imprisoned, held in custody or detained and obtain confidentially for all written and electronic communications;
(d) on a regular basis provide persons in prison, in custody or in detention with appropriate personal articles and material including those relating to leisure, intellectual and academic pursuits, hygiene, diet, medical, and dental treatment;
(e) obtain information from appropriate officials of the foreign state on the reasons for the imprisonment, custody or detention of its national and the legal or regulatory process to which they will be subjected;
(f) arrange for visits by family and friends to persons imprisoned, in custody or detained;
(g) arrange for legal, forensic and investigatory assistance, as appropriate, to the person imprisoned, in custody or detained; and
(h) maintain regular contact with family members of detained persons and keep them fully informed.

Principle 6.2: Diplomatic protection

6.2. Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a state adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another state. It includes (but is not limited to) the following:

(a) representations by the injured person's state to the foreign state at various levels up to and including heads of state and government;

(b) provision of written information, both interpretative and factual;
(c) appeals to appropriate members of the legislative branch of government;
(d) appeals to the judicial organs of the foreign state;
(e) appeals to other bodies of the foreign state as may be appropriate;
(f) representations to appropriate international bodies and agencies; and
(g) legal action against the foreign state before an international agency, tribunal or court.

Principle 6.3: Nationality

6.3.1 The state that exercises consular or diplomatic protection is a state of nationality. A state of nationality means a state whose nationality the protected individual has acquired by birth, descent, succession of states, naturalization or in any other manner not inconsistent with international law.

6.3.2 Any state of which a dual or multiple national is a national may exercise consular or diplomatic protection in respect of that national against a state of which that individual is not a national.

6.3.3 A state of nationality may exercise consular or diplomatic protection in respect of a person against a foreign state of which that person is also a national provided that the person has the predominant nationality of the claimant state. In determining "predominant nationality", states should consider:

(a) habitual residence;
(b) state of passport used and/or issuance of visa by the foreign state;
(c) the amount of time spent in each country of nationality;
(d) date of naturalization (i.e., the length of the period spend as a national of the protecting state before the claim or representation arose);
(e) place, curricula and language of education;
(f) employment and financial interests including bank accounts, social security insurance;
(g) place of family life;
(h) family ties in each country; and
(i) language used by immediate family.

6.3.4 In the event states of nationality are unable to agree on the predominant nationality of a claimant for consular or diplomatic protection, then the matter should be referred to a mutually agreed third party for resolution.

6.3.5 States are encouraged to enter into bilateral agreements in order to resolve conflicts of nationality between their respective citizens.

Principle 6.4: Exception to nationality

6.4 Any state may exercise consular or diplomatic protection in relation to persons injured by a violation of international norms with *erga omnes* status.

Principle 6.5: Obligation to extend consular and diplomatic protection

6.5.1 States should extend consular and diplomatic protection to their nationals. When there is reason to believe that a national is being mistreated by a foreign state in violation of *jus cogens* norms, including the prohibition against torture, states have an even greater responsibility to extend consular or diplomatic protection at the request of the national being imprisoned or detained by the foreign state or at the request of his or her family members.

6.5.2 States should draw up an additional optional protocol to the Vienna Convention on Consular Relations aimed at providing detailed rules concerning consular and diplomatic protection.

Part 7: Anti-Terrorism, Human Rights and Information Disclosure

Part 7 A: Rights of Access, Possession and Communication

Principle 7.1 Securing access to information

7.1 Subject to the justifiable limitations listed below, everyone has the right to obtain information from a state in accordance with Principles 12 -14 of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* and to possess and to impart that information to anyone, orally, in writing, or through any other media of his or her choice, including information considered by a state to relate to the protection of national security or public safety from terrorist threat. Principles 12 – 14 of the Johannesburg Principles provide:

> Principle 12: Narrow Designation of Security Exemption
>
> A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.
>
> Principle 13: Public Interest in Disclosure
>
> In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

Principle 14: Right to Independent Review of Denial of Information

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible, and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

Principle 7.2: Released information

7.2 Subject to the justifiable limitations listed below, everyone has the right to receive, possess, and impart to anyone orally, in writing or through any other medium of his or her choice, any terrorism-related information that is released by a person who obtained the information by virtue of government service, either with or without government approval.

Principle 7.3: Disclosure of information and open proceedings

7.3.1 Subject to the justifiable limitations listed below (and in immigration or refugee cases, subject to the consent of the applicant), all proceedings brought by a state that threaten to infringe or deny the life, liberty, or human rights of anyone shall be open to the public, and publication bans or related orders shall not be made.

