

EXTRAORDINARY MEASURES, PREDICTABLE CONSEQUENCES:

SECURITY LEGISLATION AND THE PROHIBITION OF TORTURE

September 2012





Ending Torture. Seeking Justice for Survivors

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1. Introduction

The 11 September 2001 ('9/11') attacks against the United States of America (USA) triggered sustained debates about the prohibition of torture. This included in particular the question whether extraordinary circumstances, such as a threat to a large number of people, justify exceptions that allow torture.¹ Attempts to undermine the absolute nature of the prohibition of torture were vigorously contested and have failed, considering jurisprudence and declarations upholding the sanctity of the norm in all circumstances.

Beyond this broader debate, the period following 9/11 has been characterised by the proliferation of security legislation following the adoption of United Nations (UN) Security Council resolution 1373 (2001) and later resolutions that mandated states to enact legislation to counter terrorism. Such legislation has taken the form of newly enacted special laws aimed at protecting national security against the threats posed by 'terrorism', i.e. anti-terrorism laws, or amendments to pre-existing security laws, often in the course of states of emergency. Many states readily endorsed the post 9/11 security paradigm even if they were not directly affected or threatened by similar terrorist attacks.

This Report forms part of a worldwide initiative 'Reparation for Torture: Global Sharing of Expertise',² in which REDRESS and its partners have been meeting and working with lawyers and human rights defenders from around the world to share experiences on the law and practice in respect of torture. Besides the ongoing challenges faced in combating torture in the law enforcement context, the initiative has highlighted the detrimental impact of security legislation.

Security laws enhance the powers of law-enforcement agencies. These powers have been used frequently to target individuals and communities, including those who are not engaged in any activities that would qualify as 'terrorism' under international law. Security laws invariably create an exceptional regime that is prone to facilitate torture and enshrine impunity, and undermine efforts of victims, lawyers and human rights defenders to strengthen domestic protection against torture.

As the risk of abuse inherent in security legislation is well known, as many pre 9/11 examples demonstrate, it is all the more worrying that the current generation of security laws has given rise to similar concerns. While the Security Council has stressed the need to ensure that legislative measures taken to combat terrorism comply with international human rights obligations, the prevailing security paradigm, coupled with weak systems of protection, all too often fails to meet this standard. This fact constitutes a major setback for the absolute prohibition of torture, which is based on legislative, institutional and judicial measures that strengthen protection against torture rather than measures which have the effect of eroding any advances made.

¹ See in particular Y. Ginbar, *Moral, Practical and Legal Aspects of the 'Ticking Bomb' Justification for Torture* (Oxford University Press, 2008).

² REDRESS acknowledges the funding provided by the EU for this initiative.

This Report reviews the proliferation of various types of security legislation to take stock more than ten years on since 9/11, identify trends, and examine their impact on the prohibition of torture. It highlights the problematic aspects of these laws and the practical challenges faced by those seeking accountability and justice for victims of torture. The Report seeks to provide a tool for policy makers, lawyers and human rights defenders who are faced with such laws and/or seek to help those adversely affected by their practical application. It also examines what security legislation that is adopted in circumstances giving rise to genuine security concerns should look like in order to be compatible with the prohibition of torture and to constitute best practice.

The Report is informed by a number of case studies. REDRESS selected twenty countries on the basis of several criteria – geographical distribution, adequate representation of a variety of legal systems and traditions, differing levels of adherence to the rule of law and of acceptance and implementation of popular democracy – to ensure that a broad cross-section of approaches to security legislation is considered.³ Individual country studies were complemented by information gathered by REDRESS in its work with lawyers and human rights defenders working on torture cases, as well as a review of the jurisprudence and practice of international human rights treaty bodies on the subject. The Report also draws on various studies carried out since 2001 on the detrimental effects of anti-terrorism legislation on human rights, including by international organizations and NGOs.

For the purposes of this Report, ‘security legislation’ is taken to mean any legal instrument (including laws, executive orders, decrees, regulations, subordinate legislation, etc.) which:

- (a) introduces modifications to the regular/ordinary domestic legal framework that have a bearing on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (CIDTP), or modify the legal framework relating to the provision of reparation for such violations; and
- (b) has been adopted in order to address terrorist-related or other security threats (as evident either in the text of the law itself or in the accompanying official statements of the executive/law making bodies).

The Report focuses on legislation that grants exceptional powers to the authorities over and above those normally applicable to any crime or threat to public order and security, or which provides for specific procedural and evidentiary rules for the hearing of matters relating to national security (including in particular trial of terrorist offences).

³ The countries examined in the country reports, divided by region, are China, India, Indonesia, Sri Lanka, Thailand; Egypt, Israel, Morocco, Syria; Canada and United States of America, Colombia, Peru; Kenya, Nigeria, South Africa and Sudan; Russian Federation, Turkey, United Kingdom.

The Report was written by Silvia Borelli and Lutz Oette. REDRESS expresses its gratitude to the SOAS human rights clinic for its collaboration, particularly Professor Lynn Welchman. It acknowledges the valuable research assistance in preparing individual country studies provided by Helena Bullock, Divya Iyer, Mary Johnson, and Neha Srivastava, of the SOAS human rights clinic, as well as the research assistance of Diane Douzillé and Pietro Palumbo of King’s College London, and Abdulrahman Felemban, Amy Patrick and Marwa Qari of the University of Bedfordshire. Thanks are also due to Dominique Mystris, Visiting Lecturer, University of Bedfordshire for research assistance in the final stages of preparation of the Report.

The category of ‘security legislation’ used in this Report is not identical with that of ‘emergency legislation’ – which refers to procedures designed to allow the executive to adopt legal rules outside the boundaries of ordinary law-making processes – although the two sometimes overlap. As it happens, the vast majority of security laws enacted since 9/11 have been adopted through ordinary legislative processes.⁴

This Report focuses on developments in national security legislation over the last decade. However, in a number of the countries analysed, relevant national security laws predate the events of 9/11, and the Report will examine the extent to which the so-called ‘global war on terror’ has resulted either in an amendment or changes in the application of those laws, or in the adoption of new national security laws.

Security laws cover a broad range of issues, including the creation of new criminal offences; powers to freeze assets, to intercept communications and to collect other forms of personal data; vesting law-enforcement and security agencies with exceptional powers relating to search, seizure, arrest, detention and interrogation; curtailing legal safeguards relating to arrest and detention of suspected terrorists; establishing new evidentiary rules; limiting the principle of equality of arms in criminal trials; and providing various types of immunities. While relevant provisions may constitute or result in several human rights violations, this Report focuses specifically on how security laws affect:

- safeguards against torture;
- criminal accountability for torture; and
- effective remedies and reparation for torture.

⁴ See below at Section 3.

2. Security legislation and its impact on the prohibition of torture

The prohibition of torture and CIDTP is absolute. It is borne out of the recognition that torture and other ill-treatment cannot be justified under any circumstances, not least because exceptions may quickly become the rule and erode the protection against the abuse of state power inherent in the prohibition.

It is equally clear that ‘terrorism’ (see for its definition below) constitutes a major threat to public security in many countries. Under international human rights law, states have a duty to protect the life and physical integrity of those within their jurisdiction, and this duty includes the enactment of legislation to repress acts of terrorism. This duty has been reinforced by UN Security Council resolution 1373 (2001), which mandates states to adopt specific anti-terrorism legislation. As a matter of international law, any such legislation has to be compatible with the prohibition of torture.

While anti-terrorism legislation does normally not authorise torture or CIDTP, it frequently creates a series of exceptions that impact adversely on key elements of the prohibition, particularly custodial safeguards, and constitute barriers to accountability and effective remedies. Similar considerations apply to ‘emergency laws’ that are based on the purported need to combat insurgencies or counter other threats to security. While states may adopt such legislation in situations of genuine emergencies, their power to derogate from international human rights is limited, and notably does include neither the prohibition of torture nor the right to an effective remedy.⁵

The following three case studies, focusing on the USA, Thailand and Sudan, illustrate the nature and impact of different types of security legislation on the prohibition of torture. The USA has been the driving force behind anti-terrorism measures adopted at the international level since 9/11 and has created its own web of legislation that has removed safeguards and judicial controls, thereby facilitating lack of accountability. These measures have set precedents by virtue of the status of the USA, the visibility of the different pieces of legislation and the scrutiny and challenges with which they have been received. Thailand is an example of the use of emergency laws in an internal conflict that has led to the targeting of a certain population group, weakened custodial safeguards and which has resulted in impunity. The case of Sudan shows how emergency legislation, anti-terrorism laws and national security laws can interlink and become part of a state’s arsenal of repression, resulting in widespread allegations of torture.

⁵ See Human Rights Committee, *General Comment No. 29: States of Emergency (article 4)*, UN doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 7-16.

2.1. United States of America

In the USA, the principal response to the 9/11 attacks did not take the form of emergency legislation, even though an emergency was actually declared on 14 September 2001.⁶ Rather, using the ordinary, though expedited, law-making process, the USA enacted the USA PATRIOT Act on 26 October 2001.⁷ The Act as originally enacted contained a sunset clause for many of its more controversial provisions.⁸ The PATRIOT Act introduced far-reaching anti-terrorism measures, including the creation of new substantive offences; increased law enforcement powers to conduct searches and surveillance; changes to the existing rules on immigration and federal criminal procedure; and measures against the financing of terrorist activities.

Notably, it granted the executive specific statutory authority to detain foreign nationals certified by the Attorney General to be suspected of *inter alia*, terrorism, for up to seven days prior to charge.⁹ The Act provides that after seven days the individual in question must be either charged, or removal proceedings must be commenced, failing which he or she must be released.¹⁰ However, the detention of individuals who are detained with a view to removal, but whose removal is ‘unlikely’ in the foreseeable future, can be extended by the Attorney General for additional periods of up to *six months* if their release ‘will threaten the national security of the United States or the safety of the community or any person’.¹¹ This regime significantly extended the normal maximum period of 48 hours of detention that has been set by the domestic courts, interpreting the Fourth Amendment.¹²

In parallel, in November 2001, the then President Bush made an Order that provided the framework for the establishment of the notorious detention facility at ‘Guantánamo Bay’

⁶ Proclamation Number 7463, *Declaration of National Emergency by Reason of Certain Terrorist Attacks*, 14 September 2001, 66 F.R. 48199. The declaration of national emergency has since been extended each year under to the National Emergencies Act, the most recent extension being made by President Obama on 9 September 2011: see *Message from the President Regarding the Continuation of the National Emergency with Respect to Certain Terrorist Attacks*, 9 September 2011, <http://www.whitehouse.gov/the-press-office/2011/09/09/message-president-regarding-continuation-national-emergency-respect-cert>; and 76 F.R. 56633. Further, on 23 September 2001, a national emergency was declared for the purposes of the International Emergency Economic Powers Act (IEEPA) so as to permit the adoption of financial sanctions in relation to individuals involved in terrorist activities: see *Executive Order 13224 - Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism*, 23 September 2001; 66 F.R. 49079. The national emergency deemed to exist in that regard has likewise been repeatedly extended: see, most recently, *Notice Regarding the Continuation of the National Emergency With Respect to Persons Who Commit, Threaten To Commit, or Support Terrorism*, 21 September 2011, available at <http://www.whitehouse.gov/the-press-office/2011/09/21/notice-regarding-continuation-national-emergency-respect-persons-who-com>; and 76 F.R. 59001.

⁷ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272, available at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/html/PLAW-107publ56.htm>. For commentary, see B.A. Howell, ‘Seven Weeks: The Making of the USA PATRIOT Act’, *George Washington Law Review*, (2004) Vol. 72, 1145-1207.

⁸ See below, text accompanying n. 138 *et seq.*

⁹ See 8 U.S.C. § 1226A(a)(5); see § 412, USA PATRIOT Act 2001 (above n. 7), inserting a new s. 236A into the Immigration and Nationality Act.

¹⁰ 8 U.S.C. § 1226A(a)(5).

¹¹ 8 U.S.C. § 1226A(a)(6).

¹² *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

by regulating treatment, detention and trial of certain foreign terrorist suspects.¹³ The Order established Military Commissions in order to try ‘enemy combatants’ and provided that the Commissions should operate on the basis of ‘admission of such evidence as would, in the opinion of the presiding officer of the military commission [...], have probative value to a reasonable person’.¹⁴ In the wake of credible information of ill-treatment of detainees held at Guantánamo Bay, the US Congress passed the Detainee Treatment Act 2005, which, *inter alia*, prohibited the use in any proceedings of evidence obtained by torture or cruel, inhuman and degrading treatment.¹⁵

The establishment of the Military Commissions was also challenged in the US courts. In *Hamdan v. Rumsfeld*, the Supreme Court held that the Military Commissions as set up under the Presidential Military Order of November 2001 were unlawful because they did not comply with, *inter alia*, the Geneva Conventions and the US Uniform Code of Military Justice.¹⁶ In response, Congress passed the Military Commissions Act 2006, which *inter alia* set out a clear prohibition of the admission of evidence obtained by torture (at any point in time),¹⁷ as well as of statements obtained by cruel, inhuman or degrading treatment if obtained after the passing of the Detainee Treatment Act 2005.¹⁸

However, in a significant exception, the 2006 Act still allowed for the admission of evidence obtained by coercion prior to the passing of the Detainee Treatment Act 2005 in certain circumstances, which created a grey area in which the use of evidence obtained by CIDTP could have been admissible. In particular, the 2006 Act provided that statements obtained prior to the passing of the Detainee Treatment Act 2005 as to which ‘the degree of coercion is disputed’, could be admitted by the presiding officer of the Military Commission where: ‘(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence’.¹⁹ The test of whether ‘the degree of coercion is disputed’ can be seen as a thinly veiled reference to CIDTP, with the result that evidence obtained by such treatment could have been admitted. The loophole was eventually closed by the Military Commissions Act 2009, which amended the provisions of the 2006 Act so as to prohibit reliance on statements obtained by torture and CIDTP regardless of when in time they were obtained. The 2009 Act also included greater safeguards for ‘normal’ confessions made by detainees, including a requirement that they

¹³ Presidential Military Order on Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, 66 FR 57833.

