# Chapter 9 The "Global War On Terror"

**Key points**

- The war on terror is a peculiar type of conflict: at times it involves military operations, subject to international humanitarian law, but for the most part it consists of law-enforcement action, bound to observe international human rights law.
- In times of war or other public emergencies, States can lawfully derogate from some of their human rights obligations. In times of peace, some measure of interference with certain rights may also be permitted to accommodate security concerns. The proportionality of such restrictions should, however, always be respected.
- The war on terror has entailed arbitrary deprivations of life and liberty, the use of torture and degrading treatment against suspected terrorists, the supression of due process guarantees, unwarranted interference with the right to private life, freedom of expression and association, as well as restrictions on the rights of aliens.
- The human rights cost of the global war on terror regards both the excesses of national policies and multilateral (especially UN) action.

## 1. Overview

The case studies discussed in the preceding chapters of this section illustrate traditional types of conflicts which may entail violations of international human rights and humanitarian law. However, it is useful to include in our overview of contemporary conflict situations which affect human rights an account of what is commonly referred to as the 'global war on terror'. The current chapter discusses the tension between the struggle to guarantee human security and the infringement of human rights stemming from anti-terrorist action, whether military or not. In this chapter we will see how counter-terrorism tends to impair fundamental human rights, such as the right to life, personal liberty, humane treatment, fair trial, privacy or freedom of expression. This is caused by the emergency legislation and investigative practices adopted by governments, even in democratic countries, in order to respond to the terrorist threat, by unlawful conduct during military operations motivated by self-defence against terrorism, as well as by certain multilateral counter-terrorism strategies, most particularly through the UN Security Council.

## 2. War on Terror as New Type of Conflict

The association of anti-terrorism with the concept of war has emerged in the aftermath of the catastrophic events of 11th September 2001, when coordinated suicide attacks upon the United States carried out by Islamist terrorists affiliated with the al-Qaeda network resulted in nearly 3,000 victims. As is known, the al-Qaeda terrorists hijacked four commercial passenger airliners and deliberately crashed two of them into the Twin Towers of the World Trade Center in New York, causing huge civilian casualties, while a third airliner was crashed into the Pentagon. The terrorist leader considered to be responsible for the attacks was Osama Bin Laden, a key player in the alliance between the al-Qaeda network and the Taliban regime, the Islamic fundamentalist movement in power in Afghanistan since 1996. The refusal of the Taliban to extradite Bin Laden had as a consequence the US attack on Afghanistan starting from 7th October 2001. In its resolution 1378 (2001) of 14th November 2001, the UN Security Council also condemned the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the al-Qaeda and for providing safe haven to Bin Laden, and expressed support for international efforts to root out terrorism. The invasion of Aghanistan in the fall of 2001 signs the beginning of the war on terror: a war in which terrorists are apprehended in different countries and denied their rights as prisoners of war. In the meantime, civil liberties also start to be curtailed domestically, as a means to prevent further attacks.

Launched by the US administration, the campaign against terrorism has been joined by the whole international community, and undoubtedly bears resemblance to a conflict situation. Nonetheless, for the most part, this campaign falls short of war. The accurate distinction between a state of 'war' in a strict legal sense and 'war' as a metaphor in political discourse determines the extent of states' obligations under international human rights law, and the applicability of international humanitarian law. As discussed in Chapter 4, international humanitarian law is a set of norms applying in case of armed conflict which protects civilians and parties who no longer participate actively in the hostilities (prisoners, wounded combatants). Where anti-terrorism involves proper military operations, international humanitarian law is applicable, alongside core norms of international human rights law. It is important to stress in this regard that international human rights law, while potentially limited due to the possibility of some derogation in situations of public emergency and armed conflict, does not cease to apply. Conversely, when the war on terror does not amount to an armed conflict, all human rights norms continue to be fully applicable, though states may temporarily suspend the application of specific human rights treaty provisions in order to face terrorist emergencies, as explained below.

An essential point needs to be made before we begin our analysis of this new type of conflict. Although most people usually associate terrorism with the indiscriminate killing of innocent civilians, suspected terrorists are also potential victims of human rights abuses. Moreover, the rights of the

citizenry at large are also at stake, as preventative anti-terrorism measures tend to encroach upon their rights and liberties. As this chapter discusses, the necessity to strike a proper balance between security interests and individual rights in the global war on terror is not always duly considered.

## The 'Bush Doctrine'

The concept of 'war on terrorism' is one of the pillars of the so-called 'Bush doctrine', which encapsulates the American approach to international affairs after the attacks of 11th September 2001. Its most significant expression is *The National Security Strategy of the United States* of September 2002 (see Box 1), a policy document published by the White House in the aftermath of al-Qaeda's attacks.

### Box 1: The National Security Strategy of the United States

Extract of *White House, The National Security Strategy (September 2002). Chapter III ("Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends")* available at http://www.whitehouse.gov/nsc/nss.pdf.

"The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism— premeditated, politically motivated violence perpetrated against innocents. […] The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time. […] While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of selfdefense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country;[…]".

In the light of the Bush doctrine, the war on terror can be described as an atypical conflict, characterized by three elements of novelty: a) asymmetric warfare; b) self-defence doctrine applied against non-state actors; c) attempts to legitimize 'preventive war'.

*a. Asymmetric warfare*

The exact legal significance to be attached to the "war on terror" is highly controversial. Conventionally, war is waged between states, or between government and insurgents, or between rival

factions. Al-Qaeda, and, more generally, terrorist networks cannot be engaged in an international armed conflict, so long as their actions cannot be attributed to a state. On the other hand, such terrorist cells cannot qualify as a well-identified party to an internal conflict, for, unlike rebel groups or insurgents, they do not have a responsible command structure and control over a specific territory. The international, variably cohesive, membership, compounds the difficulty of classifying terrorist networks as parties to an internal conflict as defined in Chapter 4. The lack of distinctive characteristics required by international humanitarian law, and their sporadic attacks, are further obstacles to such a classification.

