



UNODC

United Nations Office on Drugs and Crime



Frequently Asked Questions on
**International Law Aspects
of Countering Terrorism**

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Frequently Asked Questions on International Law Aspects of Countering Terrorism



UNITED NATIONS
New York, 2009

Acknowledgements

This Handbook has been finalized drawing on texts prepared by Susie Alegre under a consultancy contract for the United Nations Office on Drugs and Crime (UNODC).

This publication has been financed drawing on funds provided by the following countries, which have made voluntary contributions to UNODC's Global Project on Strengthening the Legal Regime against Terrorism: Austria, Belgium, Canada, Colombia, Denmark, France, Germany, Greece, Italy, Japan, Liechtenstein, Monaco, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

This document has not been formally edited.

The designations employed and the presentation of the material in this document do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

Preface

This publication is designed to provide a brief overview of the broader international law framework in which counter-terrorism works. It is a short introduction which aims to give a quick insight into the general principles of international law as well as the basic elements of international criminal law, humanitarian law, refugee law and human rights law which may be relevant in a counter-terrorism context.

The publication is broken down into five sections:

- Basics of international law
- International criminal law, including international cooperation in criminal law matters
- International law on the use of force and international humanitarian law
- International refugee law
- International human rights law

Each section looks at the relevance of the field of law to counter-terrorism, sets out the main sources of the law and relevant international bodies before explaining briefly how the law works in practice.

The format of the publication provides short answers to many of the questions about international law frequently asked during UNODC/TPB training workshops and other technical assistance activities. It is written in simple language and sets out the fundamentals of international law without exploring the more complex debates and arguments that exist in relation to international law and its relation to terrorism in particular. The publication thus does not attempt to cover all issues related to the international legal framework of counter-terrorism with the same weight. Some issues, which typically generate more questions, are dealt with in more detail. The publication should not be seen as an academic work and the format with minimal references reflects its practical introductory nature. International law and its application in a terrorism-related context is the subject of many publications and of a series of in-depth analyses produced by the United Nations Office on Drugs and Crime (UNODC). This should be seen as a springboard to more in-depth analysis of the issues which can be found in a number of other tools and publications produced by UNODC.^a

By the very nature of this publication as a general introduction, its content does not reflect authoritative substantive positions of the various United Nations entities.

^aSee www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html.

Contents

Preface.....	iii
Abbreviations.....	viii
Introduction: how do different bodies of international law relate to terrorism?.....	1
1. Selected issues related to international law.....	3
Why is international law important in counter-terrorism?.....	3
1.1 Sources of international law.....	3
Where does international law come from?.....	3
1.1.1 What are the key elements of the law of Treaties?.....	4
1.1.2 What is customary international law?.....	9
1.1.3 What are the general principles of law?.....	11
1.1.4 Subsidiary sources of law—where else can international law be found?..	11
1.1.5 What is meant by soft law?.....	13
1.1.6 What are the legal effects of Security Council resolutions?.....	14
1.2 The United Nations and counter-terrorism.....	14
1.2.1 What are the key United Nations institutions active in the field of counter-terrorism?.....	14
1.2.2 What are the key elements of the United Nations legal framework in the field of counter-terrorism?.....	25
1.3 Regional and subregional responses to terrorism.....	34
2. International criminal law, including international cooperation in criminal matters	37
2.1 Prosecution of <i>delicta juris gentium</i> and terrorism.....	37
2.1.1 Who can be prosecuted for <i>delicta juris gentium</i> ?.....	38
2.1.2 Where can <i>delicta juris gentium</i> be prosecuted?.....	38
2.1.3 Is there a sui generis crime of “terrorism” in international criminal law?.....	41
2.1.4 Can terrorist acts fall within the categories of “war crimes,” “crimes against humanity” or “genocide”?.....	41

2.2	International cooperation in criminal matters and terrorism.....	44
2.2.1	Jurisdiction: What bases can national courts use to establish jurisdiction over crimes of international concern?.....	44
2.2.2	Extradition: What is extradition and how is it dealt with under international law?	45
2.2.3	What is mutual legal assistance and how is it dealt with under international law?	59
3.	International law on the use of force (<i>jus ad bellum</i>) and international humanitarian law (<i>jus in bello</i>).....	63
3.1	Law on the use of force (<i>jus ad bellum</i>)	63
3.1.1	Can terrorism justify the use of force?	63
3.2	International humanitarian law.....	64
3.2.1	What principles of international humanitarian law are relevant in relation to countering terrorism?.....	64
3.2.2	Where does international humanitarian law come from?.....	65
3.2.3	Who monitors international humanitarian law?	66
3.2.4	When and where does international humanitarian law apply?.....	66
3.2.5	What is allowed under the laws of war?.....	67
3.2.6	What are the minimum guarantees set out under international humanitarian law?.....	68
3.2.7	How does international humanitarian law refer to terrorism?	69
4.	International refugee law	71
4.1	Where is international refugee law found and what aspects of international refugee law are relevant to counter-terrorism?.....	71
4.2	How does the United Nations deal with refugees?.....	72
4.3	Who is a refugee?.....	72
4.4	What does it mean to be a refugee?	73
4.5	Who is excluded from the protection of the Refugee Convention? Are terrorists excluded?.....	73
4.6	Can a refugee be expelled or returned?.....	75
4.7	How may counter-terrorism policies adversely affect refugees and asylum seekers?.....	76

5.	International human rights and counter-terrorism	79
5.1	Sources of international human rights law	79
5.1.1	Where does international human rights law come from?.....	80
5.1.2	What rights are protected?.....	82
5.2	Enforcement of human rights	86
5.2.1	What institutional frameworks exist at the international and regional levels for the promotion and protection of human rights?.....	86
5.2.2	How does international human rights law protection work?	90
5.3	Counter-terrorism and its possible impact on human rights.....	95
5.3.1	What are the possible impacts of counter-terrorism on human rights? ..	95
6.	Conclusion	101

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CTC	Counter-Terrorism Committee
CTED	Counter-Terrorism Committee Executive Directorate
CTITF	Counter-Terrorism Implementation Task Force
ECOSOC	Economic and Social Council
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP1	Optional Protocol to the International Covenant on Civil and Political Rights
ICCPR-OP2	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee for the Red Cross
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
ILC	International Law Commission
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP-CAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

OP-CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women
OP-CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
TPB	Terrorism Prevention Branch
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

Introduction: how do different bodies of international law relate to terrorism?

There is a growing body of international law which is directly relevant to the fight against terrorism. International law provides the framework within which national counter-terrorism activities take place and which allows States to cooperate with each other effectively in preventing and combating terrorism. This framework includes instruments addressing specific aspects of counter-terrorism alongside other international instruments designed for international cooperation in criminal law, the protection of human rights or refugees or the establishment of the laws of war which provide the broader context within which counter-terrorism activities take place.

International law specifically addressing terrorism exists within the general framework of international law including international criminal law, international humanitarian law, international human rights law and refugee law.

The need to place actions to combat terrorism in the broader context is clear from the text of United Nations Security Council resolutions:

Security Council resolution 1456 (2003):

[...]

6. States must ensure that any measure 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;

The following chapters will draw together the fundamental principles of international criminal law, international cooperation in criminal matters, international humanitarian law, refugee law and human rights law to provide the reader with a broad understanding of what State obligations under international law need to be borne in mind in the context of combating terrorism. As will be seen throughout the publication, no sphere of international law is entirely independent of the wider framework. International human rights standards relating to fair trial apply in proceedings under international criminal law and developments in international criminal law may influence the development of those same fair trial standards in international human rights law. Rulings on extradition proceedings will need to take into account both international human rights law and refugee law. In circumstances of armed conflict where international humanitarian law applies, international human rights law will still be applicable. This publication aims to highlight the areas of international law which are most relevant and to give a basic insight into the ways in which different aspects of international law interrelate in a counter-terrorism context.

International law generally imposes duties and obligations on States with regard to their relations with other States and with international organizations. International human rights law, refugee law and humanitarian law also impose duties and obligations on States in relation to their dealings with individuals. Although the development of international criminal law does allow for individuals to be held directly responsible for serious international crimes such as war crimes and crimes against humanity, the main focus of this publication will be on the international legal obligations of States in relation to combating terrorism.

1. Selected issues related to international law

Why is international law important in counter-terrorism?

This section sets out the reasons why international law is important in counter-terrorism and goes on to explain the sources of international law and how international law works. It will also introduce the United Nations system with a focus on United Nations action against terrorism as background information to the latter discussions on specific areas of international law.

At the international level the rights and obligations of a State under international law are superior to any rights or duties that may exist under national law. International law is applied in national courts as well as in international courts and informs the development and interpretation of national laws and practices. It is therefore crucial to have at least a basic understanding of international law in order to apply fully the legal framework relevant to counter-terrorism.

1.1 Sources of international law

Where does international law come from?

The starting point to answer this question can be found in article 38 (1) of the Statute of the International Court of Justice (ICJ) which lists the three primary sources and the subsidiary sources of international law:

Statute of the ICJ, article 38 (1):

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38 does not establish a hierarchy between the primary sources of international law. In practice, though, it seems that an international court would give precedence to a specific treaty provision over a conflicting rule of customary international law unless that rule is a peremptory norm of general international law or *jus cogens*.

A peremptory norm of general international law or *jus cogens* is a norm accepted and recognized by the international community of States as a whole as a norm from which no

derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹ A treaty will be void if at the time of its conclusion it conflicted with a norm of *jus cogens*. Even if a treaty was valid at the time of its conclusion, it will become void if it conflicts with a *jus cogens* norm which emerges subsequently.

An example of a peremptory norm of general international law or *jus cogens* is the absolute prohibition on torture. Therefore, if a treaty were concluded in the context of counter-terrorism which contradicted that prohibition, allowing torture, that treaty would be void and could not be relied upon as a source of international law.

1.1.1 What are the key elements of the law of Treaties?

i) What is a treaty?

The term “treaty” in the international context is used to describe legally binding international agreements in general. A treaty may be bilateral or multilateral and is an agreement between or among States and/or international organizations. These agreements may be denominated as conventions, pacts, charters, protocols, etc. but these denominations do not have any legal significance. A treaty is usually a written agreement but does not necessarily have to be in writing to be valid and enforceable according to international law. The universal counter-terrorism instruments are all treaties.

In general there is a presumption that an agreement between States or international organizations is a treaty. However, agreements which are governed by national law rather than international law are not treaties. Examples of agreements which would not be classified as treaties could be a contract between States on the sale of land to build an embassy, or for the provision of military equipment intended to be governed by the national laws relating to property or commerce.

Multilateral treaties such as the universal counter-terrorism instruments are drafted through diplomatic conferences where participating States are represented by delegations including legal advisers who negotiate the text based on draft proposals prepared by States or international organizations in advance.

The international law of treaties has been codified by the Vienna Convention on the Law of Treaties 1969 (VCLT).² The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 (VCLTIO)³ amplifies the existing body of norms applicable to international agreements.

¹ Vienna Convention on the Law of Treaties (VCLT), art. 53, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

² The Vienna Convention on the Law of Treaties (VCLT) entered into force in 1980.

³ The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO) has not yet entered into force.

ii) How does a treaty work?

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.⁴ This is a fundamental principle of international law and the law of treaties, also known as *pacta sunt servanda*. States cannot invoke national law to avoid this obligation.⁵

A treaty shall be interpreted in good faith “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶ The preparatory work of the treaty and the circumstances of its conclusion may assist in the interpretation of treaties where the meaning is ambiguous or obscure on the face of it or leads to a result which is manifestly absurd or unreasonable.⁷

iii) How do States agree to be bound by treaties?

Treaties take full binding effect from the time when they enter into force. Bilateral treaties enter into force when both States indicate that they agree to be bound by the treaty after a certain date. Multilateral treaties usually contain a provision which allows for entry into force after a specified minimum number of States have agreed to be bound by the treaty.

Example:

International Convention for the Suppression of Nuclear Terrorism 2005, article 25:

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

A State becomes a party to a treaty when it consents to be bound by the treaty. This consent “may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”⁸ Usually, the treaty will specify the means. Most commonly, this will be through signature and/or ratification.

In treaties requiring ratification this will usually be the second part of a two-step process. A State first signs the treaty, which is a way of authenticating the text of the treaty. This engages some minimal obligations⁹ on the part of the State but signature does not necessarily mean that the State will go on to ratify the treaty. Ratification often happens by depositing an

⁴ VCLT, art. 26.

⁵ VCLT, art. 27.

⁶ VCLT, art. 31.

⁷ VCLT, art. 32.

⁸ VCLT, art. 11.

⁹ VCLT, art. 18.

instrument of ratification after consultation and approval from national authorities, usually the legislature. Only ratification makes the provisions of the treaty binding on the State. The two stage process therefore allows States to involve national authorities in the approval of their agreements on the international level.

If a treaty is no longer open for signature, States can only accede to it. Accession has the same legal consequences as ratification.

A State “deposits” an instrument of ratification with the depositary, which has been designated by the negotiating States either in the treaty itself or otherwise. A depositary can be one or more States, an international organization,¹⁰ such as the United Nations, or the chief administrative officer of the organization, such as the Secretary-General of the United Nations.¹¹ Depositaries must act impartially in carrying out their functions which include:¹²

- Keeping custody of the original text of the treaty;
- Preparing certified copies and additional language versions and transmitting them to the parties;
- Receiving signatures and receiving and keeping instruments, notifications and communications relating to the treaty;
- Informing States of acts, notifications and communications relating to the treaty as well as informing States when the required number of signatures or instruments of ratification, etc. for entry into force has been reached.

iv) Does a State have to agree to be bound by the whole treaty?

Sometimes States adhere to a treaty with reservations. A reservation is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”¹³

Example:

International Convention for the Suppression of Terrorist Bombings 1997

Reservation:

In accordance with paragraph 2, article 20 of the International Convention for the Suppression of Terrorist Bombings, Country X does not consider itself bound by paragraph 1, article 20 of the present Convention. Country X declares that to refer a dispute relating to interpretation and application of the present Convention to arbitration or International Court of Justice, the agreement of all parties concerned in the dispute is necessary.

¹⁰ VCLT, art. 76.

¹¹ VCLT, art. 76.

¹² VCLT, art. 77.

¹³ VCLT, art. 2(1)(d).

There are three situations in which a State's ability to make reservations when adhering to a treaty is limited:¹⁴

- Where a treaty prohibits reservations;
- Where a treaty permits only certain types of reservation;
- Where a reservation is incompatible with the object and purpose of the treaty.

An example of a reservation which is incompatible with the object and purpose of a treaty would be a reservation designed to suspend a non-derogable right (such as the prohibition on torture) in a human rights convention. In the interests of protecting the rights of persons, there has been a tendency in this kind of cases to allow the ratification while nullifying the reservation in question.¹⁵

If a treaty expressly authorizes a reservation, no acceptance is required from other States parties.¹⁶ In some cases, a treaty may specify that a reservation must be accepted by all States parties.¹⁷ Where a treaty is a constituent instrument of an international organization, the reservation must be accepted by the organization in question.¹⁸

If a reservation is neither expressly permitted or prohibited and is not incompatible with the object and purpose of the treaty, the other States parties are free to choose whether they accept or reject a reservation.¹⁹ This can lead to a great deal of complexity as numerous different relationships between States may develop through a multilateral treaty where reservations are accepted or rejected by different States.

Example:

International Convention for the Suppression of Terrorist Financing 1999, article 24:

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.
2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.
3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

¹⁴ VCLT, art. 19.

¹⁵ See ECtHR, www.echr.coe.int/echr; OHCHR, www2.ohchr.org/English/bodies/hrc/index.htm.

¹⁶ VCLT, art. 20(1).

¹⁷ VCLT, art. 20(2).

¹⁸ VCLT, art. 20(3).

¹⁹ VCLT, art. 20(4).

A State may also make a statement as to what it understands a particular treaty provision to mean without seeking agreement on the interpretation from other States parties. This is an “understanding” or “declaration” rather than a reservation insofar as such a statement does not try to exclude or modify the legal effect of the provision in question. In practice, however, the line between a reservation and a unilateral interpretation can be ambiguous and it may be necessary to seek clarification from the State making the statement in order to explain its effect. This kind of statement often reflects national political or legal concerns. National courts may give effect to these declarations when ruling on matters related to implementation of a treaty.

Example:

International Convention for the Suppression of Terrorist Bombings 1997

Declaration:

“Country Y declares that it considers the application of article 2 (3) (c) of the Terrorist Bombing Convention to be limited to acts committed in furthering a conspiracy of two or more persons to commit a specific criminal offence contemplated in paragraph 1 or 2 of article 2 of that Convention.”

Declaration:

“Country Z understands article 8, paragraph 1, of the International Convention for the Suppression of Terrorist Bombings to include the right of the competent judicial authorities to decide not to prosecute a person alleged to have committed such an offence, if, in the opinion of the competent judicial authorities grave considerations of procedural law indicate that effective prosecution will be impossible.”

Treaties are generally binding on the entire territory of each State party unless either the treaty specifies otherwise or the State makes an express reservation excluding a part of its territory.²⁰

v) What happens if two treaties dealing with the same subject are in conflict with each other?

Where two treaties dealing with the same subject are in conflict with each other, generally the later treaty signed by the same parties will be considered as replacing the earlier treaty in case of conflict.²¹ This is known as the principle of *lex posteriori priori derogat*. In cases where a law of general application and a law applying to a specific circumstance are in conflict, the more specialized law will be considered to be applicable. This is known as the speciality rule or *lex specialis derogat legi generali*. This is because the more specialized law shows how States intended the law to apply in the particular situation.

²⁰ VCLT, art. 29.

²¹ VCLT, art. 30.

vi) When does a treaty cease to apply?

A treaty will be invalid if it is in breach of *jus cogens*.²²

A treaty will not necessarily be invalid if it violates national law unless the “violation was manifest and concerned a rule of [...] internal law of fundamental importance.”²³

A treaty will not be automatically terminated or suspended simply because there is a change of government in a State party or because parties have severed diplomatic or consular relations.²⁴ States may, however, withdraw from a treaty, terminate it, or suspend its operation according to methods prescribed by the treaty or with the consent of all States parties.²⁵ A material breach of a treaty is a valid ground for its suspension or termination.²⁶ In relation to treaties of a humanitarian character²⁷ or modern human rights treaties, however, a material breach by one party will not justify the suspension of the treaty.

Impossibility of performance of a treaty and a fundamental change of circumstances in specific contexts may justify termination or suspension of or withdrawal from a treaty.²⁸ However, this will not apply in relation to treaties establishing a territorial boundary. Furthermore, a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change arose as a result of a breach by the invoking party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.²⁹

The effects of war or armed hostilities on treaties are expressly excluded from the Vienna Convention on the Law of Treaties.³⁰ In practice, however, many treaties are suspended or terminated in wartime. This is not the case with treaties relating to the law of war, humanitarian law and many human rights treaties which continue to apply even in wartime.³¹

1.1.2 What is customary international law?

There is no international legislative body which can create laws which are binding on all States. (Treaties are only binding on States who have agreed to be bound by them.) So the only international law which can be considered as generally applicable arises out of international custom. Customary international law is “a general practice accepted as law”.

²² See also chapter 1.1.2, in particular “What is a rule of *jus cogens*?”.

²³ VCLT, art. 46(1).

²⁴ VCLT, art. 63.

²⁵ VCLT, art. 54 and art. 57.

²⁶ VCLT, art. 60.

²⁷ VCLT, art. 60(5); see also Advisory Opinion on the Effect of Reservations, Inter-American Court of Human Rights (ser. A) No. 2, 22 I.L.M. 37 (1983).

²⁸ VCLT, art. 61.

²⁹ VCLT, art. 62.

³⁰ VCLT, art. 73.

³¹ Eg. the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Discussed below in sections 3 and 4.

The practice of States will only amount to customary international law if it meets two tests:

- the practice is sufficiently uniform, consistent and general, and
- it is considered to be legally necessary or obligatory (*opinio juris sive necessitatis*).

If a practice is generally and consistently applied by States out of courtesy or habit but not because they consider it to be a legal necessity, it may be considered as an international usage but will not amount to customary international law.

i) How is customary international law established?

The practice of States can be identified through official government statements at international conferences or in diplomatic exchanges. Agreements and treaties are evidence of State practice. National court decisions or legislative measures or other actions taken by States to address international issues may also be considered as practice. State practice may be identified through inaction as well as action.

In order for a practice to be considered as a rule of customary international law it does not have to be universal. It should, however, be accepted by a large number of States and should not have been consistently rejected by a significant number of States. A State which has consistently rejected a practice before that practice acquires the status of customary international law will not be bound by it once it becomes law as long as that rule is not *jus cogens*.³² All other States will be bound by a rule of customary international law.

It is very difficult to identify when a practice acquires the quality of customary international law. Almost by definition customary international law develops and changes over time according to trends in State practices. Subsidiary sources of law may assist in providing proof for the existence of rules of customary international law. It should also be noted that a practice does not have to be in absolutely rigorous conformity with the rule to be customary. In order to deduce the existence of customary rules, it is sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule. For example, the use of torture is still a practice in a number of States, but this does not mean that one can say that there is insufficient practice to establish a customary prohibition against torture.

One example of customary international law developed is the duty of States to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.³³ Notwithstanding longstanding debate, there does not yet exist a universally agreed definition of terrorism, neither in customary international law nor in international treaty law.

³² See also chapter 1.1.2, in particular "What is a rule of *Jus Cogens*?".

³³ E.g. Preamble of Security Council resolution 1373 (2001).

ii) What is a rule of *jus cogens*?

Some rules of customary international law are less susceptible to change having acquired the status of peremptory norms of international law or *jus cogens*. These are “substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.”³⁴

Examples of *jus cogens* are norms which prohibit genocide, torture, slavery and the use of force contrary to the United Nations Charter.

Norms of *jus cogens* can only be modified “by a subsequent norm of general international law having the same character.”³⁵ The importance of these norms is reflected in the fact that they create obligations which States owe to the international community as a whole (*erga omnes*). Such norms must be respected and cannot be derogated from even in the face of a grave threat such as that posed by terrorism.

1.1.3 What are the general principles of law?

The general principles of law recognized by or common to the world’s major legal systems were of great importance historically in identifying the rules of international law. With the rapid development of multilateral treaty law in modern international law and the conversion of many general principles of law into customary international law through practice, general principles of law have become less important in modern times. They are still used, however, on occasion to fill gaps in the international legal system.