¹⁴ *Ibid.*, s. 4(c)(3). Regulations issued in 2002 governing the functioning of the military commissions likewise permitted that the normal rules on admissibility of evidence may not be applied; see Military Commission Order No. 1 (2002), available at <http://www.defense.gov/news/Mar2002/d20020321ord.pdf>.

¹⁵ Detainee Treatment Act 2005; Div.A, title X, Pub. L. 109-148, 30 December 2005; 119 *Stat.* 2740.

¹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁷ Military Commissions Act 2006, Public Law 109-366, 17 October 2006; 120 *Stat.* 2600, available at <http://www.gpo.gov/fdsys/pkg/PLAW-109publ366/html/PLAW-109publ366.htm>, s. 948r (b).

¹⁸ MCAT 2006 (above n. 17), s. 948r (d).

¹⁹ *Ibid.*, s. 948r (c). For criticism, see *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, *Addendum. Mission to the United States of America*, UN doc.A/HRC/6/17/Add.3, 22 November 2007, para. 27.

be voluntary.²⁰ However, the history of the Military Commissions Act illustrates the multiple attempts made to create exceptions that undermine well-established safeguards against torture.

US legislation has been designed to target those suspected of terrorism. In practice, this has covered a large number of persons who – as it emerged – have no connection with terrorism whatsoever but who became caught in the system.²¹ Allegations of ill-treatment and torture at Guantánamo Bay are well documented.²² In addition, outside of any legal framework, the United States has carried out what are commonly known as (extraordinary) renditions, i.e. removing individuals suspected of terrorist activities to third countries for the purposes of interrogation where they will be tortured or are at risk of torture.²³ However, there has been no accountability or effective remedies and reparation for these violations. The 2005 Detainee Treatment Act, in addition to providing a defence of ignorance of the law in relation to criminal proceedings,²⁴ also provides a similar defence in relation to civil claims for agents who participated in ill-treatment (including torture) of detainees.²⁵ The combined effect of the 2005 Detainee Treatment Act and the 2006 Military Commission Act was to deny recourse to ordinary civil remedies to individuals detained in Guantánamo Bay, which initially even included habeas corpus, i.e. proceedings to challenge the lawfulness of detention. However, the Supreme Court later held in *Rasul v. Bush* and *Hamdan v. Rumsfeld* that Guantánamo Bay detainees have the right to file a writ of habeas corpus.²⁶ In the later case of *Boumediene v. Bush*, following the adoption of the 2006 Military Commission Act, the Supreme Court held that the purported exclusion of jurisdiction in relation to habeas corpus claims constituted an unconstitutional suspension of the writ, and that detainees at Guantánamo were able to petition federal district courts for habeas relief in relation to their designation as enemy combatants.²⁷

²⁰ Military Commissions Act 2009, Title XVIII of the National Defense Authorization Act for Fiscal Year 2010; Pub.L.111-84, 28 October 2009; 123 Stat. 2190, available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ84/content-detail.html>, s. 102, substituting a new section 948r into the Military Commissions Act 2006.

²¹ See, e.g., Lakhdar Boumediene, 'My Guantánamo Nightmare', *New York Times*, 7 January 2012, available at <http://www.nytimes.com/2012/01/08/opinion/sunday/my-Guantánamo-nightmare.html>. See also the cases reported by the Close Guantánamo initiative, at <http://www.closeGuantánamo.org/> and W. Richey, 'Innocent, but in limbo at Guantánamo', *Christian Science Monitor*, 13 February 2006.

²² See Amnesty International, 'USA: Close Guantánamo. Guantánamo – Torture and other ill-treatment', 8 December 2006, AI Index no. AMR 51/189/2006, available at <http://www-secure.amnesty.org/en/library/info/AMR51/189/2006/en>.

²³ For an overview of the US rendition programme, see, e.g., 'Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states: Report, Rapporteur: Mr Dick Marty', CoE doc. AS/Jur (2006) 16 Part II, 7 June 2006, available at http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf; 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report', Rapporteur: Mr Dick Marty, Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Doc. 11302 rev., 11 June 2007, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>. See also Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, UN doc. A/HRC/13/42 19 February 2010, pp.43-89, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>.

²⁴ DTA 2005 (above n. 15), s. 1004. For discussion, see below, Section 4.3.2.

²⁵ DTA 2005 (above n. 15), s. 1004.

²⁶ *Hamdan v. Rumsfeld* 126 S. Ct. 2749 (2006).

²⁷ *Boumediene v. Bush* 553 U.S. 723; 128 S. Ct. 2229 (2008).

More than ten years after 9/11 there has been virtually complete impunity. Debates surrounding criminal prosecutions have not progressed so as to result in any action being taken against those responsible for ill-treatment of detainees, or their superiors.²⁸ Civil claims brought in the United States concerning renditions and allegations of ill-treatment and torture in detention have also failed on the grounds of the state secrets doctrine.²⁹ This includes claims brought by several individuals who allege that they were tortured and who had their claims vindicated in other jurisdictions.³⁰ Maher Arar, for example, had been rendered by the US authorities to Syria where he was subjected to a prolonged regime of arbitrary detention and torture. The case, which was based on intelligence information shared by Canadian authorities, resulted in a major review of security operations in Canada and a settlement of 10.5 million Canadian dollars.³¹ However, Mr Arar's attempts to pursue the perpetrators in the USA and to raise his case before US courts with a view to establishing the responsibility of US authorities, have failed to date.³² The USA therefore remains both a leading advocate of anti-terrorism legislation containing stringent and far-reaching powers, and a bastion of impunity in relation to acts of torture alleged to be committed in the course of the 'war on terror'.

2.2. Thailand

In January 2004, insurgents launched attacks against the Thai army in Southern Thailand, which marked the beginning of a conflict that has been ongoing since. The reasons for the conflict have been attributed to marginalisation of the Malay Muslims who are the majority population in the South, Islamist radicalism and political developments in Thailand more generally.³³ In January 2004, the Government of Thailand responded by applying Martial Law dating back to 1914 to the region, which grants wide powers to the military authorities, including the power to detain a person for seven days.³⁴ In 2005, the

²⁸ See, e.g., C.P. Blum, L. Magarrell, M. Wierda, 'Criminal Justice for Criminal Policy: Prosecuting Abuses of Detainees in U.S. Counterterrorism Operations', *ICTJ Policy Paper*, November 2009, <http://www.ictj.org/sites/default/files/ICTJ-USA-Criminal-Justice-2009-English.pdf>; Human Rights Watch, *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, July 2011, available at <http://www.hrw.org/sites/default/files/reports/us0711webwcover.pdf>.

²⁹ For discussion, see below, Section 4.4.3.

³⁰ L.K. Mehalko, 'Hooded: Binyam Mohamed and the State Secrets Privilege', *Boston College International and Comparative Law Review*, (2011) Vo.34, 81-94, available at http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bciclr/34_esupp/07_mehalko.pdf.

³¹ See 'Canada Reaches Settlement With Torture Victim', *New York Times*, 26 January 2007, available at <http://www.nytimes.com/2007/01/26/world/americas/26cnd-canada.html>.

³² *Arar v Ashcroft*, 414 F.Supp. 2d 250 (E.D.N.Y. 2006); 532 F.3d 157 (2d Cir. 2008) *aff'd* 585 F.3d 559 (2d Cir. (en banc) 2009); *cert. denied* 130 S.Ct. 3409 (2010).

³³ For an overview of the conflict in southern Thailand, see International Crisis Group, 'Thailand' webpage, available at <http://www.crisisgroup.org/en/regions/asia/south-east-asia/thailand.aspx>.

³⁴ Martial Law Act, B.E. 2457 (1914), available at <http://www.lawreform.go.th/lawreform/images/th/legis/en/act/1914/128.pdf>. S. 15bis of the Act authorises the military authorities to detain individuals who are suspected of violating the Act or other orders of the military authorities for up to seven days 'for inquiry or for other necessities of the military'. The application of the Martial Law Act was revoked with the adoption of an Emergency Decree on 19 July 2005 (on which, see below n. 35 and accompanying text). However, following the *coup d'etat* on 19 September 2006, the Martial Law Act 1914 was invoked once again, and continues to operate in a number of southern provinces (Yala, Pattani, and Narathiwat) in conjunction with the Emergency Decree 2005: see Cross Cultural Foundation and the Muslim Attorney Center Foundation, 'Joint Submission to the Working Group on the Universal Periodic Review of Thailand', 5 October 2011, available at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/JS8-JointSubmission8-eng.pdf>, para. 5; Amnesty International, 'Report submitted to the Working Group on the Universal Periodic Review of Thailand', 14 March 2011, pp. 2-3, available at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/AI-AmnestyInternational-eng.pdf>.

King enacted an Emergency Decree ('the 2005 Emergency Decree'),³⁵ pursuant to the emergency powers contained in section 184 of Thailand's Constitution.³⁶ Section 4 of the 2005 Emergency Decree contains an exceptionally broad definition of 'state of emergency', meaning:

a situation, which affects or may affect the public order of the people or endangers the security of the State or may cause the country or any part of the country to fall into a state of difficulty or contains an offence relating to terrorism under the Penal Code, a battle or war, pursuant to which it is necessary to enact emergency measures to preserve the democratic regime of government with the King as Head of State of the Kingdom of Thailand under the Constitution of the Kingdom of Thailand, independence and territorial integrity, the interests of the nation, compliance with the law, the safety of the people, the normal living of the people, the protection of rights, liberties and public order or public interest, or the aversion or remedy of damages arising from urgent and serious public calamity.³⁷

The 2005 Emergency Decree gives the Prime Minister the power to declare an emergency with the approval of the Council of Ministers and to issue wide-ranging regulations. Section 11 of the Emergency Decree grants the Prime Minister the power to deputise 'competent officials' with powers of arrest, detention, and deportation

[i]n the case where an emergency situation involves terrorism, use of force, harm to life, body or property, or there are reasonable grounds to believe that there exists a severe act which affects the security of state, the safety of life or property of the state or person, and there is a necessity to resolve the problem in an efficient and timely manner [...].³⁸

The provisions of the 2005 Emergency Decree have been supplemented by regulations adopted by the national security wing of the Thai armed forces, the Internal Security Operations Command (ISOC) that provide detailed rules relating to arrest and detention.³⁹ Under the 2005 Emergency Decree, competent officials may arrest anyone

³⁵ Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 (2005), 16 July 2005, available at <http://www.unhcr.org/refworld/docid/482b005f2.html> (hereinafter '2005 Emergency Decree (Thailand)'). The application of the 2005 Emergency Decree to the three southern regions of Yala, Pattani, and Narathiwat has since been extended several times, most recently in June 2012: see 'Emergency law extended in far South', *Bangkok Post*, 19 June 2012, at <http://www.bangkokpost.com/news/security/298740/south-emergency-law-extended>.

³⁶ Section 184 of the 2007 Constitution of the Kingdom of Thailand (available at <http://www.asianlii.org/th/legis/const/2007/1.html>) provides that Emergency Decrees having the force of law may be issued for '[f]or the purpose of maintaining national or public safety or national economic security, or averting public calamity'. In order for such an Emergency Decree to be made, the Council of Ministers must be of the view that a situation of emergency exists and that there is 'necessary urgency which is unavoidable'. The Emergency Decree must thereafter be approved by Parliament, failing which it lapses. There is also the possibility for Members of Parliament to refer the question of whether the Emergency Decree is in accordance with the Constitution (i.e. whether there exists a state of emergency, and whether there is urgency) to the Constitutional Court (see *ibid.*, s. 185).

³⁷ 2005 Emergency Decree (Thailand) (above n. 35), s. 4.

³⁸ *Ibid.*, s. 11.

³⁹ Regulation of Internal Security Operations Command Region 4 Concerning Guidelines of Practice for Competent Official as per Section 11 of the Emergency Decree on Government Administration in States of Emergency, B.E. 2548 (2005), unofficial translation available as Annex II to Joint Submission by the Cross Cultural Foundation and the Muslim Attorney Center Foundation, at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/JS8-JointSubmission8-eng.pdf> (hereinafter 'ISOC Regulation').