However, it must be emphasized that an international conflict did exist with the initiation on 7th October 2001 of military operations against Afghanistan, including an aerial bombing campaign, by a US-UK led coalition, whose declared purpose was to capture Osama bin Laden, defeat al-Qaeda, and remove the Taliban regime which had provided support and safe harbor to the terrorist group. In fact, the Bush doctrine extended the concept of enemy to states harbouring or supporting terrorists, and indeed under international law the conduct of armed groups acting under the overall control of a government may be imputed to that government.

After the removal from power of the Taliban, and the creation of a new Afghan regime led by President Hamid Karzai, sworn in on 19th June 2002, the engagement of US and allied forces in Afghanistan no longer amounts to an international conflict. Rather, if the ongoing military confrontation between pro-governmental and opposition forces is described as an internal conflict, the US support to the Afghan government arguably amounts to support to a party to a domestic conflict.

Thus, with the exception of those situations in which terrorist acts can be considered as conduct of a state, the term 'war' is misleading. While it is true that they commit offenses of significant gravity, terrorists are essentially criminals, and not combatants. Thus the more appropriate legal framework for anti-terrorism is *law enforcement*, even though this occasionally implies *extra-territorial* law enforcement mechanisms (when operations, such as the seizure of suspects, take place on the territory of other states, as detailed below). Consequently, international human rights law rather than international humanitarian law is the applicable human rights standard governing counter-terrorism. In fact, for the most part, unlike conventional war, involving military confrontation, the war on terrorism, understood in a non-technical sense, involves police and intelligence operations, economic sanctions and criminal justice.

*b. Self-defence doctrine applied against non-state actors*

The 'Bush Doctrine' introduced a new legal approach to terrorism, as the US administration characterized the 11th September attacks as an act of war rather than a criminal act. An important

consequence of this qualification was that the war on terror was theoretically grounded on the inherent right to self-defence provided for by general customary law, and enshrined in Article 51 of the UN Charter (see Box 2).

**Box 2: Article 51 of the UN Charter**

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security".

It is useful to note, at the same time, that the preamble of Security Council Resolution 1368 (2001), adopted on 12th September 2001, also speaks about self-defence against terrorist acts, even though the operative paragraphs emphasize police and judicial cooperation. Such resolution has generated doctrinal confusion, as it appears to contradict the reference to self-defence in the UN Charter, which only concerns inter-state relations. Indeed, even though Article 51 does not further qualify the 'armed attack' to explicitly attribute it to a state, the Advisory Opinion of the International Court of Justice of 9th July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* offers authoritative support to this interpretation (see Box 3).

**Box 3: Self-defence in the UN Charter**

Fragment of the Advisory Opinion of the International Court of Justice of 9th July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, available at http://www.icj-cij.org/docket/files/131/1671.pdf.

"Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. […] Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case" (para. 139).

Some commentators, however, emphasize that state practice is favourable to a broader interpretation of the notion of self-defence. In the context of the Israeli attack in Lebanon in the summer of 2006, states' criticism did not address the right of Israel to react to incursions by Hezbollah from the Lebanese territory, but the proportionality of those reactions.

Even if the concept of self-defence in international law is extended to include defence against the attacks by non-state actors, its relevance in the context of terrorism remains controversial. In fact, self-defence may be exercised in connection to the conduct of belligerent groups of foreign nationals (e.g. armed bands organizing raids into a state) if they are openly supported by the government of the national/ territorial state, or if that state proves unable (or unwilling) to effectively remove the danger despite the appeal of the targeted state. The above-mentioned 2006 conflict in Lebanon was such a situation. But none of these patterns are present in the war against terror, with the exception of circumstances in which a state sponsoring terrorism is involved. Therefore, the self-defence rhetoric may be inappropriate.

However, in the aftermath of 9/11, the United States and its main ally, the UK, reported to the Security Council invoking Article 51. In the specific case of the 2001 terrorist attacks against the United States, allegations about the responsibility of the Afghan regime might justify the resort to the self-defence doctrine. However, the generalized self-defence rationale for the fight against terrorists is not sufficiently grounded in international law. Some argue it is, rather, an effect of US unilateralism, for it is invoked to rationalize the use of force outside the collective security system.

*c. Attempts to legitimize 'preventive' war*

There is increasing agreement that the inherent right to self-defence is not strictly limited to situations in which an armed attack is already occurring or has occurred. Action in self-defence can also be legitimately taken in the face of imminent peril of an armed attack. However, the Bush doctrine further stretches the *pre-emptive* defence theory, asserting the legitimacy of *preventive* war. Pre-emptive war is a reaction to an arguably imminent and specific threat, though falling short of the 'ongoing armed attack' criterion for self-defence under international law. Preventive war is, on the other hand, a strategy aimed at anticipating merely potential threats. The phrasing of relevant US documents does not make a clear distinction between these terms, and they are used rather interchangeably. Legal scholars underline, however, the importance of the technical differentiation: the lawfulness of pre-emptive war is disputable, but it may be found justified, whereas preventive war, referring to speculative threats, cannot be deemed lawful under the UN Charter and existing customary rules. The war on Iraq launched on 20th March 2003 by the United States-led multinational coalition illustrates the self-proclaimed right to preventive war by the US.

**Terrorism as threat to international peace**

Another effect of the 2001 attacks against the United States was a radical shift in the UN approach to terrorism. While prior to that date the Security Council addressed terrorism sporadically, in relation to specific crises, starting from Resolution 1368 (2001) the Security Council has treated acts of terrorism in general as a threat to peace and security, irrespective of their geopolitical context.

Resolution 1368 (2001) condemned the September 11 attacks and considered that such acts, "like any act of international terrorism", represent a threat to international peace and security. The preamble of the Resolution expresses the Council's determination "to combat by all means threats to international peace and security caused by terrorist acts" and recognizes "the inherent right of individual or collective self-defence in accordance with the Charter".

The emergence of a new, general and abstract threat to international peace and security -the phenomenon of terrorism as such, rather than particular episodes of terrorist violence-, is bolstered by Resolution 1373 (2001) of 28th September 2001. The resolution, adopted by the Security Council under Chapter VII, goes far beyond being a specific response to the al-Qaeda attacks against the United States. In fact, it establishes new rules of international law, prompted by, but not tightly connected to, the September 11 events, requiring states to criminalize certain behaviour and adopt specific anti-terrorist measures. Resolution 1373 was viewed by some as a coercive ratification of parts of the Convention for the Suppression of the Financing of Terrorism adopted on 9th December 1999, not yet in force at that time.