7.3.2 Subject to the justifiable limitations listed below and to Principle 2.1.9 (in criminal matters), everyone whose life, liberty, or human rights are put at risk in a proceeding brought by a state on anti-terrorism grounds has the right: (a) to effective means to challenge the credibility, reliability or accuracy of any information relied upon by the state in those proceedings; and (b) to the disclosure and use of any information known to, or in the possession of, the state that could reasonably assist in defending against the state's case.

Part 7 B: General principles on justifiable limits and anti-terrorism

Principle 7.4: General principles on justifiable limits and anti-terrorism

7.4.1 Subject to the more specific rule for criminal matters found in Principle 2.1.9, to limit or deny the rights provided for in Principles 7.1-7.3 using justifications related to anti-terrorism, a state must demonstrate before a tribunal that has powers of full and effective scrutiny that the restriction:

a) is prescribed by a law that is accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful, and which provides adequate safeguards

against abuse, including prompt and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal;

b) is necessary in a free and democratic society to protect against a serious threat to a legitimate national security or public safety interest;
c) poses a rational means of protecting national security or public safety interests and is proportional to the specific risks that disclosure would present, and the benefit achieved for national or public security interests outweighs the damage done by denying access to information; and
d) is compatible with democratic principles.

7.4.2 Restrictions on access to government information, or penalties or consequences relating to unauthorized access to government information, can be justified as necessary in the interests of preventing terrorist acts only if they relate to national security interests as defined in Principle 2 of the Johannesburg Principles, or to the public safety interests in protecting against the reasonable apprehension of serious bodily harm or substantial damage to property. Principle 2 of the Johannesburg Principles provides:

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

7.4.3 Justifiable limitations on obtaining information shall be based on the contents of the information alone and not on its class or the manner by which it was acquired.

Principle 7.5: Disclosure of information policies

7.5 Everyone has the right to obtain agreements, guidelines and policy statements regarding information-sharing among states, subject to the justifiable exceptions above. Confidentiality rules that apply to information-sharing agreements between states may not take precedence over the right of citizens to access information from their governments.

Principle 7.6: Penalties

7.6.1 No person may be punished on national security or public safety grounds for the receipt or possession of information from whatever source obtained if: (1) the receipt, possession or disclosure of that information does not actually harm and is not likely to harm a legitimate national security or public safety interest; or (2) the public interest in knowing the information outweighs the harm from disclosure.

7.6.2 No person may be punished on national security or public safety grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

7.6.3 Protection of national security or public safety may not be used as a reason to compel a journalist to reveal a confidential source.

Principle 7.7: Appeal rights

7.7 Any decisions concerning the suppression of information, including the sanctioning of those who receive, possess or impart such information, whether arrived at in open court or not, should be subject to appeal.

Part 8: Anti-terrorism, Human Rights and the Use and Exchange of Information and Intelligence

Principle 8.1: General principles on information, privacy and intelligence

8.1.1 Everyone has the right to protection of personal information concerning him or herself. This includes the right to:

(a) know what information is held about him or herself, subject to justifiable limitations applied *mutatis mutandis* from Principle 7.4;
(b) be notified as soon as possible, consistent with justifiable limitations applied *mutatis mutandis* from Principle 7.4, that information has been collected;
(c) have personal information corrected or deleted; and
(d) compensation from states or private entities where injury arises from the misuse of information.

8.1.2. Unless there are credible grounds to believe that information, data or intelligence is accurate and reliable and that it has not been obtained either by torture or cruel, inhuman or degrading treatment or punishment, that information, data or intelligence may not be used as a basis for:

(a) the deprivation of liberty;

(b) the transfer, through any means, of an individual from the custody of one state to another;
(c) the designation of an individual as a person of interest, a security threat or a terrorist or by any other description purporting to link that individual to terrorist activities; or
(d) the deprivation of any other internationally protected human rights.

Principle 8.2: The collection and use of personal data by states

8.2.1. Personal information must be obtained by lawful means and processed in accordance with statutory rules and procedures that safeguard the rights set out above.

8.2.2. All state agencies involved in the collection and storage of personal information must ensure that:

(a) data are protected against unauthorized access, use or disclosure;
(b) data are only used in connection with the purpose for which they were collected; and
(c) data are only held for as long as necessary and are destroyed thereafter.