An example of the use of “general principles of law” is the use of the principle of *res judicata* which means that once an issue has been finally judged between two parties and is not subject to appeal it cannot be reopened for litigation.³⁶

1.1.4 Subsidiary sources of law—where else can international law be found?

Judicial decisions and the “teachings of the most highly qualified publicists” provide assistance both in identifying rules of international law and in interpreting those rules. In practice, different weight will be given to different types of subsidiary sources of law.

i) How do judicial decisions affect international law?

International Court of Justice (ICJ) decisions are the most authoritative judicial decisions with regard to international law. If the ICJ rules that a principle has become a rule of customary international law it would be practically impossible to refute that principle, although, in general, decisions of the ICJ are binding only on the parties in a particular case.³⁷ Decisions of other international tribunals such as the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Tribunal for the Former Yugoslavia (ICTY) or

³⁴ International Law Commission (ILC) Commentaries to articles on State Responsibility, Commentary to art. 40 (3).

³⁵ VCLT, art. 53.

³⁶ ICJ, Judgment - 26/02/2007 - Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), paras. 114-120; ICJ Statute art. 60 in relation to the judgments of the ICJ.

³⁷ International Court of Justice (ICJ), Statute art. 59.

the International Criminal Court (ICC) as well as the quasi-judicial determinations made by treaty-based organs such as the Human Rights Committee (HRC) are also considered to be highly authoritative.

Decisions of national and regional courts applying international law may be relevant but will have less weight than those of international tribunals.

ii) What are the “teachings of the most highly qualified publicists”?

The “teachings of the most highly qualified publicists” include both the views of individual scholars and experts and, more importantly, opinions from internationally renowned bodies such as the International Law Commission (ILC). An opinion of an international body such as the ILC or of a highly respected private institution comprised of respected lawyers from many different legal systems would be accorded greater weight than a national judicial decision or an individual academic view on a point of international law.

International Law Commission (ILC)

Established in 1947 by the General Assembly of the United Nations, the ILC is a United Nations body devoted to the progressive development and codification of international law, in accordance with article 13(1)(a) of the Charter of the United Nations. It meets in Geneva for up to three months each summer. It is composed of 34 distinguished international lawyers, representing the world’s principal legal systems, each elected for a term of five years by the General Assembly to serve in their personal capacity rather than as representatives of governments.

Examples of topics completed include:

- “Draft articles on the law of treaties” 1966 (published in the Yearbook of the International Law Commission, 1966, vol. II)
- “Ways and means of making the evidence of customary international law more readily available” (Report of the ILC 1950, published in the Yearbook of the International Law Commission, 1950, vol. II)
- “Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law” (Report of the ILC 2006, published in the Yearbook of the International Law Commission, 2006, vol. II, Part Two)

Topics under consideration include:

- The obligation to extradite or prosecute, (*aut dedere aut judicare*) (Preliminary report on the obligation to extradite or prosecute, A/CN.4/571; A/CN.4/585 and Corr.1; A/CN.4/599)
- Responsibility of international organizations (see e.g. the Fourth report on responsibility of international organizations, A/CN.4/564; A/CN.4/582)
- Expulsion of aliens (Expulsion of aliens: Memorandum by the Secretariat, A/CN.4/565; A/CN.4/573; A/CN.4/581)

WWW

www.un.org/law/ilc/

1.1.5 What is meant by soft law?

The majority of resolutions, declarations, recommendations and similar acts of international organizations are not legally binding in character but can and do provide useful sources of political commitments and often also of emerging norms of international law. Collectively, this type of instrument is known as “soft law”.

Soft law instruments, including General Assembly resolutions, are negotiated in good faith by the negotiating parties who hold some expectation that the non-binding commitments will be met as much as reasonably possible. It is important to note that soft law statements often contain language that inspires reliance on them to improve policymaking. Examples include the United Nations Standards and Norms in Crime Prevention and Criminal Justice, internationally recognized normative principles and standards in crime prevention and criminal justice developed by the international community over the past decades,³⁸ such as for example the Model Treaty on Extradition and the Model Treaty on Mutual Legal Assistance in Criminal Matters, that were both adopted by the General Assembly in its 68th plenary meeting on 14 December 1990.³⁹

General Assembly resolutions may also sometimes have normative value, which means that they provide evidence for establishing the existence of a rule or the emergence of an *opinio juris*. To assess whether a General Assembly resolution has normative value, one has to examine its content, conditions of its adoption, and the question, whether an *opinio juris* exists related to the normative value it expresses.

The International Court of Justice has said that:

International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996):

‘General Assembly resolutions, even if they are not binding may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.’⁴⁰

Some resolutions of the General Assembly have come to be accepted as declarations of customary international law; an example of this is the Universal Declaration of Human Rights (UDHR).⁴¹

³⁸ See: www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html

³⁹ For an electronic reference to the General Assembly adoption of the Model Treaty on Extradition, see www.un.org/documents/ga/res/45/a45r116.htm. For the Model Treaty on Mutual Legal Assistance in Criminal Matters, see www.un.org/documents/ga/res/45/a45r117.htm.

⁴⁰ International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), Report 1996, pp. 226-267.

⁴¹ United Declaration of Human Rights (UDHR), see www.un.org/Overview/rights.html.

1.1.6 What are the legal effects of Security Council resolutions?

Security Council resolutions can be both soft and hard law and often resolutions of the Council will include both elements. Security Council resolutions, based on chapter VII of the United Nations Charter and using mandatory language are binding on all United Nations Member States. This includes, for example, Security Council resolution 1373 (2001), which was adopted in the wake of the 11 September 2001 terrorist attacks and, *inter alia*, obliges all United Nations Member States, to take the necessary steps to prevent the commission of terrorist acts, to criminalize assistance for terrorist activities, deny financial support and safe haven to terrorists, and to “afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings.”⁴²

The reason of the binding nature of certain Security Council resolutions lies in the special nature of chapter VII of the Charter. Under chapter VII, the Security Council can take enforcement measures to maintain or restore international peace and security. article 25 of the Charter states that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Moreover, article 48 states that “[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine,” and secondly that “[s]uch decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.” Based on these articles of the Charter, Member States are bound by international law to give effect to decisions of the Security Council, even where such provisions otherwise would be in conflict with domestic law.

As mentioned above, Security Council resolutions based on chapter VII can contain both soft and hard law elements. Whether a particular element is binding on all Member States or not can be determined by looking at the language it uses. Binding on States are provisions that begin with the phrase that the Security Council “decides that States shall ...”, while in non-binding provisions the Security Council uses formulations such as: “calls upon”, “urges”, “encourages”, “notes” etc.

1.2 The United Nations and counter-terrorism

1.2.1 What are the key United Nations institutions active in the field of counter-terrorism?

The United Nations is an international organization which came into being with the entry into force of the United Nations Charter, a multilateral treaty which forms a kind of “constitution” for the United Nations, on 24 October 1946. The United Nations currently has 192 Member States.

⁴² Security Council resolution 1373 (2001).

The United Nations Charter sets down the purposes of the United Nations:

Charter, article 1:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

The Charter sets down also the principles of the United Nations:

Charter, article 2:

The Organization and its Members, in pursuit of the Purposes stated in article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under chapter VII.

The United Nations Charter contains a supremacy clause which states that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”⁴³ This means that the United Nations Charter is at the top of the hierarchy of international law obligations.

The United Nations system is made up of a number of different organs, entities and specialized agencies with differing characters, powers and mandates. The following provides a short list of those that are directly involved in counter-terrorism activities; some others which touch upon counter-terrorism through their specific perspectives will be referred to in relevant chapters.

i) The General Assembly

What are the roles and mandates of the United Nations General Assembly?

WWW

www.un.org/ga/

The General Assembly is the only United Nations organ in which all Member States have the right to be represented and to vote on a “one State–one vote” basis. It may discuss any questions or matters within the scope of the Charter.⁴⁴ Important decisions are made by a two-thirds majority, but as a matter of fact, most decisions are taken on the basis of consensus.

According to the Charter of the United Nations,⁴⁵ the General Assembly:

Charter, chapter 4:

- May consider and make recommendations on the general principles of cooperation for maintaining international peace and security, including disarmament;
- May discuss any question relating to international peace and security and, except where a dispute or situation is currently being discussed by the Security Council, make recommendations on it;

⁴³ United Nations Charter, art. 103

⁴⁴ United Nations Charter, art. 10 and art. 97.

⁴⁵ United Nations Charter, Chapter IV.

- May discuss, with the same exception, and make recommendations on any questions within the scope of the Charter or affecting the powers and functions of any organ of the United Nations;
- Shall initiate studies and make recommendations to promote international political cooperation, the development and codification of international law, the realization of human rights and fundamental freedoms and international collaboration in the economic, social, humanitarian, cultural, educational and health fields;
- May make recommendations for the peaceful settlement of any situation that might impair friendly relations among nations;
- Shall receive and consider reports from the Security Council and other United Nations organs;
- Shall consider and approve the United Nations budget and establish the financial assessments of Member States;
- Shall elect the non-permanent members of the Security Council and the members of other United Nations councils and organs and, on the recommendation of the Security Council, appoint the Secretary-General.

What role does the General Assembly play in counter-terrorism?

The General Assembly plays an important role in elaborating an international legal framework that promotes cooperation against terrorism and in encouraging governments to work more closely together in addressing this threat. In 1994, the General Assembly reaffirmed that terrorist acts are “criminal and unjustifiable, wherever and by whomever committed [...]”. It was further declared that: “Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them”.⁴⁶ It should be noted, however, that the General Assembly, despite years of debate, has so far not been able to reach a consensus on a definition of terrorism because there is no consensus on a scope of application.

The General Assembly often works in subsidiary bodies—committees—whose members are either all States or a group of States elected by the General Assembly to serve on the body.⁴⁷ The work of some of these subsidiary bodies is of direct relevance to counter terrorism:

⁴⁶ General Assembly resolution 49/60 of 9 December 1994, Declaration on Measures to Eliminate International Terrorism, A/RES/49/60.

⁴⁷ United Nations Charter, article 22.

What General Assembly committees deal with counter-terrorism?

i) Third Committee (Social, Humanitarian and Cultural Committee)⁴⁸

The Third Committee deals with a range of social, humanitarian affairs and human rights issues. An important part of the Committee's work focuses on the examination of human rights questions. It also addresses issues of crime prevention and criminal justice and deals with terrorism from a crime prevention and criminal justice perspective.

WWW

www.un.org/ga/third/index.shtml

ii) Sixth Committee (Legal Committee)

The Sixth Committee is entrusted with the consideration of legal matters. In 1994, it adopted the milestone Declaration on Measures to Eliminate International Terrorism,⁴⁹ which defined terrorism as “criminal acts” that are unjustifiable “wherever and by whomever committed”.

WWW

www.un.org/ga/sixth/index.shtml

Ad Hoc Committee established by General Assembly resolution 51/210

The Ad Hoc Committee was established by the General Assembly in resolution 51/210 of 17 December 1996 and was mandated to elaborate an International Convention for the Suppression of Terrorist bombings and, subsequently, an International Convention for the Suppression of the Financing of Terrorism as well as an International Convention for the Suppression of Acts of Nuclear Terrorism, to supplement related existing international instruments.⁵⁰ The texts negotiated by the Ad Hoc Committee have resulted in the adoption of the three treaties concerned. The Ad Hoc Committee was also mandated to thereafter address means of further developing a comprehensive convention on international terrorism and has worked on this since the end of 2000. The Ad Hoc Committee usually holds one session per year over a one or two week period, early in the year, and continues the work in the framework of a Working Group of the Sixth Committee held later in the year during the regular session of the General Assembly.

WWW

www.un.org/law/terrorism

The General Assembly has also adopted a number of resolutions relating to terrorism which provide useful sources of soft law and have high political importance even though they are not legally binding.⁵¹ A milestone has been the adoption by consensus of the United Nations Global Counter-Terrorism Strategy in September 2006.⁵²

⁴⁸ See also the Economic and Social Council (ECOSOC), www.un.org/ecosoc.

⁴⁹ General Assembly resolution 49/60 of 9 December 1994, Declaration on Measures to Eliminate International Terrorism, A/RES/49/60.

⁵⁰ The mandate has been renewed and revised on an annual basis by the General Assembly in its resolutions on the topic of measures to eliminate international terrorism.

⁵¹ United Nations Charter, art. 10 and art. 14.

⁵² General Assembly resolution 60/288 of 8 September 2006, The United Nations Global Counter-Terrorism Strategy, A/RES/60/288.

What is the United Nations Global Counter-Terrorism Strategy?

The United Nations Global Counter-Terrorism Strategy, adopted in the form of a General Assembly resolution and an annexed Plan of Action, is a unique global instrument that aims to enhance national, regional and international efforts to counter terrorism. This is the first time that all Member States have agreed to a common strategic approach to fight terrorism by resolving to take practical steps individually and collectively to prevent and combat it.

It consists of four pillars:

- Measures to address the conditions conducive to the spread of terrorism
- Measures to prevent and combat terrorism
- Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard
- Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism

WWW

www.un.org/terrorism/strategy-counter-terrorism.shtml

ii) The Security Council

What are the roles and mandates of the United Nations Security Council?

WWW

www.un.org/Docs/sc

The Security Council consists of fifteen Member States, five permanent members (China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America) and ten members which are elected for two year terms according to a formula which ensures an equitable geographic distribution. The Council has primary responsibility for the maintenance of international peace and security.

Under the Charter, the functions and powers of the Security Council are:⁵³

Charter, chapter V:

- to maintain international peace and security in accordance with the principles and purposes of the United Nations;
- to investigate any dispute or situation which might lead to international friction;
- to recommend methods of adjusting such disputes or the terms of settlement;
- to formulate plans for the establishment of a system to regulate armaments;
- to determine the existence of a threat to the peace or act of aggression and to recommend what action should be taken;

⁵³ United Nations Charter, chapter V.

- to call on Members to apply economic sanctions and other measures not involving the use of force to prevent or stop aggression;
- to take military action against an aggressor;
- to recommend the admission of new Members;
- to recommend to the General Assembly the appointment of the Secretary General and, together with the Assembly, to elect the Judges of the International Court of Justice.

As explained above, in section 1.1.6, the Security Council may enact resolutions that are binding on all United Nations Member States in accordance with article 25 and article 48 of the United Nations Charter.

How can the Security Council contribute to countering terrorism?

Deciding that “act[s] of international terrorism, constitute a threat to international peace and security” the Security Council has adopted a number of resolutions related to terrorism under chapter VII of the United Nations Charter, some of which are outlined below.⁵⁴

The Security Council has also set up three Committees, tasked to monitor the implementation of specific resolutions relating to terrorism. Membership of the Committees consists of all 15 Security Council Members: The three subsidiary bodies established by the Security Council that deal with terrorism-related issues are the Al-Qaida and Taliban Sanctions Committee, the Counter-Terrorism Committee (the “CTC”), and the 1540 Committee, all three of which have distinctively different mandates as described below:

- (i) *The Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and Taliban and associated individuals and entities (1267 Committee)*

WWW

www.un.org/sc/committees/1267/index.shtml

The 1267 Committee was established by resolution 1267 (1999) for the purpose of overseeing the implementation of sanctions on Taliban-controlled Afghanistan for its support of Usama bin Laden. The sanctions regime has been modified and strengthened by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2007) and 1822 (2008), so that the sanctions (assets freeze, travel ban and arms embargo) now cover individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban wherever located. The Committee is supported by the United Nations Secretariat and the Analytical Support and Sanctions Implementation Monitoring Team. The Committee maintains a list of individuals and entities belonging to Al-Qaida, Usama bin Laden, and/or the Taliban and other individuals, groups, undertakings and entities associated with them (“the Consolidated List”)⁵⁵. The Committee regularly reports about its activities and makes recommendations to the Security Council with a view to improve the sanctions regime, including proposing additional measures.

⁵⁴ See chapter 1.2.2.b.

⁵⁵ Ibid.

(ii) *The Counter-Terrorism Committee and its Executive Directorate***WWW**www.un.org/sc/ctc/

In the wake of the terrorist attacks of 11 September 2001, the United Nations Security Council adopted resolution 1373 (2001). In the resolution the Security Council reaffirmed that the attacks, like any act of international terrorism, constitute a threat to international peace and security. It also reaffirmed the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations. Adopted under chapter VII of the Charter of the United Nations, resolution 1373 (2001) obliges Member States, in particular, to prevent and suppress the financing of terrorist acts and to criminalize financing of terrorism; freeze without delay funds of terrorists; refrain from providing any form of support to entities or persons involved in terrorist acts; suppress recruitment of members of terrorist groups; eliminate the supply of weapons to terrorists, take the necessary steps to prevent the commission of terrorist acts, deny safe haven to terrorists; prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories; ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice; afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts; prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents.⁵⁶

The resolution established the Counter-Terrorism Committee, which comprises all 15 members of the Security Council, to monitor implementation of the resolution. This monitoring work was further enhanced when the Security Council established the Counter-Terrorism Committee Executive Directorate (CTED) on 26 March 2004, through resolution 1535 (2004), to assist the Committee. CTED's main role is to enhance the Committee's ability to monitor the implementation of resolution 1373 (2001), raise the counter-terrorism capacities of Member States by facilitating the provision of technical assistance, and promote closer cooperation and coordination with international, regional and subregional organizations. CTED became fully staffed in September 2005 and was formally declared operational in December 2005. Later, in resolution 1805 (2008), the Security Council extended CTED's mandate till December 2010.

In September 2005, the Security Council adopted resolution 1624 (2005) which calls on all States, among other things, to prevent and prohibit by law incitement to commit a terrorist act.⁵⁷ Since September 2005, the Counter-Terrorism Committee

⁵⁶ Security Council Resolution 1373 (2001) further calls upon all States, in particular, to intensify and accelerate the exchange of operational information, especially regarding actions or movements of terrorist persons or networks, forged or falsified travel documents, traffic in arms, explosives or sensitive materials, use of communications technologies by terrorist groups, and the threat posed by the possession of weapons of mass destruction by terrorist groups; exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts; cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts; become parties and fully implement the relevant international conventions and protocols relating to terrorism; ensure, 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.

⁵⁷ Security Council Resolution 1624 (2005) further calls on all States, to deny safe haven to any persons with respect to whom there is credible and relevant information that they have been guilty of such conduct; prevent those guilty of the conduct in paragraph 1 (a) from entering their territory; continue international efforts to enhance dialogue and broaden understanding among civilizations and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters; ensure that any measures taken to implement this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law and humanitarian law.

includes in its dialogue with Member States their efforts to implement this resolution.

(iii) *The 1540 Committee*

WWW

www.disarmament2.un.org/Committee1540/index.html

The 1540 Committee was established by resolution 1540 (2004) with the task to monitor Member States' compliance with obligations in the resolution, which aims to prevent weapons of mass destruction getting into the hands of non-state actors, including terrorist groups. The Committee is supported by an expert group. The work programme of the Committee includes the compilation of information on the status of States' implementation of all aspects of resolution 1540 (2004).

iii) The Secretariat

What are the roles and mandates of the United Nations Secretariat? How does its work contribute to counter-terrorism?

WWW

www.un.org/documents/st.htm

The Secretariat executes the decisions of the General Assembly and the Security Council. It comprises the Secretary-General of the United Nations⁵⁸ and such staff as the Organization may require.⁵⁹ The Secretary-General is elected for a five-year term by the General Assembly upon the recommendation of the Security Council. The Secretary-General has the power to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."⁶⁰

What is the Counter-Terrorism Implementation Task Force?

Set up by the former Secretary-General, Mr. Kofi Annan, in July 2005, the Counter-Terrorism Implementation Task Force (CTITF) is a coordinating and information-sharing body that brings together numerous entities and organizations across the United Nations system active in the area of counter-terrorism. It serves as a forum to identify and pursue strategic issues and approaches and to foster coherent action across the United Nations system.

The Counter-Terrorism Implementation Task Force (CTITF)

WWW

www.un.org/terrorism/cttaskforce.html

Chaired by the Office of the Secretary-General, the CTITF includes 24 representatives from various United Nations departments, Specialized Agencies, Funds and Programmes as well as other entities, such as the International Criminal Police Organization

⁵⁸ See www.un.org/sg.

⁵⁹ United Nations Charter, art. 97.

⁶⁰ United Nations Charter, art. 99.

(Interpol).⁶¹ Since the adoption of the United Nations Global Counter-Terrorism Strategy, the Task Force has, in addition to its policy work, increasingly incorporated operational work in specialized substantive fields. To facilitate these processes, the Task Force has set up several working groups that address issues such as:

- Financing of terrorism;
- Human rights;
- Integrated implementation;
- Radicalization and extremism that lead to terrorism;
- Use of the Internet for terrorist purposes;
- Victims of terrorism;
- Vulnerable targets.

Address by Secretary-General Ban Ki-Moon to the International Conference on Terrorism: Dimensions, Threats and Countermeasures, Tunis, Tunisia, 15 November 2007:

The United Nations Counter-Terrorism Implementation Task Force illustrates how the United Nations family can work as one. We are working with Member States in mapping and analysing national and international initiatives for addressing radicalization and recruitment; in advancing the protection of human rights; in helping to protect vulnerable targets; and in addressing the needs of victims of terrorism.

The United Nations Counter-Terrorism Online Handbook (drawn up by the CTITF) provides Member States, United Nations country teams, and relevant institutions with information available about United Nations counter-terrorism related resources.

WWW

www.un.org/terrorism/cthandbook

What is the role of the Terrorism Prevention Branch?

The Terrorism Prevention Branch (TPB) of the Vienna-based United Nations Office on Drugs and Crime (UNODC) is one of the key providers of counter-terrorism technical assistance in the legal and related areas. Its specialized services for strengthening the legal regime against terrorism respond to a series of specific mandates.

⁶¹ The CTITF includes representatives from the Counter-Terrorism Executive Directorate (CTED), the Department for Disarmament Affairs (DDA), the Department of Peacekeeping Operations (DPKO), the Department of Political Affairs (DPA), the Department of Public Information (DPI), the Department for Safety and Security (DSS), the Expert Staff of the 1540 Committee, the International Atomic Energy Agency (IAEA), the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), the International Monetary Fund (IMF), the International Criminal Police Organization (INTERPOL), the Monitoring Team of the 1267 Committee, the Office of the High Commissioner of Human Rights (OHCHR), the Office of Legal Affairs (OLA), the Organization for the Prohibition of Chemical Weapons (OPCW), the Special Rapporteur on Human Rights While Countering Terrorism, the United Nations Development Program (UNDP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Interregional Crime and Justice Research Institute (UNICRI), the United Nations Office on Drugs and Crime (UNODC), the World Customs Organization (WCO), the World Bank and the World Health Organization (WHO).