The UN Security Council's new leading role in international action against terrorism was further demonstrated by Resolution 1377 (2001), containing a "declaration on the global effort to combat terrorism". The resolution emphasizes that the acts of terrorism constitute one of the most serious threats to international peace and security and urges states to fully implement Resolution 1373 (2001). Many subsequent resolutions point into the same direction, and it could be argued that the post-September 11 activism of the UN Security Council 'internationalized' the US global anti-terror strategy.

**The problems of defining terrorism**

International counter-terrorism law is elaborated in several conventions concerning the prevention and suppression of specific acts of terrorism (see Box 4). However, attempts to adopt one comprehensive convention centered on a well-defined notion of terrorism, such as the ad hoc Committee established by the General Assembly in 1996, have failed.

The UN Security Council has repeatedly called for states to take action against terrorism, without detailing the notion of terrorist acts. The absence of a universally accepted definition of terrorism encourages states to adopt a definition at their convenience, for instance in order to oppress political adversaries by labeling them as terrorists. Moreover, States have often misused the momentum

of UN calls for anti-terrorist action to adopt disproportionate emergency legislation and legislation restricting human rights.

**Box 5. Terrorism conventions**

1. Convention on Offenses and Certain Other Acts Committed On Board Aircraft (1963)

2. Convention for the Suppression of Unlawful Seizure of Aircraft (1970)

3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971)

4. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973)

5. Convention on the Physical Protection of Nuclear Material (1979)

6. International Convention Against the Taking of Hostages (1979)

7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988)

8. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, (1988)

9. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988)

10. Convention on the Marking of Plastic Explosives for the Purpose of Identification (1991)

11. International Convention for the Suppression of Terrorist Bombing (1997)

12. International Convention for the Suppression of the Financing of Terrorism (1999)

13. International Convention for the Suppression of Acts of Nuclear Terrorism (2005)

See http://untreaty.un.org/English/Terrorism.asp for the text of the conventions and the state of ratification.

Treaty-based human rights monitoring bodies have deplored the manipulative use of the anti-terrorist policy by countries with negative human rights records, purportedly in compliance with Resolution 1373 (2001). The Report of the Counter-terrorism Committee to the Security Council of June 2008 assessing the implementation of Resolution 1373 (2001) reveals concerns for human rights violations regarding infringement on civil liberties and restrictions on individual rights such as the right to a fair trial, freedom from torture, freedom of expression and right to privacy.

Some guidance on the definition of terrorist behaviour was provided to states by Resolution 1566 (2004), which asserted that "criminal acts, including against civilians, committed with the intent to

cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature" (para. 3). This definition focuses on the intent of terrorist acts (intimidating a population or compelling a government to act in a certain manner), and refers to international conventions on terrorism, but is not sufficient to identify actions that can be legitimately criminalized.

## 3. Applicable Law

Post 9/11 counterterrorism encompasses measures adopted by States against foreign citizens, and beyond national boundaries (for instance arrest or detention abroad). In this section we will analyse the restrictions and derogations that the measures developed in the context of the Global War on Terror have imposed over the enjoyment of human rights and what is the legal framework in which such restrictions are articulated. The rights of suspected terrorists are often infringed by Western states on foreign territory, where they can more easily bypass standards they are bound to observe under the scrutiny of domestic public opinion. It is essential, therefore, to emphasize the wide personal and territorial scope of application of international human rights law, in particular:

*a. the irrelevance of nationality for the enjoyment of human rights*

States are bound to respect the human rights of all individuals within their jurisdiction, i.e. over whom they exercise authority, and not only those of their own citizens. For instance, a German citizen held in US police custody has exactly the same rights to humane treatment or judicial protection as a US citizen.

*b. the* extra-territoriality *of human rights law*

A state must observe human rights norms not only on its own territory, but wherever it exercises authority over an individual. Thus, while the United States and its allies were occupying powers in parts of Afghanistan and Iraq, they were bound not only by humanitarian law and customary human rights standards but also by treaty-based human rights provisions.

Let us first turn to the analysis of the circumstances under which rights and freedoms can be restricted, and then to how and when can they be derogated.

**Restrictions under human rights law**

The European Convention on Human Rights (ECHR) (Article 1), and the American Convention on Human Rights (ACHR) (Article 1) explicitly require states to secure the rights and freedoms recognized therein to all persons within their jurisdiction. The Human Rights Committee has also interpreted the UN International Covenant on Civil and Political Rights (ICCPR) in a similar way, even if it does not contain such explicit provision.

Nevertheless, human rights law allows some restrictions to accommodate security concerns. In the general human rights treaties, the articulation of rights is accompanied by 'safeguard clauses' designed to respond to security demands in situations falling short of emergencies (see Box 5 for an example of the usual phrasing). Such safeguard clauses appear in articles securing freedom of movement, freedom of religion, freedom of expression and freedom of assembly.

The restrictions must, however, satisfy certain criteria. They must be provided for by the law, and pursue one of the legitimate aims envisaged by the treaty (rights of others, public order, national security, etc.). As international case-law indicates, in order to be deemed necessary they must be strictly required by, and proportionate to, the achievement of the aim pursued. Further, the right to life, personal liberty and security, humane treatment, and the majority of due process guarantees are not amongst the rights which can be restricted.

**Box 5. Sample text of safeguard clause**

Article 21 ICCPR reads:

"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others".

**Derogations in situations of public emergency**

General human rights treaties allow for the temporary suspension of the exercise of one or several rights (also referred to as *derogation*) in situations of public emergency threatening "the life of the nation" (Article 4 ICCPR, Article 15 ECHR) or "the independence or security of a State Party" (Article 27 ACHR).

Derogations should take place only in exceptional circumstances, where the need to suspend a right is compelling, and the measures must be adopted only to the extent, and for no longer than, strictly necessary. Quasi-permanent states of emergency are impermissible, as are derogations in areas

not related to the emergency. Moreover, derogation measures have to be taken in any event in a manner consistent with the principle of non-discrimination. States cannot use the power to derogate unilaterally, but subject to the supervision of treaty-based monitoring bodies.

