

ON THE JURISPRUDENTIAL SIGNIFICANCE OF THE EMERGENT STATE PRACTICE CONCERNING FOREIGN NATIONALS MERELY SUSPECTED OF INVOLVEMENT WITH TERRORIST OFFENCES

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ABSTRACT

This article examines emergent state practice of European States concerning foreign nationals that are merely suspected but not charged with involvement with terrorist offences, including deportation to destinations where they risk torture, inhuman or degrading treatment or punishment – usually their own country of origin, contrary to the foremost rules of international human rights law. The article attempts a rule of law analysis with a view to evaluating the difficulty posed for States by the absence still of alternative mechanisms for ensuring both the national security interest on the one hand, and on the other, the human rights interest of terrorist suspects. The article argues that sustainable counter-terrorist strategies will be distinguished and characterised by their insistence on the recognition, promotion and protection of the dignity inherent in all individuals – including terrorist suspects whether or not they have been charged with terrorist offences. This calls for the urgent development of human rights steered national security policies that prioritize the recognition, promotion, protection and reinforcement of the dignity inherent in all individuals. Such policies will have at their core, strategies for the efficient resolution of the question of how best to deal with the individuals that are ‘merely suspected by States agents’ of involvement in terrorist offences, particularly foreign nationals. The article examines jurisprudence arising from cases involving among others the UK, Italy, Sweden, Spain, the Netherlands and France and shows a worrying appetite by these pro-democracy States to minimize human rights protection of terrorist suspects as a means of progressing the fight against international terrorism. This approach contradicts the international

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paradigm of over six decades whereby the establishment and maintenance of international peace and security was premised on human rights. The article advocates the development of human rights steered policies and strategies to deal with foreign nationals suspected of involvement with international terrorism.

Keywords: terrorism; human rights; torture; deportation with assurance

§1. INTRODUCTION

Future generations of legal historians will scarcely believe that Member States of the European Union that for the most part of the twentieth century had premised their alliances first and foremost on the recognition, promotion and protection of the dignity inherent in individuals as human beings, the rule of law, and democracy¹ had suddenly, and in reaction to the growing threat of international terrorist attacks² on civilians on their territories and abroad, begun individually and collectively to:

- (i) Challenge the sustainability of human rights guarantees, particularly to individuals that are merely suspected but not charged with involvement in terrorist offences.³
- (ii) Forge new alliances as a means of fighting international terrorism, with autocratic States reputed to use torture, inhuman and degrading treatment against their opponents.⁴
- (iii) Challenge and revoke fundamental tenets of the rule of law by resort to arbitrary arrest and indefinite detention without charge.⁵

¹ The preamble to the UN Charter bases the Organization on the recognition, promotion and protection of human rights. United Nations Charter (UNC) 26 June 1945, San Francisco, UKTS 67 (1946) Cmd. 7015; 1 UNTS xvi.

² Examining the political challenges provoked by recent terrorist attacks, including attacks on the London Underground on 7 July 2005 and on New York's Trade Centre on 11 September 2001, see Chigara, 'To discount human rights and inscribe them with *fakeness* and unreliability, OR to uphold them and engrave them with integrity and reliability? – experiences in the age of international terrorism', 25 *Nordic Journal of Human Rights* 1 (2007), 1.

³ See the decision of the Grand Chamber in *Kadi v Council & Commission (Common Foreign & Security Policy)* [2008] EUECJ C-402/ examining the sustainability of EC Regulations incorporating UN Security Council counter-terrorist measures that are inconsistent with European Convention fundamental rights of individuals.

⁴ See e.g. Italy and Tunisia's arrangements discussed in *Saadi v Italy*, Application No. 37201/06, Grand Chamber decision of 28 February 2008.

⁵ See Chigara, 'The unfinished business of human rights protection and the war on terror', 13 *Asian Yearbook of International Law* (2007), 3. See also *A & Others v. Secretary of State for the Home Department*, [2004] UKHL 56.

A number of alarming recent developments support these observations. As an intervening party in *Saadi v. Italy*⁶ the UK Government had urged a review of the absolute ban on torture and coercion under ECHR law.⁷ Further, the UK had also queried the universality of the guarantees to the presumption of innocence until proven guilty, and the right to individual freedom against terrorist suspects.

By Section 21 of the Anti-terrorism, Crime and Security Act 2001 the UK Government had empowered the Home Secretary to *certify* the indefinite detention without charge of foreign nationals that were perceived to be a risk to national security. Nonetheless, *certified* persons could go free at anytime that they elected to leave the United Kingdom altogether.

In *A & Others v. Secretary of State for the Home Department*⁸ nine certified detainees had challenged the lawfulness of their detention. They had contended *inter alia* that their detentions were inconsistent with the UK's obligations under the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998 and that, the statutory provisions under which they had been detained were demonstrably incompatible with the Convention. The judgment observed that: 'The power which the Home Secretary seeks is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom. A power of detention confined to foreigners is irrational and discriminatory. Such a power in any form is not compatible with our constitution.'⁹

In *Kadi v Council & Commission (Common Foreign & Security Policy)*¹⁰ the Governments of Spain, France, The Netherlands, the United Kingdom and the Commission of the European Communities had all supported the Council of the European Union in its opposition to the appellants' main argument that neither the Member States of the European Community nor the institutions of the Community were immune from judicial review of the European Court of Justice.¹¹

These and related developments in the practice of European Community Member States stand in stark contrast to their previous reputation as mutual harbingers and arch-protagonists in the development of the requirement of the rule of law, and of international human rights law until this point.

Through a systematic examination of recent cases involving among others the Governments of the UK, Italy, Sweden, Spain, the Netherlands and France this article

⁶ *Saadi v Italy*, Application No. 37201/06, Grand Chamber decision of 28 February 2008. See also de Londras, ASIL Insights at www.asil.org/search.cfm?displayPage=351 (last accessed 15 November 2009).

⁷ See also Declaration of the United Kingdom of 18 December 2001, registered by the General Secretariat of the Council of Europe on 18 December 2001, available also at <http://hei.unige.ch/~clapham/hrdoc/docs/UKderogechr18dec2001.html> (last accessed 27/02/08).

⁸ [2004] UKHL 56 (16 December 2004).

⁹ [2005] 2 W.L.R. 87 per Lord Hoffman, paras. 86 and 97.

¹⁰ [2008] EUECJ C-402/05 (03 September 2008).

¹¹ *Ibid.* para. 81.

reveals a worrying tendency of States to minimize human rights protection of terrorist suspects as a means of progressing the fight against international terrorism. This approach contradicts the international paradigm for the establishment and maintenance of international peace and security. The article advocates the development by governments of, and the persistent insistence by the judiciary, on human rights centred policies and strategies for dealing with foreign nationals suspected of involvement with international terrorism.