Mandates of UNODC in counter-terrorism:⁶²**WWW**www.unodc.org/unodc/en/terrorism/index.html

In 2002, the General Assembly approved an expanded programme of activities for UNODC's Terrorism Prevention Branch, focusing on the provision of technical assistance to countries, upon request, in the legal and related aspects of counter-terrorism, especially for ratifying and implementing the universal legal instruments against terrorism and for strengthening the capacity of the national criminal justice systems to apply the provisions of these instruments in compliance with the principles of rule of law. In addition, the programme of work also entails the provision of substantive input on relevant counter-terrorism issues to intergovernmental bodies, especially the Crime Commission, the Economic and Social Council, the General Assembly and the United Nations congresses on crime prevention and criminal justice, as well as specialized input on relevant counter-terrorism issues for initiatives of the United Nations Secretariat.

iv) The International Court of Justice***What are the roles and mandates of the ICJ?*****WWW**www.icj-cij.org

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations⁶³ and came into being in 1945. The Statute of the ICJ is annexed to and forms an integral part of the United Nations Charter. While all United Nations Member States are parties to the Statute, States must consent to the jurisdiction of the ICJ before they can be required to participate in disputes before the Court.

The ICJ may entertain two types of cases: legal disputes between States submitted to it by them (contentious cases) and requests for advisory opinions on legal questions referred to it by United Nations organs and specialized agencies (advisory proceedings).

Contentious jurisdiction applies only to disputes between States which have accepted that jurisdiction. The ICJ, however, cannot deal with disputes involving individuals or non-state entities. Judgements rendered by the ICJ in contentious cases are binding on the parties thereto.⁶⁴

Advisory jurisdiction may be invoked only by United Nations organs and specialized agencies. States and individuals cannot request advisory opinions.

⁶² Most recent mandates: General Assembly resolution 62/172 of 18 December 2007, Technical assistance for implementing the international conventions and protocols related to terrorism, A/RES/62/172; General Assembly resolution 62/175 of 18 December 2007, Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity, A/RES/62/175; General Assembly resolution 62/71 of 6 December 2007, Measures to eliminate international terrorism, A/RES/62/71.

⁶³ United Nations Charter, art. 92

⁶⁴ International Court of Justice (ICJ) Statute, art. 59.

The Security Council and General Assembly may seek advisory opinions on “any legal question”,⁶⁵ while other United Nations organs and specialized agencies may only seek advisory opinions on “legal questions arising within the scope of their activities”⁶⁶ and in accordance with specified rules. Advisory opinions have been sought on a range of issues including the legal consequences of the construction of a wall in the Occupied Palestinian Territory,⁶⁷ the legality of the threat or use of nuclear weapons⁶⁸ and reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.⁶⁹ Advisory opinions are non-binding but provide weighty legal authority on questions of international law.

1.2.2 What are the key elements of the United Nations legal framework in the field of counter-terrorism?

The United Nations is at the forefront of the global counter-terrorism effort. Its role in countering terrorism is extensive. As a result of its mandates and expertise in various aspects of security, development and international cooperation, it is involved in and can contribute to almost every aspect of counter-terrorism. With terrorism being a transnational phenomenon, the required global policy response and counter-measures can be pursued most effectively through the United Nations, benefiting from its global reach and multilateral tools.

There is neither a comprehensive United Nations treaty on terrorism nor an official definition of the term “terrorism” for the time being. However, the Member States of the United Nations are in the process of drafting a comprehensive convention on international terrorism⁷⁰ which would ultimately provide such a generic international definition of the crime of “terrorism” and complement the existing legal framework of international anti-terrorism instruments.

Instead, for the time being, the applicable international legal framework related to counter-terrorism is contained in a range of sources, including treaties, resolutions of the Security Council and the General Assembly, and jurisprudence. As explained in section 1.1.6. above, there have been Security Council resolutions under chapter VII addressing terrorism that include binding language addressing all Member States and imposing obligations on Member States to carry out certain obligations.

As explained in more detail below, there also exist a number of international conventions and protocols related to terrorism that require States to criminalize specific manifestations of terrorism at the international level. In addition to these specific offences contained in the international conventions and protocols related to terrorism, the International Convention for the Suppression of the Financing of Terrorism 1999 provides a generic description of terrorist acts for the purposes of the offence of financing of terrorism:

⁶⁵ United Nations Charter, art. 96(1).

⁶⁶ United Nations Charter, art. 96(2).

⁶⁷ International Court of Justice, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004), Report 2004, pp. 136-203.

⁶⁸ International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), Report 1996, pp. 226-267.

⁶⁹ International Court of Justice, Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (28 May 1951), Reports 1951, pp. 15-69.

⁷⁰ See Chapter 1.2.1 (a) with reference to the Ad Hoc Committee established by General Assembly resolution 51/210.

Convention for the Suppression of Financing of Terrorism, article 2.1:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.⁷¹

i) What are the international conventions and protocols that relate to the prevention and suppression of terrorism?⁷²

There is a set of—currently sixteen—international conventions and protocols which relate directly to the prevention and suppression of terrorism.⁷³ They each deal with specific criminal conducts rather than addressing the more general notion of “terrorism” as such. Most are penal in nature with a common format. Typically, the instruments:

- Define a particular type of terrorist violence as an offence under the convention;
- Require State Parties to penalize that activity in their domestic law;
- Identify certain bases upon which the Parties responsible are required to establish jurisdiction over the defined offence;
- Create an obligation on the State in which a suspect is found to establish jurisdiction over the convention offence and to refer the offence for prosecution if the Party does not extradite pursuant to other provisions of the convention. This last element is commonly known as the principle of *aut dedere aut judicare*.

Those international conventions and protocols are binding on States parties. It is crucial for States to become parties to those instruments and to criminalize the offences in question under their domestic law, exercise effective jurisdiction over offenders under prescribed conditions, and provide for international cooperation mechanisms that enable State Parties to either prosecute or extradite the alleged offender.

The table below provides a snapshot of the content of the sixteen international Conventions and protocols related to the prevention and suppression of terrorism:⁷⁴

⁷¹ International Convention for the Suppression of the Financing of Terrorism, article 2.1, adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. It entered into force on 22 April 2002.

⁷² UNODC has produced a set of Technical Assistance Tools, including the Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols, see www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html.

⁷³ For more information, see www.unodc.org/unodc/en/terrorism/conventions.html.

⁷⁴ Full texts and current status of multilateral treaties on terrorism deposited with the Secretary-General can be found at <http://untreaty.un.org/English/Terrorism.asp>.

1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft (Aircraft Convention) (deposited with the International Civil Aviation Organization)

Applies to acts affecting in-flight safety; authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft; and requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.

1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Unlawful Seizure Convention) (deposited with the International Civil Aviation Organization)

Requires State Parties to make it an offence for any person on board an aircraft in flight to “unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft” or to attempt to do so.

1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Civil Aviation Convention) (deposited with the International Civil Aviation Organization)

Requires State Parties to make it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts;

1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (Diplomatic agents Convention) (deposited with the Secretary-General of the United Nations)

Defines an “internationally protected person” as a Head of State, Minister for Foreign Affairs, representative or official of a State or international organization who is entitled to special protection in a foreign State, and his/her family; and requires parties to criminalize and make punishable “by appropriate penalties which take into account their grave nature” the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act “constituting participation as an accomplice”.

1979 International Convention against the Taking of Hostages (Hostages Convention) (deposited with the Secretary-General of the United Nations)

Provides that “any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention”.

1980 Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention) (deposited with the International Atomic Energy Agency)

Criminalizes the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage.

2005 Amendments to the Convention on the Physical Protection of Nuclear Material (deposited with the International Atomic Energy Agency)

Makes it legally binding for States Parties to protect nuclear facilities and material in peaceful domestic use, storage as well as transport; and provides for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, adds new offences against nuclear facilities, and includes prevention and combat-related offences.

1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (extends and supplements the Montreal Convention on Air Safety) (Airport Protocol) (deposited with the International Civil Aviation Organization)

Extends the provisions of the Montreal Convention (see above) to encompass criminal acts at airports serving international civil aviation.

1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Maritime Convention) (deposited with the International Maritime Organization)

Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation; and makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation, to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship, to place a destructive device or substance aboard a ship, and other acts against the safety of ships.

2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (deposited with the International Maritime Organization)

Criminalizes the use of a ship as a device to further an act of terrorism; criminalizes the transport on board a ship of various materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act of terrorism; criminalizes the transporting on board a ship of persons who have committed an act of terrorism; and introduces procedures for governing the boarding of a ship believed to have committed an offence under the Convention.

1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (Fixed Platform Protocol) (deposited with the International Maritime Organization)

Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established for the protection of international aviation.

2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (deposited with the International Maritime Organization)

Adapts the changes to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation to the context of fixed platforms located on the continental shelf.

1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention) (deposited with the International Civil Aviation Organization)

Designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am flight 103 bombing); parties are obligated in their respective territories to ensure effective control over unmarked plastic explosives.

1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention) (deposited with the Secretary-General of the United Nations)

Creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention) (deposited with the Secretary-General of the United Nations)

Requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect; commits States to hold legal persons which finance terrorism civilly or administratively liable and individuals criminally liable for such acts; extends criminal liability also to individuals, civil and administrative liability to legal persons; and provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy is no longer adequate justification for refusing to cooperate.

2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention) (deposited with the Secretary-General of the United Nations)

Covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors; deals with both crisis situations (assisting States to solve the situation) and post-crisis situations (rendering nuclear material safe through the International Atomic Energy Agency (IAEA)).

ii) What are the key United Nations Security Council resolutions in the field of counter-terrorism?

The United Nations Security Council has adopted a number of resolutions relating to terrorism. Some resolutions refer to specific terrorist acts, such as United Nations Security Council resolution 1189 (1998), which condemned the terrorist bomb attacks in Kenya and the United Republic of Tanzania of August 1998; other resolutions are of a more general character. Some of these Security Council resolutions are adopted under chapter VII of the United Nations Charter and impose obligations on United Nations Member States.⁷⁵ Effective implementation of these obligations by Member States is mandatory.⁷⁶

The following United Nations Security Council resolutions form the basis of Member States' obligations to counter terrorism:

Security Council resolution 1267 (1999)⁷⁷ and subsequent modifying resolutions—adopted under chapter VII of the Charter of the United Nations—require all States to: freeze the assets of, prevent the entry into or transit through their territories by, and prevent the direct or indirect supply, sale and transfer of arms and military equipment to any individual or entity associated with Al-Qaida, Usama bin Laden and/or the Taliban as designated by the 1267 Committee.⁷⁸

⁷⁵ See Charter of the United Nations, chapter VII, available at www.un.org/aboutun/charter.

⁷⁶ See chapter 1.1.6 above.

⁷⁷ Modified and strengthened by subsequent Security Council resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2007) and 1822 (2008).

⁷⁸ See chapter 1.2.1 (b) on the 1267 Committee.

Security Council resolution 1373 (2001)—adopted under chapter VII of the Charter of the United Nations—establishes a framework for improved international cooperation against terrorism including by obliging States to criminalize and prosecute acts of terrorism, and to disrupt and prevent the financing of terrorism. The obligations of Member States set out in this resolution, which is the most comprehensive binding counter-terrorism resolution, include *inter alia* the freeze of terrorist assets, the denial of safe havens for terrorists, and the prevention of movement of terrorists by effective border controls and controls on issuance of identity papers and travel documents. In the resolution the Security Council also calls upon States to implement the international conventions and protocols related to terrorism at the national level and to increase international cooperation against terrorism. By the resolution the Council also established the Counter-Terrorism Committee to monitor implementation by Member States.⁷⁹ The resolution is considered a landmark in Security Council history due to its broad scope and legislative nature. It is the first time that the Security Council obliged States to make wide-ranging changes to their national legislation. As a result of its comprehensive binding nature, the reader will find numerous references to specific elements of the resolution throughout this text.

Security Council resolution 1456 (2003) reaffirms that States' measures to combat terrorism must comply with international law, in particular international human rights, refugee and humanitarian law, and emphasizes the importance of the broader context in strengthening the fight against terrorism, including an enhanced dialogue and understanding among civilizations in order to prevent the targeting of different religions and cultures, and the need to address unresolved regional conflicts and the full range of global issues, including development issues.

Security Council resolution 1540 (2004)—adopted under chapter VII of the Charter of the United Nations—establishes a framework for States to prevent non-state actors from developing, acquiring, manufacturing, possessing, transporting or transferring nuclear, chemical or biological weapons.⁸⁰

Security Council resolution 1566 (2004)—adopted under chapter VII of the Charter of the United Nations—includes the establishment of a working group that is tasked with considering the possibility of establishing an international fund to compensate victims of terrorist acts as well as considering and submitting “recommendations to the Council on practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaida/Taliban Sanctions Committee.”⁸¹

Security Council resolution 1624 (2005),—adopted without reference to chapter VII of the Charter of the United Nations—includes soft law elements concerning the fight against terrorism and in particular calls on States “to prohibit by law incitement to commit a terrorist act or acts” as well as to prevent such acts.⁸²

⁷⁹ See chapter 1.2.1 (b) on the CTC.

⁸⁰ Security Council resolution 1540 (2004).

⁸¹ Security Council resolution 1566 (2004).

⁸² Security Council resolution 1624 (2005).

iii) What are the main elements of the Al-Qaida and Taliban sanctions regime?

A number of Security Council resolutions⁸³ adopted under chapter VII of the United Nations Charter have established an international sanctions regime against Al-Qaida and the Taliban which is binding on all States.

The 1267 Committee was established under Security Council resolution 1267 (1999) (see Part I) to monitor implementation of the sanctions regime. The 1267 Committee is responsible for the designation of individuals or entities associated with Al-Qaida, Usama bin Laden and/or the Taliban. Individuals and entities so designated are placed on the so-called "Consolidated List."⁸⁴ The Consolidated List is regularly updated.

The sanctions regime has been modified and strengthened by subsequent resolutions, all adopted under chapter VII of the United Nations Charter, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008) so that the sanctions now cover individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban wherever located. It is important to note that the primary responsibility for the implementation of the sanctions measures rests with the Member States and that effective implementation is mandatory.

Member States are required to take the following actions in relation to individuals and entities included on the Consolidated List:

- Freeze without delay the funds and other financial assets or economic resources of designated individuals and entities [assets freeze];
- Prevent the entry into or transit through their territories by designated individuals [travel ban]; and
- Prevent the direct or indirect supply, sale and transfer from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types, spare parts, and technical advice, assistance, or training related to military activities, to designated individuals and entities [arms embargo].

Pursuant to Security Council resolution 1455 (2003), Member States must report to the 1267 Committee on the implementation of the resolutions.

How does a name get onto the list?

Member States propose individuals and entities for inclusion on the Consolidated List. Inclusion on the list is not dependent on a criminal conviction and proceedings on the basis of listing are administrative rather than criminal in nature. Member States do need to provide a statement of case in support of the proposed listing. The statement of case should provide as much detail as possible on the basis(es) or justification for the listing, including:

- Specific findings demonstrating the association or activities alleged;
- The nature of the supporting evidence (e.g. intelligence, law enforcement, judicial, media, admissions by subject, etc.);

⁸³ Security Council resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008).

⁸⁴ The Consolidated List is available at: www.un.org/sc/committees/1267/consolist.shtml.

- Supporting evidence or documents that can be supplied; and
- The details of any connection with a currently listed individual or entity.

The 1267 Committee will then consider the designation and, if consensus among the 15 Members is reached, add the individual or entity to the Consolidated List. Whenever updated, the United Nations Secretariat will inform all Member States by note verbale and issue a press release. For individuals, an Interpo-UNSC Special Notice will also be issued by Interpol through its regular channels.

Can a name be removed from the list?

The process for de-listing has evolved in response to criticism that the opacity of the system undermined the ability for petitioners to effectively challenge their inclusion on the Consolidated List. Although these concerns have been addressed, the debate on the de-listing process is still ongoing. In order to facilitate the de-listing process, procedures exist for removing individuals and entities from the sanctions lists. By resolution 1730 (2006), the Security Council established the focal point process, through which de-listing requests can be submitted to a focal point established within the Secretariat's Security Council Subsidiary Organs Branch.⁸⁵

Any individual(s), groups, undertakings, and/or entities on the Consolidated List may submit a petition for de-listing. Petitioners can submit a request for de-listing either through the focal point process⁸⁶ or through their State of residence or citizenship. In a de-listing submission to the State of residence or citizenship, the petitioner should provide justification for the de-listing request, offer relevant information and request support for the de-listing. The Committee, in determining whether to remove names from the Consolidated List, may consider, among other things:

- Whether the individual or entity was placed on the Consolidated List due to a mistake of identity; or
- whether the individual or entity no longer meets the criteria set out in relevant resolutions (e.g. the individual is deceased or the association with another individual or entity on the list has been severed).

Whether submitted through the focal point process or by a Member State, the Committee can only decide to de-list an individual or entity by consensus.

The Committee also considers submissions from States concerning exemptions to the assets freeze under resolution 1452 (2002) and for the travel ban under paragraph 1 (b) of resolution 1822 (2008).⁸⁷ Should a Member State wish to release frozen assets to pay for basic expenses, e.g. rent, foodstuff, medicines and legal services, it may do so, provided it so informs the 1267 Committee and the Committee does not object thereto within 3 days.⁸⁸

⁸⁵ See the annex to Security Council resolution 1730 (2006).

⁸⁶ Established by Security Council resolution 1730 (2006).

⁸⁷ Similar provisions were included in previous relevant resolutions.

⁸⁸ For further details on exemptions, see www.un.org/sc/committees/1267/exemptions.shtml.

Finally it is important to note that the United Nations mechanisms created in the effort to counter-terrorism do not function in isolation but are complementary to one another. The Security Council, in resolution 1805 of 20 March 2008, which mainly focuses on CTED's role in supporting the CTC, "reiterate[d] the need to enhance ongoing cooperation among the CTC, the Committee established pursuant to resolution 1267 (1999), and the Committee established pursuant to resolution 1540 (2004), as well as their respective groups of experts, including through, as appropriate, enhanced information sharing, coordinated visits to countries, technical assistance and other issues of relevance to all three committees, and expresse[d] its intention to provide guidance to the committees on areas of common interest in order better to coordinate counter-terrorism efforts."⁸⁹

1.3 Regional and subregional responses to terrorism

There are a large number of regional and subregional organizations whose mandate includes work relating to terrorism. The mandate and law making powers of these organizations vary considerably. Some have extensive legislative and supranational authority, others only the power to adopt non-binding recommendations.

The table below provides an illustrative list of regional and subregional instruments relating to terrorism that are binding for their State parties:

- **OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance**, concluded at Washington, D.C. on 2 February 1971. (*Deposited with the Secretary-General of the Organization of American States*)

WWW www.oas.org

- **European Convention on the Suppression of Terrorism**, concluded at Strasbourg on 27 January 1977. Amending Protocol, concluded at Strasbourg on 15 May 2003. (*Deposited with the Secretary-General of the Council of Europe*)

WWW conventions.coe.int

- **SAARC Regional Convention on Suppression of Terrorism**, signed at Kathmandu on 4 November 1987. (*Deposited with the Secretary-General of the South Asian Association for Regional Cooperation*)

WWW www.saarc-sec.org

- **Arab Convention on the Suppression of Terrorism**, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998. (*Deposited with the Secretary-General of the League of Arab States*)

WWW www.arableagueonline.org

⁸⁹ Security Council resolution 1805 (2008).

- **Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism**, done at Minsk on 4 June 1999. *(Deposited with the Secretariat of the Commonwealth of Independent States)*

WWW www.cis.minsk.by

- **Convention of the Organization of the Islamic Conference on Combating International Terrorism**, adopted at Ouagadougou on 1 July 1999. *(Deposited with the Secretary-General of the Organization of the Islamic Conference)*

WWW www.oic-oci.org

- **Organization of African Unity Convention on the Prevention and Combating of Terrorism**, adopted at Algiers on 14 July 1999. *(Deposited with the General Secretariat of the Organization of African Unity)*

WWW www.africa-union.org

- **Association of South East Asian Nations (ASEAN), ASEAN Convention on Counter Terrorism**, adopted at Cebu, Philippines on 13 January 2007

WWW www.aseansec.org/19250.htm

- **Council of Europe Convention on the Prevention of Terrorism**, concluded at Warsaw on 16 May 2005 (Deposited with the Secretary-General of the Council of Europe)

WWW www.coe.int

While regional instruments provide useful frameworks, they are limited in their geographical scope and complement, but cannot replace, the international instruments. International instruments enable States to cooperate with all other States, including those outside the particular geographical region.

2. International criminal law, including international cooperation in criminal matters

Acts of terrorism are crimes and therefore the first specific area of international law that this publication will address is international criminal law. Most legal scholars agree that a recognizable body of international criminal law does exist. However, the precise parameters of this body of law are not defined, perhaps because this is one of the most dynamic areas of international law that has seen a lot of development in recent times. In its widest context, the source of international criminal law might be derived from the general principles of international law recognized by civilized nations; and therefore, found in the customary law accepted by states, the general criminal law recognized by nations, and the treaties which govern particular conduct.⁹⁰

International criminal law can be categorized according to whether the conduct in question is international, constituting an offence against the world community, or whether the act is transnational, affecting the interests of more than one state. In other words, the notion of international criminal law encompasses two separate categories of offences: (a) the most serious crimes of concern to the international community (*delicta juris gentium*), which are crimes against mankind as a whole, such as genocide, crimes against humanity and piracy; and (b) offences that by their nature affect the interest of more than one State and that require international legal cooperation in criminal matters for their effective prosecution, as is often the case in crimes relating to terrorist acts, money-laundering, financial crimes, wilful damage to the environment, or child pornography.

This chapter provides information on both notions of international criminal law, described above. The first part of this chapter will identify *delicta juris gentium* and describe how they may be relevant to terrorism. The second part of the chapter will look at international cooperation in criminal law matters and describe ways in which States cooperate with each other.