There are, however, some rights that States are bound to enforce in any situation, also called *non-derogable rights*. The list of non-derogable rights slightly differs from one treaty to another, but many do coincide, such as the right to protection against arbitrary deprivation of life, slavery, punishment without law, torture and inhuman or degrading treatment. These rights are also protected by *peremptory norms* of international law or *jus cogens* ("compelling law"), i.e. norms accepted by the international community of States as reflecting its highest values, and from which no derogation is therefore permitted under any circumstance.

**Substantive rights concerned**

*a. Arbitrary deprivation of life*

Under treaty-based human rights law, states have two types of obligations: not only are they bound to "respect", i.e. not interfere with, fundamental rights and liberties (*negative* obligations), they are also expected to "ensure" or "secure" such rights, i.e. actively enforce them, and defend them against violations by third parties (*positive* obligations). We shall briefly analyze the implications of these sets of obligations with reference to the right to life.

*Negative* obligations

The obligation to refrain from impairing the fundamental right to life means that States bear responsibility for the use of lethal force during anti-terrorist operations. Such operations must aim at all times at preserving the life of individuals suspected of terrorism. In the fight against terrorism, the use of force employed must be absolutely necessary in order to prevent an attack or effect lawful arrest, and operations must be carefully planned and carried out in such a way as to minimize incidental loss of innocent civilian life. Furthermore, if death or injury occurs when a suspected or convicted terrorist is in state custody, there is a strong presumption of state responsibility. In such cases, the burden of proof is on state authorities, who are expected to provide a satisfactory explanation for the cause of the individual's death.

When the war on terror takes the form of an armed conflict proper, and terrorists can be considered lawful military targets, international humanitarian law does not prohibit deprivation of life. However, the extra-judicial killing of suspected terrorists in circumstances falling short of war constitutes arbitrary deprivation of life, and violates human rights law.

*Positive* obligations

While states normally do not incur responsibility for wrongful acts of private persons, positive human rights obligations require that states exercise due diligence in preventing such acts. This entails, however, only reasonable precautions against possible attacks. On the other hand, states must carry out effective investigations into unlawful killings, such as those arising from terrorist acts, in order to bring perpetrators to justice. In fact, according to the case-law of the European Court of Human Rights, a violation of the right to life may also result from the ineffective investigation, or the lack of investigation, into acts of private violence. Inaction amounts to a procedural violation of the obligations connected to the right to life, as opposed to the substantive violations that occur when the unlawful acts have been actually committed by state agents. The state is considered responsible for both substantive and procedural violations when the authorities fail to investigate an illegitimate use of lethal force by state agents.

*b. Arbitrary deprivation of liberty*

Preventive detention can be longer in the fight against terrorism than normally admitted for ordinary crimes, as human rights treaty monitoring bodies have recognized. However, the deprivation of liberty cannot be arbitrary, and there must be certain procedural safeguards. Detention without charge or access to a judge of persons suspected of participating in terrorist activities is, for the European Court, a violation of Article 5 of the ECHR, which secures the right to liberty. Moreover, according to the Human Rights Committee's *General Comment No. 29*, the norm prohibiting the arbitrary prolonged deprivation of liberty has evolved into a peremptory norm. The multiple forms of violation of the right to personal liberty in the war on terror are illustrated more in detail in Section 4.

*c. Torture as interrogation technique*

The prohibition of torture, inhuman or degrading treatment is a non-derogable provision of general human rights treaties (Article 7 ICCPR, Article 3 ECHR, Article 5.2 ACHR), allowing for no exception under any circumstances. It is also barred by the Torture Convention and two regional conventions, the Inter-American Convention to Prevent and Punish Torture (1985) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987). The prohibition of torture irrespective of the presumed or proven conduct of an individual is among a few uncontroversial peremptory norms of general international law, which cannot be superseded by a conflicting customary or treaty norm.

**BOX 6. Torture, inhuman treatment and ill-treatment**

The European Court of Human Rights differentiated amongst the notions of torture, inhuman treatment and degrading treatment in *Ireland v UK*, of 1978: "torture" means deliberate inhuman treatment causing very serious and cruel suffering; "inhuman treatment or punishment" means infliction of intense physical and mental suffering; "degrading treatment" is ill-treatment designed to arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

No exceptional justifications, such as the need to obtain information to impede an imminent terrorist attack, may be used to circumvent this absolute norm. In the landmark case *Chahal v UK* of 1996, the European Court has insisted that the fight against organised crime or terrorism cannot be invoked as a justification for the ill-treatment of a detainee. Prohibited treatment includes humiliating or brutal techniques of interrogation, and the prolonged regime of detention in extreme conditions (such as solitary confinement or sensory deprivation).

The effects of the international prohibition of torture go beyond the obligation imposed on states not to resort to torture. As found in *Soering v. UK* (1989) and subsequent cases, expelling an individual to a country in which he may be subjected to torture or prohibited ill-treatment also constitutes an indirect violation of this norm. Stressing the unconditional nature of the prohibition against ill-treatment, the European Court has established that a state wishing to deport even an individual found guilty of a serious criminal offence, or constituting a threat to national security, must nevertheless make an independent assessment of the circumstances the individual would face in the country of return. This is explored further in Section 4 in the discussion on extraordinary rendition.

Unlike with many other rights, a state must enforce the right to protection from torture even when an armed conflict is taking place on its territory. This right is articulated in Common Article Three of the 1949 Geneva Conventions (see Box 9 in Chapter 4).

*d. Suppression of due process guarantees*

The principles of due process of law encompass not only the right of terrorism victims to justice, but also the right of suspected terrorists to a fair trial, including an independent and impartial tribunal, the presumption of innocence, the right of the accused to be informed of the charges against him or her, the access to independent legal advice, the non-retroactivity of criminal sanctions (*nullum crimen sine lege*), and the right to be tried within a reasonable time. With reference to the latter aspect, the European Court specified that it is incumbent on the States to organize their legal system in order to ensure that trials can be held within a reasonable time. The principle prohibiting the retrospective application of criminal law is among those provisions of general human rights treaties that do not allow

for derogations. The Human Rights Committee found violations of Article 15 ICCPR (non-retroactivity) when an individual received a significantly more severe criminal sanction than the one specified by the law in force at the time the terrorist offence was committed.