§2. JURISPRUDENTIAL ANALYSIS ON EMERGENT STATE PRACTICE ON TREATMENT OF TERRORIST SUSPECTS

A. *BY V SECRETARY OF STATE FOR THE HOME DEPARTMENT*¹² [2008] (*BY*)

In this appeal to the UK Special Immigrations Appeals Commission *BY* had challenged the Home Secretary's decision to obstruct his right to free movement from Germany to the United Kingdom as the spouse of an EEA national under Regulations 9 and 12 of the Immigration (European Economic Area) Regulations 2006. The Home Secretary's decision had been countenanced by references to national security concerns emanating from *BY*'s membership and involvement with BK – an active terrorist organisation whose declared objective is described as the establishment of an independent state of Khalistan, by all means, including terrorism.¹³

Section 3 of the Terrorism Act 2000 had proscribed BK in the United Kingdom since February 2001. However, BK had not been proscribed in Germany¹⁴ – the country that had previously granted *BY* asylum.¹⁵ Nonetheless, EC Regulation 2580/2001 of 27 December 2001 had required Member States to freeze BK assets because of its terrorist activities.

The decision in *BY* resolves the uncertainty created for individuals by the promulgation of powerful EC Directives¹⁶ that are said to be both Community Law-amending and Community Law-consolidating¹⁷ in the light of Member States' ability to circumvent such obligations by doing one of two things, or both.

The first of these is the invocation of the binary opposition that distinguishes between civil rights obligations on the one hand, and public law rights on the other. The labelling of EC Directive obligations as public law rights has the effect of subordinating those

¹² [2008] UKSIAC 65/07 Decision of 07 November 2008.

¹³ *Ibid.* para. 16.

¹⁴ *Ibid.* para. 16.

¹⁵ *Ibid.* para. 1.

¹⁶ See e.g. Directive 2004/38/EC on the right of every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States. The same right should be granted to their family members, irrespective of nationality.

¹⁷ *Ibid.* para. 6.

same obligations to prerogative measures of the sovereign.¹⁸ This makes them weaker than previously imagined of measures with 'direct effect' on the territories of Member States.

The Commission has qualified the freedom of movement within the EEA as a public law right. The Commission stated that:

Control of the boundaries of a Member State is just as much 'part of the hard core of public authority prerogatives,' identified by the Strasbourg Court in *Ferrazzini v Italy*, when applied to EEA nationals as to aliens. In the case of the latter, it is firmly established that decisions regarding the entry, stay and deportation of aliens do not concern the determination of civil rights, any more than of a criminal charge: *Maaouia v France*. There is a clear distinction between deprivation of a right of residence or abode in the territory of a Member State resulting from the refusal of entry and the interference with the right of an individual to live at a particular place within a Member State of the kind which may be imposed by a control order: a decision on the latter may well involve determination of a civil right, in particular if the result of State action is to prevent an individual from living in a property which he owns or which he has the right to occupy. Not so where the prohibition on residence is general throughout the territory of the Member State.¹⁹

Generally, EC Directives are understood to be binding upon Member States.²⁰ According to the European Parliament, directives are binding 'as to the result to be achieved, upon each Member State to whom they are addressed. However, the national authorities are left the choice of form and methods to achieve their objectives. Directives may be addressed to individual, several or all Member States. In order to ensure that the objectives laid down in directives become applicable to individual citizens, an act of transposition by national legislators is required, whereby national law is adapted to the objectives laid down in directives. Individual citizens are given rights and bound by the legal act when the directive is incorporated into national law.'²¹ Nonetheless, distinguishing between public law rights-creating EC Directives, on the one hand, and civil rights-creating EC Directives, on the other, has the potential to generate expectations of direct applicability that Member States can subsequently sideline by merely tipping a Directive into the former category thus making it subject to the sovereign's prerogative orders. In such a case, unless the public law rights envisaged by the EC Directive are consistent with the corresponding sovereign prerogative orders (a situation which makes disputes inconceivable) the promulgation of law-amending and or, law-consolidating EC Directives can create great expectations that may not after all materialise.

¹⁸ Ibid. paras. 11 and 13.

¹⁹ Ibid. para. 11.

²⁰ See especially Raito, J, *The Principle of Legal Certainty in EC Law*, (Kluwer 2003). 83.

²¹ See Sources and scope of Community Law, European Parliament Fact Sheets, European Parliament website available at www.europarl.europa.eu/factsheets/1_2_1_en.htm (last accessed 11 December 2009).

The second is the simple invocation by States Parties of claw-back clauses similar to those present in Chapter VI of EC Directive 2004/38. The Directive confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States.²² Further, the Directive designates the free movement of persons as a core freedom of the internal market that was intended to have no internal frontiers.²³ Even more, “The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be granted also to their family members, irrespective of nationality...”²⁴

However, Article 27 authorizes Member States parties to restrict freedom of movement and residence *inter alia* on the grounds of public security. In the current climate in which national security appears to be gaining priority over human rights as the dominant driver of the criminal justice system, this caveat appears to have become a licence for States to test the strength of the judiciary’s commitment to human rights.

Where the Home Department authorizes the limitation of a person’s right to freedom of movement and residence on grounds of national security, the individual’s only recourse in law is to challenge the proportionality of the limitation imposed against their claim. Article 27.2 requires measures taken on grounds of public policy or public security to comply with the principle of proportionality, based exclusively on the personal conduct of the individual concerned. Previous criminal convictions do not in themselves constitute grounds for taking such measures. Moreover, the ‘personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on consideration of general prevention are unacceptable.’²⁵

BY’s appeal had raised the question of the applicability of EC Directive-driven public law rights where sovereign prerogative orders enabled different outcomes. In a ruling of 7 November 2008 the UK’s Special Immigrations Appeals Commission (UK Commission) dismissed the appeal on the grounds of the limitation permissible under Article 27 of EC Directive 2004/38 which deals with the primary and individual right to move and reside freely within the territory of the Member States.

The UK Commission also found that the EC Directive 2004/38 created public law rights that were subject to sovereign prerogative rights that take priority over public law rights. The case is also authority for the proposition that an individual cannot be a threat to national security of the State of abode or intended abode, and hope to benefit from EC Directive public law rights. Sovereign prerogative rights will prevent this even if the limitation clauses in the relevant EC Directive fail to achieve that.

²² Preamble, para.1.

²³ Ibid. para. 2.

²⁴ Ibid. para. 5.

²⁵ Ibid. Article 27.2.

Even more, the UK Commission stated that *BY*'s membership in an organisation that posed a national security threat to India was sufficient grounds for denying him the EC Directive 2004/38 public law primary and individual right to move and reside freely within the territory of the Member States. It stated that:

For the reasons set out in the Closed Judgment, we are satisfied on balance of probabilities that *BY* has been and remains an active participant in the affairs of *BK*. As such, he poses a genuine and sufficiently serious threat affecting a fundamental interest of the United Kingdom namely its public security. It is immaterial that *BK* has not committed a terrorist act within the United Kingdom and may never do so. It does, however, promote and commit acts of terrorism in India. For the reasons explained in paragraphs 33 – 41 of the Judgment of Lord Woolf in *Home Secretary v Rehman* [2003] 1 AC 153, the national (and public) security of the United Kingdom is also put at risk by support for and the commission of terrorist acts abroad.²⁶

B. *KADI V COUNCIL & COMMISSION*²⁷ [2008] JOINED CASES C-402/05
AND C415/05

The joined cases²⁸ of Yassin Abdulla Kadi, a resident of Jeddah, Saudi Arabia, and the Al Barakaat Foundation, established in Sweden, had challenged the legality of EC Regulations for ensuring compliance with Security Council Resolutions adopted under Chapter VII of the UN Charter.²⁹ The Resolutions imposed *inter alia* certain specific restrictive measures against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network, and the Taliban. On 8 March 2001 the Sanctions Committee had published its first consolidated list of affected entities pursuant to Security Council resolutions 1267 (1999) and 1333 (2000).³⁰

In particular, Mr. Kadi and Barakaat had both sought the annulment of Regulation No. 467/2001 that contains in Annex I a list of persons, entities and bodies affected by the freezing of funds imposed by the Regulation.³¹ Individually, Mr Kadi had sought the annulment also of EC Regulation No.2062/2001 that had amended for the third time the Sanctions Committee's Annex I (Regulation 467/2001) list of persons, entities and bodies affected by the freezing of funds, adding his name and others thereon.³² Barakaat had individually sought annulment also of EC Regulation No.2199/2001 that had amended for the fourth time the Sanctions Committee's Annex I (Regulation 467/2001) list of

²⁶ [2008] UKSIAC Case 65/07 Decision of 07 November 2008 para.20.