2.1 Prosecution of *delicta juris gentium* and terrorism

The outrage felt in the aftermath of the Second World War, whilst leading to the Nuremberg and Tokyo trials and the adoption of the Genocide Convention in 1948, did not translate immediately into the creation of a new order of international criminal justice. The International Law Commission, a United Nations body comprised of prominent legal experts and devoted to the progressive development of international law, was tasked with drafting a statute for an international criminal court. But the process lacked momentum and did not

⁹⁰ See American Society for International Law, ASIL Guide to Electronic Resources for International Law, with further electronic resources at www.asil.org/resource/crim1.htm.

yield tangible results. This changed in the post-Cold War period. In 1993, the Security Council, faced with wars in the former Yugoslavia, set up the International Criminal Tribunal for Yugoslavia (the ICTY) and, a year later, established the International Criminal Tribunal for Rwanda (the ICTR) in response to the Rwandan genocide. In 1998, the Statute of the International Criminal Court was adopted in Rome, leading to the establishment of the International Criminal Court (the ICC). The ICC and the two ad hoc tribunals through their jurisprudence, including their interpretation of their respective statutes and the development of rules of procedure, gave and are still giving rise to important growth and progress of the field of international criminal law relating to *delicta juris gentium*. In particular, the body of law related to the individual accountability for genocide, crimes against humanity and war crimes was further developed.

2.1.1 Who can be prosecuted for *delicta juris gentium*?

As explained above, the term *delicta juris gentium* refers to crimes that shock the conscience of nations and address the criminal responsibility of individuals. Those individuals may be acting on behalf of a State or may be non-State actors.

2.1.2 Where can *delicta juris gentium* be prosecuted?

Delicta juris gentium can be prosecuted either at the national or international level.

Despite the development of international criminal tribunals, including the ICTY and the ICTR, and the establishment of the International Criminal Court, national courts remain the predominant forum for prosecuting serious crimes of international concern. Cases brought before national courts are often only known in the country or region where the trial occurred. In some cases the accused persons are prosecuted for international crimes which have been incorporated into domestic law. In other cases the accused are prosecuted for regular domestic offenses, such as murder, because the country has failed to adequately incorporate international crimes into domestic law.⁹¹

Ad hoc tribunals

The International Criminal Tribunal for the former Yugoslavia (ICTY)⁹² was established by Security Council resolution 827 under chapter VII on 25 May 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The International Criminal Tribunal for Rwanda (ICTR) was established by Security Council resolution 955 in 1994 in response to the genocide and other serious violations of international humanitarian law carried out in Rwanda in 1994. Both tribunals provide examples illustrating the powers of the Security Council to establish ad hoc tribunals in response to a threat to international peace and security posed by serious violations of international criminal law.⁹³

⁹¹ For an overview of case-law of domestic prosecution, in particular of genocide, see www.preventgenocide.org/punish/ domestic, showing that in all regions of the world, the Americas, Europe, Africa and Asia-Pacific such domestic prosecution takes place.

⁹² See www.icty.org.

⁹³ See www.icttr.org.

Hybrid tribunals

In addition to the *ad hoc* tribunals created by the Security Council under chapter VII, a number of hybrid tribunals, tasked with adjudicating cases of war crimes, crimes against humanity and genocide, have been created. The Special Court for Sierra Leone⁹⁴ was set up jointly by the Government of Sierra Leone and the United Nations. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Another example for a hybrid tribunal, where national and international judges sit jointly, are the Extraordinary Chambers of the Courts of Cambodia, designed to try senior members of the Khmer Rouge⁹⁵ and the Court of Bosnia and Herzegovina, Section 1, tasked with adjudicating war crimes related to the 1992-1995 conflict.⁹⁶ Furthermore, a Special Tribunal for Lebanon, mandated to try those suspected of assassinating former Lebanese Prime Minister Rafik Hariri, was established by an Agreement between the United Nations and the Lebanese Republic pursuant to Security Council resolution 1664 (2006) of 29 March 2006, which was endorsed by Security Council resolution 1757 (2007). The Special Tribunal for Lebanon, in which Lebanese and international judges will sit, distinguishes itself from the other hybrid courts mentioned before in that it is not mandated to deal with war crimes and crimes against humanity, but addresses a political crime that targeted a specific person.⁹⁷

International Criminal Court (ICC)

The International Criminal Court (ICC) distinguishes itself from the *ad hoc* tribunals by the fact that it is a permanent court with a global scope (it is not limited in its jurisdiction to one country or region of the world). It was established by the Rome Statute of the International Criminal Court, so called because it was adopted in Rome, Italy on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Rome Statute is an international treaty, binding only on those States which formally express their consent to be bound by its provisions. These States then become “parties” to the Statute. In accordance with its terms, the Statute entered into force on 1 July 2002, once 60 States had become parties.

Under the Rome Statute, the ICC may exercise jurisdiction over genocide, crimes against humanity and war crimes, as defined in detail in the Rome Statute. A supplementary text of the “Elements of Crimes” provides a breakdown of the elements of each of these crime. Furthermore, the crime of aggression has been included in the Rome Statute but the ICC cannot currently exercise jurisdiction over this crime because there has been no agreement so far on a definition of aggression and the conditions under which the Court could exercise its jurisdiction.

⁹⁴ See www.sc-sl.org. The Special Court has made judgements on the crime of terrorism.

⁹⁵ See www.eccc.gov.kh/english/default.aspx.

⁹⁶ See www.sudbih.gov.ba/?jezik=e.

⁹⁷ See www.un.org/apps/news/infocus/lebanon/tribunal.

The ICC has jurisdiction over individuals accused of these crimes. This includes those directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute.

The ICC does not have universal jurisdiction. It may only exercise jurisdiction if:

- The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;⁹⁸
- The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or
- The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

The Court's jurisdiction is further limited to events taking place since 1 July 2002. Even where the Court has jurisdiction, it will not necessarily act. The principle of "complementarity" provides that certain cases will be inadmissible even though the Court has jurisdiction. In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable to genuinely carry out the investigation or prosecution. For example, a case would be admissible if national proceedings were undertaken for the purpose of shielding the person from criminal responsibility. In addition, a case will be inadmissible if it is not of sufficient gravity to justify further action by the Court.⁹⁹

International Criminal Court:

The ICC Statute does not provide jurisdiction for prosecuting an offence of "terrorism" but may prosecute terrorist acts if they amount to war crimes, crimes against humanity, or genocide within the definition provided in the Statute.

WWW

www.icc-cpi.int

Jurisdiction of the ICC can be triggered in three different ways under the Statute:¹⁰⁰

- Referral by the United Nations Security Council under chapter VII of the United Nations Charter;
- Referral by a State party; or
- ICC Prosecutor's own motion.

⁹⁸ ICC Statute, art. 12, "Preconditions to the Exercise of Jurisdiction".

⁹⁹ ICC Statute, art. 17, "Issues of Admissibility".

¹⁰⁰ ICC Statute, art. 13, "Exercise of Jurisdiction".

At the negotiations of the Rome Statute, there was a discussion to include terrorism as one of the crimes that may fall within the jurisdiction of the ICC. However, it was decided not to do so.¹⁰¹ In 2009, a review conference of the Assembly of State Parties will take place to determine whether any amendments to the Rome Statute are appropriate. The plenipotentiaries for the establishment of an ICC adopted a resolution in 1998, recommending to consider on this occasion the inclusion of crimes of terrorism in the jurisdiction of the ICC.¹⁰²

2.1.3 Is there a sui generis crime of “terrorism” in international criminal law?

There is no international crime of “terrorism” in the sense of a *delicta juris gentium* and terrorism as such is neither a war crime nor a crime against humanity. One reason for this is the fact that there is, as yet, no general international agreement on a definition of terrorism.¹⁰³ Furthermore, the statutes of the various tribunals do not include terrorism as a crime sui generis. As discussed above, while it had been discussed to include “terrorism” in the Rome Statute as a category of crime over which the ICC would have jurisdiction, there had been no consensus at the time of the adoption of the statute and further discussions will only take place in 2009. The Rome Conference on the International Criminal Court regretted that “no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court”.¹⁰⁴

2.1.4 Can terrorist acts fall within the categories of “war crimes,” “crimes against humanity” or “genocide”?

Individual acts of terrorism, however, may fall within the category of war crimes or crimes against humanity if they fulfil the requirements set out in the provisions prohibiting them. In addition, disproportionate illegal State responses to terrorism may also incur individual criminal responsibility and amount to acts that fall within the definition of international crimes.

Terrorist acts as a war crime

In fact, the Statutes of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone include provisions¹⁰⁵ that refer to a specific prohibition of terrorism in the context of armed conflict, as a special subcategory of war crimes governed by International Humanitarian Law (IHL), discussed below. These two statutes do not, however, include a general crime of “terrorism”.

In order for acts of terrorism to be considered as “war crimes” they would necessarily have to take place within the context of armed conflict. War crimes are serious violations of the

¹⁰¹ See www.un.org/News/facts/iccfact.htm.

¹⁰² Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998, (A/CONF.183/10).

¹⁰³ See also chapter 1.2.1.

¹⁰⁴ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, annex 1, resolution E, done at Rome on 17 July 1998, (A/CONF.183/10).

¹⁰⁵ See ICTR Statute, article 4 (*d*), electronically available at www.un.org/icttr/statute.html; and Statute of the Special Court for Sierra Leone, article 3 (*d*), electronically available at www.sc-sl.org/Documents/scsl-statute.html.

rules of international humanitarian law which will be discussed further in chapter 3. International law on the Use of Force (*jus ad bellum*) and International Humanitarian Law (*jus in bello*).

Terrorist acts as crime against humanity

“Crimes against humanity” are acts (such as murder, torture or inhumane acts) directed against the civilian population on a widespread or systematic basis, either in time of war or in peace time. Crimes against humanity have been defined differently according to the jurisdiction and context concerned.

Example:

Rome Statute establishing the International Criminal Court, article 7:

Crimes against humanity

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

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

2. For the purpose of paragraph 1:

- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

Some acts of terrorism may fall under the definition of “crimes against humanity” where they are sufficiently widespread or systematic. The ICC Statute¹⁰⁶ requires that crimes against humanity should be in furtherance of a State or organizational policy to commit such an attack on a civilian population but does not require that the acts must be attributable to a State. Whether or not terrorist acts can amount to crimes against humanity will depend to a great degree on their scale. Sporadic or random acts are unlikely to be sufficiently widespread or systematic; however a single act of great magnitude may in itself amount to a widespread attack amounting to a crime against humanity. Whether or not an attack is systematic may be assessed on the basis of evidence of a series of attacks or of an identifiable plan or policy behind the attack.¹⁰⁷

Terrorist acts as genocide

It is at least theoretically possible that acts of terrorism may fall within the scope of “genocide”. Genocide presupposes a mental element, meaning the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”, and a physical element which includes five acts described in sections (a), (b), (c), (d) and (e). A crime must include both elements to be called “genocide”. Terrorist acts may only fall under the scope of genocide when the perpetrator acts with the necessary intent “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” and if the terrorist acts committed fulfil the requirements set out in the listing of prohibited acts in the second part of the genocide definition.

***Convention on the Prevention and Punishment of Genocide, article 2
(taken over by the Rome Statute, article 6):***

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

In conclusion, for the time being the individual responsibility for acts of terrorism can be adjudicated within the framework of international criminal law in the sense of *delicta juris gentium* only if the terrorist act can also be subsumed under the crimes of genocide, war crimes or crimes against humanity.

¹⁰⁶ Rome Statute of the International Criminal Court, article 7, A/CONF.183/9, electronically available at www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

¹⁰⁷ Jurisprudence of the ICTR and the ICTY, see www.icttr.org and www.icty.org.

2.2 International cooperation in criminal matters and terrorism

As the phenomenon of terrorism has become increasingly international, cooperation between States to prevent acts of terrorism and to bring terrorists to justice has become a crucial element in the criminal justice approach to combating terrorism. International cooperation through extradition and mutual legal assistance is vital for the arrest and transfer of terrorist suspects to face trial or serve a sentence as well as to secure evidence for a successful prosecution and to freeze terrorists' assets. International cooperation in criminal matters is the key to combating impunity for acts of terrorism.

2.2.1 Jurisdiction: What bases can national courts use to establish jurisdiction over crimes of international concern?

There are a number of bases on which national courts may establish jurisdiction over crimes of international concern, including terrorism. These are principally:

- When the crimes were committed in the territory of the State or on board vessels flying the flag or aircraft registered in the State (territorial jurisdiction);
- When the suspects are nationals of the State (active personality jurisdiction);
- When the victims are nationals of the State (passive personality jurisdiction);
- When the conduct amounts to a serious international crime such as crimes against humanity or war crimes (universal jurisdiction).

In this vein, the international conventions and protocols related to the prevention and suppression of terrorism include provisions which specify the bases on which States must or can establish jurisdiction in relation to the offences contained in the relevant instrument.¹⁰⁸

Example:

International Convention for the Suppression of Terrorist Bombings 1998, article 6:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:
 - (a) The offence is committed in the territory of that State; or
 - (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
 - (c) The offence is committed by a national of that State.

¹⁰⁸ Furthermore, with the obligation contained in Security Council resolution 1373 (2001) to criminalize certain terrorism-related acts, States will also have to establish jurisdiction to prosecute these acts. Resolution 1373 (2001) states, for example, that States shall "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts."

2. A State Party may also establish its jurisdiction over any such offence when:
 - (a) The offence is committed against a national of that State; or
 - (b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or
 - (c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or
 - (d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or
 - (e) The offence is committed on board an aircraft which is operated by the Government of that State.

[...]

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.
5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

2.2.2 Extradition: What is extradition and how is it dealt with under international law?

Extradition involves the transfer of a person from one State to another for the purposes of criminal prosecution or to execute a criminal sentence where a fugitive has already been convicted of a criminal offence. Extradition takes place only once there is agreement between the relevant States.

Extradition is different from other forms of transfer (such as deportation, expulsion or rendition) in so far as the extradition process provides certain minimal procedural guarantees to the person who is being extradited. These guarantees are described in more detail below.

There is no general obligation under international law for a State to extradite. The duty to extradite usually arises from bilateral or multilateral extradition treaties although a treaty is not a necessary requirement for extradition between States.

The United Nations has drawn up a Model Treaty on Extradition¹⁰⁹ on which States may choose to base their extradition agreements of this type.

¹⁰⁹ As adopted by General Assembly resolution 45/116 of 14 December 1990, Model Treaty on Extradition, A/RES/45/116; subsequently amended by General Assembly resolution 52/88 of 12 December 1997, International Cooperation in Criminal Matters, A/RES/52/88. See www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf. In this context, see also the UNODC Model Law on Extradition, www.unodc.org/pdf/model_law_extradition.pdf.

Example:***United Nations Model Treaty on Extradition 1990, article X: Obligation to extradite*¹¹⁰**

Each Party agrees to extradite to the other, upon request and subject to the provisions of the present Treaty, any person who is wanted in the requesting State for prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence.

There are also a number of regional extradition treaties governing extradition arrangements between the States parties to those treaties,¹¹¹ which reflect common legal traditions or commonly accepted norms and standards in certain regions and which may therefore allow for simplified procedures.¹¹²

Other treaties may impose obligations with regard to extradition for specific particularly serious offences. International conventions and protocols related to the prevention and suppression of terrorism¹¹³ provide themselves a treaty basis for extradition in relation to the specific offences which they cover.

Example:***Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973, article 8:***

To the extent that the crimes set forth in article 2 are not listed as extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them.

1. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, if it decides to extradite, consider this Convention as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested State.

¹¹⁰ See www.unodc.org/pdf/model_treaty_extradition.pdf.

¹¹¹ For example, European Convention on Extradition 1957, <http://conventions.coe.int/treaty/en/Treaties/Html/024.htm>; Convention relating to the simplified extradition procedure between Member States of the European Union 1995, <http://europa.eu/scadplus/leg/en/lvb/114015a.htm>; Southern African Development Community Protocol on Extradition 2002 (not yet in force), www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/sadc/protextra.pdf; Inter-American Convention on Extradition 1981, www.oas.org/juridico/English/treaties/b-47.html; Convention on Extradition and Judicial Assistance in Penal Matters 1962; Arab League Extradition Convention 1952; Economic Community of West African States Extradition Agreements.

¹¹² See the European Union Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States 2001, which significantly simplifies the process for transfer of fugitives within the European Union. For further reference, see http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm.

¹¹³ A UNODC Manual on international judicial cooperation in terrorist cases is under preparation.

2. States parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the procedural provisions and the other conditions of the law of the requested State.
3. Each of the crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of article 3.

The United Nations Convention Against Corruption (UNCAC)¹¹⁴ and the United Nations Convention against Transnational Organized Crime (UNTOC)¹¹⁵ contain state-of-the-art provisions on international legal cooperation in criminal law matters. This is important in the context of counter-terrorism because terrorists may be involved in corruption and may employ the same methods as transnational organized criminal groups and in certain cases UNCAC and UNTOC may complement the universal instruments against terrorism. The definition of the term “organized criminal group” in UNTOC does not include groups that do not seek to “obtain a financial or material benefit” in order to exclude groups with purely political and social motives, as may be the case with respect to certain terrorist and insurgent groups. However, UNTOC may still apply to any crimes committed by a terrorist group which are covered by UNTOC (e.g. if a terrorist group commits a robbery, drugs smuggling or uses money-laundering to raise financial and material benefits and to fund their activities).

In this regard, it is important to note that article 16 of UNTOC sets out a very detailed legal framework for enabling extradition with regard to the offences which it covers. article 16 aims at an expedited, efficient process and tightens and eliminates grounds for refusal of extradition.

i) What is meant by the principle *aut dedere aut judicare*?

Certain crimes are so serious that, when a suspect of such a crime is found on the territory of a State, that State is obliged either to extradite the suspect to a State claiming jurisdiction to prosecute, or to submit the person for prosecution in their national courts. This is known as the principle of “extradite or prosecute” or *aut dedere aut judicare*.¹¹⁶ It is a type of universal jurisdiction designed to combat impunity for serious criminal offences including terrorist offences. There is some discussion as to whether or not it may also form a principle of customary international law in relation to certain serious offences of international concern¹¹⁷ but there is no general agreement yet on this point.

It is worth noting that the obligation *aut dedere aut judicare* does not actually entail an obligation to prosecute as such, but rather an obligation to submit the case for prosecution. The decision as to whether or not a prosecution will in fact take place remains with the national competent authorities. The authorities will decide on the same basis as they would

¹¹⁴ For an electronic version of UNCAC, see www.unodc.org/unodc/en/treaties/CAC/index.html.

¹¹⁵ For an electronic version of UNTOC, see www.unodc.org/unodc/en/treaties/CTOC/index.html.

¹¹⁶ The application of this principle is under consideration by the ILC, see www.un.org/law/ilc.

¹¹⁷ See International Law Commission, Report on the work of its 58th Session (2006), Chapter XI, A/61/10.

decide in a purely domestic case bearing in mind the weight of evidence and other such issues. Moreover, the obligation to prosecute does not mean that an allegation which, following an investigation, is established as unfounded has to be brought before a court. The constitutional law and substantive and procedural rules of the country concerned will determine to what extent the prosecution must be pursued.

The principle *aut dedere aut judicare* is enshrined explicitly in the international conventions and protocols related to the prevention and suppression of terrorism, starting with the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, (article 7).

Example:

Convention for the Suppression of Unlawful Seizure of Aircraft 1970, article 7:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purposes of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

It is also part of various human rights instruments, such as the Convention against Torture¹¹⁸ and international humanitarian law, including the 1949 Geneva Conventions, which oblige States to try or extradite (*aut dedere aut judicare*) individuals responsible for having committed “grave breaches” of the Conventions.¹¹⁹

In practical terms, the principle of *aut dedere aut judicare* requires an effective national framework to allow for the prosecution of suspects in cases where the alleged offences were not carried out in the territory of the requested country and/or neither suspect nor victims are nationals of the requested country. Effective mutual legal assistance will also be necessary for effective prosecutions.¹²⁰

ii) How do extradition proceedings work?

Extradition proceedings are not strictly speaking criminal proceedings. The tribunal deciding on whether or not a person is extraditable is not tasked with determining the guilt or innocence of that person. It may, however, be necessary for a requesting State to demonstrate that it has sufficient evidence upon which to prosecute the person (*prima facie* evidence), or that a valid conviction and sentence exist, so as to prove that an extradition request is genuinely for the purposes of prosecution or for the execution of a criminal sentence.

¹¹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5.

¹¹⁹ Art. 49 and 50 of the First Geneva Convention, art. 50 and 51 of the Second Geneva Convention, art. 129 and 130 of the Third Geneva Convention and art. 146 and 147 of the Fourth Geneva Convention. The principle of *aut dedere aut judicare* can also be found in art. 85 of Additional Protocol I.

¹²⁰ A recent example of a successful prosecution of a foreign national who had committed crimes outside the territory of the country of prosecution was that of Mr. Faryadi Zardad, an Afghan national convicted for crimes of torture in the United Kingdom in 2005. See www.cps.gov.uk/news/pressreleases/archive/2005/135_05.html.

Sometimes a requested State will require the requesting State to provide it with “*prima facie* evidence” or a showing of “probable cause” before it will grant extradition. However, extradition proceedings should not be treated as a “mini trial”, and the level of evidence required to show that there is a basis for extradition and subsequent prosecution will not be the same level of evidence required to prove guilt in a national court.

In some States¹²¹ there has been a general principle in extradition law that the requested State will not inquire into the good faith of another State’s request. This “rule of non-inquiry” precludes the requested State from taking into consideration any issues relating to the evidence as well as to the trial and the treatment of the suspect in the requesting country.

The procedures and law applicable to extradition vary widely from State to State and the law applicable to extradition in a requested State may include differing procedures dependent on the nature of the agreement it has with a particular requesting State. There are, however, a number of features of extradition which apply in many cases and which reflect the inter-state nature of extradition arrangements and the potential impact of extradition on the rights of the individual concerned. Extradition proceedings are generally divided into a judicial and an administrative phase with a court deciding on whether or not a requested person is extraditable before the executive takes the final decision as to whether or not the person will be extradited in a particular case.

Extradition proceedings are often seen as cumbersome and lengthy but their complex nature is necessary to provide minimum guarantees to the subjects of the extradition request. They relate to the cooperation between the relevant States although they must also respect States’ obligations to the individual concerned. Where a person consents to be extradited, the extradition proceedings can be simplified and faster.¹²² In some regions, states have established simpler surrender procedures between countries sharing common legal obligations or similar systems which allow them to reduce the formal safeguards prior to extradition or surrender.¹²³

The international law of human rights and its application in the context of counter-terrorism will be discussed more fully in chapter 4 of this publication. It is worth noting here, however, that international human rights law applies in a number of ways in relation to extradition.