‘suspected of having a role in causing the emergency situation, or being an instigator, a propagator, a supporter of such act or concealing relevant information relation to the act which caused the emergency situation’.⁴⁰ In arresting and taking suspected persons into custody, a competent official must apply for leave of a court,⁴¹ which appears to be primarily for the purposes of identification and ensuring that the ‘right’ person is arrested.⁴² An individual in relation to whom leave is granted ‘shall be taken into custody at a designated place which is not a police station, detention centre, penal institution or prisons and shall not be treated as a convict’.⁴³ Extensions of detention may be sought every seven days.⁴⁴ According to the complementary regulations, ‘the arrest and detention is to be carried out with the aim to give explanation and instil correct attitude so that the person quits the behaviour or stops abetting the act that may give rise to violence in states of emergency’.⁴⁵ The person has to be released after thirty days unless he or she is subjected to a criminal prosecution.

Under the 2005 Emergency Decree, competent officials and persons having identical powers are granted immunity; they

[...] shall not be subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act if such act was performed in good faith, non-discriminatory, and was not unreasonable in the circumstances or exceed the extent of necessity, but this does not preclude the right of a victim to seek compensation from a government agency under the law on liability for wrongful acts of officials.⁴⁶

The UN Special Rapporteur on counter-terrorism has expressed concern that the definition of state of emergency is overly broad and vague, and potentially in contravention of Thailand’s obligations under Article 4 of the ICCPR.⁴⁷ Likewise, the UN Human Rights Committee expressed concern that the 2005 Emergency Decree ‘does not explicitly specify, or place sufficient limits, on the derogations from the rights protected by the Covenant that may be made in emergencies and does not guarantee full implementation of article 4 of the Covenant’.⁴⁸

In addition to the Emergency Decree and regulations, an Internal Security Act was adopted in 2008 that may be applied to a situation that ‘affects internal security but does not yet require the declaration of a state of emergency under the Act on Government

⁴⁰ 2005 Emergency Decree (Thailand) (above n. 35), s. 11(1).

⁴¹ *Ibid.*, s. 12.

⁴² ISOC Regulation (above n. 39), Rule 3.2.

⁴³ 2005 Emergency Decree (Thailand) (above n. 35), s. 12.

⁴⁴ *Ibid.*, s. 12.

⁴⁵ ISOC Regulation (above n. 39), Rule 3.8.

⁴⁶ 2005 Emergency Decree (Thailand) (above n. 35), s. 17.

⁴⁷ See *Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Addendum, Communications with Governments*, UN doc. A/HRC/10/3/Add.1, 24 February 2009, paras. 282-284.

⁴⁸ *Concluding Observations of the Human Rights Committee: Thailand*, UN doc. CCPR/CO/84/THA, 8 July 2005.

Administration in a State of Emergency’, which adds a further layer of security laws that has been applied at various times, including in the South.⁴⁹ While the Internal Security Act constitutes an improvement in as much as it does not provide for immunity and contains some other safeguards, it also includes some provisions giving cause for concern.⁵⁰ Section 21 of the Act provides for preventive detention for ‘educational purposes’ to be imposed by a court:

if an investigating officer believes that any accused person has committed an offence which affects internal security as designated by Cabinet by mistake or out of ignorance, and granting the suspect the opportunity to reform will be of benefit to the maintenance of internal security, the investigating officer shall submit records about the accused along with the opinion of the officer to the Director [who may then, through the public prosecutor, petition a court to order] that person be sent to the Director to undergo training at a designated place for a period not exceeding 6 months [...].⁵¹

Since 2004, over 10,000 ethnic Malay Muslims have been detained under Martial Law and the Emergency Decrees for up to 37 days. According to a recent statistic, charges were filed against only around 20% of those arrested and detained for security reasons.⁵² 50% of these charges were dismissed for lack of evidence, with only one case reaching the Supreme Court, resulting in an acquittal.⁵³ As the authorities are not required to produce the detainee before the court when seeking an extension, courts routinely grant requests, with few questions asked. Other safeguards have equally proved ineffective; national and international human rights organisations have reported a number of torture cases during detention under the special legal regime.⁵⁴ Since the beginning of the conflict in 2004, no member of the security forces has been successfully prosecuted for torture or ill-treatment, despite the surfacing of many complaints and an authoritative report of the National Human Rights Commission of Thailand on 34 cases of torture.⁵⁵

The case of Imam Yapa Kaseng detained pursuant to the 2005 Emergency Decree and the ISOC Regulation illustrates the impact of this draconian legal regime.⁵⁶ Imam Yapa

⁴⁹ Internal Security Act 2008, B.E. 2551 (2008), translation available at http://thailaws.com/law/t_laws/tlaw0342.pdf.

⁵⁰ For a detailed analysis, see International Commission of Jurists, *Thailand's Internal Security Act: Risking the Rule of Law?*, February 2010, available at <http://icj.org/IMG/REPORT-ISA-THAILAND.pdf>.

⁵¹ For the text of relevant legislation and information on the application of security laws in the region, see Cross Cultural Foundation and Muslim Attorney Centre, *Thailand: A Compilation of Reports-Recommendations to the Judiciary Concerning the Administration of Justice in the Security Related Cases in the Southern Border Provinces*, 2010.

⁵² Society for Threatened People, ‘Report submitted to the Working Group on the Universal Periodic Review of Thailand’, 14 March 2011, available at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/STP-SocietyThreatenedPeoples-eng.pdf>.

⁵³ Ibid.

⁵⁴ See, e.g., Amnesty International, ‘Thailand: Torture in the Southern Counter-insurgency’, AI Index no. ASA 39/001/2009, 13 January 2009, available at <http://www.amnesty.org/en/library/info/ASA39/001/2009/en>.

⁵⁵ See National Human Rights Commission of Thailand, Report No. 275-308/2553, 15 September 2010, available at http://www.nhrc.or.th/2012/wb/en/news_detail.php?nid=536&parent_id=1&type=highlight, at p 3. See further, Amnesty International, ‘Report submitted to the Working Group on the Universal Periodic Review of Thailand’ (above n. 34).

⁵⁶ See Cross Cultural Foundation and the Muslim Attorney Center Foundation, ‘Joint Submission to the Working Group on the Universal Periodic Review of Thailand’, 5 October 2011, available at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/JS8-JointSubmission8-eng.pdf>, para. 5.

Kaseng was arrested by the Special Taskforce 39 in Narathiwat along with three other individuals. Two days after his arrest, Imam Yapa died while in custody, allegedly as a result of torture.⁵⁷ The Army offered conflicting reasons for his death, asserting alternatively that he fell to the ground and cracked his ribs or that a soldier cracked his ribs while trying to resuscitate him.⁵⁸ A motion requesting the court to investigate the torture of Imam Yapa was dismissed on account of the military officials having the power to detain him under the Martial Law Act and the Emergency Decree.⁵⁹ In 2010, a provincial court likewise dismissed a criminal complaint for lack of jurisdiction, which was said to be proper as against the military officials in the Military Court; the charges against the police officer were dropped. Individuals such as Imam Yapa's widow do not have a right of recourse to bring suits before the Military Court but must seek the cooperation of the Military Attorney General to take their case. The family appealed the dismissal of the criminal case, which was affirmed on appeal and is now pending at the Supreme Court.⁶⁰ A civil lawsuit was filed seeking damages of 15 million Thai Bath from the Ministry of Defense, the Royal Thai Army and the Royal Thai Police; the case was settled out of court.⁶¹

While impunity prevails, the Songkhla Administrative Court has made a number of important rulings, such as finding – in the case of death in custody of Mr Azaree Sama-ae – that immunity under the Martial Law Act does not apply to unlawful acts, and awarding compensation of over 500,000 Thai Bath (case on appeal at the time of writing),⁶² which indicates some willingness to provide a measure of justice in response to the use and abuse of sweeping emergency powers.

2.3. Sudan

A military government took power in Sudan in 1989 following a successful coup. Since then, Sudan has been embroiled in a number of conflicts, particularly in Darfur from 2003 onwards and other parts of the country, such as South Kordofan, more recently. The government of Sudan has faced military challenges from rebel groups and political opposition, most recently in form of a series of public protests in 2011 and 2012. Sudan hosted Osama Bin Laden in the 1990s and was known to support terrorists. However, it changed its policies in the late 1990s and has cooperated with other states in counter-terrorism measures.⁶³

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Black Case no. 39/2010, Judgment of the Songkhla Administrative Court of 30 January 2012 (summary on file with REDRESS). See also http://voicefromthais.wordpress.com/2012/01/12/2012_01_11_songkhla-administrative-courts-will-read-the-verdict-of-the-damage-claim-against-state-agencies-on-death-in-custody_mr-assaree-ismae-ae/.

⁶³ See on recent developments in Sudan, P.M. Holt and W.M. Daily, *A History of the Sudan, From the Coming of Sudan to the Present Day* (5th ed., Pearson Education Ltd, 2011), Chapter 16.

Immediately after taking power in 1989, the Government of Sudan issued an emergency decree that vested it with wide-ranging powers.⁶⁴ This state of emergency, which is generally declared by the President with some limited parliamentary involvement, was lifted in July 2005 for the whole of Sudan, except for Darfur and parts of eastern Sudan. The state of emergency for Darfur has remained in force since. It is governed by the Emergency and Protection of Public Safety Act of 1997⁶⁵ and relevant bylaws. The Act vests the competent authority with wide discretionary powers to arrest any person on grounds of ‘crimes related to the declaration’.⁶⁶ Section 15 of the Emergency and Public Safety Bylaw of 1998 allows for indefinite detention on public safety grounds without specifying any safeguards. Moreover, section 37 of the Bylaw restricts the bringing of compensation claims, which have to be lodged within 12 months from the day of the incident giving rise to the claim and require prior notification.

There have been a number of allegations of torture in Darfur, under emergency laws or otherwise. In one case, five persons were detained in relation to an incident in which the police had lost their guns in a refugee camp and fighting had ensued.⁶⁷ The five detainees – who were influential figures in the camp – alleged that they were tortured to name the persons involved in the fight and to retrieve the guns. After they were initially released on bail, they were re-arrested under the 1997 and 1998 emergency laws. They were detained incommunicado in Nyala prison for 25 days and one of them was not provided with medical treatment even though he was seriously ill and requested medical help. Notwithstanding a complaint brought, there has been no investigation into the wrongful arrest and detention, and/or the withholding of medical treatment with a view to holding the perpetrators accountable, or any reparation for the violations suffered.

In 2001, Sudan enacted anti-terrorism legislation. Under the Anti-Terrorism Act 2001, terrorism means:

[...] all violent acts or threats thereof, whatsoever the reasons or objectives behind them, that take place in execution of an individual or collective criminal scheme aiming at terrorizing or terrifying the people by causing injury or endangering their lives, freedoms or security or causing damage to the environment or public or private funds or any facilities or public and private properties or occupying or capturing them or exposing any national or strategic resources to danger.⁶⁸

The offence of terrorism comprises the following elements and punishment:

⁶⁴ For discussion, see *Amnesty International and Others v. Sudan* (Comm. Nos. 48/90, 50/91, 52/91, 89/93), African Commission on Human and Peoples’ Rights (1999).

⁶⁵ Emergency and Protection of Public Safety Act 1997, Act Number 1 of 1998, text available at http://www.pclrs.org/1997_Emergency_Act_2.pdf.

⁶⁶ Emergency and Protection of Public Safety Act 1997, s.5 (above n. 65).

⁶⁷ *Mayor Hussein Ishaq Yahia Sayo & Others v. Director of North Darfur State Police & Others*, a case brought before Sudan’s Constitutional Court. On file with REDRESS.

⁶⁸ Anti-Terrorism Act 2001, Art. 2.

Any person [who] undertakes, incites, attempts, or facilitates by talk or deeds or publication, to commit an act in execution of a purpose of terrorist nature against the State or its social security, citizens, public/private utilities or properties or facilities or installations, shall be sentenced by death or imprisonment for life.⁶⁹

The Act also stipulates several other offences, including membership in a terrorist organisation as well as attacks on means of transport, the environment and kidnapping (illegal detention). Notably, it allows for the establishment of special anti-terrorism courts and vests the Chief Justice with the power to enact rules of procedures. The rules subsequently enacted have given rise to a series of concerns over their compatibility with the right to a fair trial, as they allowed trials in absentia and reduced the number of, and time for appeals.⁷⁰ In practice, the Act has been mainly used against Darfurians, particularly those accused of being rebels following the 2008 attacks by the Justice and Equality Movement on Omdurman, several of whom were sentenced to death in trials where they had alleged that the evidence used against them had been obtained by means of torture.⁷¹ In the case of *Mohammed Saboon v. Sudan Government*, which challenged the constitutionality of the rules of procedure adopted by the Chief Justice, also known as Regulation 25, the President of the Court offered this astonishing explanation for upholding the regulation:

Yes, this Court is not a political one; but it is also not an island isolated from what is happening in the Country. It cannot, in my opinion, in considering the Regulations whose constitutionality is contested, do so without reconciling itself with some departure from usual norms. This is not an innovation. In Nuremberg the serious loss of lives and property, and the cruelty and brutality with which the war was conducted forced those in power to disregard one of the most settled principles of law, that is the retroactivity of laws. It is quite normal in times of disaster, invasion, war and other national crises to suspend some basic rights temporarily, property may be confiscated and persons may be detained in disregard of the normal law. Therefore I refuse to decide against Regulation 25, which requires the application of its provisions, notwithstanding the provisions of the laws of Criminal Procedure and Evidence. This would no doubt be in contradiction of the principles of jurisprudence and judicial precedent, which place constitutional provisions at

⁶⁹ *Ibid.*, Art. 5.