Human rights bodies have often found that special tribunals (such as military tribunals in charge of trying civilian suspects) do not satisfy fair trial guarantees. European cases on court martials have found the trial of civilians by military tribunals inconsistent with the ECHR, particularly where there are close structural links between the executive authorities and the military officers conducting such trials. The jurisprudence of the Human Rights Committee also suggests that tribunals comprising serving members of the armed forces do not ensure the necessary independence and impartiality guarantees.

*e. Disproportionate interference with private life, freedom of expression and association*

The right to private life, freedom of expression and freedom of association can be limited by states in order to protect collective interests, such as public order and security. The actual need for an interference with one of these rights will much depend on the assessment of the states, who enjoy wide margin of appreciation. However, interference must be strictly necessary and proportionate.

International monitoring bodies have upheld freedom of expression even in situations of turmoil and violence. This is particularly the case of political speech, considered to be a cornerstone of democratic society. States may take action against speech inciting people to violence, but the line between legitimate interference with, and unnecessary repression of, free speech is not always clear-cut.

The right to association can also be curtailed for fear of terrorist threats, and not always on lawful grounds. Restrictions on freedom of association can include the dissolution of organisations considered to promote violence and destabilization. However, the dissolution of political parties cannot be decided in the absence of specific evidence of threat or harmful action by such parties, as the European Court found in *United Communist Party v Turkey* case (1998).

*f. Restrictions on the rights of aliens*

The absolute prohibition of torture, even in cases involving terrorist acts, has a direct impact on States' duty of *non-refoulement*: as explained above, a person cannot be extradited or expelled to a country where there are serious grounds for fearing that the person will be subjected to ill-treatment. This principle, upheld by international case-law, is explicitly stated in the Convention against Torture (Article 3), in the American Convention on the same matter (Article 13) and the Charter of Fundamental Rights of the European Union (Article 19). Recently the European Court has suggested in *Mamatkulov v Turkey* (2007) that not only the risk of torture, but also the risk of a "flagrant denial of justice" (i.e. a significant

violation of fair trial rights) may bar extradition. A risk in the war on terror is that, in expulsion proceedings and asylum proceedings, guarantees might not be strictly observed.

## 4.Contentious Issues after 9/11

Spatial limitations do not allow for a broad comparative account of anti-terrorism policies. However, we examine here US practice, particularly relevant for several reasons: the links between the conceptual origins of the 'war on terror' and US advocacy, the global dimensions of alleged US abuses, the mixed – domestic and international – policy areas where human rights are at stake, and the multiple court cases available.

### The erosion of civil liberties: the USA Patriot Act (2001)

The *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* – USA PATRIOT Act –, adopted by the US Congress in the fall of 2001, contains many controversial provisions on the expansion of police and prosecutorial powers. A key concern is the apparent inconsistency of the act with constitutionally guaranteed civil rights, as the use of 'National Security Letters' allows the Federal Bureau of Investigation (FBI), without a court order, to require institutions and agencies (as may be hospitals, banks, libraries, businesses, car rental agencies, phone companies, internet providers etc.) to reveal the personal records of their customers. The introduction of home searches with delayed notification to affected individuals may also involve an infringement upon the right to privacy. Further, many have been critical of the creation of a Fingerprint Identification System for the recognition of foreign nationals before issuance of a visa to them, or permitting them entry to or exit from the United States.

One of the most contentious provisions of the Patriot Act involves indefinite detention without charge of foreigners suspected of being connected to terrorism or representing a threat to national security. The act provides for mandatory detention until removal from the United States of an alien certified by the Attorney General as a suspected terrorist or a threat to national security. A person may be held up to seven days without charges, after which removal proceedings or charges must be instituted, or the person must be released. However, after removal proceedings have been initiated, a non-national whose removal is "unlikely in the reasonable foreseeable future" may be detained indefinitely if the Attorney General considers that his or her release will "threaten the national security of the United States or the safety of the community or any person". This provision may apply, with adverse consequences, to stateless individuals, to individuals who cannot be removed because their country of origin will not accept them, or who cannot be deported because they would face torture if

returned to their country. Amnesty International has argued that US practice is inconsistent with international procedural guarantees aimed at protecting people from arbitrary or wrongful deprivation of liberty.

**Treatment of suspected terrorists**

*1. The status of "enemy combatant" and "unlawful combatant"*

a. The indefinite arrest without charges of US citizens

The Bush administration classified hundreds of foreigners and some US citizens as "enemy combatants", a notion covering members or affiliates of Taliban or al-Qaeda forces engaged in, or supporting, hostilities against the United States or its allies. This qualification allows the US authorities to hold individuals without access to counsel and without charges or trial for the duration of the war on terrorism, which actually means for an indefinite duration. However, if the war on terror is construed as an armed conflict, the legal status of any person under detention should correspond to one of the categories recognized by international humanitarian law, either injured combatants, prisoners of war, or civilians under occupation, each category being entitled to the protection afforded by the relevant Geneva Convention.

The extensive use of this designation by the US administration creates a deplorable exception to the guarantees of criminal justice, as anyone can be seized, far from any recognizable battlefield, and detained indefinitely upon unverified allegations by US or other governments. As the famous Padilla case shows (see Box 7), when applied to US nationals, the "enemy combatant" qualification leads to the arbitrary curtailment of their constitutional rights.