8.2.3. States should ensure that their privacy laws prevent private companies from being forced to disclose personal data to state agencies in the absence of an order to do so from an independent judicial authority. Private companies should only be compelled by states to retain personal data for law enforcement purposes on a case-by-case basis subject to an order from an independent judicial authority. Mandatory "data retention" regimes should be repealed and prohibited. Data mining" and other practices that involve the processing of large amounts of personal data in the absence of specific criminal investigations should also be prohibited.

8.2.4. All states should establish independent data protection supervisory bodies with the power to adjudicate individual complaints and conduct audits of public and private entities.

8.2.5. All state agents involved in intelligence collection and information-sharing must receive ongoing and up-to-date training concerning human rights obligations and data protection rules.

Principle 8.3: Exchanges of personal data between states

8.3.1. States must ensure that their receipt, dissemination and use of any information, data, or intelligence to and from other states does not result in the violation of human rights.

8.3.2. States should only share information on a case-by-case basis and only where there are reasonable grounds for believing that it is accurate and reliable. Prior to the exchange of data the sending state must ensure that the receiving state will treat the information to an adequate level of data protection. Bulk transfers of personal information must be prohibited.

8.3.3. States sharing information have an obligation to correct information once they learn of its unreliability. States agencies and/or private companies involved must be subject to shared, joint and several liability where errors or abuses occur.

8.3.4. Confidentiality rules that apply to information-sharing agreements between states may not be used as grounds to deny individual data protection rights or take precedence over the right of citizens to access information from their governments.

8.3.5. All international agreements authorizing the exchange of personal information should be agreed at ministerial level and subject to parliamentary scrutiny. Such agreements must also be subject to regular examination by an independent review body.

8.3.6. All international agreements and practices authorizing the exchange of personal information must be reviewed in order to ensure their compliance with human rights law and data protection standards. Adequate safeguards must be introduced where necessary.

8.3.7. The UN member states should develop and adopt an international instrument affirming privacy and data protection as fundamental human rights and laying down minimum standards for protection in accordance with these principles.

Part 9: Oversight, Review and Control of Security Intelligence Agencies

Principle 9.1: Monitoring regime for security intelligence activities

9.1.1 States must ensure that security intelligence activities, including law enforcement activities related to national security, are subject to a multi-faceted regime of safeguards and scrutiny, which should include:

a) clear statutory and internal controls;
b) oversight and accountability by the executive branch of government;
c) review by an independent body;
d) review by a body of the legislative branch of government;
e) judicial scrutiny;
f) human rights, data protection, freedom of information, financial audit and whistleblower protection instruments; and

g) free and independent civil society institutions, including the media and advocacy groups.

9.1.2 The objective of this monitoring regime should be to ensure:

a) the propriety of security intelligence activities;
b) the effectiveness of security intelligence activities;
c) maximal transparency of security intelligence activities;
d) the legitimacy of security intelligence activities; and
e) the accountability of the government and security intelligence agencies for their activities.

9.1.3 These principles apply to all security intelligence activities, whether carried out by specialized security intelligence agencies, other governmental or public agencies, non-state actors or foreign actors on behalf of, or for the use of, the state or its agencies. The regime of safeguards and scrutiny may vary according to the risks posed by the activity or combination of activities in question. Law enforcement activities related to national security should in particular be subject to specialized safeguards and scrutiny.

9.1.4 States must ensure that the joint or integrated conduct of security intelligence activities by state actors, foreign actors and non-state actors does not undermine these principles or diminish the protections afforded by a state's monitoring regime.

9.1.5 In principle, the powers and resources available to independent agencies that review national security activities should be commensurate with the national security activities being reviewed.

Principle 9.2: Oversight and accountability by the executive branch of government

9.2.1 The executive branch of government must be accountable for the effectiveness and propriety of security intelligence activities. It must oversee these activities by directing them and scrutinizing them on an ongoing basis.

9.2.2 There must be safeguards against impropriety by the executive branch in its oversight of security intelligence activities.

Principle 9.3: Review by an independent body

9.3.1 Security intelligence activities must be reviewed by a body that is independent of government and the agencies that it reviews.

9.3.2 The review body must at minimum be charged with auditing and reviewing the propriety of the security intelligence activities.

9.3.3 The review body must at minimum be empowered to:

a) review and investigate, where and how it sees fit, the activities and policies of the agencies within its purview;
b) compel any information, including all levels of secure information, from any person;
c) investigate and resolve complaints, including ensuring effective access, representations and remedies for complainants;
d) make public reports of its findings and recommendations; and
e) take all reasonable steps to protect the confidentiality of information that is subject to national security confidentiality.