Lawfulness of Detention: Extradition proceedings will generally involve the arrest or detention of a person, engaging the right to liberty and security of the person. This means that the grounds and procedures for extradition must fulfil the test of legality and be established in national law and that persons concerned must be able to challenge the lawfulness of their arrest or detention before a court during the extradition proceedings.¹²⁴

¹²¹ Particularly in common law jurisdictions, such as the United Kingdom, United States of America and Canada.

¹²² UNODC Model Law on Extradition, Section 27, www.unodc.org/pdf/model_law_extradition.pdf.

¹²³ For example the European Arrest Warrant and Surrender Procedures in the EU. For further reference, see http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm.

¹²⁴ See also chapter 5 on International Human Rights Law.

International Covenant on Civil and Political Rights 1966, article 9:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

[...]

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The *right of access to consular officials*¹²⁵ and the possibility of access to the International Committee of the Red Cross¹²⁶ also provide important safeguards for persons taken into custody on suspicion of terrorist offences outside their country of nationality, whether for the purposes of extradition or for prosecution in that country.

International Convention against the Taking of Hostages 1979, article 6:

1. Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the alleged offender is present shall, in accordance with its laws, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. That State Party shall immediately make a preliminary inquiry into the facts.

[...]

3. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

(a) To communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;

(b) To be visited by a representative of that State.

4. The rights referred to in paragraph 3 of this article shall be exercised in conformity with the laws and regulations of the State in the territory of which the alleged offender is present subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 of this article are intended.

¹²⁵ See also chapter 5 on International Human Rights Law.

¹²⁶ See also Vienna Convention on Consular Relations 1963, art. 36.

5. The provisions of paragraphs 3 and 4 of this article shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with paragraph 1(b) of article 5 to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

Fairness of Proceedings: Extradition proceedings themselves are not criminal proceedings which would let concerned individuals enjoy the full range of fair trial protections laid down in article 14 ICCPR and regional human rights instruments. However, the consideration on the fairness of proceedings as a whole will include the extradition proceedings. A failure to ensure fairness in extradition proceedings may undermine the ability of the requesting State to effectively prosecute the suspect on return. The obligation to guarantee fair treatment is explicitly mentioned in the international conventions and protocols related to the prevention and suppression of terrorism.

Example:

International Convention for the Suppression of the Financing of Terrorism (1999), article 17:

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law including international human rights law.

iii) On what grounds will extradition be refused?

Extraditable offences and double criminality

Extradition will only be possible if an offence is “extraditable”. An extradition treaty or national legislation may identify a list of specific offences as extraditable offences. Alternatively and more commonly, instead of identifying a list of specific extraditable offences, extraditable offences may be defined in general terms in the relevant extradition treaty or national legislation as serious criminal offences carrying a specified minimum penalty. The international conventions and protocols related to the prevention and suppression of terrorism provide that the offences contained in them should be considered as extraditable offences by States parties to them.

Many extradition arrangements require that the offence for which a person is requested is an offence in both the requesting and the requested State (“double criminality”). In general, the offence in question does not need to be identical in the laws of both States but the conduct that forms the basis of the offence must be criminalized in both States and usually punishable with a minimum sentence in order to give rise to extradition. This means that, even if a requested State does not have a specific crime of “terrorism” according to its domestic

law, violent acts of terrorism will most likely be extraditable offences as their constituent elements, such as murder, attempted murder or violence against persons or property, will be punishable with the minimum sentence giving rise to extradition.

Non-extradition of nationals

Many States do not extradite their own nationals and this principle is enshrined in many national constitutions. In some regional contexts, however, exceptions to this principle are made.¹²⁷ Moreover, the nationality of a person is not an acceptable ground for refusal to surrender this person to the jurisdiction of existing international tribunals such as the International Criminal Court, the International Criminal Tribunal for Yugoslavia or the International Criminal Tribunal for Rwanda.

If a person cannot be extradited for the criminal offences set forth in the international conventions and protocols related to the prevention and suppression of terrorism because of his or her nationality, he or she should be submitted for prosecution in the national courts of the requested country. In some cases, a State's domestic law may allow for the extradition of a national for prosecution in the requesting State upon the condition that the person will be returned to the requested State to serve the sentence ("conditional extradition").

Example:

International Convention for the Suppression of the Financing of Terrorism, article 10:

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation [to extradite or prosecute].

Political offence exception

Historically, States often refused to extradite for crimes considered to be political in nature in order to protect individuals against the possibility that States may request extradition for politically motivated prosecutions ("political offence exception"). The United Nations Model Treaty on Extradition contains a mandatory ground for refusal of extradition "[i]f the offence for which extradition is requested is regarded by the requested State as an offence of a political nature"¹²⁸. This exception has gradually been eroded in relation to terrorism. Security Council resolution 1373 (2001) states "that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists."¹²⁹ The most recent

¹²⁷ The European Arrest Warrant system within the EU, for example, does not allow non-extradition of own nationals as a grounds for refusal to transfer a suspect or convict between EU Member States.

¹²⁸ United Nations Model Treaty on Extradition, art. 3(a).

¹²⁹ Security Council resolution 1373, para. 3(g).

international conventions and protocols related to the prevention and suppression of terrorism, starting from the adoption of the Bombing Convention 1997, explicitly exclude the political offence exception in relation to the offences contained in them.

Example:

International Convention for the Suppression of Terrorist Bombings 1998, article 11:

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Protection against extradition for prosecution or punishment on account of race, religion, nationality, ethnic origin or political opinion

While the political offence exception has been generally suppressed in relation to terrorist offences, humanitarian reasons can be a ground to refuse extradition. The Model Treaty on Extradition states that extradition shall not be granted “if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person’s position may be prejudiced for any of those reasons”.¹³⁰ This applies also in cases of persons suspected of having committed terrorist acts.

Example:

International Convention for the Suppression of Terrorist Bombings 1998, article 12

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons.

¹³⁰ United Nations Model Treaty on Extradition, art. 3(b).

Human rights considerations as grounds for refusing extradition

In addition to the grounds for refusing extradition expressly included in treaties dealing with extradition, grounds also arise from other obligations. Most importantly, in order to comply with its international human rights obligations, a State cannot extradite a person where there is a substantial risk that certain rights, such as the prohibition on torture, inhuman and degrading treatment,¹³¹ would be violated in the requesting State upon the person's return (principle of non-refoulement).¹³² The principle of non-refoulement is the cornerstone of the international refugee protection regime. It has been codified, as a fundamental principle, from which no derogation is permitted, in the 1951 Refugee Convention and its 1967 Protocol and will be discussed in detail in chapter 4 on Refugee Law. As an inherent part of the absolute prohibition on torture, which has attained the rank of *jus cogens* under customary international law, the prohibition of refoulement to a State where there are substantial grounds for believing that the person concerned might become subject to torture, is binding on all States.

The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment codifies this obligation. article 3 of the Convention expressly provides that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

In relation to other human rights considerations, States' obligations may vary according to differing obligations under regional human rights instruments to be read in conjunction with the International Covenant on Civil and Political Rights and the Universal Declaration on Human Rights. Other rights which may give rise to grounds for refusal to extradite include:

- The right to life;
- The right not to be tried twice in respect of the same offence (*ne bis in idem*);
- The right to a fair trial.

Excerpt from the United Nations Model Treaty on Extradition 1990, article 3: Mandatory grounds for refusal:

Extradition shall not be granted in any of the following circumstances:

[...]

(b) If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons;

¹³¹ For a case where a human rights court has found that an expulsion was not possible because the persons concerned might become subject to torture or ill-treatment in the receiving country, see e.g. European Court of Human Rights, *Saadi v. Italy*, (Application no. 37201/06), judgement of 28 February 2008.

¹³² Discussed below in chapter 5 on International Human Rights Law and in chapter 4 on Refugee Law in greater detail.

[...]

(d) If there has been a final judgement rendered against the person in the requested State in respect of the offence for which the person's extradition is requested;

[...]

(f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14;

(g) If the judgement of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence.

Article 4: Optional Grounds for Refusal

Extradition may be refused in any of the following circumstances:

[...]

(b) If the competent authorities of the requested State have decided either not to institute or to terminate proceedings against the person for the offence in respect of which extradition is requested;

[...]

(d) If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out;

[...]

(g) If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal;

(h) If the requested State, while also taking into account the nature of the offence and the interests of the requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

When determining whether or not to grant extradition, the requested State may find itself in a conflict of obligations. On the one hand, a duty to extradite may arise from a bilateral or multilateral extradition agreement to which both the requesting and the requested States are party, or under provisions in international or regional instruments which establish a duty to extradite or prosecute. On the other hand, the requested State is bound by its non-refoulement obligations under international refugee and human rights law, which preclude the extradition of a refugee or an asylum-seeker to the requesting State under the conditions examined already. In such situations, bars to the surrender of an individual under international refugee and human rights law prevail.¹³³

¹³³ See UNHCR "Guidance Note on Extradition and International Refugee Protection, chapter II, 3, electronically available at www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=481ec7d92.

In order to fulfil their obligations, States may rely on diplomatic assurances.¹³⁴ This has been a long-standing practice in extradition relations between States, where they serve the purpose of enabling the requested State to extradite without thereby acting in breach of its obligations under applicable human rights treaties, national—including constitutional—law, and/or provisions in extradition law which would otherwise preclude the surrender of the individual concerned. Their use is common in death penalty cases, but assurances are also sought if the requested State has concerns about the fairness of judicial proceedings in the requesting State, or if there are fears that extradition may expose the wanted person to a risk of being subjected to torture or other forms of ill-treatment.¹³⁵ If a requested State is not in a position to obtain adequate guarantees through diplomatic assurances to remove the risk of a serious human rights violation should the person be returned, it may be required to exercise jurisdiction over the offence in order to prosecute instead of extraditing.¹³⁶

Asylum and refugee status. How are extradition proceedings conducted with regard to persons with asylum and refugee status?

Extradition proceedings may involve persons who have been granted refugee status or are in the process of applying for asylum in the requested State.¹³⁷

Where extradition proceedings are concurrent with asylum proceedings, the person should not be extradited until the final decision on asylum has been taken. To do so may result in a breach of the State's international obligations, notably the principle of non-refoulement, enshrined in both international refugee law and international human rights law.¹³⁸

Even if persons are not granted refugee status or lose their refugee status by virtue of their involvement in terrorist acts, the principle of non-refoulement in international human rights law will prevent their extradition where there is a substantial risk that they would be subjected to torture, cruel, inhuman or degrading treatment or punishment upon their return to the requesting country.¹³⁹

If a refugee or asylum-seeker is the subject of an extradition request from another country (i.e. not the State from which they are seeking asylum), extradition may be possible to that State if there are sufficient guarantees that the person would not be at risk of re-extradition or expulsion to a third country where that person would be at risk of serious violations of his or her human rights. In such cases, extradition may be granted on the basis of a guarantee that the person would be returned to the requested State upon completion of proceedings in the requesting State (“conditional extradition”).

¹³⁴ To receive such diplomatic assurances, however, does not automatically absolve the State from any further responsibility. In the *Saadi vs. Italy* case, cited above, the ECtHR e.g. asserted that it would have the right to examine whether there would be a human rights violation in the case of handing over the applicant to a receiving State even if there had been diplomatic assurances. The Court stated in paragraph 148: “The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.”

¹³⁵ See also chapter 4 on “International Refugee Law”, in particular the subparagraph “Can a refugee be expelled or returned?”.

¹³⁶ See chapter 2.2.2.

¹³⁷ For a more detailed discussion on the interplay of asylum proceedings and extradition, see UNHCR “Guidance Note on Extradition and International Refugee Protection”.

¹³⁸ See UNHCR, Note on Non-Refoulement (Submitted by the High Commissioner), 23 August 1977, EC/SCP/2, electronically available at www.unhcr.org/excom/EXCOM/3ae68ccd10.html.

¹³⁹ See chapter 4.

Excerpt from the UNHCR Guidance Note on Extradition and International Refugee Protection:

From an international protection point of view, the principal concern in extradition cases concerning refugees or asylum-seekers is to ensure that those in need and deserving of international protection have access to and benefit from such protection, while at the same time avoiding the abuse of the institution of asylum by persons who seek to hide behind it for the purpose of evading being held responsible for serious crimes.

This requires, on the one hand, a rigorous assessment of the wanted person's eligibility for refugee protection, based on a careful examination of all relevant facts and with due observance of procedural fairness requirements. [...], persons responsible for crimes may not qualify for refugee status, either because they do not meet the inclusion criteria of the refugee definition set out in article 1A(2) of the 1951 Convention, or because their involvement in certain serious crimes or heinous acts gives rise to an exclusion clause of article 1F of the 1951 Convention.

On the other hand, where an extradition request concerns a refugee or an asylum-seeker, States must ensure compliance with their protection obligations under international refugee and human rights law. These obligations form part of the legal framework governing extradition and need to be taken into consideration when determining whether the wanted person may be lawfully surrendered to the requesting State. Most importantly, in considering the extradition of a refugee or an asylum-seeker, States are bound to ensure full respect for the principle of non-refoulement under international refugee and human rights law.

Extradition and asylum processes must be coordinated in such a way as to enable States to rely on extradition as an effective tool in preventing impunity and fighting transnational crime in a manner which is fully consistent with their international protection obligations.

Specialty

It is a general principle that a person, once extradited, will be tried only for the offences contained in the extradition request and only in the requesting State ("rule of specialty"). Any further charges or extradition to a third State should only occur with the consent of the requested State.

iv) What arrangements deal with the transfer of sentenced prisoners and transfer of detained witnesses?

In addition to extradition arrangements, international cooperation may also be used to transfer sentenced prisoners between States so that prisoners may serve their sentence in their country of nationality or residence. Generally, this kind of transfer is based on the presumption that the impact of the sentence on a person and his/her family will be exacerbated by him/her being a long way from home. Transfers may also occur in the context of States' surrendering a person with the condition that they will be returned to serve their sentence in the requested State. There may be issues relating to differing types of sentencing and of procedures relating to review and execution of sentences, which will need to be taken

into consideration. The United Nations has produced a Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released¹⁴⁰ and a Model Agreement on the Transfer of Foreign Prisoners.¹⁴¹

In the context of mutual legal assistance,¹⁴² States may agree to temporarily transfer detained witnesses to give evidence in proceedings in another State. The considerations relating to human rights law and refugee law discussed in relation to extradition should also be borne in mind in relation to any such temporary transfer of a person to another State, particularly if the person objects to the transfer.

International Convention for the Suppression of the Financing of Terrorism 1999, article 16:

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 2 may be transferred if the following conditions are met:
 - (a) The person freely gives his or her informed consent;
 - (b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.
2. For the purposes of the present article:
 - (a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;
 - (b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;
 - (c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;
 - (d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.
3. Unless the State Party from which a person is to be transferred in accordance with the present article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such a person was transferred.

¹⁴⁰ Adopted by General Assembly resolution 45/119 of 14 December 1990, Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released, A/RES/45/119.

¹⁴¹ For an electronic version, see: www.uncjin.org/Standards/Rules/r08/r08.html.

¹⁴² See also chapter 2.2.3.

2.2.3 What is mutual legal assistance and how is it dealt with under international law?

Mutual legal assistance is the process by which States assist each other to obtain evidence and other forms of cooperation necessary for criminal investigations and prosecutions in relation to criminal offences. Mutual legal assistance relates to judicial cooperation rather than to police cooperation which is governed by a different legal and institutional framework, and covers a wide array of acts providing assistance to a requesting country, such as:

- Taking evidence or statements from persons;
- Assisting in the availability of detained persons or others to give evidence or assist in investigations;
- Effecting service of judicial documents;
- Executing searches and seizures;
- Examining objects and sites;
- Providing information and evidentiary items;
- Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.¹⁴³

Mutual legal assistance arrangements are usually governed by bilateral or multilateral mutual legal assistance treaties but a treaty is not a prerequisite for cooperation. In order to keep abreast with newly developing investigation techniques, it is advantageous when such treaties on mutual legal assistance do not contain exhaustive listings to describe the acts for which the treaty applies, to avoid the need for amending existing mutual legal assistance treaties each time new methods of investigation become standard (e.g. DNA testing).

The United Nations has drawn up a Model Treaty on Mutual Assistance in Criminal Matters¹⁴⁴ which provides some guidance as to possible procedures and considerations in relation to the granting or refusing of requests for mutual legal assistance.¹⁴⁵ While it explicitly mentions a number of types of assistance to which the Model Treaty may apply, it does not provide an exhaustive list.

There are also a number of regional treaties governing mutual legal assistance arrangements between the States parties to those treaties¹⁴⁶ which reflect common legal traditions or commonly accepted norms and standards in certain regions. The arrangements for mutual assistance are often less formal and more flexible than those which apply to extradition.

¹⁴³ United Nations Model Treaty on Mutual Assistance in Criminal Matters, art. 1(2), www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

¹⁴⁴ Adopted by General Assembly resolution 45/117 of 14 December 1990, Model Treaty on Mutual Assistance in Criminal Matters, A/RES/45/117; subsequently amended by General Assembly resolution 53/112 of 9 December 1998, Mutual assistance and international cooperation in criminal matters, A/RES/53/112. See www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

¹⁴⁵ UNODC Model Laws, www.unodc.org/unodc/en/legal-tools/Model.html.

¹⁴⁶ For example, European Convention on Mutual Assistance in Criminal Matters 1959, <http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>; Convention on Mutual Assistance in Criminal Matters between the Member States of the EU 2000, <http://europa.eu/scadplus/leg/en/lvb/l33108.htm>; Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters 2002, www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/sadc/protextra.pdf; Inter-American Convention on Mutual Assistance in Criminal Matters 1992, www.oas.org/juridico/English/treaties/a-55.html; Benelux Convention on Extradition and Judicial Assistance in Penal Matters 1962. See also European Union Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States 2001, which significantly simplifies the process for transfer of fugitives within the European Union.

Mutual assistance is a key component in international cooperation to combat terrorism and the international conventions and protocols related to the prevention and suppression of terrorism contain specific provisions for States to cooperate as fully as possible in the prevention, investigation and prosecution of terrorist offences.¹⁴⁷

Example:

Convention for the Suppression of Nuclear Terrorism 2005, article 14:

States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.

States Parties shall carry out their obligations under paragraph 1 of the present article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their national law.

As stated above,¹⁴⁸ certain activities of terrorist groups may fall within the ambit of the United Nations Convention against Transnational Organized Crime (UNTOC), which contains state-of-the-art provisions on international legal cooperation in criminal law matters, including on mutual legal assistance. In its article 18, it sets out a very detailed framework for mutual legal assistance activities that obliges parties to UNTOC to adopt the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings frameworks for mutual legal assistance and to the fullest extent possible.¹⁴⁹

i) On what grounds can mutual legal assistance be refused?

Grounds for refusal will mainly be determined according to the applicable bilateral or multilateral treaties. Refusal of mutual legal assistance should be exceptional and based on clearly stated grounds.

The Model Treaty on Mutual Assistance in Criminal Matters offers States the possibility, where feasible, to render assistance, even if the act on which the request is based is not an offence in the requested State (absence of dual criminality) or to consider restricting the requirement of dual criminality to certain types of assistance, such as search and seizure.¹⁵⁰

¹⁴⁷ In accordance with paragraph 2 (f) of Security Council resolution 1373 (2001) Member States shall “[a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings”.

¹⁴⁸ See chapter 2.2.2.

¹⁴⁹ See United Nations Convention Against Transnational Organized Crime, art. 18, available at www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.

¹⁵⁰ *Ibid.*, footnotes 5 and 6.

Example:***United Nations Model Treaty on Mutual Assistance in Criminal Matters, article 4 - Refusal of assistance:***

1. Assistance may be refused if:
 - (a) The requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order (ordre public) or other essential public interest;
 - (b) The offence is regarded by the requested State as being of a political nature;
 - (c) There are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality, ethnic origin or political opinions or that that person's position may be prejudiced for any of those reasons;
 - (d) The request relates to an offence the prosecution of which in the requesting State would be incompatible with the requested State's law on double jeopardy (*ne bis in idem*);
 - (e) The assistance requested requires the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction;
 - (f) The act is an offence under military law, which is not also an offence under ordinary criminal law.

The international conventions and protocols related to the prevention and suppression of terrorism provide that the therein contained offences cannot be regarded as fiscal or political offences for the purpose of refusing mutual assistance requests. However, if there are substantial grounds for believing that a request is made "for the purposes of prosecuting or punishing a person on account of their race, religion, nationality, ethnic origin or political opinion," (humanitarian clause), the request may be refused.

Example:***International Convention for the Suppression of the Financing of Terrorism***

Article 13—None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence.

Article 14—None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 15—Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 of for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

In providing assistance, a requested State will still be bound by its international human rights obligations. The execution of mutual legal assistance requests may impact on individual rights, such as the right to privacy or freedom from self-incrimination, and this should be taken into consideration in deciding on the appropriateness of granting a request and the means of executing a request. General human rights considerations are detailed below (see section 5).

Both the laws of the requesting and the requested States including their international and national human rights obligations will be relevant in the execution of a request for mutual legal assistance. The requested State will have to act in accordance with its own laws and obligations in executing a request.

In order to ensure that the evidence will be admissible in criminal proceedings in the requesting State, the request will ideally be executed in accordance with the procedural laws of the requesting State as well. For example, in order to protect witnesses and informants, it is sometimes necessary to consider procedural means of recognizing pre-trial statements. In most European countries, pre-trial statements given by witnesses and collaborators of justice are recognized as valid evidence in court, provided that the parties have the opportunity to participate in the examination of witnesses.¹⁵¹ Let us assume that this idea applies in the requesting State. In this case, if witness statements at the pre-trial stage are taken in the requested State, the requesting State should ask the requested State to ensure that the parties to the case can participate in the examination of the witnesses. In this way, the obtained witness statement may then later be admissible before the courts in the requesting State. More generally, effective cooperation requires good communication between the States as to their respective legal requirements.

ii) What arrangements exist to deal with the transfer of criminal proceedings?