⁷⁰ See in particular A.M. Medani, 'A Legacy of Institutionalised Repression: Criminal Law and Justice in Sudan', in L. Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, 2011), pp. 67-88, at 79-82.

⁷¹ *Report of the Special Rapporteur on the Situation of Human Rights in the Sudan, Sima Samar*, UN doc. A/HRC/11/14, June 2009, para. 30: 'In April and May 2009, anti-terrorism courts in Khartoum sentenced a further 41 individuals to death for participation in the May 2008 JEM attack, bringing the total number of death sentences for participation in the attack to 91. As in earlier trials, those condemned were convicted of charges under the Criminal Act, Anti-Terrorism Act, and Arms, Ammunitions and Explosives Act. The charges did not aim to establish individual criminal responsibility for killing or injuring civilians or recruiting child soldiers. Instead, they referred mainly to collective crimes including criminal conspiracy, membership of a terrorist organization and waging war against the state. Defendants were not granted access to defense counsel until the trials began. The accused were held *incommunicado* for up to four months before the trials, during which most of them registered confessions they later retracted in court, alleging the statements were made under duress. Nonetheless, the confessions were admitted as prosecution evidence and eventually formed part of the basis for the verdicts. In a meeting between the Special Rapporteur and the National Assembly's Human Rights Committee on 3 June 2009, the Committee stated the court sessions were closed, and that its members were not able to attend.'

the top of the pyramid, followed by laws emanating from the legislative authority. Any provision in any law or subsidiary legislation which contradicts the Constitution, and any legislation which contradicts with the law becomes void. Thus I should be impelled to pronounce the illegality of Regulation 25, had it not been for the exceptional circumstances and the exceptional crimes which prompted the adoption of the said Regulations, as I explained in this paragraph.

The Sudanese National Intelligence and Security Services (NISS) had been vested with extremely broad powers of arrest and detention throughout the 1990s and 2000s in pursuance of a broad and ill-defined security mandate. While concerns over systematic torture by the NISS are longstanding, its officials, as well as the police and the army, enjoy immunity from prosecution, which has in practice resulted in impunity.⁷² The 2005 Comprehensive Peace Agreement (CPA) and 2005 Interim National Constitution (INC) envisaged fundamental reforms of security legislation as part of a broader democratic transformation. According to the INC, the NISS was to be transformed into an intelligence service with no powers of arrest and detention, which would have greatly limited their extraordinary powers and reduced the scope for torture.⁷³ A new National Security Act was finally enacted in 2010.⁷⁴ However, contrary to the principles set forth in the CPA and INC, it retained broad powers of arrest and detention, as well as immunity, for agents of the NISS. Under the National Security Act, individuals can be detained for up to four and a half months without being brought before a judge.⁷⁵ The NISS is alleged to have been responsible for arresting, detaining and torturing scores of protesters, human rights defenders, individuals from Darfur, White Nile or South Kordofan (all conflict areas) and others.⁷⁶ Bushra Rahma, a human rights defender from South Kordofan, was arrested and detained by the NISS in June 2011 on suspicion of ‘waging war against the state’ in relation to human rights reports he had shared with foreign organisations. Bushra Rahma alleged that he was held incommunicado and tortured during his detention. Contrary to a ruling by the Khartoum Criminal Court that refused to renew detention and ordered that Bushra be released, Bushra Rhama was immediately rearrested after leaving the court. It took almost another year and a series of interventions on his behalf before he was eventually released in July 2012. The cases

⁷² See REDRESS and Sudanese Human Rights Monitor, *Comments to Sudan’s 4th and 5th Periodic Report to the African Commission on Human and Peoples’ Rights: The need for substantial legislative reforms to give effect to the rights, duties and freedoms enshrined in the Charter* (April 2012), available at <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%20Report%20-%20Legislative%20Reforms.pdf>, Section 4.3.

⁷³ See REDRESS and SORD, *Security for All: Reforming Sudan’s National Security Services*, September 2009, available at <http://www.pclrs.org/downloads/Resources/Resources/Security%20for%20all%20Final.pdf>.

⁷⁴ The text of the Act can be found at <http://www.pclrs.org/downloads/bills/Institutional%20Law/National%20Security%20Act%202010%20UNMIS%20unofficial%20English%20%20Transaltion%20final%20version%202010-02-03%20single%20space.pdf>. See for a brief analysis of the law, see N. Adeeb, ‘At the State’s Mercy: Arrest, Detention and Trials under Sudanese Law’, in Oette (ed.) (above n. 70), p. 121, at pp. 133-136.

⁷⁵ National Security Act (Sudan) (above n. 74), s. 51(e)-(h).

⁷⁶ See Sudan Democracy First Group, REDRESS and African Centre for Justice and Peace Studies, *Comments to Sudan’s 4th and 5th Periodic Report to the African Commission on Human and Peoples’ Rights: Article 5 of the African Charter: Prohibition of torture, cruel, degrading or inhuman punishment and treatment*, April 2012, available at <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%204th%20and%205th%20Periodic%20Report.pdf>.

under various pieces of security legislation highlighted above are symptomatic of a system in which the authorities acting in Darfur and NISS members enjoy almost complete impunity, due to a combination of broad security powers, immunity laws and the lack of effective investigations and prosecutions for human rights violations in Sudan.

2.4. Findings

At first sight, the three case studies have little in common. The three countries featured are very different in terms of their political and legal systems and the context in which legislation has been enacted differs considerably. Notwithstanding this outward appearance, there is a common denominator. In all countries, security legislation has created a separate regime with a potentially broad field of application due to the scope of offences and grounds for detention. A person who falls within such a regime faces a severe curtailment of his or her rights ('he' will be used as most targets have been men): he can be held for lengthy periods of detention without access to a lawyer or a judge; in case of torture, there is no access to effective safeguards or complaints procedures; he risks being prosecuted for the most serious offences that carry severe punishments; he faces the risk of being tried before special courts lacking independence, which may admit evidence extracted under torture or CIDTP; he may theoretically bring a criminal complaint but knows that they will not be successful because immunity laws shield the perpetrators; he may bring a civil suit but officials may enjoy immunity or authorities may benefit from the state secrets doctrine.

Conversely, the competent authorities find themselves in a position where they have: broad powers to arrest and detain persons; almost complete control over a person as they are not subject to effective judicial supervision or challenges; no fear of any criminal or civil accountability for any acts carried out against those falling within the scope of the regime. In essence, this regime shifts the balance of power within a system decisively towards special forces forming part of the executive, and thereby effectively removes a considerable number of persons from the protection of the law. Policies to this effect have in all three countries been led by the executive but have also to some degree been sanctioned by parliament (though the democratic credentials of the legislatures in question differ markedly).

The consequences of the adoption of such laws have by and large not been counteracted by the judiciary, which has in some instances, particularly in Sudan, even reinforced them. These policies and the measures enacted have enhanced the vulnerability of a considerable number of persons, be they predominantly Muslim suspects in the USA, Malay Muslims in Thailand or ethnic Darfurians and others in Sudan. In all three countries, the security regimes are associated with allegations of torture that exceed the allegations levelled in other contexts, such as law-enforcement, and have been met with impunity.

3. The making and life span of security legislation: Modalities, prerequisites, scrutiny and duration

The three case studies featured security legislation that has been adopted as emergency laws, in the course of fast track procedures or as ordinary statutory laws. This may suggest that the process by which security legislation is enacted makes no difference. While this may be correct in a particularly country situation, the process can be, and often is, important. This is because international law and national laws recognise states of emergencies as exceptions that may justify certain derogations, a qualification that does not automatically apply, as such, to anti-terrorism or other security legislation. The process of enacting legislation is also crucial for the checks and balances that apply to scrutinise bills and ensure that they are compatible with fundamental rights and international human rights. Finally, the way by which a specialised regime is established may determine when or how it can be changed. For example, emergency or anti-terrorism legislation may become entrenched where it can be easily renewed by the executive or, conversely, requires considerable support where it lapses if not renewed by parliament, which ensures an element of democratic control.

3.1. Emergency laws

The rationale for emergency laws is that states need to respond to situations of emergency, which, under international law, denote a ‘threat to the life of a nation’.⁷⁷ Such a threat has been defined as ‘an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population, or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the state is composed’.⁷⁸ By giving states the power to declare a state of emergency, international human rights law recognises vital security interests within the broader legal framework in recognition of the possibility that, without such power, states may not ratify treaties or simply ignore any legal constraints in practice. However, this power is exceptional and, due to the apparent risk of abuse, it is subject to several limitations: (i) states have to be transparent, i.e. declare a state of emergency; (ii) the threat has to be genuine; (iii) states may only derogate from certain rights, such as the right to liberty and security; and (iv) any such derogation must be necessary and proportionate to counter the threat identified.

Several rights, including the prohibition against torture and key safeguards, such as the right to an effective remedy, are not subject to derogation.⁷⁹ National, regional and

⁷⁷ See ICCPR, Art. 4(1): ‘time of public emergency which threatens the life of the nation’; Art. 15(1), ECHR: ‘war or other public emergency threatening the life of the nation’; ACHR, Art. 27(1) ‘war, public danger, or other emergency that threatens the independence or security of a State Party’.

⁷⁸ International Law Association, *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (1984), section A.1(b), available at <http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/ParisMinimumStandards.pdf>. See also *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1984), available at <http://www1.umn.edu/humanrts/instreet/siracusaprinciples.html/>, para. 39.

⁷⁹ The rights specified to be absolute and non-derogable under any circumstances in all the major general human rights instrument are the right to life (save in respect of deaths resulting from lawful acts of war), the prohibition of torture, the prohibition of slavery and

international courts, while at times giving states some discretion when determining whether there is an emergency, have frequently subjected provisions of emergency laws to close scrutiny concerning their compatibility with applicable human rights standards.⁸⁰

In most legal systems, the legal framework applicable to states of emergency is set out in the constitution. This includes conferring the power to declare a state of emergency, the procedures for the adoption of emergency legislation (decrees, etc.), the derogability of rights, the length of emergencies, and the power of review, particularly legislative and judicial review. The constitutions in most of the countries surveyed authorise the executive to declare a state of emergency. This power is to some degree counterbalanced by the need to obtain approval from other bodies, particularly parliament, failing which the emergency lapses.⁸¹

In some countries, such as Israel and South Africa, emergencies are to be declared by parliament.⁸² This would appear to provide safeguards against the executive power hastily declaring an emergency. However, parliament may not act as a break against recourse to emergencies where the underlying policy rationale is widely shared. In Israel, for example, the emergency regime has been an integral tool in the legal framework governing the conflict from its outset in 1948. In South Africa, following the negative experiences of apartheid, states of emergency are subject to substantial parliamentary and judicial controls.⁸³ While this system has not been tested in practice, it provides important

forced labour, and the prohibition of retrospective criminal laws (*nullem crimen sine lege*): see Art. 4, ICCPR; Art. 15, ECHR; Art. 27, ACHR. On the absolute nature of the prohibition of torture and CIDTP, see also Art. 2(2), CAT and Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN doc. CAT/C/GC/2, 24 January 2008, para. 6. Although the right to a remedy is not expressly included in the list of non-derogable rights under Art.4 ICCPR, it is generally recognized that the obligation on States to provide redress for victims of torture and other ill-treatment remains applicable during a state of emergency. See Human Rights Committee, *General Comment No. 29* (above n.5).

⁸⁰ See, e.g., the principles set out by the UN Human Rights Committee in *General Comment No. 29* (above n.5), at para. 14. With regard to the ECHR, see the ‘Greek Case’ (*Denmark, Norway, Sweden and the Netherlands v. Greece*) (App. nos 3321-24/67), Report of the European Commission of Human Rights, 5 November 1969, and see *A and others v. United Kingdom* (App. no. 3455/05), ECtHR [GC], Judgment of 19 February 2009, para. 179; with regard to the ACHR, see Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of 30 January 1987; Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of 6 October 1987. For an example of domestic scrutiny, see *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 (the ‘Belmarsh’ case).