²⁷ [2008] OJ 2009 C-285/2, EU Joined Cases C402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat Foundation v Council and Commission*. Hereinafter *Kadi*.

²⁸ *Ibid.*

²⁹ Outlining the significance to the proceedings of the Security Council Resolutions 1267 (1999); 1333 (2000); 1452 (2002); 1455 (2003), see *Kadi*. Specifically see paras. 15–45.

³⁰ *Ibid.* para. 30.

³¹ *Ibid.* para. 29.

³² *Ibid.* para.32.

persons, entities and bodies affected by the freezing of funds, adding its name and others thereon.³³

Mr. Kadi had argued before the Court of First Instance that the EC Regulations enacted to ensure Security Council Resolutions had in so far as they related to him, breached his fundamental rights, including the right to be heard and the right to respect for property as well as the principle of proportionality and the right to effective judicial review. France, The Netherlands and the United Kingdom had intervened to argue *inter alia* that ‘no review of the internal lawfulness of resolutions of the Security Council may be carried out by the Community judicature’.³⁴

Dismissing the Application, the Court of First instance had reasoned that³⁵ Resolutions of the Security Council, adopted under Chapter VII of the UN Charter are immutable. As such they are irrevocably binding on all the Members of the Community. Such Resolutions obligate all Members of the Community to take all measures necessary to ensure their fulfilment. This may require Members of the Community to vacate any provision of the Community Law – whether a provision of primary law or a general principle of community law if it threatens the fulfilment of such a Resolution. Moreover, the Court of First Instance had stated that ‘... in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the UN, the provisions of that Charter have the effect of binding the Community’.³⁶

Regarding the question of the requirement of the Court to review the legality of Community measures such as the contested Regulations that seek to give effect to Resolutions of the Security Council, the Court of First Instance in its capacity as custodian and guarantor of protected fundamental rights appears to have taken an ‘incapacity approach’ which it then backed up with a ‘monolithic’ conception of the relationship between national and international law. It stated:

While the EC is based on the rule of law, inasmuch as neither its Members nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions³⁷ ... the contested legislation constitutes the implementation at Community level of the obligation placed on Member States of the Community, as Members of the United Nations, to give effect, if appropriate by means of a Community act³⁸...the Community acted under circumscribed powers leaving it no autonomous discretion in their exercise, so that it could, in particular, neither directly alter the content of the resolutions at issue nor set up any mechanism capable

³³ Ibid. para. 33.

³⁴ Ibid. para.263.

³⁵ Ibid. para. 76–80.

³⁶ Ibid. para.79.

³⁷ Ibid. para. 81.

³⁸ Ibid. para. 83.

of giving rise to such alteration.³⁹ [Therefore,] the challenging of the internal lawfulness of the contested Regulation implied that the Court should undertake a review, direct or indirect, of the lawfulness of the resolutions put into effect by that regulation in the light of fundamental rights as protected by the Community legal order.⁴⁰

The monolithic view of the relationship between national law and international law had prevailed over the dualist approach, shutting out arguments for judicial review – which is the traditional hallmark of libertarian society. The Court of First instance had insisted that fundamental rights of individuals could not alter the applicability within the Community of Security Council Regulations issued under Chapter VII of the UN Charter.⁴¹

The Court of First Instance's reliance on this monolithic conception of the relationship between national and international law as the reason why judicial review of relevant EC Regulations was not an option is contradicted by the Court's own reverence of the dualist view of the relationship between national and international law that shows through the fact that EC Regulations had had to be adopted for the specific purpose of transforming the relevant UN Resolutions into EC Law.

Regarding the question of whether the Community measures pursuant to the relevant Security Council resolution breached first, the fundamental right to respect for property of individuals, and secondly, the right to be heard, the Court of First Instance had appeared to be unreceptive to the idea of 'human rights based' adjudication. The human rights approach to adjudication seeks to recognize, promote and protect the dignity inherent in all individuals as human beings. Instead the Court of First Instance had adopted a public interest based approach to the question. The Court had reasoned that:

[T]he freezing of funds did not constitute an arbitrary, inappropriate or disproportionate interference with the right to private property of the persons concerned and could not, therefore, be regarded as contrary to *jus cogens*, having regard to the following facts: the measures in question pursue an objective of fundamental public interest for the international community, that is to say, the campaign against international terrorism, and the United Nations are entitled to undertake protective action against the activities of terrorist organizations.⁴²

By approaching the question from a public interest perspective the Court of First Instance had enabled introduction of the psychologies surrounding the question of national security. This focuses attention not on the rights of the accused individual in relation to the power of the State unleashed against them, but on the balancing act of achieving the 'less terrible' among the potential scenarios/consequences. Balancing acts of this nature

³⁹ Ibid. para. 84.

⁴⁰ Ibid. para. 85.

⁴¹ Ibid. para. 86–88.

⁴² Ibid. para. 92.

are based on the introduction of binary viewpoints in order to countenance one of them. These exercises can obscure the issue and result in the abandonment of the exercise of justice.

For instance, the Court of First instance introduced the binary of ‘freezing of property’ and ‘confiscation of property’ to argue that the action taken against listed individuals, (the freezing of their funds and their assets) was less severe than its extreme other, (the potential confiscation of their funds and their assets). Therefore, the applicants could not sustain their claim of arbitrary treatment. This strategy seeks to trivialise the outcome for listed individuals by suggesting that more severe measures could have been deployed but were not. Consequently, affected individuals should count themselves fortunate despite being deprived of the opportunity to defend themselves against the accusations implied in the relevant Community Regulations. The moral of this seems to be that being listed on the Sanctions Committee’s list is equivalent to being found guilty as charged.

Without exception EC Member States’ criminal justice systems have been established on the presumption of innocence. The view is that, ‘... it is far worse to convict an innocent man than to let a guilty man go free’.⁴³ To accept the summary listing of individuals for freezing of assets and funds based on allegations that they have not had a chance to respond to would constitute a paradigm shift of immense proportions for the European Community.

Under ordinary circumstances the requirement of due process ‘protects the accused against conviction except upon proof beyond a reasonable doubt of all of the elements necessary to constitute the crime with which he is charged’.⁴⁴ Other procedural safeguards that underpin the presumption of legal innocence in the criminal justice system include ‘the privilege against self-incrimination and the right to remain silent while in police custody and during trial; the duty of the State to disclose exculpatory evidence; the right to compulsory evidence; the right to confront adverse witnesses; and the right to effective assistance of counsel’.⁴⁵ This is because international human rights ‘enshrine a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty’.⁴⁶ This right points to another fundamental right, namely, the right to be heard before any action can be imposed by Community institutions.