**Box 7. The Padilla case**

A well-known example of arrest and detention of US citizens as "enemy combatants" is that of José Padilla. Padilla was born in Brooklyn, New York, in 1970, and grew up in Chicago since the age of 5. He converted to Islam after a tumultuous adolescence, which saw him involved in street gang activity, resulting in an extensive criminal record for gun and assault charges. In May 2002, on his return home from overseas travelling, to Egypt, Saudi Arabia, Afghanistan, Pakistan, and Iraq, he was arrested on suspicion of planning to build and explode a radioactive "dirty bomb" in the United States. Initially arrested on a material witness warrant, he was shortly after declared an enemy combatant by a

memorandum issued by President Bush, and transferred from the Department of Justice to the custody of the Department of Defence, which detained him without formal charges at a military naval prison in Charleston, South Carolina. The transfer occurred without any notice whatsoever to his attorney or to his family. According to the memorandum, Padilla had engaged in hostile and war-like acts, was closely associated with al-Qaeda, with which the US was "at war", and represented a grave danger to US security. Overruling the December 2002 decision of the district court petitioned by Padilla's attorney for a writ of habeas corpus, the Second Circuit Court of Appeals found in its December 2003 decision (*Padilla v Rumsfeld* ) that the President did not have the constitutional authority to detain US citizens on US soil outside a zone of combat, insofar as the power to curb civil liberties in times of crises (such as the suspension of the right to habeas corpus) lied with the Congress, and that Padilla should be released from military custody and tried by a civilian court. His case was moved to a civilian court, and in 2008 he was eventually sentenced to 17 years and 4 months in prison for criminal conspiracy, paradoxically a different crime than the one originally alleged for his arrest and detention.

US courts have challenged the legitimacy of detention without trial of American "enemy combatants" as an exercise of the president's war powers. In the June 2004 *Hamdi v Rumsfeld* decision, the US Supreme Court established that members or supporters of hostile forces in Afghanistan could be lawfully detained as "enemy combatants", a category whose recognition was loosely based on international humanitarian law; however, citizen-detainees were still entitled to their constitutional right to be informed of the factual basis for detention and contest it before an independent decision-maker. The *Hamdi* case presents significant analogies with the *Padilla* case, although the suspect was initially seized in Afghanistan (therefore on a battlefield) by the Northern Alliance, a group opposed to the Taliban and allied with the US-led coalition. The court relied on international humanitarian law when it established that detention may not last longer than active hostilities, and emphasized that indefinite detention for interrogation purposes is not allowed. The court rejected the government's claim that an "enemy combatant" had no right to a hearing in order to challenge this status. Taking into consideration the risk that Hamdi might be erroneously deprived of liberty, the plurality in *Hamdi* stressed that "a citizen 'shall not be deprived of life, liberty, or property, without due process of law', pursuant to the Fifth Amendment to the US Constitution; not even a decision of the President has the authority to supersede that provision". However, the plurality opinion provided for a rebuttable presumption in favour of the government's evidence in the proceedings, and accepted the use of a military tribunal rather than a court hearing. The *Hamdi* ruling left unclear the status of "enemy combatants" held prisoners in the broader "war on terrorism" outside the Afghanistan context.

It has been suggested that the resort to "enemy combatant" classifications actually concealed a desire by the executive branch to avoid judicial oversight, and its reaction to the *Hamdi* decision seemed

to confirm it. Instead of allowing Hamdi to challenge his detention in court, the US administration surprisingly decided that he no longer represented a threat to national security. He was flown to Saudi Arabia after he denounced his US citizenship, as a condition for his release.

**Box 8.** ***Hamdi v Rumsfeld*** **(U.S. Supreme Court, June 28, 2004)**

"Striking the proper constitutional balance here is of great importance to the nation during this period of on-going combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad".

"The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action".

"It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties […] which makes the defense of the nation worthwhile".

b. Guantanamo Bay detainees and the "no law" zone

The restrictive, and largely disputed, interpretation of the 1949 Geneva Conventions by the US administration placed the individuals captured in the "war on terrorism" and detained at Guantanamo Bay – allegedly Taliban and al-Qaeda members – in what was described as a "legal black hole". In a memorandum of 7th February 2002, President Bush denied the status of prisoner of war (the protection afforded by the Third Geneva Convention) to both categories: to al-Qaeda members because al-Qaeda was not a contracting party to the Geneva Conventions, and to the Taliban insofar as it unilaterally classified them as *unlawful combatants*.

The Bush administration analysis does not appear consistent with international humanitarian norms. Since an international conflict between the US and Taliban-led Afghanistan was in progress at that time, Taliban soldiers did qualify as prisoners of war (POW) under Article 4 (A) (1) of the Third Geneva Convention on the treatment of prisoners of war, in their capacity as "members of the armed forces of a party to the conflict". It must also be noted that many of the Guantanamo Bay detainees were captured outside zones of armed conflict, and many alleged they were erroneously arrested.

According to the Geneva provisions, persons suspected of having committed a belligerent act must be treated as prisoners of war until a "competent tribunal" clarifies their status (Article 5). American authorities did not comply with the requirement in this provision when they refused to bring the inmates before a tribunal, and subjected them to long-term arbitrary detention. Also, former Afghan soldiers of the Taliban army have not been repatriated once "active hostilities" have ended (in June 2002, after the installation of US-friendly Karzai government), despite the explicit provision of the Third Geneva Convention requiring it (Article 118). Granting POW status to Taliban soldiers would not have prevented US authorities from interrogating or prosecuting them for terrorist acts or war crimes, nor would it have impeded detention without charge for the limited duration of the military conflict.

Conversely, al-Qaeda members did not belong to the regular forces, nor to paramilitary forces (militia and volunteers corps) having a responsible chain of command, wearing a distinctive sign, carrying arms openly and conducting operations in accordance with the laws and customs of war (requirements of Article 4 A (2) of the Third Geneva Convention). They could therefore be considered *unlawful* or *unprivileged combatants*, i.e. civilian belligerents not allowed to conduct hostilities, and therefore not protected from prosecution for engaging in the armed conflict, nor eligible for POW status in the event of capture. However, al-Qaeda members not aligned with the Taliban are protected by Article 5 of the Fourth Geneva Convention, which specifies that civilians suspected of activity hostile to the security of the territorial state or occupying power are entitled to the same treatment as civilian noncombatants, and may only forfeit the right of communication (if absolute military security so requires); the Convention specifically stresses that they cannot be deprived of fair trial rights.