⁸¹ For instance, under the Constitution of the Republic of Turkey 2007 (available at <http://www.worldlii.org/tr/legis/const/2007/1.html#P2>), the power of declaring a state of emergency or martial law is vested in the Council of Ministers, meeting under the chairmanship of the President of the Republic, only after consultations with the National Security Council. The declaration of emergency must then be immediately submitted to the National Assembly for approval (see arts. 120 and 122(1)). China requires the Standing Committee of the National People’s Congress to decide whether a declaration should be made, which is then promulgated by the President: see Art. 67(20), Constitution of the People’s Republic of China 2004, available at <http://www.asianlii.org/cn/legis/const/2004/1.html>. In Morocco, under the new Constitution adopted in 2011, the King must seek consultation with a broad range of Constitutional actors (including the Prime Minister, the Presidents of the two chambers of Parliament and the President of the Constitutional Court) prior to declaring a state of emergency: see Constitution of Morocco (2011), available at http://www.sgg.gov.ma/BO/bulletin/FR/2011/BO_5964-Bis_Fr.pdf, Art. 59. In Nigeria, the National Assembly must approve emergency decrees, which are declared by the President, by a two-thirds majority within two days if it is in session and in any case within 10 days if not in session: see Art. 305(6)(b), Constitution of the Federal Republic of Nigeria 1999, available at <http://www.ngex.com/nigeria/govt/constitution/default.htm>. In Thailand, as noted above, any emergency decrees issued are subject to approval by Parliament, failing which they lapse; in addition, the Constitution foresees the possibility of judicial review by the Constitutional Court of whether a state of emergency in fact exists (see above n. 36).

⁸² See Basic Law: The Government (2001) (Israel), s. 38 (available at http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm); Constitution of the Republic of South Africa 1996, s. 27 (available at <http://www.info.gov.za/documents/constitution/1996/index.htm>).

⁸³ Section 37 of the Constitution of the Republic of South Africa 1996 provides that a state of emergency is to be declared by the National Assembly, that any legislation adopted pursuant thereto can only be prospective and can last no more than 21 days unless the National Assembly resolves to extend the declaration, which can be for no more than 3 months at a time. The first such vote to extend

safeguards against possible abuse. In Egypt, the Constitutional Declaration of 2011 provides that, while the President may declare an emergency, parliament must approve it as soon as possible, and any emergency lasting longer than six months has to be approved in a People's referendum.⁸⁴ This was clearly drafted in response to, and with a view to preventing a repeat of, the notorious quasi-permanent state of emergency that had been in force since 1967, though it subsequently did not prevent its further extension.⁸⁵

One problematic feature of emergency regimes is the use of the very term 'emergency'. In some countries, the term is not defined, which leaves virtually unfettered discretion to the executive.⁸⁶ Whilst most other systems do define the term 'emergency', the definitions used tend to be broad. For example, the decree issued by the Supreme Council of Armed Forces renewing regulations arising from the emergency refers to the case of 'facing any internal disturbances, all terrorism danger, national security or public system disruption or financing all these ...'.⁸⁷ In the UK Civil Contingencies Act 2004, for example, 'emergency' is defined as (a) an event or situation which threatens serious damage to human welfare in a place in the United Kingdom, (b) an event or situation which threatens serious damage to the environment of a place in the United Kingdom, or (c) war, or terrorism, which threatens serious damage to the security of the United Kingdom.⁸⁸ This definition emphasises the seriousness of the threat, a requirement recognised in international jurisprudence.⁸⁹ However, it still leaves considerable latitude to the relevant body to determine 'seriousness' which is reflective of a general reluctance to curtail decision-making powers to characterise a situation as an emergency. Some systems, such as in Colombia and Peru, distinguish between different types of emergencies that are subject to different procedures and limit the powers to issue declarations related to the crisis identified.⁹⁰

a state of emergency can be adopted by simple majority, but subsequent extensions require a qualified majority of 60%. Any resolution can only adopted following a public debate. Section 37(3) expressly provides for judicial review of the declaration of emergency (and any extension), as well as of 'any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency'.

⁸⁴ The 2011 Constitutional Declaration requires a declaration of emergency to be approved by Parliament within seven days from the Presidential proclamation; a popular referendum is required for the renewal of any state of emergency after the first 6 months: see Constitutional Declaration 2011, available at <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>, Art. 59.

⁸⁵ In practice, Egypt has continued to be under a state of emergency even following the deposition of President Mubarak. Under the previous regime, Egypt had been under a near continuous state of emergency since 1967 (with only a short interruption in 1980), most recently pursuant to Presidential decree No. 126 adopted by President Mubarak in July 2010, which had extended the state of emergency for a further two years. By Decree No. 193 of the Supreme Council of Armed Forces, dated 10 September 2011, the military government simply amended Presidential Decree No. 126 so as to slightly expand its scope to cover a broad range of situations, including not only terrorism but domestic disturbances of varying degrees of severity (see <http://www.egyptiancabinet.gov.eg/Decrees/PresidentialDecrees.aspx>). The state of emergency lapsed on 31 May 2012.

⁸⁶ See, e.g., China's Constitution of 2004 (above n. 81), Arts. 67(2), 80, 89(16).

⁸⁷ Supreme Council for Armed Forces Decree No. 193 (15 September 2011), available at <http://www.cabinet.gov.eg/Decrees/PresidentialDecrees.aspx>.

⁸⁸ Section 19, Civil Contingencies Act 2004 (CCA), available at <http://www.legislation.gov.uk/ukpga/2004/36/contents>. For an overview of the Act, see 'Civil Contingencies Act 2004: A Short Guide (revised)', available at <http://www.cabinetoffice.gov.uk/media/132428/15mayshortguide.pdf>.

⁸⁹ See the sources cited above, n. 80.

⁹⁰ Political Constitution of Colombia (1991), Arts 212-215 (available at <http://web.presidencia.gov.co/constitucion/index.pdf> and Political Constitution of Peru, 1993, Art. 137 (available at <http://www.tc.gob.pe/legconperu/constitucion.html>).

Once an emergency has been declared, most legal systems vest the executive with the power to enact decrees having the force of law. The procedural latitude to declare an emergency and adopt emergency legislation is in many countries circumscribed by substantive constraints, namely the need to adhere to constitutional rights or other legislation, such as the Human Rights Act in the United Kingdom, when adopting emergency laws or regulations. Most constitutions surveyed expressly stipulate that emergency legislation may not derogate from certain rights, particularly the prohibition of torture.⁹¹ Some constitutions, such as in Colombia or South Africa, explicitly provide that international human rights obligations apply in respect of the derogability of rights.⁹² However, the constitution or legislation of other states seemingly allow the derogation of rights that is broader than envisaged under the ICCPR or other treaties; for example, Sri Lanka's constitution allows derogation from the right to be brought before a judge, which removes a crucial safeguard.⁹³ Moreover, in some countries, such as in China and Syria, the respective constitution does not include any explicit limits to derogation.

In practice, however, emergency laws adopted are frequently characterised by prioritising security considerations at the expense of individual rights. Delegated security legislation or regulations can be particularly pernicious as they are removed from the normal parliamentary process. Thailand's emergency regulations and Sudan's emergency bylaws discussed above are two such examples. In Sri Lanka, emergency regulations adopted by the executive under the Public Security Ordinance of 1947 empower the police and the army to arrest anyone without a warrant, hold them incommunicado, prohibit detainees to have contact with family or friends and admit confessions made to senior police officials with the onus on the accused to prove that the 'confession' was extracted under duress.⁹⁴ The Public Security Ordinance, which harks back to colonial days but has now been given constitutional status, further provides that 'no emergency regulation, order or rule [to] be called in question in any court'.⁹⁵ This is an extreme example of the ousting of a court's jurisdiction but it reflects a practice where emergency regulations are often the subject of limited if any judicial review.

⁹¹ See e.g. Art. 28I(1) of the Constitution of the Republic of Indonesia, 1945, as amended, available at www.humanrights.asia/countries/indonesia/laws/uud1945_en and Art. 56(3) of the Constitution of the Russian Federation, 1993.

⁹² Section 37(3) Constitution of the Republic of South Africa and Art. 93 Constitution of Colombia, 1991.

⁹³ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Art. 15, available at <http://www.priu.gov.lk/Cons/1978Constitution/1978ConstitutionWithoutAmendments.pdf>.

⁹⁴ Public Security Ordinance No. 25 of 1947 (PSO), available at http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/public_security_ordinance.htm. Under Part II of the PSO, the executive is given the power to, *inter alia*, issue emergency regulations which may authorise detention without charge or trial; authorise entry, search and seizure of property; amend or suspend the operation of any law (with the only exception of the Constitution); create special courts to prosecute offenders, including for offences created under emergency regulations. In addition, the PSO provides for very broad immunities from criminal prosecution or civil suits for state agents. For discussion, see A. Wedagedara, 'The Continuing "State of Emergency" in Sri Lanka' (Institute of Defense Studies and Analysis (IDSA), September 2011), available at http://www.idsa.in/idsacomments/TheContinuingStateofEmergencyinSriLanka_awedagedara_050911. See also for details on the prolonged state of emergency in Sri Lanka, see Amnesty International, 'Sri Lanka: Briefing to the UN Committee Against Torture' (October, 2011), available at <http://www.amnesty.org/en/library/asset/ASA37/016/2011/si/2bb1bbe4-8ba5-4f37-82d0-70cbfec5bb2d/asa370162011en.pdf>; International Commission of Jurists, 'Sri Lanka Briefing Paper: Emergency Laws and International Standards' (March 2009), available at <http://www.icj.org/IMG/SriLanka-BriefingPaper-Mar09-FINAL.pdf>.

⁹⁵ Art. 8(II), PSO (Sri Lanka) (above n. 94).

States of emergency are exceptional. They should therefore be of limited duration, being in place only as long as the situation giving rise to the emergency lasts. Several legal systems have put in place procedures that limit the duration of emergencies and require continuous support for extensions. South Africa is particularly noteworthy because, as already noted above, the proclamation of a state of emergency is the responsibility of the legislature and is limited to 21 days. Subsequent extensions, which can be for no more than 60 days, require legislative approval. At the expiry of the relevant time limits, the state of emergency, together with any legislation adopted pursuant to the extraordinary powers, lapses. In Kenya, the initial state of emergency is in force for 14 days only, after which the first extension – for up to two months at a time – requires a 2/3 majority and any following extensions a 3/4 majority.⁹⁶ This introduces a very visible democratic safeguard against the abuse of emergency powers. However, in many other countries, emergency laws have become a quasi-permanent feature. In Israel, emergency legislation has been in force almost continuously since 1948, in parts of India since 1958, in Syria from 1963 to 2011, in Egypt since 1971, and in Sri Lanka since 1983 to name some of them. These examples demonstrate the lack of adequate safeguards, which have effectively turned exceptions into the rule. This applies to authoritarian regimes that are not subject to any constraints, such as Syria and Egypt, as well as in democratic or majoritarian systems with a strongly shared security paradigm, such as Israel, India and Sri Lanka. Moreover, in some countries, such as in Sri Lanka, the imposition of emergency laws has been explicitly linked to 9/11 as giving effect to Security Council resolution 1373.⁹⁷

Judicial review can act as an important safeguard against the abuse of emergency legislation or laws incompatible with human rights standards. As mentioned above, several countries, such as Sri Lanka, provide for no judicial review. In contrast, several systems explicitly provide for judicial scrutiny of emergencies and emergency laws. In South Africa and Kenya, for example, the courts are empowered to rule on the validity of a declaration of a state of emergency, its renewal, and any legislation or action taken pursuant to such declaration.⁹⁸ Similarly, in Thailand, the conformity of a declaration of state of emergency with the Constitution can be referred to the Constitutional Court.⁹⁹ However, even where provided for, judicial review may be limited in practice because of judicial deference. This applies in particular to the judiciary's reluctance to independently consider whether in fact, a state of emergency exists. However, judges have exhibited more willingness to assess the actual measures taken in furtherance of the state of emergency. In *A v. Secretary of State for the Home Department*,¹⁰⁰ for example, the UK House of Lords held that the indefinite administrative detention of foreign nationals –

⁹⁶ See s. 58 of the 2010 Constitution of Kenya, text available at http://www.parliament.go.ke/index.php?option=com_content&view=article&id=83&Itemid=79.

⁹⁷ Regulation 5, Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006 (hereinafter 'Emergency Regulations 2006 (Sri Lanka)'), text available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=country&docid=45af76a62&skip=0&coi=LKA&querysi=emergency%20regulations&searchin=title&display=10&sort=date>.

⁹⁸ See Constitution of the Republic of South Africa 1996 (above n. 82), s. 37(3); Constitution of Kenya 2010 (above n. 96), s. 58(5).

⁹⁹ Constitution of the Kingdom of Thailand (2007) (above n. 36), s. 185.

¹⁰⁰ *A and others v. Secretary of State for the Home Department* (above n. 80).

who were suspected of being involved in terrorism activities but could not be deported – was discriminatory and hence unlawful.¹⁰¹

While domestic courts have a mixed record of ruling on emergency laws, with many courts seemingly being reluctant to challenge the executive in what is undoubtedly a highly sensitive area, others have taken a strong stance. The Supreme Court of Pakistan, for example, warned against extended states of emergencies because they are bound to seriously undermine the rule of law and facilitate human rights violations:

Unless the suspension of fundamental rights has a reasonable nexus with the object of a proclamation of emergency, the concession to the President of arbitrary and unlimited powers of suspension during the period of an emergency is likely to lead to despotism and anarchy and have serious dangers for human rights. The President's power to proclaim and emergency under the Constitution must be exercised with minimal disturbance to rights and liberties [...].¹⁰²

The prescient nature of this judgment, dating back to 1998, became clear in 2007 when the then-President Musharraf declared a state of emergency, which was validated by the Supreme Court after the judges who were opposed to it had been made to stand down:

In the recent past the whole of Pakistan was afflicted with extremism, terrorism and suicide attacks using bombs, hand grenades, missiles, mines, including similar attacks on the armed forces and law enforcing agencies, which reached climax on 18th of October 2007 when in a similar attack on a public rally, at least 150 people were killed and more than 500 seriously injured. The situation which led to the issuance of Proclamation of Emergency of the 3rd day of November 2007 as well as the other two Orders, referred to above, was similar to the situation which prevailed in the country on the 5th of July 1977 and the 12th of October 1999 warranting the extra-constitutional steps, which had been validated by the Supreme Court of Pakistan in *Begum Nusrat Bhutto v. Chief of the Army Staff* (PLD 1977 SC 657) and *Syed Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan* (PLD 2000 SC 869) in the interest of the State and for the welfare of the people, as also the fact that the Constitution was not abrogated, but merely held in abeyance.