Nonetheless, the Court of First Instance had insisted that the right to be heard was limited where the Court was incapable of reviewing the position.⁴⁷ In the Court’s view, its incapacity derived from the fact that:

⁴³ *In re Winship*, 397 U.S. 358 (1970) at 372.

⁴⁴ *Ibid.* at 364.

⁴⁵ Laufer, ‘The Rhetoric of Innocence’, 70 *Washington Law Review* (1995), 335.

⁴⁶ *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56 Per Lord Bingham para. 41.

⁴⁷ *Kadi*, para. 93.

[B]oth the substance of the measures in question and the mechanisms for re-examination fell wholly within the purview of the Security Council and its Sanctions Committee. As a result, the Community institutions had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the sanctions Committee, no discretion with regard to those matters, and no discretion either as to whether it was appropriate to adopt sanctions vis-à-vis the applicants.⁴⁸

Whatever, the benefits of the monist approach advocated by the Court of First instance regarding the question whether EC Regulations relevant to UN Security Council Regulations were immune from judicial review in the EC, the rubber stamping formality envisaged for the ECJ by that approach would result in a Court whose function in relation to the UN Security Council served in similar circumstances to unleash blind fury against individuals suspected of involvement with terrorist activity.

Further, it would assert a strong negative impact on the jurisprudence of the EC, resulting in inconsistency, unpredictability and irreconcilable jurisprudence on the protection of fundamental freedoms of individuals. The human rights project has been strengthened in part by the Courts' insistence on ensuring against arbitrary treatment of individuals by the State. In spite of the reversal of the decision of the Court of First Instance by the Grand Chamber on 3 September 2008, it is sufficiently worrying that such a decision was reached in the first place – advocating as it does, that there are times when the ECJ's function and purpose can be reduced to in effect rubber stamping decisions of a political body external to its autonomous legal system, despite an adverse effect on the fundamental rights of individuals. That approach points to wilful neglect of the duty incumbent upon the Court as guarantor of the rule of law within the EC.

Fortunately for human rights, the Grand Chamber⁴⁹ restored adjudication to its former orientation when it held that the EC had a basic norm, namely, the rule of law. That *grund norm* precluded both its Member States and its institutions from denying review of the conformity of their acts. That basic norm had also established a complete system of legal remedies and procedures for the Court of Justice to review the legality of the conduct of its institutions.⁵⁰ In doing so the Grand Chamber had rejected the Court of First Instance arguments of incapacity that had been premised on a monolithic view of the relationship between national and international law. The Grand Chamber insisted instead on the autonomy of the Community legal system. That autonomy is 'ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community'.⁵¹

⁴⁸ Ibid.

⁴⁹ Ibid. paras. 280–376.

⁵⁰ Ibid. para. 281.

⁵¹ Ibid. para. 282.

The key question in this case was whether measures taken to incorporate UN Security Council Regulations into EC law were immune from judicial review. The Grand Chamber was unequivocal that ‘respect for human rights is a condition of the lawfulness of Community acts and measures incompatible with respect for human rights are not acceptable in the Community’.⁵² This is because ‘fundamental rights form an integral part of the general principles of law whose observance the Court ensures’.⁵³

It follows from this that the dualist approach to the relationship between international law and national law could serve as a useful tool for the protection of fundamental human rights that a national security obsessed Security Council, or Member State Party of the EC might wish to set aside on account of national security interest.

C. SAADI V. ITALY⁵⁴ 28 FEBRUARY 2008

Pursuant to Article 36(2) of the European Convention on Human Rights⁵⁵ (ECHR), under Rule 44(2) of the rules of procedure,⁵⁶ the UK had intervened in *Saadi* in support of Italy’s bid to deport on suspicion of terrorist offences, Nassin Saadi, a Tunisian national who held a residence permit issued by the Italian authorities on 29 December 2001.⁵⁷ This case seems to indicate a shift from human rights driven criminal justice systems to public security centred criminal justice systems, at least in relation to terrorism.

In 2006 Italy’s Minister of the Interior had ordered the deportation of Nassin Saadi to Tunisia under the provisions of Legislative Decree No. 144 of 27 July 2005 on ‘Urgent Measures to combat international terrorism’.⁵⁸ On 29 May 2007 the Italian embassy in Tunis had sent a note *verbale* to the Tunisian Government requesting diplomatic assurances that Nassin Saadi would not suffer torture, inhuman or degrading treatment or punishment, and would not be denied justice upon his return to Tunisia. By return of a note *verbale* the Tunisian government had on 4 July and also on 10 July 2007 assured the Italian authorities that Nassin Saadi’s legal protections would be respected. They had also reminded the Italian authorities that Tunisia ‘had voluntarily acceded to the relevant international treaties and conventions’.⁵⁹

The UK Government had argued before the European Court of Human Rights (ECtHR) that requirements of national security in the post 9/11 and 7/7 eras justified a

⁵² Ibid. para. 284.

⁵³ Ibid.

⁵⁴ 49 EHRR 30 (2009), Judgement of 28 February 2008, hereinafter *Saadi*. See also de Londras, *Saadi v Italy: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases*, ASIL Insights (May 13, 2008), www.asil.org/search.cfm?displayPage=351.

⁵⁵ 213 UNTS 221 (1955).

⁵⁶ *Saadi*.

⁵⁷ Ibid, n.53 para.56–7.

⁵⁸ The Decree converted into statutory law No. 155 of 31 July 2005. See generally *Saadi*.

⁵⁹ Ibid. para. 55.

review of the prohibition against torture and ill treatment of individuals⁶⁰ so that States should be able to deport individuals that they perceived to be a risk to their own national security⁶¹ regardless of whether they risked torture, inhuman or degrading treatment or punishment in the receiving State.⁶²

The UK Government had advanced the following reasons for its new position on individual freedoms of aliens:

- 1) Terrorism seriously endangers the absolute right to life, which is also the necessary precondition for the enjoyment of all other fundamental rights.⁶³
- 2) The ECHR did not guarantee the right to political asylum.⁶⁴
- 3) Article 5(1)(f) of the Refugee Convention (1951) that governs the status of refugees recognises the right of States to deport aliens because it authorises the arrest of a person against whom action is being taken with a view to deportation.⁶⁵

Consequently, the deporting State's only duty of care towards the deportee may be limited to securing from the receiving State the assurance that s/he will not suffer torture, inhuman or degrading treatment or punishment upon arrival at her/his destination. This practice, also known as deportation with assurance (DWA practice) has emerged in a relatively short period of time to become European States' key counter-terrorism instrument⁶⁶ in spite of safeguards in both national laws and the ECHR protecting individuals through guarantees of due process and the presumption of innocence.⁶⁷ This development appears to be problematic for several reasons.

It could be argued that by resorting to such action at all, States are making the claim that national security interests justify their conversion from rule oriented democracies to *quasi* totalitarian communities, able to disregard among other things, the principle of presumption of innocence until proven guilty and the due process of the law⁶⁸ – *de lege ferenda*. It is a State's position in regard to this *de lege ferenda* that typically distinguishes between authoritarian and liberal democratic States. If this is correct, the

⁶⁰ See *Chahal v U.K.* (1996) 23 EHRR 413. Judgment of 25 October 1996 (hereinafter *Chahal*).