The practice of indefinite detention without charge of terrorist suspects in the "law-free zone" of Guantanamo, for the alleged purpose of assessing evidence against them, was criticized by the US Supreme Court. In the *Rasul v Bush* decision of 29th June 2004 the court ruled that foreign detainees at Guantanamo Bay had the right to challenge the lawfulness of their detention, filing a petition for a writ of *habeas corpus* (judicial mandate ordering that a person under detention be brought to court so that it may be determined whether or not they are lawfully imprisoned, and whether or not they should be released from custody) (see Box 9). After the Supreme Court's decision in *Rasul*, the U.S. administration established the Combatant Status Review Tribunals, panels made up of three military officers with the mandate to review the factual information for the enemy combatant classification of Guantanamo inmates. The July 2004 memorandum establishing these military tribunals allowed for the detainees to be present at the proceedings, but did not confer the right to counsel, access to classified evidence or to sources of allegations against them. As emphasized below, the special military tribunals have subsequently been challenged in domestic courts.

**Box 9. *Rasul v Bush* (US Supreme Court, June 28, 2004)**

"Consistent with the historic purpose of the habeas corpus writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace. The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

"Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in Eisentrager v. Forrestal. […] Petitioners in these cases differ from the Eisentrager detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. Not only are petitioners differently situated from the Eisentrager detainees, but the Court in Eisentrager made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' constitutional entitlement to habeas corpus. The Court had far less to say on the question of the petitioners' statutory entitlement to habeas review."

*2. Military Commissions trials for non-US terrorism suspects*

Military commissions designed to try aliens charged with terrorism were first set up pursuant to President Bush's Military Order of 13th November 2001 ("Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism"). The operation of these commissions is primarily regulated by the Military Commission Order No. 1 issued by the US Department of Defense on 21st March 2002, which set forth the guidelines on membership, procedures, admissibility of evidence, procedural safeguards for defendants, and review.

The military commissions have been widely criticized for failing to meet basic fair trial guarantees. They allow the use of coerced evidence and hearsay, and place restrictions on the ability of military and civilian defense counsel to present an effective defense. Further, unlike US courts-martial, against whose decisions individuals can appeal to the US Court of Appeal for the Armed Forces (a civilian court outside the control of the executive), and ultimately to petition the US Supreme Court, the commissions regulations permit appeal only to another military panel whose members answer to the US

President. There is an obvious risk of undue political influence, and the commissions do not satisfy the minimum requirement of an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, prescribed by Article 75 of the First Additional Protocol to the 1949 Geneva Conventions. The US never ratified the Additional Protocols, but this provision binds them insofar as it is declaratory of customary law. Moreover, according to Article 102 of the Third Geneva Convention, detainees entitled to be considered as prisoners of war cannot be validly sentenced unless the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the detaining power; the clear double standard created by the establishment of these 'special' commissions is not consistent with this provision. In *Hamdan v Rumsfeld* (2006), the US Supreme Court held that the Bush administration did not have authority to set up particular military commissions to try Guantanamo Bay detainees without Congress authorization, insofar as their structure and procedures violated both the Uniform Code of Military Justice and the four Geneva Conventions.

The Military Commissions Act of 2006 adopted in response to the *Hamdan* decision retained many aspects of the Bush administration's counter-terrorism policy, such as the President's authority to classify individuals as unlawful enemy combatants, and deny them the protection of both the US Uniform Code of Military Justice and the Geneva Conventions, or the denial of the federal courts' jurisdiction to review claims of wrongful detention or abuses brought by the inmates.

In the the *Boumediene v. Bush* decision of 12th June 2008, the US Supreme Court found that the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 fail to provide appropriate *habeas corpus* protection, and it recognized the right of Guantanamo prisoners to challenge their detention in civilian courts. The majority decision found that the constitutionally guaranteed right of *habeas corpus* review does apply to persons held at the naval base of Guantanamo and to persons designated as enemy combatants. According to the Court, if Congress intends to suspend the right, an adequate substitute must be offered to prisoners providing them with an effective opportunity to demonstrate their detention is due to an erroneous application or interpretation of relevant law; the reviewing decision-maker must have the ability to redress errors, to assess the sufficiency of the evidence relied on by the executive, and to consider any relevant exonerating evidence.

*3. Extraordinary renditions, secret detention facilities, and torturous interrogation*

The US administration has often resorted to so-called *extraordinary renditions*, effectively outsourcing the interrogation of suspected terrorists to foreign countries which may engage in torture. The practice involves the secret seizure of persons from US or foreign soil and transfer to overseas detention facilities outside ordinary legal avenues (deportation, extradition). The individuals concerned

do not have an opportunity to contest their detention; they are held incommunicado, subjected to ill-treatment, and sometimes executed. Secret US detention facilities abroad, beyond the reach of the law, or international independent scrutiny, are the location of multiple violations, such as arbitrary deprivation of liberty, subjection to torture, cruel, inhuman or degrading treatment, suppression of procedural safeguards, and even arbitrary deprivation of life. Suspects are held for extended periods of detention without access to legal counsel, review of the grounds for detention, or supervision by the International Red Cross or other organizations monitoring respect for human rights.

The use of torture in the war on terror became notorious after the publicity surrounding the revelation of abuses on prisoners in the Abu Ghraib prison in Iraq in 2004. Also, "stress and duress" interrogation techniques have apparently been used in Afghanistan at the US air force base in Bagram (north of Kabul). Detailed press accounts indicate the use of techniques such as prolonged hooding, standing while handcuffed to the ceiling, sleep deprivation, confinement in painful positions. While falling short of torture, these techniques amount to cruel, inhuman and degrading treatment prohibited by a peremptory norm of international law, as explained in Section 3.

## 5. Global dimensions of counter-terrorism

### UN and EU financial sanctions against alleged terrorists

The UN Security Council has increasingly used the power to resort to non-military sanctions conferred by Article 42 of the UN Charter in order to impose measures against specific individuals rather than states. After the events of September 11, financial sanctions were aimed at the al-Qaeda network and its supporters as such, with no reference to the attacks on the US or to the Afghan regime (Resolution 1390 (2002)). This broad and indeterminate objective may lead to the inclusion of innocent individuals on the proscription list. Such list is drawn up by a subsidiary organ of the Security Council, the Sanctions Committee, on the basis of information and requests advanced by member states, in accordance with often unverifiable intelligence information. Until recently, a designated individual could be removed from the list only if the state of nationality or residence was willing to seek cancellation through bilateral consultations with the designating state or addressing the Sanctions Committee. The possibility of direct individual requests for de-listing addressed to the Sanctions Committee has been subsequently provided for by Resolution 1730 (2006). However, the process for seeking the removal of a name from the list still depends on the willingness of the states in the Committee to re-examine the case, and continues to be based on political negotiation rather than on independent third-party control.