In a twist of fate, the events surrounding the imposition of the emergency law in 2007 vindicated the 1998 ruling of Pakistan's Supreme Court as they contributed to President Musharraf's resignation in 2008.

¹⁰¹ Ibid.

¹⁰² *Farooq Ahmad Khan Leghari and Others v. Federation of Pakistan and Others*, [1999] P.L.D. (S.C.) 57 (Supreme Court of Pakistan, 28 July 1998).

3.2. Anti-terrorism laws

Anti-terrorism legislation has been enacted in over 140 states since 9/11 according to a recent study.¹⁰³ While some anti-terrorism legislation dates back considerably in time, such as in India (1958), Israel (1948), Peru (1992), Sri Lanka (1979) or Turkey (1971), much is of more recent origin. Anti-terrorism legislation has been enacted to counter global terrorism, particularly in countries directly affected or most at risk such as the USA or the UK, or purportedly in furtherance of Security Council resolution 1373, such as South Africa's Protection of Constitutional Democracy against Terrorist and Related Activities Act (POCDATARA),¹⁰⁴ or in response to specific incidents of terrorism, such as in Morocco in 2003,¹⁰⁵ or in Nigeria in 2011.¹⁰⁶

The problematic features of anti-terrorism laws, some of which are due to the complex nature of terrorist activities and the difficulties of effectively combating terrorism, require careful scrutiny. In practice, the process by which anti-terrorism legislation is adopted differs widely. Many states have used fast-tracked or expedited legislative processes in which the passage of ordinary legislation is expedited through Parliament, whether in accordance with pre-existing fast-track procedures, or through de facto compression of the normal periods for consideration at the different stages.¹⁰⁷ Examples are the USA PATRIOT Act, adopted by the US Congress, and most of the UK's anti-terrorism laws adopted since 9/11.

Although fast-tracked legislative processes are in practice resorted to for a number of different reasons, their use is particularly common when adopting security legislation based on the real or perceived urgency of the situation. This 'urgency' frequently means that the time available for parliamentary debate is severely curtailed: what would normally take a few months may be done within a matter of days. The risks inherent in the processes are evident. The UK House of Lords Select Committee on the Constitution ('the Constitution Committee') recognised the importance of being able to use expedited legislative procedures where prompt legislative measures are required to face a situation

¹⁰³ Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide Since September 11* (May 2012), available at <http://www.hrw.org/sites/default/files/reports/global0612ForUploadFinal.pdf>.

¹⁰⁴ Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (POCDATARA), available at <http://www.info.gov.za/view/DownloadFileAction?id=67972>.

¹⁰⁵ Law No. 03-03 on Combating Terrorism of 28 May 2003 (*Loi no. 03-03 relative à la lutte contre le terrorisme*), French text available at http://www.justice.gov.ma/fr/legislation/legislation.aspx?ty=2&id_1=142#1142. The legislation in question was passed into law less than two weeks after the Casablanca attacks of 16 May 2003.

¹⁰⁶ As to Nigeria, see the Terrorism (Prevention) Act 2011, Act No. 10 (3 June 2011), available at <http://easylawonline.files.wordpress.com/2011/09/terrorism-done.pdf>. On the process leading to the adoption of the TPA, see I.T. Sampson and F.C. Onuoha, 'Forcing the Horse to Drink or Making it Realise its Thirst'? Understanding the Enactment of Anti-Terrorism Legislation (ATL) in Nigeria', *Perspectives on Terrorism*, (2011), Vol. 5, No. 3-4, available at <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/154/html>.

¹⁰⁷ On the question of the definition of fast-tracked / expedited legislation, see UK Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL Paper 116-I/III, 2008-09), vol. I, available at <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/116.pdf>, paras. 10-13. The following definition of fast-track legislation was adopted by the Constitution Committee: 'bills [...] which the Government of the day represents to Parliament must be enacted swiftly [...] and then uses its power of legislative initiative and control of Parliamentary time to secure their passage' (ibid., para. 27).

of crisis but equally highlighted various problems arising from resort to this practice. This included: (i) the lack of adequate parliamentary scrutiny of the proposed legislation adopted by expedited procedures; (ii) the possibility of abuse of expedited procedures in situations which did not present the requisite urgency; (iii) the quality of the laws adopted through the processes in question; and (iv) the more limited possibilities for campaigners and interested organizations to try to influence the legislative process.¹⁰⁸ In addition, it emphasised the risk that Parliament would ‘act in haste and repent at leisure’, i.e. the fact that laws passed through fast-tracked processes will often remain on the statute book.¹⁰⁹

Anti-terrorism legislation raises a number of concerns from a human rights perspective. The wider its scope, the broader is the category of conduct which is covered, and the greater the number of persons who may be the subject of measures taken pursuant to that legislation. The lack of an agreed definition of terrorism at the international level, combined with the perceived urgency of the threat, has meant that states have often overreached in setting broad triggers for the application of security laws. This has in particular taken the form of adopting overly broad and sweeping definitions of terrorist crimes in their laws.

The need to frame definitions narrowly in a manner which does not lend itself to extensive interpretation has been emphasised by human rights monitoring bodies and experts.¹¹⁰ The current draft definition for the proposed UN Comprehensive Convention on International Terrorism (which dates from 2002) provides some guidance in this regard. It defines terrorism offences falling within the scope of the draft Convention as encompassing conduct by which a person

[...] by any means, unlawfully and intentionally, causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
- (c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.¹¹¹

¹⁰⁸ UK Constitution Committee, *Fast-track Legislation* (above n. 108), vol. I, paras. 44-46.

¹⁰⁹ *Ibid.*, vol. I, para. 55.

¹¹⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: *Mission to Peru*, UN doc. A/HRC/16/51/Add.3, 15 December 2010, para. 22.

¹¹¹ See *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session (28 January - 1 February 2002)*, UN doc. A/57/37 (11 February 2002), Annex II, draft Art. 2(1). Negotiations in relation to the draft Convention are still ongoing: see most recently, *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Fifteenth session (11 to 15 April 2011)*, UN doc. A/66/37; as to the status of the draft definition of terrorism offences, see *ibid.*, para. 10.

A similar definition can be found in Security Council Resolution 1566 (2004)¹¹² and the UN Special Rapporteur on Counter-Terrorism has equally developed criteria that stress the link between seriousness, purpose and specificity.¹¹³

Seen from this perspective, much of the security legislation adopted since 9/11 is problematic. In Russia, for example, the Federal Law on Counteracting Terrorism of 6 March 2006 introduced a controversial definition of terrorism.¹¹⁴ The Law defines ‘terrorism’ as: ‘[...] the ideology of violence and the practice of influencing the adoption of a decision by state power bodies, local self-government bodies or international organisations connected with frightening the population and (or) other forms of unlawful violent actions’.¹¹⁵ The fact that the definition refers to the ‘ideology of violence’ in addition to ‘the practice of influencing’ is particularly problematic, insofar as it focuses on the beliefs of individuals. Further, the definition of the notion of ‘terrorist activity’, which complements that of ‘terrorism’ under the 2006 Law, is even broader and includes ‘informational or other assistance to planning, preparing or implementing an act of terrorism’; and ‘popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity’.¹¹⁶

The definition of terrorism contained in the Moroccan Penal Code by Law No. 03-03 on counter-terrorism, adopted in the aftermath of the Casablanca terrorist attacks of 2003,¹¹⁷ has also been criticised for its broad scope. Under Article 218(1) of the Penal Code as amended, terrorism is defined as consisting of the commission of one of a list of acts when ‘[...] committed intentionally in connection with an individual or group enterprise having the aim of seriously undermining public order through intimidation, terror and violence’.¹¹⁸ The list of acts that may amount to terrorism if committed with the

¹¹²UN Security Council resolution 1566 (2004), para. 3.

¹¹³ See *Report of the Special Rapporteur on counter-terrorism: Mission to Peru*, UN doc. A/HRC/16/51/Add.3, 15 December 2010, para. 22, and *Report of the Special Rapporteur on counter-terrorism, Australia: Study on Human Rights Compliance While Countering Terrorism*, UN doc. A/HRC/4/26/Add.3, 14 December 2006, para. 13.

¹¹⁴Federal Law No. 35-FZ ‘On Countering Terrorism’ of 6 March 2006, available at <http://www.legislationline.org/documents/action/popup/id/4365> (hereinafter ‘Law on Countering Terrorism 2006 (Russian Federation)’), Art. 3(2)(e) and (f). The law sets out the legal principles and organisational procedures to conduct operations to fight against terrorism in the Russian Federation, ‘counteraction’ being defined to include the ‘detection, prevention, suppression, disclosure and investigation of an act of terrorism (struggle against terrorism)’ (Art. 3(4)(b)).

¹¹⁵Law on Countering Terrorism 2006 (Russian Federation) (above n. 114), Art. 3(1).

¹¹⁶*Ibid.*, Art. 3(2).

¹¹⁷Law No. 03-03 (Morocco) (above n. 105).

¹¹⁸ Art. 218(1) of the Moroccan Penal Code as amended (available at http://www.justice.gov.ma/fr/legislation/legislation.aspx?ty=2&id_l=142#1142) provides: ‘Constituent des actes de terrorisme, lorsqu’elles sont intentionnellement en relation avec une entreprise individuelle ou collective ayant pour but l’atteinte grave à l’ordre public par l’intimidation, la terreur ou la violence, les infractions suivantes: (1) l’atteinte volontaire à la vie des personnes ou à leur intégrité, ou à leurs libertés, l’enlèvement ou la séquestration des personnes ; (2) la contrefaçon ou la falsification des monnaies ou effets de crédit public, des sceaux de l’État et des poinçons, timbres et marques, ou le faux ou la falsification visés dans les articles 360, 361 et 362 du présent code; (3) les destructions, dégradations ou détériorations; (4) le détournement, la dégradation d’aéronefs ou des navires ou de tout autre moyen de transport, la dégradation des installations de navigation aérienne, maritime et terrestre et la destruction, la dégradation ou la détérioration des moyens de communication; (5) le vol et l’extorsion des biens; (6) la fabrication, la détention, le transport, la mise en circulation ou l’utilisation illégale d’armes, d’explosifs ou de munitions; (7) les infractions relatives aux systèmes de traitement automatisé des données; (8) le faux ou la falsification en matière de chèque ou de tout autre moyen de paiement visés respectivement par les articles 316 et 331 du code de commerce; (9) la participation à une association formée ou à une

necessary intent, include theft, forging money, and infringement of data protection regulations.¹¹⁹ Concerns have been raised that this definition of terrorism is overly broad and vague, and does not provide adequate safeguards for suspects in terrorism-related cases.¹²⁰ In the context of its consideration of Morocco's most recent periodic report, the UN Committee Against Torture expressed concern that Law No. 03-03 'does not set out a precise definition of terrorism, as required in order to uphold the principle that there can be no penalty for an offence except as prescribed by law'.¹²¹ It also criticised the way in which the two new offences of 'apology for terrorism'¹²² and incitement,¹²³ introduced by Law No. 03-03, had been framed, noting that '[i]t was also concerned by the fact that the law in question defines advocacy of terrorism and incitement of terrorism as offences, which can be defined as such even if they do not necessarily involve an actual risk of violent action'.¹²⁴ In China, a legislative resolution passed in October 2011 defines terrorist activities as:

Activities conducted by violence, destruction, intimidation and other means to create social panic, endanger public security or threaten state organs or international organizations and causing or attempting to cause casualties, grave property loss, damage to public facilities, disruption of social order and other severe social harm, as well as activities to assist the above activities by instigation, financing or any other means.¹²⁵

Concerns have also been expressed in relation to potential ethnic profiling and discrimination resulting from anti-terrorism laws. An example is the motive clause in Canada's Anti-Terrorism Act 2001, which applies to act committed 'in whole or in part

entente établie en vue de la préparation ou de la commission d'un des actes de terrorisme; (10) le recel sciemment du produit d'une infraction de terrorisme'.

¹¹⁹ Art. 218(1) of the Moroccan Penal Code as amended (above n. 118).

¹²⁰ See, e.g., Amnesty International, 'Continuing abuses against individuals suspected of terrorism related activities in Morocco', 10 June 2010, available at <http://www.amnesty.org/en/library/asset/MDE29/013/2010/en/21eb0965-f0b4-442e-b9cf-69ce9e65f393/mde290132010en.pdf>.