⁶¹ Declaration of the United Kingdom of 18 December 2001, registered by the General Secretariat of the Council of Europe on 18 December 2001, available also at <http://hei.unige.ch/~clapham/hrdoc/docs/UKderogechr18dec2001.html> (last accessed 27/02/08).

⁶² See UN Human Rights Committee General Comment No. 13 on Equality before the courts and the right to a fair and public hearing by an independent court established by law. See also *Gridin v Russian Federation*, Communication No. 770/1997, decision of the 20 July 2000 (sixty-ninth session), upholding claims of state violation of the presumption of innocence.

⁶³ *Saadi* para.119.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ See also Jones 'Deportations with assurances: Addressing key criticisms', 57 *International and Comparative Law Quarterly*1, (2008), 183. Prohibiting this practice, see *Saadi*.

⁶⁷ *Chahal*.

⁶⁸ See generally Chigara, *Nordic Journal of Human Rights*.

UK's intervention in *Saadi v. Italy* seeking a review of the absolute ban on torture and coercion under ECHR law⁶⁹ represents a major shift away from its historic position of protector and proponent in the development of international human rights law. Even more surprising is that a twenty-first century UK Government would argue that national security interests justified introduction into UK courts evidence procured through torture as long UK agents had themselves not been directly involved in inflicting the torture.⁷⁰

One must ask if national security ever suffices as a defence against breach of principles of the rule of law on the one hand, or as a justification for entering into private arrangements over an individuals' basic freedoms and rights, particularly with States that have a record of practicing torture and violating basic human rights, States that Western democracies had hitherto alienated through their foreign polices at every opportunity.⁷¹

Thirdly, the emergent DWA practice is worrying because of its apparent conflict with *jus cogens* norms. Both the Italian case and the UK petition in *Saadi v. Italy* are curious developments unless the prevailing standards on the regulation of torture on the one hand, and those on international terrorism on the other are of similar juristic weight. Standards with similar juristic weight adduce a competing preferential capacity to regulate the same sphere. They impose on the Court the requirement to carefully evaluate the priority to be accorded to each, and in what circumstances. Support for this view is ubiquitous. One is the UK's unrelenting legislative campaign against international terrorism since 9/11.⁷² The other is the UK's use of diplomatic channels to attempt a circumvention of its own constitutional⁷³ and Council of Europe⁷⁴ human rights obligations.

⁶⁹ See also Declaration of the United Kingdom of 18 December 2001, registered by the General Secretariat of the Council of Europe on 18 December 2001, available at <http://hei.unige.ch/~clapham/hrdoc/docs/UKderogechr18dec2001.html>.

⁷⁰ *A(FC) and Others (FC) v Secretary of State for the Home Department* [2005] UKHL 71.

⁷¹ Examples include the following: UK/ Libya, MOU of 18 October 2005 signed in Tripoli, Libya by Her Majesty's Ambassador to Libya, Anthony Layden and the Libyan Acting Secretary for European Affairs, Abdulati Ibrahim al-Obidi, available on Foreign Office Website: www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1129040148696;

UK/ Lebanon MOU of 23 December 2005, signed in Beirut by Her Majesty's Ambassador to Lebanon, James Watt and the Lebanese Minister of Justice Charles Rizk, available on Foreign Office Website: www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1134650095963; UK/ Jordan MOU of 10 August 2005 signed at Aaman. Full text available on BBC website: <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/uk/4143214.stm>.

⁷² Discussing the earlier and ensuing legislation see generally Chigara, *Nordic Journal of Human Rights* 1.

⁷³ Especially resort to DWAS. See above n.71.

⁷⁴ By a declaration contained in a *Note Verbale* from the Permanent Representative of the United Kingdom, dated 18 December 2001, registered by the Secretariat General on 18 December 2001 the UK Government sought derogation from Article 5 of the ECHR on account of the public emergency within the meaning of Article 15 (1) of the Convention. See also at <http://hei.unige.ch/~clapham/hrdoc/docs/UKderogechr18dec2001.html>. See also Article 2(1) and 1(1) of the PTA (2005) discussing the tension

Fourth, the emergent DWA practice has reopened the sore issue of whether *jus cogens* – intentional law’s ‘super-norms’⁷⁵ are real, or a mere utopian construction that is starkly opposed by State practice in the pursuit of national interest. This is because, if DWA practice goes unchecked, it could add disregard for *jus cogens* to the list of inconsequential State breaches of international law.

The dominant view appears to be that in spite of occasional setbacks in the development and enforcement of norms of international law, the international community requires a category of universally binding norms of *jus cogens* that do not depend for their force on prior State consent, otherwise States would have no way of dealing with certain, complex international concerns.

§3. THE GROWING THREAT OF INTERNATIONAL TERRORISM

A. STATES DISCOVER THEIR ACHILLES HEEL – THE LEGACY OF 9/11 AND 7/7

Since 9/11 and 7/7 the Security Council has passed at least twenty-one resolutions on the matter of counter terrorism.⁷⁶ Of these, resolution 1373 is arguably the most important because it creates new law and establishes a mechanism for its enforcement. The resolution obliges States to criminalise in their national jurisdictions, terrorism and all terrorism-facilitating activities; and to cooperate in counter terrorism activities in order to constrain this menace – what Kofi Annan referred to as the 5-Ds approach, namely, dissuade, deny, deter, develop and defend.⁷⁷

Resolution 1373 establishes the UN Counter-Terrorism Committee (CTC) comprising the 15 Security Council delegations. The CTC is mandated to monitor States’ implementation of the resolution and where necessary, to provide relevant technical assistance to UN Member States.⁷⁸

created by UK counter-terrorism legislation against its human rights obligations under the Human Rights Act (1988). See also Sands ‘British Prevention of Terrorism Act 2005’, ASIL Insights, available at www.asil.org/insights/2005/04/insights050427.html.

⁷⁵ Paust, ‘The Reality of *jus cogens*’, 81 *Connecticut Journal of International Law* (1991–1992), 81.

⁷⁶ At least three in 2001 – 1377, 1373 and 1368.

⁷⁷ See ‘The UN against terrorism’, at UN website: www.un.org/sc/ctc/unaction.shtml. See also UN General Assembly resolution on The UN Global Counter-Terrorism Strategy, General Assembly Resolution A/Res/60/288 (20/09/06).

⁷⁸ S/Res 1373 (2001) 28 September. Available at UN website: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

B. RULE OF LAW COUNTER-TERRORISM DRIVEN POLICIES AND STRATEGIES

The emergent DWA practice⁷⁹ allies States that have records of practicing torture and violating basic human rights of individuals⁸⁰ with those States reputed for instigating development of international human rights as we know them today. This points to the ascendance of national security interest and the potential rapid decline of human rights as the convergence factor for States today.⁸¹ The practice could also be explained as early indications of emerging customary international law on the right of States to deport foreign nationals that they suspect of involvement with unproven terrorist offences.

C. THE PROBLEM WITH DWA PRACTICE AS A TOOL FOR ENSURING NATIONAL SECURITY

DWA practice appears on the face of it to be both arbitrary and divorced from the legal safeguards of due process. It is manifestly opposed to the foremost norms of international law, including the prohibition against torture, inhuman or degrading treatment or punishment and the requirement of *non-refoulement* that prohibits the forcible return of refugees to their countries of origin.