Criminal proceedings may be transferred from one State to another in order to effectively prosecute terrorist offences, reduce conflicts of jurisdiction and reduce pre-trial detention. Arrangements for transfer of proceedings may be on a bilateral or multilateral basis and the United Nations has drawn up a Model Treaty on the Transfer of Proceedings in Criminal Matters.¹⁵² The position of the suspected person¹⁵³ and the rights of the victim¹⁵⁴ should be taken into account in deciding on a possible transfer of proceedings. Once a transfer of proceedings is agreed upon, the transferring State cannot continue proceedings against the suspected person in relation to the same offence (*ne bis in idem*).¹⁵⁵

¹⁵¹ Piancete, N. (2006), "Analytical Report", in Council of Europe, *Terrorism: Protection of Witnesses and Collaborators of Justice*, Strasbourg: Council of Europe, p. 22.

¹⁵² General Assembly resolution 45/118 of 14 December 1990, Model Treaty on the Transfer of Proceedings in Criminal Matters, A/RES/45/118.

¹⁵³ *Ibid.*, art. 8.

¹⁵⁴ *Ibid.*, art. 9.

¹⁵⁵ *Ibid.*, art. 10.

3. International law on the use of force (*jus ad bellum*) and international humanitarian law (*jus in bello*)

Terrorism is a crime and needs to be addressed through criminal law at the national and international levels. As terrorist acts may also occur in the context of armed conflict, this publication will set out the basic parameters in international law for the use of force as well as the basic framework of rules which apply in armed conflict and describe how they may apply to terrorism. The exact parameters as to how international humanitarian law (IHL) applies in relation to terrorist groups is subject of much contemporary debate which is beyond the remit of this publication. However, certain principles of IHL may usefully be highlighted as relevant in relation to countering terrorism and will be discussed below.

3.1 Law on the use of force (*jus ad bellum*)

3.1.1 Can terrorism justify the use of force?

The current laws relating to the use of force are contained in the United Nations Charter and in customary international law. The general prohibition on the use of force is one of the fundamental principles of the United Nations and is set down in article 2 of the Charter:

Charter, article 2:

[...]

(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice, shall not be compromised.

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations.'

The “raison d’être” of the United Nations Charter is described in its article 1, namely “to maintain international peace and security”:

Charter, article 1:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The importance of the prohibition of the use of force against another State is shown by the fact that it is considered to be one of very few peremptory norms of customary international law or *jus cogens*.¹⁵⁶

There are only two exceptions to the general prohibition:

- the use of force in self-defence,¹⁵⁷ and
- a Security Council authorization of force, which applies when the Council determines the use of force necessary for the maintenance or restoration of international peace and security.¹⁵⁸

The use of force in response to acts of terrorism will only be legitimate if justified in accordance with one of these two exceptions.

3.2 International humanitarian law (IHL)

3.2.1 What principles of international humanitarian law are relevant in relation to countering terrorism?

International humanitarian law, also known as the law of armed conflict or the law of war, is the body of rules that, in times of armed conflict, protects persons who are not or are no longer participating in the hostilities and regulates the methods and means of warfare. Its main purpose is to limit and prevent human suffering in times of armed conflict. Most of the rules regulate the conduct not only of governments and their armed forces, but also of armed opposition groups and any other parties to a conflict.

Terrorist acts may occur during armed conflicts or in time of peace. IHL applies only in situations of armed conflict; it does not therefore regulate terrorist acts committed in peacetime. IHL will apply to the activities of terrorist organizations and to counter-terrorism initiatives in the context of an internal or international armed conflict. IHL will apply whether or not the original use of force was lawful. IHL and international human rights law (discussed in detail in chapter X) are not mutually exclusive but complementary.¹⁵⁹ International human rights law continues to apply in conjunction with IHL in a situation of armed conflict. Terrorism in the context of armed conflict may also incur individual criminal responsibility under international criminal law.¹⁶⁰

Many of the international conventions and protocols related to the prevention and suppression of terrorism contain clauses of exception in relation to the military and times of war, stating that activities of armed forces during an armed conflict, governed by IHL, are not governed by the conventions. An example for an explicit exception clause can be found in the International Convention for the Suppression of Terrorist Bombing, which entered into force on 23 May 2001.

¹⁵⁶ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392, 27 June 1986, para. 190.

¹⁵⁷ United Nations Charter, art. 51.

¹⁵⁸ Under chapter VII of the United Nations Charter.

¹⁵⁹ International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), Report 2004, para. 106.

¹⁶⁰ See chapter 2.

Example:***International Convention for the Suppression of Terrorist Bombing 1997, article 19:***

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.
2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

3.2.2 Where does international humanitarian law come from?

IHL can be found in customary international law and in various treaties relating to the law of war:

The principal sources of international humanitarian law are the four Geneva Conventions of 1949¹⁶¹ and the three Additional Protocols to these Conventions.¹⁶²

- First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)
- Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)
- Third Geneva Convention Relative to the Treatment of Prisoners of War (1949)
- Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)
- First Protocol Relating to the Protection of Victims of International Armed Conflicts (1977)
- Second Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (1977)
- Third Protocol Relating to the Adaption of an Additional Distinctive Emblem (2005)

Other texts include the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1980 Convention on Certain Conventional Weapons and the 1997 Ottawa Convention on the Prohibition of Anti-Personnel Mines.

WWW

www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions

¹⁶¹ The four Geneva Conventions, revised and expanded in 1949 entered into force in 1950.

¹⁶² The first Protocol and second Protocol to the Geneva conventions were adopted in 1977 and entered into force in 1979; the Third Protocol was adopted in 2005 and entered into force in 2007.

International humanitarian law is developed and interpreted through national and international jurisprudence. In particular, the jurisprudence of the ICTY and ICTR is important for the further development of IHL.¹⁶³

3.2.3 Who monitors international humanitarian law?

International Committee for the Red Cross (ICRC)

The main body addressing international humanitarian law is the ICRC, a neutral, impartial and independent humanitarian organization. The mandate to protect and assist the victims of armed conflict has been conferred by States through the four Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005. The ICRC's mandate and legal status set it apart both from intergovernmental agencies, such as United Nations organizations, and from non-governmental organizations. Its tasks include spreading knowledge of humanitarian law, monitoring compliance, drawing attention to violations, and contributing to the development of humanitarian law.

WWW

www.icrc.org

The international conventions and protocols related to the prevention and suppression of terrorism contain provisions which allow a State to invite the ICRC to visit persons who have been detained in relation to the terrorism offences covered by the respective conventions.¹⁶⁴

3.2.4 When and where does international humanitarian law apply?

IHL applies in situations of armed conflict:

- An international armed conflict involves the armed forces of at least two States or an armed conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in their exercise of the right of self-determination.
- A non-international armed conflict is an armed confrontation within the territory of one State between the State armed forces and organized armed groups, or between such armed groups.

Protocol II to the Geneva Conventions deals with internal armed conflict as defined above. However, as clarified in article 1, paragraph 2 of Protocol II, a certain threshold is required so that IHL applies: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."¹⁶⁵ If there is a disagreement on whether or not the threshold for the existence of an armed conflict is exceeded, courts may be called upon to make the determination.

¹⁶³ In particular see ICTY, Tadic Decision, section 2, www.icty.org.

¹⁶⁴ See for example International Convention for the Suppression of Acts of Nuclear Terrorism (2005), article 10(5).

¹⁶⁵ Additional Protocol 2 to the Geneva Conventions.

The Geneva Conventions are binding on all its States parties engaged in armed conflicts. This is the case even if other parties to the conflict are not party to the Conventions. Many IHL treaty provisions enshrine obligations owed to the international community as a whole (*erga omnes*) and reflect customary international law. Even if one party to the conflict violates a binding rule of IHL, this cannot provide a justification for violations by another party to the conflict.

The rules of IHL will apply to the activities of organizations, including terrorist organizations if they are a party to an armed conflict. Militias or volunteer corps, including organized resistance movements engaged in armed conflict, must fulfil the following conditions if their members are to be considered as lawful combatants for the purposes of IHL:

- Being commanded by a person responsible for his subordinates;
- Having a fixed distinctive sign recognizable at a distance;
- Carrying arms openly;
- Conducting their operations in accordance with the laws and customs of war.¹⁶⁶

IHL continues to apply in the whole territory of the warring States (or in the case of non-international conflicts, the whole territory under the control of a party) whether or not actual combat takes place there.¹⁶⁷

3.2.5 What is allowed under the laws of war?

A fundamental principle of IHL is the principle of humanity which gives rise to the principle of distinction, the principle of proportionality and the prohibition on causing superfluous injury or unnecessary suffering.

Under the principle of distinction, the parties to a conflict must at all times distinguish between civilians and combatants,¹⁶⁸ and attacks may be directed only at military objectives. Military objectives are defined as those objectives which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, under the circumstances ruling at the time, offers a definite military advantage.¹⁶⁹ The only circumstance in which civilians may be targeted is for the time in which they take a direct part in hostilities.¹⁷⁰ Thus, attacks on civilian objects¹⁷¹ are unlawful unless at the time of the attack they were used for military purposes and their destruction offered a definite military advantage.

¹⁶⁶ Third Geneva Convention, article 4A(2) (d).

¹⁶⁷ ICTY, Tadic Jurisdiction Appeal Decision, see www.icty.org.

¹⁶⁸ International Committee of the Red Cross, Customary International Humanitarian Law, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, 2005 (hereafter "ICRC Study"). This study was prepared upon recommendation of the twenty-sixth International Conference of the Red Cross and Red Crescent (December 1995) and is based on an extensive analysis of State practice (e.g. military manuals) and documents expressing opinion *iuris*. See pp. 3-8 (Rule 1) and 25-36 (Rules 7-10).

¹⁶⁹ *Ibid.*, pp. 25-32 (Rules 7-8).

¹⁷⁰ *Ibid.*, pp. 19-24 (Rule 6).

¹⁷¹ *Ibid.*, pp. 32-34 (Rule 9).

Indiscriminate attacks are similarly prohibited by International Humanitarian Law.¹⁷² They are those which (a) are not directed at a specific military objective; (b) employ a method or means of combat which cannot be directed at a specific military objective; or (c) employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and therefore are of a nature to strike military objectives and civilians or civilian objects without distinction.¹⁷³ Attacks by bombardment, including with rockets, which treat as a single military objective a number of clearly separated and distinct military objectives located in an urban area or rural village are prohibited.¹⁷⁴ The prohibition of indiscriminate attacks must not only determine the strategy adopted for a particular military operation but also limit the use of certain weapons when the civilian population will be affected.

Under the principle of proportionality, attacks on legitimate military objectives which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited.¹⁷⁵

Finally, an attacker must take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.¹⁷⁶ A number of specific precautionary measures are prescribed by humanitarian law in relation to the planning and conduct of attacks.¹⁷⁷ In addition, an attacker is required to give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.¹⁷⁸

International humanitarian law also imposes obligations on defenders. The use of human shields is prohibited.¹⁷⁹ Violation of this rule requires the defender's specific intent to use civilians to prevent otherwise lawful attacks.¹⁸⁰ In addition to this prohibition, the defender also has affirmative obligations to protect civilians by keeping them away from military targets.¹⁸¹

3.2.6 What are the minimum guarantees set out under international humanitarian law?

Article 3 of all four Geneva Conventions, often referred to as "Common article 3", as well as of the Second Additional Protocol contains minimum guarantees that apply to both international armed conflict as well as national armed conflict:

¹⁷² Ibid., p. 37 (Rule 11).

¹⁷³ Ibid., pp. 40-43 (Rule 12).

¹⁷⁴ Ibid., pp. 43-45 (Rule 13).

¹⁷⁵ Ibid., p. 46-50 (Rule 14).

¹⁷⁶ Ibid., p. 51-55 (Rule 15).

¹⁷⁷ Ibid., pp. 51-67 (Rules 15-21).

¹⁷⁸ Ibid., pp. 62-65 (Rule 20).

¹⁷⁹ Ibid., pp. 337-340 (Rule 97).

¹⁸⁰ Ibid., pp. 339-340 (Rule 97).

¹⁸¹ Ibid., pp. 68-76 (Rules 22-24).

Common article 3 provides for the following minimum guarantees:

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

[...]

3.2.7 How does international humanitarian law refer to terrorism?

The Fourth Geneva Convention (article 33) states that “[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited”, while Additional Protocol II (article 4) prohibits “acts of terrorism” against persons not or no longer taking part in hostilities. The main aim is to emphasize that neither individuals nor the civilian population may be subject to collective punishments, which, among other things, obviously induce a state of terror.

Both Additional Protocols to the Geneva Conventions also prohibit acts aimed at spreading terror among the civilian population. “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” (AP I, article 51(2) and AP II, article 13(2)).

These provisions are a key element of international humanitarian law rules governing the conduct of hostilities, i.e. the way military operations are carried out. They prohibit acts

of violence during armed conflict that do not provide a definite military advantage. It is important to bear in mind that even a lawful attack on military targets can spread fear among civilians. However, these provisions outlaw attacks that specifically aim to terrorize civilians, for example campaigns of shelling or sniping of civilians in urban areas.

Extract from an ICRC publication "International humanitarian law: answers to your questions":

Terrorist acts may occur during armed conflicts or in time of peace. As international humanitarian law applies only in situations of armed conflict, it does not regulate terrorist acts committed in peacetime.

The requirement to distinguish between civilians and combatants, and the prohibition of attacks on civilians or indiscriminate attacks, lies at the heart of humanitarian law. In addition to an express prohibition of all acts aimed at spreading terror among the civilian population (art. 51, para. 2, Protocol I; and art. 13, para. 2, Protocol II), IHL also proscribes the following acts, which could be considered as terrorist attacks:

- Attacks on civilians and civilian objects (arts. 51, para. 2, and 52, Protocol I; and art. 13, Protocol II);
- Indiscriminate attacks (art. 51, para. 4, Protocol I);
- Attacks on places of worship (art. 53, Protocol I; and art. 16, Protocol II);
- Attacks on works and installations containing dangerous forces (art. 56, Protocol I; and art. 15, Protocol II);
- The taking of hostages (art. 75, Protocol I; art. 3 common to the four Conventions; and art. 4, para. 2b, Protocol II);
- Murder of persons not or no longer taking part in hostilities (art. 75, Protocol I; art. 3 common to the four Conventions; and art. 4, para. 2a, Protocol II).

Apart from prohibiting the above acts, humanitarian law contains stipulations to repress violations of these prohibitions and mechanisms for implementing these obligations (...).¹⁸²

¹⁸² Extract from an ICRC publication "International humanitarian law: answers to your questions", electronically available at www.icrc.org/web/eng/siteeng0.nsf/html/5L2BUR.

4. International refugee law

4.1 Where is international refugee law found and what aspects of international refugee law are relevant to counter-terrorism?

There are various aspects of international refugee law that are relevant to counter-terrorism.¹⁸³ Individuals suspected of terrorism may have acquired refugee status or may be seeking asylum. Conflicts involving terrorist groups may cause individuals fearing persecution by those groups to flee their countries in search of asylum. Moreover, extradition is also a key instrument in States' efforts to fight terrorism and many anti-terrorism conventions and other instruments dealing with transnational crime contain provisions which establish a duty to extradite those suspected of being responsible for certain crimes. Such instruments typically require States parties to ensure that the acts in question are offences under their criminal law and may form the basis for extradition even in the absence of existing extradition treaties between the States concerned. Yet non-refoulement obligations deriving from international human rights law impose bars to extradition under certain circumstances, in addition to those based in international refugee law.

This chapter will, among others, look at the requirements of being considered as a refugee, at the clauses which exclude certain people from being considered as refugees as well as at the rights and obligations of refugees and asylum-seekers.

The process of developing a body of international law to protect refugees began in the early part of the 20th century under the League of Nations, the predecessor of the United Nations. It culminated on 28 July 1951 in the approval of the Convention relating to the Status of Refugees by a special United Nations conference.

The Convention Relating to the Status of Refugees:

WWW

www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf

Spells out who is a refugee and identifies certain categories of persons, such as war criminals, who do not qualify for refugee status. It sets out the kind of legal protection, other assistance and social rights refugees should receive from States and defines the obligations of refugees to host governments.

¹⁸³ For a list of documents on refugee law and counter-terrorism, see United Nations High Commissioner for Refugees, Selected Documents Relevant to National Security and Counter-Terrorism, January 2008. Online at UNHCR Refworld, available at: www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4794c81c2.

This first instrument was limited to protecting mainly European refugees in the aftermath of World War II. The 1967 Protocol relating to the Status of Refugees expanded the scope of the Convention and removed a deadline and geographical restrictions from the Convention, as the problem of displacement spread around the world. The 1951 Convention also inspired the development of regional instruments, such as the 1969 Organization of African Unity (OAU) Convention governing the specific aspects of refugees problems in Africa¹⁸⁴ and the 1984 Cartagena Declaration on Refugees.¹⁸⁵

4.2 How does the United Nations deal with refugees?

On 14 December 1950, the United Nations General Assembly established the Office of the United Nations High Commissioner for Refugees (UNHCR). In carrying out its mandate of leading and coordinating international action to protect refugees, it strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country.¹⁸⁶

United Nation High Commissioner for Refugees (UNHCR)

The Office of the UNHCR was established on 14 December 1950 by the United Nations General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. In more than five decades of its existence, UNHCR has helped an estimated 50 million people. Its staff of around 6,300 people works in more than 110 countries and continues to help 32.9 million persons.

WWW

www.unhcr.org

4.3 Who is a refugee?¹⁸⁷

Convention relating to the Status of Refugees, article 1:

A person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution.

¹⁸⁴ OAU Convention governing the specific aspects of refugees problems in Africa, done in Addis Abeba on 10 September 1969, electronically available at www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf.

¹⁸⁵ Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena from 19-22 November 1984.

¹⁸⁶ See www.unhcr.org/basics.html.

¹⁸⁷ See the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, www.unhcr.org/home/PUBL/3d58e13b4.pdf.

As this article makes clear, there are three elements which need to be fulfilled to be considered as a refugee: (a) the person must be outside his/her country of nationality (the Convention therefore does not cover so-called internally displaced persons); (b) the person must have a well-founded fear of persecution due to one or more of the five reasons listed; and (c) protection is not available in the country of origin. It does not matter if the persecution comes from State authorities or non-state actors such as terrorist groups. Refugees may for example flee countries where the State does not provide adequate protection from the activities of terrorist groups.

4.4 What does it mean to be a refugee?

In 1951, the General Assembly adopted a Convention regulating the legal status of refugees (the “Refugee Convention”). The Refugee Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees yet attempted on the international level. It lays down basic minimum standards for the treatment of refugees, without prejudice to the granting by States of more favourable treatment. The Refugee Convention is to be applied without discrimination as to race, religion or country of origin, and contains various safeguards against the expulsion of refugees.

Certain provisions of the Refugee Convention are considered so fundamental that no reservations may be made to them. These include the definition of the term “refugee” and the so-called principle of “non-refoulement”¹⁸⁸, i.e. that no Contracting State shall expel or return (“refouler”) a refugee, against his or her will, in any manner whatsoever, to a territory where he or she fears persecution.

Refugees have both rights and obligations. Refugees are required to respect the laws and regulations of their country of asylum.

Convention relating to the Status of Refugees, article 2: General obligations:

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

4.5 Who is excluded from the protection of the Refugee Convention? Are terrorists excluded?

In certain cases, the Refugee Convention does not apply and thus does not offer its protection. These exceptions are laid down in article F of the Refugee Convention.

¹⁸⁸ See also chapter 2.2.2. on extradition above.

Convention relating to the Status of Refugees, article 1F:

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.

In the context of whether the Refugee Convention protects persons believed to have committed terrorist acts, it is important to note that Security Council resolution 1373 (2001) explicitly “declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.”

According to article 1F of the Refugee Convention, a person with respect to whom there are serious reasons for considering that “he has been guilty of acts contrary to the purposes and principles of the United Nations” is excluded from the protection of the Refugee Convention. Accordingly, based on Security Council resolution 1373 (2001),¹⁸⁹ a person believed to be responsible for acts, methods and practices of terrorism does not fall within the scope of protection otherwise afforded by the Refugee Convention. That said, as regards the personal scope of article 1F (c), UNHCR maintains that since articles 1 and 2 of the United Nations Charter essentially set out the fundamental principles that States must uphold in their mutual relations, in principle, only persons who are in positions of power in their countries or in State-like entities would appear capable of violating these provisions. UNHCR accepts that, in exceptional circumstances, the leaders of organizations carrying out particularly heinous acts of international terrorism which involve serious threats to international peace and security may be considered to fall within the scope of article 1F (c).¹⁹⁰

Furthermore, subparagraphs (a) and (b) of article 1F provide two additional reasons for excluding a person from the rights granted to refugees by the Refugee Convention, which may also apply to persons who are seriously believed to have committed terrorist acts. Such terrorist acts may fall within the scope of subparagraph (a) as a crime against peace, a war crime, or a crime against humanity. In that case, the person suspected of having committed such an act will not be protected by the Refugee Convention, no matter whether he/she has

¹⁸⁹ Moreover, Security Council resolution 1373 (2001) in paragraph 3(f) and (g), explicitly calls upon States to “[t]ake 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”; and 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.”

¹⁹⁰ See e.g. UNHCR comments on Clause 52 of the UK Immigration Asylum and Nationality Bill 2005, available at: www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments_dec2005clause52.htm.

committed such acts before becoming a refugee or after they have been granted the status of refugee. A terrorist act as defined in the international conventions and protocols related to the prevention of terrorism may also constitute a serious non-political crime and thereby fall under the scope of subparagraph (b).

In conclusion, a person who has committed a serious terrorist offence either in the country of asylum or outside of it cannot be classified as a refugee under the Convention and cannot benefit from refugee status. However, adequate procedures must be in place to ensure that he/she can challenge the allegations against him/her. In addition, other protections, including those provided by international human rights law, do still apply to terrorists.

4.6 Can a refugee be expelled or returned?

Under certain circumstances and subject to certain conditions, refugees may be expelled from the country in which they found refuge. In particular, as set out in article 32 of the Refugee Convention, a refugee may be lawfully expelled on the grounds of national security or public order. Such grounds may apply to persons who are suspected to be involved in terrorist acts. However, certain procedures have to be observed. In particular, due process must be observed and the expulsion must be according to the law. Generally, procedures must be in place to allow the individual to participate in the proceedings, and to appeal and challenge the decision to expel him either in person or through a representative. Furthermore, the refugee shall be granted a reasonable grace period of time allowing him/her to seek legal admission into another country.