¹²¹ *Concluding Observations of the Committee against Torture: Morocco*, UN doc. CAT/C/MAR/CO/4, 21 December 2011, available at http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.MAR.CO.4_en.pdf, para. 8. See also International Commission of Jurists, 'Submission to the Committee Against Torture on the Examination of the Fourth Periodic Report of the Kingdom of Morocco under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (October 2011), available at <http://www2.ohchr.org/english/bodies/cat/docs/ngos/ICJ-CAT47-Morocco.pdf>.

¹²² Under Art. 218-3 of the Penal Code as amended (above n. 118): 'Est puni d'un emprisonnement de 2 à 6 ans et d'une amende de 10.000 à 200.000 dirhams, quiconque fait l'apologie d'actes constituant des infractions de terrorisme, par les discours, cris ou menaces proférés dans les lieux ou les réunions publics ou par des écrits, des imprimés vendus, distribués ou mis en vente ou exposés dans les lieux ou réunions publics soit par des affiches exposées au regard du public par les différents moyens d'information audio-visuels et électroniques.'

¹²³ Art. 218-5, Moroccan Penal Code as amended (above n. 118).

¹²⁴ *Concluding observations of the Committee against Torture: Morocco*, UN doc. CAT/C/MAR/CO/4, 21 December 2011, para. 8. The new definition of terrorism and the new offences introduced by Law No. 03-03 have also been criticized by NGOs: see, inter alia, the ICJ's submission to the Committee against Torture on the Examination of the Fourth Periodic Report of the Kingdom of Morocco (above n. 121).

¹²⁵ Decision on Issues concerning Strengthening Anti-Terrorism Work, Art. 2, available at <http://www.lawinfochina.com/display.aspx?id=9082&lib=law>. See also Laney Zhang, 'China: Legal Definition of Terrorist Activities Clarified', *Library of Congress* (4 November 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402874_text.

for a political, religious or ideological purpose, objective or cause'.¹²⁶ Unsurprisingly, this broad definition has immediately raised concerns that it allows any form of dissent to be interpreted as terrorism.¹²⁷ In contrast, Nigeria's Terrorism Prevention Act, 2011, excludes an act from its ambit that 'disrupts a service but is committed in pursuance of a protest' unless it is carried out for one of the purposes prohibited in the Act.¹²⁸

Broad definitions of terrorism are highly problematic.¹²⁹ They risk violating the principle of legality and being applied to conduct that is not sufficiently serious to be punished as harshly as terrorist activities. Further, they are prone to lead to the selective application of the law, which can result in discrimination against minority groups, crackdowns on human rights defenders, activists, journalists or other persons exercising their right to freedom of expression, or simply those who are opposed to the government. From the perspective of the protection against torture, the definitions serve as entry point, which bring those concerned within the scope of special regimes that frequently lack adequate safeguards and accountability mechanisms, and thereby enhance the risk of torture. This concerns in particular prolonged pre-charge detention, administrative detention, restriction of defence rights and immunity provisions. Sudan is an example where the authorities have used a combination of anti-terrorism laws, security legislation and criminal law on offences against the state to this effect. Legislative reforms or judicial protection, such as the judgment of Peru's Constitutional Court on the interpretation of broad terrorist defences under Decree Law No. 25475 (1992), which result in clearer definitions in line with international standards,¹³⁰ are critical in limiting the scope of application of anti-terrorism laws.

Anti-terrorism laws, similarly to emergency legislation, may be enacted to react to specific threats but may remain in force virtually indefinitely. This is particularly the case where such laws have become an integral part of counter-insurgency and policing of certain communities, such as in Israel, Sri Lanka and Turkey to name a few examples.

One important means of preventing anti-terrorism laws from becoming permanent by default is to introduce so-called sunset clauses. These clauses lead to an automatic lapse of the legislation unless it is renewed after the duration specified. This is what happened in the United Kingdom, where successive anti-terrorism laws extended the duration of pre-charge detention from seven to fourteen and then to twenty-eight days.¹³¹ After

¹²⁶ See Anti-Terrorism Act 2001 (S.C. 2001, c. 41) (available at <http://laws-lois.justice.gc.ca/eng/acts/A-11.7/index.html>), which introduced a new section 83.01 into the Criminal Code. For discussion, see below, Section 5.

¹²⁷ 'China: Anti-terror law changes raise concern' *Radio Free Asia* (3 November 2011), available at <http://www.unhcr.org/refworld/docid/4ec268c426.html>.

¹²⁸ Section 1(3) Prevention of Terrorism Act, 2011, available at www.nassnig.org/nass/legislation.php?id=881.

¹²⁹ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin - Ten areas of best practices in countering terrorism*, UN doc. A/HRC/16/51, 22 December 2010, para 26, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>.

¹³⁰ Resolution of the Constitutional Court, File No. 010-2002-AI/TC, suit filed by MarcelinoTineo Silva and other citizens (3 January 2003) <http://www.tc.gob.pe/jurisprudencia/2003/00010-2002-AI.html>.

¹³¹ Subsequent to the events of 9/11, the maximum period of permissible pre-charge detention under the Terrorism Act 2000 was increased from the original 7 days to 14 days by an amendment introduced by the Criminal Justice Act 2003, s.309, available at <http://www.legislation.gov.uk/ukpga/2003/44/contents>. An attempt to extend the period to 90 days in 2005 was unsuccessful, and the

unsuccessful attempts by the government to pass legislation extending the maximum period of pre-charge detention to forty-two and even ninety days, the maximum period reverted to fourteen days after the extension to twenty-eight days, which was subject to annual renewal, and was allowed to lapse in January 2011.¹³² Sunset clauses can constitute an important means to ensure democratic control. However, there is a risk that they may be used to appease opponents and that, once in force, security services and others will strenuously cling to the powers they have been given. Indeed, practice is mixed to date and parliamentary majorities and/or public opinion may ensure that anti-terrorism measures remain on the statute book, albeit sometimes only in modified form, even where there are significant human rights concerns.

Legislation may also be subject to parliamentary review after a particular period of its application. Such provision can be made either in the legislation itself, or be decided by parliament. However, given that, unless a majority of parliament is in favour of modifying the legislation, it will continue to be in force, such a mechanism is by its nature substantially weaker than the inclusion of a ‘sunset’ clause. The UK Constitution Committee regarded post-legislative scrutiny as playing a particularly important role in the case of fast-track legislation.¹³³ It recommended that review of fast-track legislation should be made a priority, and that any legislation adopted following a fast-track passage should be subjected to review, ideally within one year, and at most within two years. Again, it recommended that the default position should be a presumption of a one or two year review period, and that any departure therefrom should require justification.¹³⁴

The Canadian Anti-Terrorism Act 2001 provides an example of the combination of these two mechanisms. In addition to containing sunset clauses applicable to specific provisions, which expired in early 2007, the Act required a comprehensive review of its provisions and operation to be undertaken within three years of its adoption.¹³⁵ As observed by one of the Parliamentary Committees which carried out the review, the motivation underlying the inclusion of the provision was that it ‘would allow Parliament to assess both the provisions of the Act and their effect on Canadians after an appropriate period of time’.¹³⁶ Following some delays, the House Sub-Committee released an interim report in October 2006. It recommended the extension of provisions relating to the two matters which were subject to ‘sunset’ clauses, relating to ‘investigative hearings’ of persons suspected of having information related to terrorism and recognizance with

maximum period was thereafter extended (subject to annual renewal by Parliament) to 28 days under the Terrorism Act 2006 (text available at <http://www.legislation.gov.uk/ukpga/2006/11/contents>).

¹³² An attempt by the Government in 2008 to secure a further extension of the maximum period for detention without charge to forty-two days was defeated in the House of Lords: see Liberty, *Charge or Release. Terrorism Pre-Charge Detention – Comparative Law Study* (July 2010), available at <http://www.liberty-human-rights.org.uk/policy/reports/comparative-law-study-2010-pre-charge-detention.pdf>. In July 2010, the 28 day period was extended for only six months, (S.I. 2010/1909); and that extension was permitted to expire without further renewal in January 2011.

¹³³ Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL Paper 116, 3 vols, 2008-09), vol. I, paras. 208-209, available at <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/116.pdf>.

¹³⁴ *Ibid.*

¹³⁵ See s. 145, Anti-Terrorism Act 2001 (Canada) (above n. 126).

¹³⁶ *Fundamental Justice in Extraordinary Times. Main Report of the Special Senate Committee on the Anti-terrorism Act* (February 2007), p.1, available at <http://www.parl.gc.ca/Content/SEN/Committee/391/anti/rep/rep02feb07-e.pdf>.

conditions (a form of preventive arrest) even though neither provision had been used at the time.¹³⁷ However, notably, contrary to the recommendations, Parliament did not extend the application of the relevant provisions within the relevant deadline, the Government losing a vote in the House of Commons 159-124 on 27 February 2007, which meant that the provisions expired in accordance with the sunset clauses.

As noted above, the USA PATRIOT Act as originally passed contained sunset clauses in relation to a number of provisions, with a deadline of 31 December 2005 after which they would lapse. Substantial agreement within Congress on re-authorisation was reached in 2005,¹³⁸ and further modifications were subsequently agreed in 2006.¹³⁹ As a result of the 2005 legislation, some of the most controversial provisions were slightly modified in order to accommodate some of the concerns relating to the protection of civil liberties; and most of the provisions previously subjected to a sunset clause were made permanent. Two provisions relating to surveillance (the ‘roving wiretap’ and ‘library records’ provision) were re-enacted with a new sunset clause which was set so as to expire in 2009. Following the change of Administration, under President Obama, further legislation was adopted in 2011 which extended the applicability of the ‘roving wiretap’ and ‘library records’ provisions for a further four years, until 1 June 2015.¹⁴⁰

In Australia, a sunset clause applies to the entirety of Division 3 of Part 3 of the Australian Security Intelligence Organisation Act, 1979, which contains draconian powers, allowing the security services to apply for interrogation and detention warrants in relation individuals believed to hold potentially useful information.¹⁴¹ The Division in question, which was introduced by way of amendment under the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act, 2003, was originally

¹³⁷ *Review of the Anti-terrorism Act; Investigative Hearings and Recognizance with Conditions Program: Interim Report of the Standing Committee on Public Safety and National Security*, October 2006, available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=193467>.

¹³⁸ However, the law was only signed by President Bush on 9 March 2006: USA PATRIOT Improvement and Reauthorization Act of 2005, Public Law 109-177, 9 March 2006; 120 Stat. 191.

¹³⁹ USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006; Public Law 109-178; 9 March 2006; 120 Stat. 278. Extensions to the original 31 December 2005 deadline were made by Public Law 109-160; 30 December 2005, 119 Stat. 2957 (extending the deadline to 3 February 2006); Public Law 109-170, 3 February 2006; 120 Stat. 3 (extending the deadline to 10 March 2006). For commentary on the 2005 and 2006 amendments and extension, see B.T. Yeh and C. Doyle, ‘USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis’ (Cong. Research Serv., CRS Report for Congress Order Code RL33332, 21 December 2006), available at <http://www.fas.org/sgp/crs/intel/RL33332.pdf>.

¹⁴⁰ See the *PATRIOT Sunsets Extension Act 2011*; Public Law 112-14; 27 May 2011; 125 Stat. 216, extending the sunset deadline to 1 June 2015. Previous legislation had previously provided for short extensions of the deadline so as to keep the controversial powers in force: See the *Department of Defense Appropriations Act 2010*; Public Law 111-118; 19 December 2009; 123 Stat. 3470 (extending the deadline from 31 December 2009 to 28 February 2010); Public Law 111-141; 27 February 2010; 124 Stat. 37, extending the deadline to 28 February 2011, and the *FISA Sunsets Extension Act 2011*; Public Law 112-3; 25 February 2011; 125 Stat. 5 (extending the deadline from 28 February 2011 to 27 May 2011).

¹⁴¹ Australian Security Intelligence Organisation Act 1979 (ASIO Act); for the text of the ASIO Act as amended by the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, see http://www.austlii.edu.au/au/legis/cth/consol_act/asioa1979472/ (hereinafter ‘ASIO Act, as amended’).

specified to cease to have effect three years after it commenced.¹⁴² That deadline has subsequently been extended, and it presently is set to expire on 22 July 2016.¹⁴³

Review of the legality of anti-terrorism legislation, or parts thereof, is another important safeguard. The availability of such procedures depends on whether the judiciary has the power to strike down legislation or declare it incompatible with the constitution or applicable law. In several instances, courts have acted as an important corrective force and their decisions have resulted in the repeal or amendment of legislation, such as in the UK and in Peru.¹⁴⁴ However, as the example of Sudan's Constitutional Court shows, national courts may be highly deferential and rely on security rationales in upholding anti-terrorism laws.

¹⁴² Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, s. 3 and Schedule 1, para. 24 (adding, *inter alia*, s. 34ZZ to the ASIO Act 1979).

¹⁴³ ASIO Act, as amended (above n. 141), s. 34ZZ. The extension was made by the ASIO Legislation Amendment Act 2006, s. 3 and Schedule 2, para. 32.

¹⁴⁴ *A and others v. Secretary of State for the Home Department* (above n.80) and Resolution of Peru's Constitutional Court (above n. 130).