DWA practice appears also to positively reward torturing States that are willing to do the 'unacceptable dirty work' for Western States.⁸² In the process, deporting States become both duplicitous and complicit in the perpetuation of State torture. DWA as a practice is incomprehensible especially for the strict regulationist who requires consistent reference and adherence to, and the persistent application of standards in their sphere of

⁷⁹ Agreements between States are binding under international law regardless of their designation. See *Anglo Norwegian Fisheries Case (UK v. Norway)* ICJR (1951), 116. Article 2 (b) of the Vienna Convention on the Law of Treaties (1969) (VCLT) provides that a treaty 'is an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

⁸⁰ Examples include the following: UK/ Libya, MOU of 18 October 2005 signed in Tripoli, Libya by Her Majesty's Ambassador to Libya, Anthony Layden and the Libyan Acting Secretary for European Affairs, Abdulati Ibrahim al-Obidi, available at Foreign Office Website: www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1129040148696; UK/ Lebanon MOU of 23 December 2005, signed in Beirut by Her Majesty's Ambassador to Lebanon, James Watt and the Lebanese Minister of Justice Charles Rizk, available on Foreign Office Website: www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1134650095963; UK/ Jordan MOU of 10 August 2005 signed at Aaman full text available on BBC website: <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/uk/4143214.stm>.

⁸¹ Outlining the tenets of legitimacy, see also Franck, 'Legitimacy in the International Legal System', 82 *American Journal of International Law* (1988), 705.

⁸² See also *A (FC) and Others (FC) v Secretary of State for the Home Department* [2005] UKHL 71, per Lord Bingham.

operation⁸³ because in spite of its present character which is at best nascent custom, it is already challenging peremptory norms of international human rights law.⁸⁴

Recently described by Human Rights Watch as the UK's dangerous ambivalent policy towards torture,⁸⁵ DWA practice contradicts States' publicly proclaimed international human rights obligations. It appears to be a national security instrument borne out of extreme and unnecessary desperation.⁸⁶

The horrific terrorist attacks on New York, London, Bali, Turkey, Nairobi, Mumbai and other places in recent times has brought to the fore of international debate the difficulty of ensuring national security at the start of the twenty-first century. In tackling this problem the UK Labour government appears to have supposed that judges were going to accept their decision to practice DWA. Further, the Government appears to have presumed that the UK courts were going to accept evidence obtained through torture as long as UK agents had themselves not been involved in its production.

It is perhaps significant that a growing band of commentators regard international terrorism as a significant, noteworthy and legitimate policy driver that requires a change in the legal traditions of Western democracies. They argue that under particular circumstances torture could and should be applied in abeyance of human rights' guarantees to any individual suspected of planting a bomb if the torture of that individual by law enforcement agents previously authorised by a judge is likely to save the lives of innocent members of the public.

However, the prohibition against torture in Article 15 of the Convention against Torture (1984) charges State Parties to the Convention to '... ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made'. This procedural requirement has become a criterion for distinguishing between civilised States and uncivilised States.

Professor Bozeman⁸⁷ writes that all political systems have been concerned with security in their public orders.

The annals of history tell us that 'security' is an elusive goal everywhere, in great empires and commonwealth as well as in small folk societies, city-States and nation States. Throughout

⁸³ See Kelsen, 'The Pure Theory of Law: Its Method and Fundamental Concepts, Part I' 50 *Law Quarterly Review* (1934), 475.

⁸⁴ See Kreimer, 'Too close to the rack and the screw: Constitutional constraints on torture in the War on terror', 6 *University of Pennsylvania Journal of Constitutional Law* (2003), 278.

⁸⁵ See 'UK: A Dangerous Policy on Torture', available at Human Rights Watch website: <http://hrw.org/english/docs/2006/11/02/uk14482.htm>. See also: www.hrw.org/backgrounder/eca/uk1106/.

⁸⁶ British Prime Minister Tony Blair called this the new 'values and interest' based foreign policy pursued by his government. See Democratic Leadership Council website at: www.dlc.org/ndol_ci.cfm?contentid=253880&kaid=128&subid=187.

⁸⁷ Bozeman, 'Human Rights and National Security', 9 *Yale Journal of World Public Order* (1982-1983), 42.

time, 'security' has been in short supply for generations of human beings, whatever their political habitat and status in society.

The moral appears to be that human rights should not become international terrorism's whipping boy. But the current practice of portraying the national security dilemma as trumping human rights concerns creates a binary opposition between the two ideas that is often exaggerated to unfairly indict human rights as a facilitator of terrorism.

If not corrected, this logical fallacy will be used by States to create a much deeper crisis, precipitated by the minimization and often outright denial of human rights of individuals who are merely suspected of involvement with terrorist offences. The emergence of DWA practice shows governments' timidity in dealing with the challenges posed by international terrorism.

But what is uncertain is whether the 'any blow will do' approach that is evident in the knee-jerk policy shift of Western States from recognizing and protecting human rights of individuals to undermining them will suffice to combat international terrorism. This is because the key issue regarding the central case about law is practical reasonableness.⁸⁸ Previously, Western States premised their alliances on the policy of human protection of others and the principle of the rule of law. The fact that international terrorism has changed that demonstrates the enormity of the challenge of national security in the age of international terrorism. But should it result in the shrinking of the gap between fundamental practice of democratic States and their autocratic rivals on the rule of law and protection of basic human rights of individuals?

The policy shift from recognition, promotion and protection of basic human rights of individual to denunciation of the same and renunciation of aspects of the rule of law has heightened debate among and between the radical idealists on the one hand, and the radical realists on the other. Domestic, regional and international courts and tribunals are having to clarify the meaning and immutability of certain principles all over again, especially the significance of the constitutional requirements of the principle rule of law and human rights in the face of DWA practice that encourages and promotes indefinite detention without trial, and deportation of terrorist suspects to destinations where they risk torture, inhuman or degrading treatment.⁸⁹

This development has rekindled the question of whether the reality of universal human rights is mere speculation in light of its subservience to brute State force whenever occasion calls for it.

⁸⁸ Freeman, *Lloyd's Introduction to Jurisprudence*, (Sweet and Maxwell, 7th ed. 2001).

⁸⁹ See Lambert, 'Protection against *refoulement* in Europe: Human Rights comes to the rescue', 48 *International and Comparative Law Quarterly* 3 (1999), 515.

D. REALIST AND IDEALIST CRITIQUE

Radical realist critique regards human rights as merely another tool in States' armour. They may be relevant or not, alongside other commitments in the consideration of the best possible outcome. In this regard, human rights are neither sacrosanct nor immutable. For this reason it is possible to characterise them as hypothetical and nothing more. They should always be counterbalanced by society's prevailing circumstances and challenges.

Radical idealist critique insists that human rights inhere in the status of being human.⁹⁰ They are more sympathetic to the immutable theory of human rights. They argue also that human rights have become both the deoxyribonucleic acid (DNA) of human dignity and index to the rule of law in democratic States. Therefore, whatever strategies States adopt to deal with any challenge ought always to comply with their international human rights obligations. If this is correct, then considerations of national security that seek to undermine the dignity inherent in individuals *qua* human beings are misguided and inconsistent with the rule of law upon which democratic States are premised. Consequently, they are not logically sustainable.