The mechanism arguably entrenches upon the right to a fair trial, the right to peaceful enjoyment of property, and to an effective remedy. Individual claims have started to be filed with

national and regional courts for human rights violations. Until recently, the case-law of European Community courts on EU legislation that incorporates UN proscription lists has not offered significant judicial protection of suspects' rights in the face of Security Council counter-terror (*Yusuf and Al-Barakaat* and *Kadi* decisions of September 2005, *Ayadi* and *Hassan* decisions of July 2006). The Court of First Instance stated that UN Charter obligations, and, consequently, Security Council's binding resolutions, prevail over any other international obligations. Therefore, according to the court, such resolutions, but also the EC legislation adopted in order to give effect to the former, cannot be submitted to the judicial review of the EC jurisdictional bodies, with the extremely limited and unlikely exception of *jus cogens* violations.

However, the *Kadi* appeal judgment issued by the Court of Justice of the European Communities on 3rd September 2008 introduced a major shift. The court stated that the EC must ensure the consistency of any piece of legislation – including EC acts implementing Security Council decisions – with the fundamental principles of EC law, which comprise the respect for individual rights and liberties. The Court emphasized this was particularly important in the absence of effective UN remedies, as the re-examination procedure open to blacklisted individuals does not ensure the guarantees of judicial protection.

**Obligations of states when acting under Chapter VII**

The 2006 *Al-Jedda* case before the London Court of Appeal illustrates the reluctance of domestic courts to monitor the action of states when holding terrorist suspects within an operation authorized by the UN Security Council. This deference relies on Article 103 of the UN Charter, which indicates that in the event of a conflict between the obligations of member states under the charter and their obligations under any other international agreement (such as human rights treaties), the former are to prevail. Charter obligations are given broad meaning, encompassing binding Security Council decisions, that Member States agreed to accept and carry out under article 25 of the UN Charter.

The plaintiff was a dual British and Iraqi national who had travelled to Iraq, where he had been arrested and detained by British forces on the grounds that he was suspected of membership of a terrorist group, and of terrorist activities. No evidence to support this claim was given and no intention to press criminal charges was presented. British forces were part of a multinational force which was acting under the authority of Resolution 1546 (2004) adopted by the Security Council under Chapter VII. By that resolution, the Security Council gave the multinational force "authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq", and according to one of the letters annexed to the resolution, the force might undertake internment where "necessary for imperative reasons of security". During the proceedings, the Secretary of State contended that the UN Charter and

Resolution 1546 imposed an obligation on the UK to detain Al-Jedda which prevailed over the latter's conflicting right under Article 5.1 of the ECHR to be promptly brought before a judge after arrest. Conversely, the plaintiff argued that the resolution at most authorized the UK to take action to detain him but did not oblige it to do so, and thus there was no conflict within the meaning of Article 103. The London court found, however, that the "obligations" in Article 103 were not to be construed narrowly, and thus the authorized action was also to be regarded as compulsory.

In its December 2007 judgment on Al-Jedda's appeal, the House of Lords confirmed that the detention was not contrary to the right to liberty under Article 5.1 of the ECHR (and under the Human Rights Act 1998), because the application of that provision was restricted by virtue of the operation of Articles 25 and 103 of the UN Charter. Though the UK did not have the obligation to detain the plaintiff specifically, it was bound to exercise its power of detention wherever necessary for imperative reasons of security. Therefore, the UK could lawfully exercise the power to detain authorized by the Security Council, although it had to ensure that the detainee's rights under Article 5 were not infringed to any greater extent than was inherent in such detention.

As this judicial outcome shows, when States adopt counter-terrorism measures under the authorization of Chapter VII resolutions, they have almost unconstrained discretion not to enforce internationally recognized human rights.

## 6. Conclusions

Balancing human rights and security is one of the major challenges of post September 11 anti-terrorism, nationally and internationally. A great danger of the 'war on terror' rhetoric is that it attempts to justify the suspension of some rights protected by international human rights law without observing the legal protection deriving from the international humanitarian law, which eventually means that neither set of norms is fully acknowledged. The longer-term resort by states to derogations from human rights motivated by the war on terror reduces civil rights and liberties standards and may have negative effects on the rule of law, on democratic institutions, and on the public administration of justice.

**For Discussion:**

i. What is the status of terrorists and terrorist acts under international law?

The correct assessment of the lawfulness of anti-terrorism measures, including from the viewpoint of their consistency with human rights and/or humanitarian law, largely depends on the understanding of the exact legal framework of the "war on terror", and on the classification of the parties to it under international law.

**Key questions:**

- How would you qualify the September 11 terrorist attacks: individual crimes, or acts of war?
- Can a State be at war with a terrorist group or a transnational criminal organization?

ii. What is the relationship between security and fundamental rights?

The global war on terror has prompted the view that security and human rights are necessarily antagonist goals, and that the former should prevail over the latter. Nearly a decade after the inauguration of post 9/11 counter-terrorism, it is important to reconsider their relationship and inquire how far we are ready to compromise human rights in the pursuit of security.

**Key questions:**

- Is the curtailment of human rights indispensable to combat terrorism?
- Should harsh treatment falling short of torture be permitted in order to prevent imminent huge loss of life?
- From the viewpoint of the citizenry, is the renouncement at some civil liberties desirable for increased personal security?

iii. What is the applicable law?

The war on terror is significantly different from traditional international and internal conflicts, which constituted the factual background for the development of current international law. The existing norms of international law might not be apt in the fight against terrorism of global reach, or might need to be reinterpreted and adapted.

**Key questions:**

- Is international law adequately equipped to address the new challenge of international terrorism?
- Should humanitarian law apply to captured terrorists, and if so how?

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