Convention relating to the Status of Refugees, article 32: Expulsion:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

The possibility of expulsion is limited by a fundamental principle mentioned above, the so-called “principle of non-refoulement”, already discussed in the context of extradition in chapter 2.2.2 above. It is set out in article 33 of the Refugee Convention and obliges all States not to expel or return (“refouler”) a refugee, against his or her will, in any manner whatsoever, to a territory where he or she fears persecution.

Convention relating to the Status of Refugees, article 33:

1. 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 race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The protection against unlawful expulsion or return¹⁹¹ according to international refugee law does not apply to terrorists who pose a risk to the security of the country or have been convicted of a serious terrorist crime.¹⁹² Persons who have originally been granted refugee status may have that status revoked if it is found that one of the grounds for exclusion contained in the Geneva Convention apply to them.¹⁹³

The principle of non-refoulement has also been reflected and developed in international human rights law: even those suspected or convicted of serious terrorist crimes cannot be expelled or returned to a country in circumstances where there is a serious risk that they would suffer grave breaches of human rights, in particular torture, cruel, inhuman and degrading treatment.¹⁹⁴ The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states in article 3 that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".¹⁹⁵ According to the United Nations Committee Against Torture the term "another State" does not only refer to a State to which a person is being expelled, returned or extradited, but also to any State to which the person may subsequently be expelled, returned or extradited.¹⁹⁶

4.7 How may counter-terrorism policies adversely affect refugees and asylum-seekers?

UNHCR has raised a number of concerns about the adverse impact of some counter-terrorism policies on refugees and asylum-seekers,¹⁹⁷ such as the risk of refugees and asylum-seekers being detained automatically on the basis of their status; the risk of denial of refugee status

¹⁹¹ In accordance with the Refugee Convention, art. 33 (1), *supra*.

¹⁹² See Refugee Convention, art. 33 (2), *supra*.

¹⁹³ See Refugee Convention, art. 1F, *supra*.

¹⁹⁴ See chapter 5 on Human Rights Law below.

¹⁹⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, adopted 10 December 1984, available at www.unhcr.ch/html/menu3/b/h_cat39.htm.

¹⁹⁶ 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", www.hrw.org/press/2001/11/eusecurity-memo.htm.

¹⁹⁷ UNHCR, News Story of 23 October 2001, "Possible repercussions for refugees following terrorist attacks worry UNHCR", www.unhcr.org/news/NEWS/3bd563394.html.

in violation of the Convention and Protocol relating to the Status of Refugees¹⁹⁸; the risk of deportation; the risk of restrictions on status determination procedures or the risk of the improper application of exclusion clauses for certain groups or individuals who are perceived as somehow linked to terrorism because of religion, ethnicity, national origin or political affiliation.

Security Council resolution 1456 (2003):

6. States must ensure that any measure 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;

It is important to repeat that the Security Council has explicitly stated that States must ensure that measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee, and humanitarian law.¹⁹⁹ Also the General Assembly²⁰⁰ has repeatedly made explicit reference to States' obligations under the 1951 Convention and the 1967 Protocol, including in the 2006 United Nations Global Counter-Terrorism Strategy.²⁰¹

¹⁹⁸ Beyond grounds of exclusion contained in article 1 (F) of the Geneva Convention on the Status of Refugees.

¹⁹⁹ See Security Council resolution 1269 (1999), para. 4(iv); Security Council resolution 1373 (2001), paras. 3(f) and 3(g); Security Council resolution 1456 (2003), Annex, para. 6; Security Council resolution 1535 (2004), Annex, preambular para. 6; Security Council resolution 1566 (2004), preambular para. 4; Security Council resolution 1617 (2005), preambular para. 4; Security Council resolution 1624 (2005), preambular para. 2 and operative para. 4.

²⁰⁰ See also General Assembly resolution 49/60 of 9 December 2004, Declaration on Measures to Eliminate International Terrorism, Annex, at para. 5, A/RES/49/60; General Assembly resolution 51/210 of 17 December 1996, Measures to Eliminate International Terrorism, Annex, preambular paras. 6 (with specific reference to articles 1, 2, 32 and 33 of the 1951 Convention) and 7, A/RES/51/210; General Assembly resolution 57/219 of 27 February 2003, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, para. 1, A/RES/57/219; General Assembly resolution 58/187 of 22 March 2004, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, para. 1, A/RES/58/187; General Assembly resolution 60/1 of 24 October 2005, 2005 World Summit Outcome, para. 85, A/RES/60/1; General Assembly resolution 60/43 of 6 January 2006, Measures to Eliminate International Terrorism, preambular paras. 11 and 19, op. para. 3, A/RES/60/43; General Assembly resolution 60/158 of 28 February 2006, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, preambular paras. 7 and 13, op. paras. 1 and 5, A/RES/60/158; General Assembly resolution 62/71 of 8 January 2008, Measures to Eliminate International Terrorism, preambular paras. 12 and 20, A/RES/62/71; General Assembly resolution 62/159 of 11 March 2008, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/RES/62/159.

²⁰¹ See United Nations Global Counter-Terrorism Strategy, Plan of Action chapters 1.2.1a) and 5.1 (please double-check quotation).

5. International human rights and counter-terrorism

Human rights obligations form an integral part of the international legal counter-terrorism framework, both through the obligation on States to prevent terrorist attacks, which have the potential of hugely impacting upon and resulting in undermining human rights, and through the obligation to ensure that any counter-terrorism activities respect human rights.

United Nations Secretary-General, Ban Ki Moon, Address to the International Conference on Terrorism, Dimensions, Threats and Counter-Measures, Tunis, Tunisia, 15 November 2007.²⁰²

When we stand up for human rights, combat poverty and marginalization, when we seek to resolve conflicts, support good governance and the rule of law, we do so because these activities have intrinsic value and should be pursued in their own right. But as we do, we also work to counter terrorism by addressing the very conditions that can be conducive to it.

United Nations Global Counter-Terrorism Strategy, Part IV:

We resolve to undertake the following measures, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism.

International human rights law is intended to provide a basic standard of protection of a set of rights for all human beings at all times and in all places. This chapter will look at where international human rights law comes from, how it impacts on counter-terrorism and how the basic principles of human rights law work. It will focus on the broad application of human rights in the counter-terrorism context and the key features of human rights obligations but will not study in detail the application of particular rights.

5.1 Sources of international human rights law

A collection of United Nations instruments form the core of international human rights law. These include the United Nations Charter, the Universal Declaration of Human Rights²⁰³ (UDHR), the International Covenant on Civil and Political Rights²⁰⁴ (ICCPR), and

²⁰² Address to the International Conference on Terrorism, Dimensions, Threats and Counter-Measures, Tunis, Tunisia, 15 November 2007, available www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=149.

²⁰³ Universal Declaration of Human Rights (1948), electronically available at www.un.org/Overview/rights.html.

²⁰⁴ International Covenant on Civil and Political Rights (1966), see www.unhcr.ch/html/menu3/b/a_ccpr.htm.

the International Covenant on Economic, Social and Cultural Rights²⁰⁵ (ICESCR).. In addition, there are a number of optional protocols such as the Optional Protocol to the International Covenant on Civil and Political Rights, adopted in 1966 or the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

5.1.1 Where does international human rights law come from?

United Nations Charter

The United Nations Charter forms the basis of modern international human rights law identifying the respect for human rights and fundamental freedoms as one of the prerequisites for stability and peace. While the Charter places human rights at the heart of the United Nations system, it does not elaborate on the substance of human rights and fundamental freedoms.

United Nations Charter, article 55:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

[...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Universal Declaration of Human Rights (UDHR)

The UDHR is accepted as “a common standard of achievement for all peoples and all nations”.²⁰⁶ It was adopted as a non-binding General Assembly resolution in 1948 but has come to be considered as an authoritative source for the rights and freedoms that the United Nations and its Member States are obliged to promote under the Charter. The UDHR is considered as a part of customary international law and is therefore a basis for international human rights obligations that apply to all States, even those who are not parties to other human rights treaties.

The first article of the UDHR describes the idea of fundamental human rights: “All human beings are born free and equal in dignity and rights.” The UDHR sets out a general prohibition of discrimination and then enumerates specific groups of rights, including civil, cultural, economic, political and social rights to be protected. articles 3 to 21 describe classical civil and political rights, such as the right to life, the prohibitions on slavery and torture, the right to equality before the law, freedom of speech, assembly, and movement, the right to private life etc. articles 22 to 28 guarantee a range of economic, social and cultural rights, including the affirmation in article 28, that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

²⁰⁵ International Covenant on Economic, Social and Cultural Rights (1966), available at www.unhchr.ch/html/menu3/b/a_cescr.htm.

²⁰⁶ Universal Declaration of Human Rights (1948), electronically available at www.un.org/Overview/rights.html.

The UDHR is not a directly legally binding treaty as its name (“declaration”) suggests but its importance should not be underestimated because of its high moral force. When the UDHR was adopted, there was general agreement that the rights it contains should be put into a legally binding form as treaties, which would directly bind States that agreed to their terms. As a result, a number of international human rights treaties were adopted over time that contain human rights that are legally binding on the States parties to those treaties.

United Nations human rights treaties

A number of general and specific human rights treaties flesh out many of the rights contained in the UDHR. There are nine core international human rights treaties. A committee of experts is tasked with monitoring the implementation of the respective provisions by States parties. As of July 2008, seven such committees exist. The Convention on the Rights of Persons with Disabilities has entered into force, but the treaty body monitoring its implementation has not been established yet. The International Convention for the Protection of All Persons from Enforced Disappearance (Enforced Disappearance Convention) is not in force yet.

The core treaties along with their optional protocols are:

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination ²⁰⁷
ICCPR	International Covenant on Civil and Political Rights ²⁰⁸
ICCPR-OP1	Optional Protocol to the International Covenant on Civil and Political Rights ²⁰⁹
ICCPR-OP2	Second Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty ²¹⁰
ICESCR	International Covenant on Economic, Social and Cultural Rights ²¹¹
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women ²¹²
OP-CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women ²¹³
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ²¹⁴
OP-CAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ²¹⁵

²⁰⁷ Entry to force on 21 December 1965.

²⁰⁸ Entry to force on 16 December 1966.

²⁰⁹ Entry to force on 16 December 1966.

²¹⁰ Entry to force on 15 December 1989.

²¹¹ Entry to force on 16 December 1966.

²¹² Entry to force on 18 December 1979.

²¹³ Entry to force on 10 December 1999.

²¹⁴ Entry to force on 10 December 1984.

²¹⁵ Entry to force on 18 December 2002.

CRC	Convention on the Rights of the Child ²¹⁶
OP-CRC-AC	Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict ²¹⁷
OP-CRC-SC	Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography ²¹⁸
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ²¹⁹
	International Convention for the Protection of All Persons from Enforced Disappearance (Enforced Disappearance Convention) ²²⁰
	Convention on the Rights of Persons with Disabilities ²²¹
	Optional Protocol to the Convention on the Rights of Persons with Disabilities ²²²

WWW

www2.ohchr.org/english/law/

Regional human rights treaties

As well as the United Nations Human Rights Instruments, a number of regional organizations also have treaties for guaranteeing human rights on a regional basis, which build on the core United Nations treaties and reflect the particularities of the region. These include:

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950²²³

American Convention on Human Rights 1969²²⁴

African Charter on Human and Peoples' Rights 1981²²⁵

European Union Charter of Fundamental Rights and Freedoms 2000²²⁶

5.1.2 What rights are protected?

The first two parts of the ICCPR, comprising articles 1 to 5, are an important set of what may best be described as provisions of an overarching or structural nature. article 1, which forms Part I, guarantees the right of self-determination. This right differs from the other Covenant rights in that it is a right expressly ascribed to "peoples" rather than to individuals.

²¹⁶ Entry to force on 20 December 1989.

²¹⁷ Entry to force on 25 May 2000.

²¹⁸ Entry to force on 25 May 2000.

²¹⁹ Entry to force on 18 December 1999.

²²⁰ Not yet in force.

²²¹ Not yet in force.

²²² Not yet in force.

²²³ See www.coe.int.

²²⁴ See www.oas.org.

²²⁵ See www.achpr.org.

²²⁶ See www.europa.eu.

It is also the only right that is common to both Covenants, as article 1 of the International Covenant on Economic, Social and Cultural Rights is identical. While the precise meaning under international law of the right of self-determination remains in a state of development, a precondition for a full and genuine expression of self-determination on the part of a people is the enjoyment by its members in whole measure of the rights contained in the ICCPR.

Part II comprises articles 2 through 5. article 2 is one of the fundamental cornerstones of the ICCPR. It provides that a State party must respect and ensure the rights of the ICCPR to all persons within its jurisdiction. With some exceptions, such as the right to vote, these rights extend not only to citizens but to everyone in the State's territory and must be respected without discrimination. If necessary, legislation should be enacted to properly guarantee these rights. Moreover, States parties are required to provide remedies to persons whose rights under the Covenant are breached. article 3 provides for the equal right of men and women to the enjoyment of Covenant rights. article 4 clearly sets out the strictly permissible boundaries for suspending or derogating from certain rights, in order to foreclose the possibility of any abuses. article 5 contains a general protective provision.

Part III, the heart of the ICCPR, lists the substantive rights and fundamental freedoms guaranteed by the treaty. These are the articles that are commonly invoked by individuals alleging that their rights under the Covenant have been violated. Part III includes the following rights that may be also relevant in the context of counter-terrorism:

- The right to life²²⁷
- Freedom from torture²²⁸
- Freedom from slavery²²⁹
- The right to liberty and security of the person²³⁰
- The right of detained persons to be treated humanely²³¹
- Freedom of movement²³²
- The right of a lawful alien to be expelled only in pursuance of a decision reached in accordance with law and the right to judicial review of such a decision²³³
- The right to a fair trial²³⁴
- Freedom from retrospective penalties²³⁵
- The right to recognition everywhere as a person before the law²³⁶
- The right to private and family life and protection of reputation²³⁷

²²⁷ ICCPR, art. 6.

²²⁸ ICCPR, art. 7.

²²⁹ ICCPR, art. 8.

²³⁰ ICCPR, art. 9.

²³¹ ICCPR, art. 10.

²³² ICCPR, art. 12.

²³³ ICCPR, art. 13.

²³⁴ ICCPR, art. 14.

²³⁵ ICCPR, art. 15.

²³⁶ ICCPR, art. 16.

²³⁷ ICCPR, art. 17.

- Freedom of thought, conscience, religion and belief²³⁸
- Freedom of opinion and expression²³⁹
- The prohibition on incitement to discrimination, hatred or violence²⁴⁰
- Freedom of assembly and association²⁴¹
- Equal protection of the law²⁴²
- The right to participate in public affairs²⁴³
- The right of ethnic, linguistic or religious minorities to enjoy their culture, practice or profess their religion and use their own language²⁴⁴
- The right to an effective remedy²⁴⁵

The Second Optional Protocol to the ICCPR relates to the abolition of the death penalty in States parties.²⁴⁶

As noted above, the ICESCR also guarantees the rights of peoples to self-determination set down in the ICCPR. The ICESCR, like the ICCPR, develops then corresponding rights in the field of economic, social and cultural rights of individuals, including the right to non-discrimination, the right to work,²⁴⁷ the right to health²⁴⁸ and education,²⁴⁹ and trade union rights.²⁵⁰ Given the common understanding that civil and political and economic, social and cultural rights are indivisible and interdependent, the rights contained in the two Covenants complement each other.

The relationship between terrorism and measures adopted to combat terrorism and economic, social and cultural rights is complex. Terrorism and measures adopted to combat terrorist acts are both influenced by and have an impact upon economic, social and cultural rights of individuals around the world.

Like other forms of serious crime, terrorism undermines economic and social development, especially in conflict countries and regions with weak systems of governance, sub-optimal criminal justice systems and tenuous economic stability. Specifically, terrorism (and perceived vulnerability to attack) drives investment and business away. Foreign and domestic investors often perceive terrorism and the country's vulnerability to an attack as a sign of social instability and a clear risk to safe investment. Moreover, terrorism erodes a country's social and human capital as terrorist attacks and the associated fear of attacks degrade quality of life and can force skilled workers to leave the country. Terrorist attacks and fear thereof also

²³⁸ ICCPR, art. 18.

²³⁹ ICCPR, art. 19.

²⁴⁰ ICCPR, art. 20.

²⁴¹ ICCPR, art. 21 and 22.

²⁴² ICCPR, art. 26.

²⁴³ ICCPR, art. 25.

²⁴⁴ ICCPR, art. 27.

²⁴⁵ ICCPR, art. 2.

²⁴⁶ For the status of ratification, see www.unhchr.ch/pdf/report.pdf.

²⁴⁷ ICESCR, art. 6

²⁴⁸ ICESCR, art. 12.

²⁴⁹ ICESCR, art. 13.

²⁵⁰ ICESCR, art. 8.

erode other basic rights of citizens, including freedom of movement, access to possible employment and educational opportunities, and it discourages accumulation of assets. Therefore strengthening the capacity of criminal justice systems to suppress serious crime and combat terrorism is a crucial component to a comprehensive development strategy because it prevents the erosion of basic human rights, which are necessary for a social and economic stability.

Another aspect is the fact that terrorism may be favoured by disadvantages in social and economic conditions. The United Nations Global Counter-Terrorism Strategy²⁵¹ explicitly lists measures “aimed at addressing the conditions conducive to the spread of terrorism, including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance”, while recognizing that none of these conditions can excuse or justify acts of terrorism. The strategy reaffirms the resolve to “promote a culture of peace, justice and human development, ethnic, national and religious tolerance, and respect for all religions, religious values, beliefs or cultures by establishing and encouraging, as appropriate, education and public awareness programmes involving all sectors of society” and the “determination to ensure the timely and full realization of the development goals and objectives agreed at the major United Nations conferences and summits, including the Millennium Development Goals.”

Former United Nations High Commissioner for Human Rights, Sergio de Mello (2002):

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

Instruments relating to civil and political rights such as the ICCPR entail an immediate obligation on States parties to comply with their provisions.²⁵² The rights contained in the ICESCR, however, impose an obligation on States parties to undertake to guarantee those rights “to the maximum of [their] available resources”.²⁵³ This principle of progressive realization acknowledges the constraints on State parties due to the limits of available resources but at the same time it imposes the obligation to take deliberate, concrete and targeted steps towards full realization of the rights in the ICESCR.

In addition to the ICCPR, consideration should be given to other United Nations human rights instruments which elaborate on some rights, such as the UN CAT as well as those which deal with particular categories of person such as children or women who may need specific attention to ensure the protection of their human rights.

²⁵¹ General Assembly resolution 60/288 of 8 September 2006, The United Nations Global Counter-Terrorism Strategy, A/RES/60/288.

²⁵² ICCPR, art. 2(1).

²⁵³ ICESCR, art. 2(1).

5.2 Enforcement of human rights

The High Commissioner for Human Rights is the principal human rights official of the United Nations. The High Commissioner heads the Office of the High Commissioner for Human Rights (OHCHR), which is mandated to offer leadership in the field of human rights, educate and take action to empower individuals and assist States in upholding human rights.

The Office of the High Commissioner for Human Rights (OHCHR), a department of the United Nations Secretariat, is mandated to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the United Nations and in international human rights laws and treaties. The mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining the United Nations system in the field of human rights. In addition to its mandated responsibilities, the Office leads efforts to integrate a human rights approach within all work carried out by United Nations agencies.

WWW

www.ohchr.org

5.2.1 What institutional frameworks exist at the international and regional levels for the promotion and protection of human rights?

i) United Nations Human Rights bodies.

What are the roles and mandates of the United Nations Human Rights bodies?

The United Nations system for the promotion and protection of human rights consists of two main types of bodies: bodies created under the United Nations Charter, including the new Human Rights Council, and bodies created under the international human rights treaties. Most of these bodies receive secretariat support from the OHCHR.

ii) United Nations Charter bodies

What are the roles and mandates of the United Nations Charter bodies?

Human Rights Council²⁵⁴

The Human Rights Council, based in Geneva, is a subsidiary organ of the General Assembly and has replaced the Commission on Human Rights²⁵⁵ since 2006. The Human Rights Council is made up of 47 Member States elected for three years and selected on the basis of equitable geographical distribution.

²⁵⁴ The Human Rights Council has replaced the Commission for Human Rights whose last session was held in 2006.

²⁵⁵ Established by General Assembly Resolution 60/251 of 15 March 2006.

The Human Rights Council's functions include:

- To promote human rights education and learning as well as to provide advisory services, technical assistance and capacity-building
- To provide a forum for dialogue on thematic issues relating to human rights
- To make recommendations to the General Assembly for the further development of international law in the field of human rights
- To promote the full implementation of States' human rights obligations
- To undertake a universal periodic review of the fulfilment of States' human rights obligations and commitments
- To contribute, through dialogue and cooperation, towards the prevention of human rights violations and to respond promptly to human rights emergencies
- To work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society
- To make recommendations with regard to the promotion and protection of human rights
- To submit an annual report to the General Assembly

Special procedures

“Special procedures” is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Currently, there are 28 thematic and 10 country mandates. Special procedures' mandates usually call on mandate holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations worldwide, known as thematic mandates.

Special procedures are either carried out by an individual (called “Special Rapporteur”, “Special Representative of the Secretary-General” or “Independent Expert”) or a working group usually composed of five members (one from each region). Mandate-holders of the special procedures serve in their personal capacity, and do not receive salaries or any other financial compensation for their work. The independent status of the mandate-holders is crucial in order to be able to fulfil their functions in all impartiality. The Office of the High Commissioner for Human Rights provides them with personnel, logistical and research assistance to support them in the discharge of their mandates.

Most importantly, in relation to counter-terrorism, a Special Rapporteur on the Protection and Promotion of Human Rights while Countering Terrorism was appointed in 2005.²⁵⁶ In addition, other relevant Special Procedures include the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on

²⁵⁶ The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism was appointed by the Commission on Human Rights, in its Resolution 2005/80, for a period of three years. In December 2007, the Human Rights Council, in its resolution 6/28, decided to extend the mandate for a period of three years.

extrajudicial, summary or arbitrary executions, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on freedom of religion, and Working Groups such as on Arbitrary Detention or on Enforced or Involuntary Disappearances.²⁵⁷

Joint statement by the Special Rapporteurs/Representatives, Experts and Chairpersons of the Working Groups of the special procedures of the United Nations Commission on Human Rights, 30 June 2003:

[The Special Rapporteurs and Independent Experts] share in the unequivocal condemnation of terrorism, they voice profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism which affect negatively the enjoyment of virtually all human rights—civil, cultural, economic, political and social.