The idealist perspective reduces DWA to a measure which increases security at the price of human development, particularly in western democracies where this is measured by State pursuit and adherence to international human rights obligations and the rule of law. In his treatise on 'The Judgement of the Nations' Dawson warns that: 'As soon as men decide that all means are permitted to fight evil, then their good becomes indistinguishable from the evil they set out to destroy'.⁹¹

E. DRAWING LINES IN THE SAND: AT WHAT POINT DOES AN INDIVIDUAL BECOME A THREAT TO NATIONAL SECURITY?

The United Kingdom (UK) Special Immigration Appeals Commission (SIAC) has stated that determination of the relationships and factors that constitute national security interest is a matter for the executive and not the Courts.⁹² In this sense, it is a political rather than a legal matter. For the UK government, a foreign national is, or becomes, a risk to national security and deserving of DWA practice if he or she is a member of an organisation that is willing to actively support violent Islamist opposition abroad against a regime that is averse to international terrorism.⁹³

⁹⁰ See generally Chigara, 'Nordic Journal of Human Rights'.

⁹¹ See Murphy, 'Man's Inhumanity to Man: The Case of Political Terrorism', *The Flannery O'Connor House Lecture Series*, 2002, available at: www.cjsocpols.armstrong.edu/murphy/flannery_lecture.htm.

⁹² See *DD and AS v. The Secretary of State for the Home Department*, Appeal No: SC/42 and 50/2005, judgment of 27 April 2007, para. 29, available at Justice Department website: www.hmcourts-service.gov.uk/legalprof/judgments/siac/siac.htm.

⁹³ *Ibid.* para. 34.

The reciprocal and mutual benefit that States that engage in DWA obtain is the suppression or possible eradication of agents, purveyors and supporters of international terrorism. The moral is that a political enemy of a State that is opposed to international terrorism is a natural threat to UK national security from the moment that (i) the UK labels him/her a terrorist suspect or, (ii) if the State of origin claims that he is wanted back for questioning/charges of seeking to overthrow that government in furtherance of international terrorism. This follows from emerging State alliances against international terrorism.

According to SIAC, the UK government's prerogative in this matter enables it to lay down the test of deportability. Thereafter, it is for the courts to weigh the facts in each case in order to ascertain whether that threshold had been met in accordance with established requirements of fairness in a democratic society and submission of the executive to the rule of law. In this sense, the policy of the UK to embrace and make new friends on account solely of their newly discovered potential to confer reciprocal advantage in the war against international terrorism underlines two things. One is the current shortage of much needed tools to counter international terrorism. The other is the desperation on the part of governments to immediately restore relative parity with non-State actors that now threaten national security in more complicated ways than States themselves do. In the circumstances, the question is whether DWA practice is sustainable.

The problem of course is that the success or failure of 'desperate measures' is often down to chance rather than calculated deliberate and purposive meticulous planning. This raises the further question of whether national security as a legal defence for State minimization of human rights of individuals is not a two edged cutting sword that serves to ensure the human rights of the public on the one hand, and the utmost compromise of the human rights of foreign nationals suspected of terrorist conduct on the other.

F. CLEARING THE MISCONCEPTIONS

Recent Home Secretary John Reid threatened to take the UK out of the ECHR regime unless the decision in the *Chahal*⁹⁴ case was rescinded. In that case the European Court of Human Rights had considered *inter alia* the question whether the threat that a foreign national might pose to national security entitled the host State to extradite the former even if that would expose the former to a real risk of being subjected to ill treatment contrary to Article 3 of the European Convention on Human Rights – itself a peremptory norm of general international law. The Court had replied in the negative. It stated that the Convention prohibits in absolute terms torture, inhuman, degrading treatment or punishment, '... irrespective of the victim's conduct'.

⁹⁴ *Chahal*.

The idea is simple. Where individuals fail, the State should not and must not fail in similar fashion by not recognizing and protecting the inherent dignity of the human being. Having a bad father does not entitle oneself to become a bad son or daughter.

Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the contracting State to safeguard him or her is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or even dangerous, cannot be a material consideration.⁹⁵

The absolute quality of the prohibition against torture, inhuman or degrading treatment of individuals under international law precludes the sacrificing of individuals' inherent dignity *qua* human beings on the altar of national security. It requires instead that States adopt measures and strategies that always put the recognition, promotion and protection of human rights of individuals first. The free world has recognised, endorsed and sought fervently to uphold this view for a long time. The threat of international terrorism appears to be a test for modern States' commitment to this principle. Their responses stand to either devalue or enhance the international human rights project.

G. DWA PURPOSE

The legitimacy of DWA practice is linked *inter alia* to its ability to secure its purpose without uprooting the pillars on which civilized society has been established. Therefore, an evaluation of the DWA's practical purpose in the light of the legal challenges that it faces is called for, especially because of the evolving international constitutional arrangements in international relations.

Especially for the deporting State, DWA practice is first and foremost an embarrassing acknowledgment that the receiving State has a poor human rights record, hence the need for the 'assurance agreement.' DWA assurances enable the receiving State to make additional assurances that this time around, it will honour its international human rights obligations with regard to this particular deportee. The deportee is therefore placed in a special category of his own and enjoys greater human rights protection than the rest of the citizens because he or she is an enemy of the State. This makes DWA practice an attempt on the part of the deporting State to cleanse its own conscience by throwing its arms up in the air and rolling its eyes to the sky in a 'what else can we do?' attitude.

It appears also to be an attempt by the deporting State to persuade the public that the deportee is not being sacrificed on the altar of national security. The fact is that these deportees are being sent to a State that is reputed for torturing and breaching human

⁹⁵ Ibid. Confirmed by the House of Lords in *A and others v. Secretary of State for the Home Department* [2005] 2 W.L.R. 87 at para. 9.

rights of individuals on its territory than respecting it⁹⁶ and that has no record of being merciful to its enemies.

Moreover, the deporting and receiving states share the view that the deportee is at best undesirable. Why would the receiving State wish to have such a person in its territory? The most probable reason is that the receiving government is only too grateful to land its hands on its erstwhile enemy. This makes it more likely than not that the deportee will be subjected to torture, inhuman or degrading treatment, contrary to the deporting State's international obligations not to send any individual to a destination where they risk torture.

It has been suggested that the receiving State is more likely than not to observe and honour its MOU undertakings because the deportee's case has already been widely publicised. Consequent, both private and public local and international organisations will be observing the deportee's case in order to ensure that the receiving State honours its assurances. Reliance on the activism of organisations that the receiving State also has a record of ignoring provides weak safeguards. Public shaming is often the only tool such organizations have. Receiving governments are in this situation because of their immunity to shame. Therefore this argument is unsustainable simply because its record is one of failure in most cases.

Another argument often made to justify the deportations in spite of the obvious and real risk of torture or inhuman or degrading treatment for the deportee is that the agreed system of periodic policing of the MOU undertakings between the deporting and receiving States will stop the receiving State from mistreating the deportee. Doubt about this stems from the fact that States regard the MOU strategy as a mechanism for strengthening cooperation in the fight against a common threat in order to ensure their own safety and survival.⁹⁷ It appears more than ambitious to expect that the cooperating States will engage in any type of conflict over the receiving State's treatment of their common worst enemy.