Principle 9.4: Scrutiny by a body of the legislative branch

9.4 Security intelligence activities should be scrutinized by a body of members of the legislative branch, independent from the executive branch, with power to compel any information, including all levels of secure information, from any person.

Principle 9.5: Scrutiny and control by the judicial branch

9.5 States must ensure that independent, impartial and regularly constituted tribunals play a role in the scrutiny and control of intrusive powers.

Principle 9.6: Role of other instruments and institutions

9.6.1 States must ensure that security intelligence activities are subject to human rights, data protection, freedom of information, financial audit and whistleblower protection instruments.

9.6.2 States must ensure the freedom and independence of civil society institutions that play a role in scrutinizing security intelligence activities, including the media and advocacy groups.

Part 10: Anti-terrorism, Human Rights and the Role of the United Nations Security Council

Principle 10.1: UN Charter is binding

10.1 The UN Security Council is bound by the UN Charter to act in accordance with the purposes and principles of the Charter, including human rights.

Principle 10.2: jus cogens human rights

10.2 The UN Security Council may not limit or derogate from human rights that are of a *jus cogens* character, including the right not to be subject to torture.

Appendix

These Principles were developed at a workshop at the University of Ottawa, Faculty of Law. That workshop was made possible through the generous financial support of the Canadian Social Sciences and Humanities Research Council, Rights & Democracy and the University of Ottawa.

Contact Point for the Principles:

Professor Craig Forcese
Faculty of Law
University of Ottawa
57 Louis Pasteur
Ottawa, On K1N 6N5

Tel: 613-562-5800 ext 2524
Fax: 613-562-5124
cforcese@uottawa.ca

PART 1: The following experts participated in their individual capacities in the colloquium held to draft these Principles. Organizations and affiliations are listed strictly for purposes of identification and not as an indication of organizational endorsement of these Principles:

1. Ron Atkey Q.C., Osler, Hoskin and Harcourt LLP, Canada
2. Sharryn Aiken, Faculty of Law, Queen's University, Canada
3. Warren Allmand, former Solicitor General of Canada
4. Michael Byers, University of British Columbia, Canada
5. Sandra Coliver, Open Society Justice Initiative, United States
6. John Currie, Faculty of Law, University of Ottawa, Canada
7. Edward J. Flynn, Human Rights Advisor, United Nations
8. Ben Hayes, Statewatch, UK
9. Carla Ferstman, REDRESS, UK
10. Craig Forcese, University of Ottawa, Faculty of Law, Canada
11. Vera Gowland-Debbas, Graduate Institute of International Studies, Switzerland
12. Susheel Gupta, Lawyer and Air India victim family member, Canada
13. Julia Hall, Human Rights Watch, United States
14. Barbara Jackman, Jackman & Associates, Canada
15. François Larocque, Faculty of Law, University of Ottawa, Canada
16. Nicole LaViolette, University of Ottawa, Faculty of Law, Canada
17. Graham Mayeda, University of Ottawa, Faculty of Law, Canada
18. Alex Neve, Secretary General, Amnesty International Canada

19. Lisa Oldring, Rule of Law and Democracy Unit, UN Office of the High Commissioner for Human Rights
20. Juliet O'Neill, Journalist, *Ottawa Citizen*, Canada
21. David Paccioco, University of Ottawa, Faculty of Law, Canada
22. Gar Pardy, Former Director General, Consular Affairs Bureau, Canadian Department of Foreign Affairs, Canada
23. Cathleen Powell, Faculty of Law, University of Cape Town, South Africa
24. Victor V. Ramraj, Faculty of Law, National University of Singapore
25. Kent Roach, Faculty of Law, University of Toronto, Canada
26. Alasdair Roberts, Maxwell School, Syracuse University, United States
27. Margaret Satterthwaite, NYU School of Law, United States
28. Craig Scott, Osgoode Hall Law School, York University, Canada
29. Roch Tasse, International Civil Liberties Monitoring Group, Canada
30. Lorne Waldman, Waldman & Associates, Canada
31. Stephen Watt, American Civil Liberties Union, United States
32. Maureen Webb, Legal Counsel, Canadian Association of University Teachers, Canada
33. Rick Wilson, Washington College of Law, American University, United States
34. Andrea Wright, Former Legal Counsel, Policy Review, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Canada

PART 2: The following people were present and participated in the discussions but are not able to take a position on the Principles because of their organizational affiliations or for other reasons:

1. Ian Seiderman, Senior Legal Advisor, Amnesty International, International Secretariat, UK