They draw attention to the dangers inherent in the indiscriminate use of the term “terrorism”, and the resulting new categories of discrimination. They recall that, in accordance with the International Covenant on Civil and Political Rights and pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, certain rights are non-derogable and that any measures of derogation from the other rights guaranteed by the Covenant must be made in strict conformity with the provisions of its article 4.

[...]

They strongly affirm that any measures taken by States to combat terrorism must be in accordance with States’ obligations under the international human rights instruments.²⁵⁸

iii) United Nations Treaty bodies

What are the roles and mandates of the United Nations Treaty bodies?

There are currently seven human rights treaty bodies that monitor implementation of the core international human rights treaties:²⁵⁹

- Human Rights Committee (HRC)
- Committee on Economic, Social and Cultural Rights (CESCR)
- Committee on the Elimination of Racial Discrimination (CERD)
- Committee on the Elimination of Discrimination Against Women (CEDAW)
- Committee Against Torture (CAT)
- Committee on the Rights of the Child (CRC)
- Committee on Migrant Workers (CMW)

²⁵⁷ A full list of special procedures can be found at www2.ohchr.org/english/bodies/chr/special/manual.htm.

²⁵⁸ Joint statement of 30 June 2003 (E/CN.4/2004/4, annex 1); the full text can be found at www2.ohchr.org/English/bodies/chr/special/index.htm.

²⁵⁹ In addition, as mentioned above, there may be treaty bodies established in the future for the International Convention for the Protection of All Persons from Enforced Disappearance (Enforced Disappearance Convention) and the Convention on the Rights of Persons with Disabilities once those conventions enter into force.

The implementation of the ICCPR by States is monitored by the HRC. All States parties are obliged to submit regular reports to the Committee on how these rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”.

The HRC may consider individual complaints brought against State parties which have accepted this procedure by ratifying the First Optional Protocol to the ICCPR.²⁶⁰ The HRC also issues statements on thematic issues and working methods, which are known as “general comments” and offer a useful source of interpretation of the scope of rights contained in the ICCPR.²⁶¹ The CERD and CEDAW also consider individual complaints in specific circumstances.

In the context of counter-terrorism, the Committee against Torture (CAT), the body of human rights experts that monitors implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties, is of particular importance. Furthermore, the more recent Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), adopted by the General Assembly on 18 December 2002 and in force since 22 June 2006, provides for the establishment of “a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment,”²⁶² to be overseen by a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

OHCHR has produced a Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism (HR/PUB/03/1)

WWW

www.ohchr.org/documents/publications/digestjurisprudenceen.pdf

iv) Regional mechanisms

What are the roles and mandates of the regional mechanisms?

In addition to the United Nations mechanisms for guaranteeing human rights, regional organizations also have their own mechanisms for monitoring and enforcing respect for human rights and fundamental freedoms. The jurisprudence, standard setting and findings of regional bodies provide useful insights into the development of international human rights standards. In particular, the jurisprudence of regional courts such as the ECtHR²⁶³ and the

²⁶⁰ In addition, ICCPR, art. 41-43 set out a procedure to resolve disputes between State Parties (inter-state complaints) when one State party complains that another State Party is not giving effect to a provision of the ICCPR. However, this mechanism has never been used so far.

²⁶¹ All decisions and general comments are available on the HRC website, www.ohchr.org/english/bodies/hrc/index.htm.

²⁶² OPCAT, article 1

²⁶³ See www.echr.coe.int.

Inter-American Commission and Court of Human Rights²⁶⁴ is an important source of international human rights law. As many of the rights contained in regional treaties reflect rights contained in the ICCPR, there is a degree of cross-pollination in interpreting international human rights treaties so that, for example, ECtHR judgments which expand on the principles contained in the prohibition on torture, cruel, inhuman and degrading treatment contained in article 3 European Convention of Human Rights (ECHR) may be used as a tool for interpreting the parallel prohibition contained in article 7 ICCPR.²⁶⁵

5.2.2 How does international human rights law protection work?

i) How do Human Rights work?

Human rights and fundamental freedoms are not simply declaratory ideals; they must be practical and effective. There are a number of principles which need to be borne in mind to understand how the rights and freedoms contained in international instruments are to be given practical value in a counter-terrorism context.

Crucial to the relevance of human rights instruments is the idea that they are “living instruments”. This means that the interpretation of human rights protections contained in international instruments evolves over time as the societies in which they apply develop. So, for example, the ECtHR found that corporal punishment in Europe in the 1970s amounted to cruel, inhuman and degrading punishment in violation of the ECHR even though at the time of the drafting of the ECHR in the 1950s corporal punishment was a widely accepted form of punishment in Europe.²⁶⁶

ii) Whose rights are protected?

Human rights protections are designed for everyone. This means that a State must protect the rights of any individual within its territory or subject to its jurisdiction, whether or not they are nationals of the State.

Example:

ICCPR, article 2:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

²⁶⁴ See www.cidh.org.

²⁶⁵ See, for example, para 4.3 of the decision of the Human Rights Committee in *Alzery v. Sweden*, CCPR/C/88/D/1416/2005 of 10 November 2006, which cites both ECtHR and UNCAT jurisprudence in support of arguments before the HRC on the principle of non-refoulement.

²⁶⁶ ECtHR, *Tyrer v. UK*, Application no 5856/72, 25 April 1978, para. 31, see www.coe.int and www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database.

In a counter-terrorism context, this means that States must make every effort to protect the rights of the public in general, victims of terrorist attacks, individuals involved in counter-terrorism activities and persons suspected of being involved in or supporters of terrorists activities. Although the ICCPR does not mention the rights of legal persons, similar entities or collectives, certain rights that it contains, such as the right to freedom of religion or belief,²⁶⁷ freedom of association²⁶⁸ or the rights of members of minorities,²⁶⁹ may be enjoyed not only as individual rights but also “in community with others”, as collective rights belonging to a group of people.²⁷⁰

Where a person is subject to extradition or expulsion proceedings, their rights are protected by the obligations of the requested State in which they are detained. Respect of the human rights of such detainees pending extradition or expulsion may affect the State’s ability to extradite or expel them.²⁷¹

United Nations Human Rights Committee General Comment 31 (80) on the General Legal Obligation Imposed on States Parties to the Covenant:

[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

iii) Who can be held responsible for human rights violations and how do these relate to terrorist attacks?

Terrorist acts have a devastating impact on the enjoyment of human rights of individuals, such as the right to life. International human rights instruments govern the responsibilities of States with regard to the individual, not the criminal responsibility of terrorist individuals and organizations. States²⁷² can be held responsible for violations of their international human rights obligations which include a duty to protect people from acts of terrorism.²⁷³

²⁶⁷ ICCPR, art. 18.

²⁶⁸ ICCPR, art. 22.

²⁶⁹ ICCPR, art. 27.

²⁷⁰ United Nations Human Rights Committee, General Comment 31 (80) on the General Legal Obligation Imposed on States Parties to the Covenant, para. 9.

²⁷¹ See paras. 127-129.

²⁷² Human Rights experts, such as the Special Rapporteur on extrajudicial, summary or arbitrary executions, have advocated that based on the idea first expressed in the Universal Declaration of Human Rights, that “every organ of society respect and promote human rights”, that under certain conditions, and in particular when a group “exercises significant control over territory and population and has an identifiable political structure” it may also be required to respect human rights. See Report of the Special Rapporteur, Philip Alston, Mission to Sri Lanka, (28 November to 6 December 2005), Economic and Social Council, E/CN.4/2006/53/Add.5 of 27 March 2006, paras. 24-33 on this question in general and in particular on the obligations of the rebel Liberation Tigers of Tamil Eelam (LTTE) to respect human rights.

²⁷³ See para. 208.

States may also be held responsible for violations of human rights which were carried out by private individuals or non-state actors in certain circumstances. For example, of particular relevance in relation to counter-terrorism, a State may be held responsible for human rights violations involving:

- Private companies working on behalf of the State, for example in the security sector,
- Inadequate criminal legislation to govern the activities of, or
- Failure to act to prevent the activities of groups such as terrorist groups in the territory of the State.

United Nations Human Rights Committee General Comment 31 (80) on the General Legal Obligation Imposed on States Parties to the Covenant:

4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level—national, regional or local—are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility.

[...]

iv) What must a State do to fulfil its human rights obligations?

By becoming parties to international human rights treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. The right to life therefore has three dimensions: (a) the State should not arbitrarily take life, (b) the State should protect life, e.g. by putting in place a legal criminal law system that will prohibit murder and (c) the State should fulfil its promise to guarantee the right to life by creating socio-economic conditions in which the right to life can flourish.

Firstly, even in the context of terrorism, a State must respect its obligations under international human rights law. In particular, a State must ensure that it does not violate human rights or fundamental freedoms in carrying out its counter-terrorism activities.

Secondly, a State's human rights obligations include a positive obligation to protect the rights of individuals within their territory or subject to their jurisdiction from terrorist attacks. This presupposes the establishment of an effective criminal justice system within the rule of law to combat impunity for terrorists.²⁷⁴ The prosecution of terrorists according to international

²⁷⁴ See the UNODC publication, "Preventing terrorist acts: a criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments", www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html.

standards of fair trial is a core part of the State's obligation to protect human rights in a counter-terrorism context. An effective counter-terrorism strategy designed to prevent terrorist attacks and to minimize the impact on human life and suffering in the event of an attack is a prerequisite for any State to fulfil its international human rights obligations.

United Nations Human Rights Committee General Comment 31 (80) on the General Legal Obligation Imposed on States Parties to the Covenant:

8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. [...]

Thirdly, a State must fulfil its obligations under international human rights law, meaning that States must take positive action to facilitate the enjoyment of basic human rights even in the face of terrorism.

v) What is the right to an effective remedy?

In order for human rights and fundamental freedoms to be practical and effective, there must be remedies for individuals whose rights have been breached. The right to an effective remedy is a right which underpins the entire international human rights system.

The right to an effective remedy requires a national framework capable of upholding the rule of law, including the possibility of a judicial remedy for alleged violations of human rights and mechanisms to ensure accountability for the action or inaction of State authorities. In order for a State to fulfil its international human rights obligations, a State must be able to admit to the possibility of a violation of human rights occurring within its territory. It is not enough for a State to simply assert that it is human rights compliant because it has ratified international human rights instruments.

ICCPR, article 2(3):

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

An effective remedy may take many forms depending on the particular circumstances and the specific right in question. Effective remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including, in particular children. States should establish appropriate judicial and administrative mechanisms under domestic law to ensure the right to an effective remedy. National human rights institutions may play a role in guaranteeing the right to an effective remedy, as may the judiciary.

Human Rights Committee, General Comment 31:

A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

An effective remedy includes the right to reparation for victims of human rights violations. The General Assembly has adopted a set of normative principles and standards which deal with the rights of victims of crime. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in its resolution 40/34 of 29 November 1985, supports the principle that victims of crime are entitled to reparations.²⁷⁵ The General Assembly adopted further more recently, on 16 December 2005, the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”. According to these “Basic principles”, which are the result of an extensive study of legal resources on reparation in conventional and customary international law and incorporate existing principles as well as emerging concepts,²⁷⁶ reparation should be proportional to the gravity of the violations and the harm suffered and may take the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Human Rights Committee, General Comment 31:

16. article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6,

²⁷⁵ Electronically available at www2.ohchr.org/english/law/victims.htm.

²⁷⁶ Electronically available at www2.ohchr.org/english/law/remedy.htm.

[compensation for persons unjustly detained,] the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

Even if there is no finding of violation of the substantive right in question, a failure to provide an effective remedy may, in itself, amount to a violation of human rights. Some rights consist of a substantive right and a procedural aspect which provides safeguards to guarantee that right. An example of that is the prohibition on torture, cruel, inhuman or degrading treatment or punishment which requires investigation of complaints, prosecution of perpetrators and compensation for victims.

General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (art. 7):

1[...] The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.

5.3 Counter-terrorism and its possible impact on human rights

5.3.1 What are the possible impacts of counter-terrorism on human rights?

Counter-terrorism can impact on human rights in a large number of ways. Human rights are likely to be engaged at all stages in the process of combating terrorism, including the following examples:²⁷⁷

Criminalization

In legislating, it is crucial that States ensure that the principle of legality is applied. There have been concerns that overly broad definitions of ‘terrorism’ may lead to criminalization of legitimate activities such as lawful protests and expressions of opinion which, while unpalatable, do not amount to incitement to violence.²⁷⁸

²⁷⁷ For a more exhaustive list of specific human rights challenges in the context of terrorism and countering terrorism see part III of the OHCHR Fact Sheet No. 32 on “Human Rights, Terrorism and Counter Terrorism”.

²⁷⁸ See e.g. the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in his report to the Human Rights Commission of 28 December 2005, E/CN.4/2006/98, electronically available at www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/3_CODEXTER/Working_Documents/2006/Sheinin%20E-CN.4-2006-98.pdf.

Prosecution

Prosecutions of terrorists may be extremely complex, sensitive and vulnerable to security concerns. Despite the difficulties involved in prosecuting terrorist offences, the right to a fair trial must be guaranteed in terrorism cases. Miscarriages of justice in terrorism cases not only lead to violations of individual rights but also to impunity for those actually responsible for terrorist acts.

Detention

Both convicted and suspected terrorist detainees must be treated humanely, regardless of the nature of the crimes that they have, or are alleged to have, committed. Even in the context of terrorism, arbitrary detention and disappearances can never be justified but detention is only possible in accordance with the law. Furthermore, all persons detained, including those suspected of terrorism, have the right to habeas corpus or equivalent judicial procedures at all times and in all circumstances to challenge the lawfulness of their detention.

Prevention

Counter-terrorism activities designed to detect, disrupt and prevent terrorist attacks may involve techniques which interfere with the right to privacy. A legislative framework is needed for this kind of activities to ensure that they are proportionate to their aims.²⁷⁹

The use of force by law enforcement officers to prevent an imminent terrorist attack is of particular concern. Clear rules need to be in place for the use of force in the context of counter-terrorism. Accountability for inappropriate use of force should be ensured through the establishment of independent and effective complaints mechanisms.

i) How can human rights be restricted in the context of counter-terrorism?

United Nations Human Rights Committee General Comment 31(80) on the General Legal Obligation Imposed on States Parties to the Covenant:

6. [...] States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

International human rights obligations apply, even in the complex and pressing context of combating international terrorism. International human rights obligations are designed to provide protection for individual rights in the real world and, as such, international human rights treaties contain a degree of flexibility in relation to interfering with certain rights while other rights are considered as so fundamental that no interference with them can be allowed in any circumstances.

²⁷⁹ See section iii) below.

What are absolute rights?

Absolute rights are a category of rights which permit no qualification or interference on any grounds whatsoever.

The absolute prohibition on torture, cruel, inhuman or degrading treatment is an example of an absolute right. There can never be a justification for inflicting torture, cruel, inhuman or degrading treatment or punishment on anyone. Not even the threat of an imminent terrorist attack potentially leading to massive loss of life can justify using interrogation techniques which would violate this prohibition.²⁸⁰

International Covenant on Civil and Political Rights, article 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Other examples of absolute rights are the prohibition of slavery and certain aspects of the right to life as well as the right to humane treatment of those deprived of their liberty. Even those prisoners who have been convicted of serious terrorist offences must be treated humanely.

What rights may be restricted?

Human rights are inalienable. They should not be taken away. Certain human rights however can be restricted in specific circumstances as long as the restrictions do not undermine the spirit of the right itself and are applied only in specific situations and according to due process. The right to freedom of association and assembly and the right to respect for private life are all examples of rights that may be subject to certain restrictions in the context of counter-terrorism. The right to liberty may be restricted if a person is found guilty of a crime by a court of law, including of a terrorist act punishable under the applicable law.

Some provisions contain grounds for qualifying the enjoyment of a particular right in order to protect the rights of others or for the protection of national security but due process must be observed and qualifications should only be applied on an exceptional basis when necessary.

Example:
ICCPR, article 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

²⁸⁰ For more details on the prohibition of torture and human rights, see OHCHR Fact Sheet No. 32 on "Human Rights, Terrorism and Counter Terrorism".

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals. (emphasis added).

ii) How can human rights be suspended in the context of counter-terrorism?

International human rights instruments contain the possibility to suspend the application of certain rights in clearly defined, temporary and exceptional circumstances.²⁸¹ Before a State may to invoke article 4 of the ICCPR for example, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The second requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. Furthermore, States proclaiming a state of emergency with consequences that could entail derogation from any provision of the ICCPR must act within their constitutional and other provisions of law that govern such proclamations and the exercise of emergency powers. Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1 of the ICCPR. During armed conflict, whether international or non-international, the rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1 of the Covenant, to prevent the abuse of a State's emergency powers.

This possibility to suspend the application of certain rights is known as derogation:

ICCPR, article 4:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

²⁸¹ United Nations Human Rights Committee, General Comment 29 on States of Emergency (art. 4) CCPR/C/21/Rev.1/Add.11.

Rights can be divided into derogable and non-derogable rights. All absolute rights are non-derogable. Some non-derogable rights may be restricted. No derogation is possible from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 ICCPR:

- Right to life (art. 6)
- Prohibition on torture, cruel, inhuman or degrading treatment or punishment (art. 7)
- Prohibition on slavery and servitude (art. 8)
- Prohibition on imprisonment for contractual obligation (art. 11)
- Prohibition on retrospective criminal punishments (art. 15)
- Right to recognition as a person before the law (art. 16)
- Right to freedom of thought, conscience and religion (art. 18)

ICCPR General Comment 29 – States of Emergency (article 4):

[...] States parties may in no circumstances invoke article 4 of the Covenant as 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.

iii) What is the difference between an interference as opposed to a violation of human rights?

In the counter-terrorism context it may be necessary to interfere with those rights which permit restrictions or to derogate from derogable rights.²⁸² For example, a surveillance operation will interfere with the right to private life of suspects and possibly of other individuals with whom terrorist suspects have come into contact; the arrest of a terrorist suspect will, by definition, interfere with the individual's right to liberty; the proscription of a terrorist organization will impact on its members' freedom to associate with each other.

As provided for by international human rights conventions, States may legitimately limit the exercise of certain rights, including the right to freedom of expression, the right to freedom of association and assembly, the right to freedom of movement and the right to respect for one's private and family life. In order to fully respect their human rights obligations while imposing such limitations, States must respect a number of conditions. In addition to respecting the principles of equality and non-discrimination, the limitations must be prescribed by law, in pursuance of one or more specific legitimate purposes and "necessary in a democratic society." The States must carry out the following tests:²⁸³

²⁸² The Siracusa Principles on the Limitation and Derogations Provisions in the ICCPR, a non-binding set of principles drawn up by a group of independent international legal experts brought together under the aegis of the International Commission of Jurists provides a useful reference point for interpretation on the scope of limitation of and derogation from human rights.

²⁸³ See e.g. footnote above on the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, United Nations Doc E/CN.4/1984/4 (1984). A detailed explanation can be found in the OHCHR Fact Sheet No. 32 on "Human Rights, Terrorism and Counter Terrorism", pp. 22-29, with reference to primary sources regarding the various tests.

Is the limitation prescribed by law?

Any interference with human rights must be in accordance with the law. This means that an individual must be able to know or find out what the law is in order to regulate his/her conduct in accordance with the law. The existence of legislation alone is not sufficient to meet the test of legality. Any law which provides for interference with individual rights must be sufficiently precise and must not be arbitrary. A national law which conflicts with the general principles of international law will not fulfil the test of legality.

Is the limitation in pursuance of a legitimate purpose?

To ensure legality, an interference with human rights must be justified on the basis of a limited set of permissible grounds. Such grounds include, for example, national security, public safety, the protection of public morals and the protection of the rights of others. Some human rights provisions clearly specify which of these grounds may give rise to a limitation on the right in question. The grounds for limiting human rights should be interpreted strictly.

Is the limitation necessary and proportionate?

Any limitation on rights must be shown to be necessary and proportionate. The test of proportionality is not explicit in human rights instruments but in practice it is the key to ensuring that a restriction on human rights is permissible. In relation to counter-terrorism measures, a proportionate approach requires that any measure taken:

- Must impair the right as little as possible,
- Must be carefully designed to meet the objective, and
- Must not be based on unfair, arbitrary or irrational considerations.

Proportionality is required in the design of a particular measure and also in the application of that measure in individual cases.

Is the limitation respecting the principles of non-discrimination and equality?

Even if a measure satisfies the first three tests, it will violate human rights standards if the measure is discriminatory. A measure will be considered to be discriminatory if it differentiates between people on the basis of sex, race, religion, nationality or ethnicity without any objective and reasonable justification. The questions of discrimination and proportionality are interlinked.

If, for example, a counter-terrorism measure interferes only with the rights of non-nationals in a State where both non-nationals and nationals pose a terrorist threat, that measure is likely to breach the State's human rights obligations on the grounds that it is discriminatory and is not carefully designed to meet the threat posed by national and non-nationals alike.

6. Conclusion

With the increasingly international nature of terrorism, a knowledge of international public law is crucial for understanding the legal framework for counter-terrorism activities. In this vein, the preceding chapters were intended to provide the reader with a basic understanding of the most important aspects of international criminal law, humanitarian law, refugee law and human rights law relating to counter-terrorism.

One lesson that can be learnt from looking at the framework of international law relating to terrorism is that it has a complex and interlocking structure. No body of international law stands in isolation and the variety of tools required for preventing and combating terrorism may engage a number of different aspects of international law. A request for extradition of an individual under one of the universal counter-terrorism instruments may raise questions of international refugee law or international human rights law. A decision on whether or not to prosecute a terrorist may give rise to questions of international criminal law and international human rights law as well as national rules on jurisdiction.

The aim of this *General Introduction to the International Law Framework of Counter-Terrorism* was to provide a first general overview. More detailed information on relevant legal aspects relating to counter-terrorism can be found in other UNODC publications, including the *Legislative Guide to the universal legal regime against terrorism*, the *Guide for the legislative incorporation and implementation of the universal anti-terrorism instruments*, the publication entitled *Preventing terrorist acts: a criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments*, as well as in a number of further tools and comparative studies produced by UNODC.



UNODC

United Nations Office on Drugs and Crime

Vienna International Centre, PO Box 500, 1400 Vienna, Austria
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-5866, www.unodc.org

FOR UNITED NATIONS USE ONLY