Moreover, the deporting State may well need to deport other terrorist suspects to the same State in the future. That makes criticizing the receiving State a non-starter. At the very least, it would create problems for the deporting government which could not realistically return additional foreign nationals to the offending state in the face of domestic criticism. Thus it is most unlikely that the deporting State will query the ill treatment of deportees, even if it had reason to do so. It also makes any assurances of the receiving State that the deportee will be well treated untrustworthy and any claims

⁹⁶ See, *Omar Othman (aka Qatada) v Secretary of State for the Home Department*, Appeal No: SC/15/2005, Judgment of 26 February 2007, para. 169, available at Justice Department website: www.hmcourts-service.gov.uk/legalprof/judgments/siac/siac.htm.

⁹⁷ See *DD and AS v. The Secretary of State for the Home Department*, Appeal No: SC/42 and 50/2005, judgment of 27 April 2007; See also *Omar Othman (aka Qatada) v Secretary of State for the Home Department*, *ibid.*

of the deporting State that it will supervise the receiving State's compliance with their agreement a practical nonsense.

H. INTERNATIONAL LAW'S REQUIREMENT NOT TO SEND AN INDIVIDUAL TO A PLACE THAT THEY RISK TORTURE, INHUMAN AND DEGRADING TREATMENT AND THE MOU STRATEGY FOR DEALING WITH FOREIGN NATIONALS SUSPECTED OF TERRORIST ACTIVITY

DWA practice is contrary to international law's requirement on States to act in good faith towards their international commitments in that:

- (i) It results in private deals between States regarding the welfare of individuals that themselves are regarded by the transacting States as mere consideration,⁹⁸ – i.e. a benefit that passes from the deporting State to the receiving State.
- (ii) It seeks to undo or amend States' publicly and universally established guarantees not to send individuals to destinations where they will face a real risk of torture, inhuman or degrading treatment.
- (iii) It enables the deporting State to avoid due process regarding its claims of terrorist offences against the deportee whom they can punish by returning him to a state where he or she is considered an enemy of the state. By treating the deportee as consideration in a private deal, the deporting State loses immediately any moral authority to challenge the receiving State about its treatment of the deportee. This in itself incites the receiving State to treat the deportee any way it chooses.

*Pinochet No.3*⁹⁹ has made it unequivocally clear that it is not the function of the State to undermine the dignity inherent in individuals *qua* human beings. Consequently, State officials could not plead the defence of State immunity when accused of breaching the basic human rights of individuals.

I. ON WHAT BASIS WOULD DWA PRACTICE ATTAIN SUSTAINABILITY?

To be sustainable, national ordering strategies of democratic States must be consistent with established constitutional requirements¹⁰⁰ and correspond with international

⁹⁸ See generally E. McKendrick, *Contract Law* (Macmillan, 4th ed, 2007).

⁹⁹ *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No.3), [1999] H.L. 2 Weekly Law Reports, 827.

¹⁰⁰ In 1911, US Supreme Court Justice Horace Lurton wrote in the *National Review*: 'The contention that...the Constitution is to be disregarded if it stands in the way of that which is deemed of the public advantage...is destructive of the whole theory upon which our American Commonwealths have

human rights law. Unsustainable social ordering processes collapse because of their failure to engage constructively criticisms levelled against them. Present day Zimbabwe is teetering on the verge of economic collapse, political stalemate and social malaise because of the anti-human rights arbitrariness of its current government.

Sustainable strategies are characterised by their consistency in regard to: constitutional arrangements, international human rights morality and practice, the requirements of norms *jus cogens* and measurable tenets of efficiency. At first glance DWA practice does not appear to be consistent with these criteria. The House of Lords was unequivocal that Part 4 of the Anti-terrorism, Crime and Security Act 2001 was irrational, discriminatory and contrary to the rule of law in that it deprived the detained person of the procedural protection upon which the criminal justice system had been moulded.¹⁰¹ Consequently, DWA practice has been judged to fail on all of the four criteria of sustainability referred to above.

This jurisprudential chaos occasioned by the emergent DWA practice is significant to that extent that it fits the mould of nascent custom. Rather than undermine the legitimacy of the international legal system, this jurisprudential chaos has the potential to strengthen the international legal system by fine-tuning the scope and limits of previously established standards as well as possibly creating new norms on the right of States to DWA practice.

§4. CONCLUDING REMARKS

The latest intelligence coefficient test for international lawyers is probably this: how should States respond to the growing threat of international terrorism. This article examined the sustainability of emergent State practice of European States concerning foreign nationals that are merely suspected but not charged with involvement with terrorist offences, including deportation to destinations where they risk torture, inhuman or degrading treatment or punishment – usually their own country of origin, contrary to the foremost rules of international human rights law (DWA practice).

Although DWA practice could be characterised as nascent custom, perhaps with potential instantly to create *jus cogens* on the right of States to arbitrarily sidestep the judicial guarantees of due process enshrined in the rule of law and human rights in order to combat international terrorism, it nevertheless breaches the basic theory that norms *jus cogens* are higher norms that no State should ever challenge.

The emergent DWA practice inclines States more towards a rule of suspicion and autocracy rather than the rule of law and human rights. This compromises individuals' human

been founded.' Lurton, available at Quotes from Supreme Court Justices website: <http://home.att.net/~midnightflyer/supreme.html>.

¹⁰¹ *A & Others v. Secretary of State for the Home Department* [2005] 2 W.L.R. 87.

rights, especially those of foreign nationals by exposing them to the risk of deportation to destinations where they risk torture, inhuman or degrading treatment, contrary to international human rights law. The deportation of foreign nationals perceived to be a threat to national security once an agreement has been reached with the receiving State – usually the subject’s country of origin, and a memorandum of understanding (MOU) signed with an indication that the suspect will not suffer torture, inhuman or degrading treatment, also known as DWA practice, is inconsistent with the rule of law.

The Grand Chamber of the ECtHR ruled in *Saadi v Italy* that the prohibition against torture, inhuman or degrading treatment or punishment, is absolute, irrespective of the victim’s conduct.¹⁰² It makes no provision for exceptions or derogation under Article 15, even in the event of a public emergency threatening the life of the nation.¹⁰³ Therefore, under Article 3, DWA practice is, by reason of creating a situation whose outcome results in the exposure of the deportee to the risk of proscribed ill treatment, unacceptable.¹⁰⁴

The decision in *Saadi v Italy* privileges the overriding quality of *jus cogens* over other sources of international law, including treaties, even to the extent of nullifying MOUs for the deportation of terrorist suspects to destinations where they risk torture, inhuman or degrading treatment. However, the potential for States to persist with DWA practice and to attempt a partial or complete circumnavigation of the emergent jurisprudence, which insists on a human rights centred counter-terrorism strategy, persists. States continue to act primarily in self-interest.¹⁰⁵ As long as governments of receiving States perceive a significant advantage in receiving their enemies and governments of deporting States perceive significant benefit in the DWA practice, the *Saadi v Italy* decision is unlikely to be the final straw on this matter.

¹⁰² *Saadi*, para.127.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid*, para. 126.

¹⁰⁵ See also L. Henkin, *How Nations Behave*, 2nd ed., (Columbia University Press, 1979).