4. The compatibility of security legislation with the prohibition of torture

4.1. Custodial safeguards

Custodial safeguards are at the heart of the prevention of torture. They are based on the recognition that detainees are vulnerable to torture, particularly in the period immediately following arrest, and need to be protected against an overbearing executive power. The main approach to providing a measure of protection has therefore been to open detention to external control and to allow detainees access to the outside world, particularly to defend their rights. Measures to prevent torture therefore primarily consist of visiting mechanisms and what is known as custodial safeguards.

These safeguards are recognised in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹⁴⁵ the Optional Protocol to the CAT, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture. International human rights treaty bodies and the UN Special Rapporteur on Torture in particular have developed standards and obligations relating to custodial safeguards.¹⁴⁶ In its *General Comment No. 2*, the Committee Against Torture emphasised that:

Certain basic guarantees apply to all persons deprived of their liberty [...]. Such guarantees include, inter alia, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.¹⁴⁷

This section examines the degree to which security legislation weakens if not negates these safeguards, and how the various changes to ordinary legislation characteristic of security laws have enhanced the risk of torture.

4.1.1. Criminalisation and the principle of legality

Security legislation typically introduces a range of criminal offences to counter the threat identified, such as offences related to terrorism in anti-terrorism laws and a range of

¹⁴⁵ See in particular Art. 2(1) CAT, as interpreted by the Committee against Torture. See *General Comment No. 2* (above n. 79).

¹⁴⁶ *Ibid.* and *General Recommendations of the Special Rapporteur on Torture*, UN doc. E/CB,4/2003/68, 17 December 2002.

¹⁴⁷ *General Comment No. 2* (above n. 79), para. 13.

offences in emergency laws, such as crimes against the state, rioting, unlawful assembly and the like. Security related offences, which may also be contained in criminal acts, are frequently extremely broad and criminalise a range of acts. Beyond the broader policy question of whether there is any merit to criminal law approaches to counter security threats, this practice raises several distinctive concerns.

The vague definition of offences may be incompatible with the principle of legality. This principle requires that punishments need to be based on offences in force at the time of the ‘crime’ and that the offences prescribed by law are sufficiently specific.¹⁴⁸ In Indonesia, emergency legislation, i.e. Law No.16 of 2003, which allowed the retroactive application of the Anti-Terrorism Law to the Bali Bombings, was held to be unconstitutional by the Constitutional Court ‘because it breached the Constitution’s non-derogable right to be free from prosecution under a retrospective law’.¹⁴⁹ The underlying rationale is that individuals know what conduct is lawful and may not inadvertently commit a crime. Legality is therefore a basic principle of criminal justice that protects against possible abuse.

In addition, even where the principle of legality is adhered to, many security laws criminalise conduct that should be lawful, such as the exercise of the right to peaceful assembly and association.¹⁵⁰ An example is Russia’s Federal Law No.114-FZ 2002 that seeks to counteract ‘extremist activity’ and applies to ‘the activity of public and religious associations or any other organisations, or of mass media, nor natural persons to plan, organise, prepare and perform’ acts that bring about ‘forcible change of the foundations of the constitutional system’, ‘the subversion of the security’ or ‘the exercise of terrorist activity’, among other.¹⁵¹ This is not only incompatible with international standards, it also creates an atmosphere that stifles civil society and may undermine efforts to raise concerns over the treatment of individuals, including torture, where the media is subject to censorship.

Limiting the use of broad and vague offences is commonly not included as a safeguard against torture. However, these offences have an intrinsic link to the practice of torture because they provide the grounds on which authorities may arrest and detain persons. As such, they constitute entry points that expose individuals to the risk of torture. They may also further undermine safeguards against arbitrary arrest, prolonged detention and torture particularly where they are subject to arrest without warrants and are non-bailable.

4.1.2. Prohibition of arbitrary arrest and detention

¹⁴⁸ See in particular Art. 15 (1) ICCPR, which stipulates the principle *nulla poena sine lege* (no punishment without law).

¹⁴⁹ S. Butt, ‘Indonesian Terrorism Law and Criminal Process’, Islam, Syari’ah and Governance Background Paper Series, ARC Federation Fellowship, University of Melbourne, 2008; Sydney Law School Research Paper No. 09/30, p. 24, available at <http://ssrn.com/abstract=1400506>

¹⁵⁰ Human Rights Watch, *In the name of security* (above n. 103), pp. 48-50, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, UN doc. A/HRC/20/27, 21 May 2012, para. 21.

¹⁵¹ Federal Law No. 114-FZ 2002 ‘On the Counteraction of Extremist Activity’, Art. 1, available at <http://www.legislationline.org/documents/action/popup/id/4368>.

International law provides some protection against arrest and detention on the grounds of broad and vague offences as it prohibits arbitrary deprivation of liberty. The Human Rights Committee has defined this prohibition in *Mukong v. Cameroon* as follows:

[...] ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. [T]his means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.¹⁵²

It is essential but not sufficient for authorities to comply with domestic laws when depriving persons of their liberty; otherwise, states would be able to arrest and detain persons on the flimsiest of grounds. Legislation must therefore be predictable and not give authorities discretion that is so wide that it is not subject to control. In addition to an offence being sufficiently precise and, in terms of its contents, being compatible with international human rights standards, the authorities must also demonstrate that there is at least a reasonable suspicion that someone has committed an offence. This is problematic in anti-terrorism cases because the authorities may not have sufficient information (or may not wish to disclose sensitive information) that would satisfy an objective observer that a person may have committed an offence (related to terrorism), which is the test developed by the European Court of Human Rights in *Fox, Campbell and Hartley v United Kingdom*.¹⁵³ In response, Indonesia’s Anti-Terrorism Law allows arrests to be made on the basis of an intelligence report.¹⁵⁴ Applying international standards requiring ‘reasonable suspicion’ as set out in *Fox, Campbell and Hartley v United Kingdom*, the authorities would in these situations not be entitled to arrest and detain a person. This poses a dilemma for the authorities as they run the risk that arrest and detention of suspects is arbitrary and hence prohibited under international law. In response, states have either extended pre-charge detention or put in place so-called preventive/administrative detention regimes, both of which are highly problematic, as the next sections will show.

4.1.3. Broadening of detention regimes

One common feature of security legislation is that it extends the time of detention before an individual must be charged or released. The rationale offered for such deviations is that investigations into terrorism, in particular of an international nature, are generally particularly complex and may necessitate enquiries to be made and information obtained from abroad prior to it being possible to press charges or mount a prosecution. Equally,

¹⁵² Human Rights Committee, *Mukong v. Cameroon*, UN doc. CCPR/C/51/D/458/1991, 10 August 1994, para. 9.8.

¹⁵³ *Fox, Campbell and Hartley v United Kingdom* (App. nos 12244/86; 12245/86; 12383/86), ECtHR, Judgment of 30 August 1990.

¹⁵⁴ See Butt (above n. 149), p. 18, discussing how Art. 26(3) of Indonesia’s Anti-Terrorism Law of 2003 differs from the Indonesian Code of Criminal Procedure.

‘governments are obviously eager to apprehend suspects at a relatively early stage of an investigation, before the commission of overt acts’.¹⁵⁵

Pre-trial detention is generally regarded as problematic because it deprives detainees of their liberty before conviction (presumption of innocence) and is known to enhance the risk of torture.¹⁵⁶ The practice of extending pre-charge detention is, in this context, of particular concern because it lengthens the time for which an individual is in police custody (‘garde à vue’). The Special Rapporteur on Torture has emphasised the importance of limiting this period:

Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted.¹⁵⁷

This statement reflects the general international law on the right to liberty according to which pre-charge detention should be short, that is, normally not longer than 48 hours. Pre-charge detention should be subject to regular judicial supervision and access to a lawyer, the absence of which significantly increases the risk of torture. The investigating authorities have a strong incentive to use all possible means within the time given to obtain information and evidence that would allow them to bring charges. Indeed, the extended period of pre-charge detention gives them unprecedented access to a suspect that they would normally not have. In cases of suspects falling into the special category of ‘security threats’, judicial supervision is frequently limited because it has to rely on reassurances by the authorities that are based on intelligence. The judiciary may also be perfunctory or deferential because of the widely shared recognition that extraordinary situations require extraordinary measures.

In the years since 9/11, a number of European countries have extended the maximum time limits for detention without charge. In Russia, amendments made to the Code of Criminal Procedure in 2004 allow the prosecutor to apply to the court for detention of terrorist suspects for up to 30 days (rather than the ordinary 10 days) ‘in exceptional

¹⁵⁵ See *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (International Commission of Jurists, Geneva, 2009), available at <http://www.ijf.org/assets/docs/028/207/3e83f1c-fbfc2cf.pdf> (hereinafter ‘EJP Report’), p. 145.

¹⁵⁶ See, e.g., Art. 9(3) ICCPR. See also Rule 6 of the UN Standard Minimum Rules for Non-custodial Measures (adopted by the General Assembly on 14 December 1990, text available at www2.ohchr.org/english/law/tokyorules.htm): ‘(a) pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim; (b) alternatives to pretrial detention shall be employed at as early a stage as possible; (c) pretrial detention shall last no longer than necessary and shall be administered humanely and with respect for the inherent dignity of human beings; and (d) the offender shall have the right to appeal to a judicial or other competent independent authority in cases where pretrial detention is employed’.

¹⁵⁷ *Report of the Special Rapporteur on torture* (2002) (below n. 218), para. 26(g).

circumstance’, without having to press any formal charges.¹⁵⁸ The scope for judicial oversight is extremely limited during this period.¹⁵⁹ Some commentators have suggested that the fact that the prosecuting authorities are not required to formulate any charges prior to seeking authorisation of such prolonged detention, increases the risk that the individual will then subsequently be forced to confess or testify.¹⁶⁰

In Morocco, one of the amendments to the Criminal Procedure Code introduced by Law No. 03-03 on counter-terrorism, allows individuals arrested on suspicion of being involved in a terrorist offence to be held in *garde à vue* up to a maximum of twelve days (as opposed to the ordinary eight day custodial period), before being brought before the investigative judge.¹⁶¹ The Criminal Procedure Code does not specifically require that a detainee should be brought before the prosecutor, and it appears that in practice, the Prosecutor will not see the detainee until the end of the *garde à vue* period.¹⁶²

In Sri Lanka, the Prevention of Terrorism Act 1979 (PTA) allows detention of individuals suspected of involvement in terrorism for a period of up to 18 months without charge or any judicial supervision of detention.¹⁶³ Section 7 of the Act provides that individuals arrested on suspicion of involvement in terrorism must be brought before a judge within 72 hours and that the judge shall order detention on remand.¹⁶⁴ However, under section 9, a Minister is allowed to order detention of individuals whom he/she has ‘reason to believe or suspect [to be] connected with or concerned in any unlawful activity’ under the Act, for an initial period of three months.¹⁶⁵ The period of detention can then be extended

¹⁵⁸ See art. 100(2) of the Criminal Procedure Code of the Russian Federation, as amended by Federal Law No. 18-FZ of 22 April 2004; the text of the Criminal Procedure Code is available at <http://legislationline.org/download/action/download/id/1698/file/3a4a5e98a67c25d4fe5eb5170513.htm/preview>. For commentary, see *Conclusions and Recommendations of the UN Committee Against Torture: Russian Federation*, UN doc. CAT/C/RUS/CO/4, 6 February 2007, para. 8(c).

¹⁵⁹ The general safeguard under Art. 94 of the Criminal Procedure Code of the Russian Federation that the detainee should in any case be brought before a court within 48 hours of his/her arrest applies also to individuals detained under the provision in question. However, it appears that that safeguard has little practical effects, given that suspects, included those arrested on broad grounds such as the finding of ‘undoubted traces of the crime’ on their person, clothes, or in their dwelling (Art. 91(3) of the Criminal Procedure Code of the Russian Federation), are only provided very generic information about allegations against them, and are therefore unable to challenge their detention in an effective manner; see EJP Report (above n. 155), p. 148.

¹⁶⁰ See, e.g., Lev Levinson (Human Rights Institute), ‘Submission to the Eminent Jurists Panel in connection with public hearings on terrorism, counter-terrorism and human rights in Russia (Moscow, January 2007)’, available at <http://ejp.icj.org/IMG/Levinson.pdf>.

¹⁶¹ Art. 66(4) of the Criminal Procedure Code (as amended), added by Law No. 03-03. The initial period of detention in terrorism cases is 96 hours, which can be extended twice for additional periods of 96 hours upon the written authorization of the prosecutor.

¹⁶² Human Rights Watch, ‘Morocco: Human Rights at a Crossroads’, 20 October 2004, available at <http://www.hrw.org/node/11932/>.

¹⁶³ Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, available at [http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/prevention_of_terrorism.htm\(hereinafter 'PTA'\)](http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/prevention_of_terrorism.htm(hereinafter 'PTA')). The PTA represents the principal piece of anti-terrorism legislation in the Sri Lankan legal system. It was introduced as a temporary measure to address a sudden upsurge in political violence but was subsequently codified permanently in 1981 and has now been in force for over 30 years. Although not adopted as emergency legislation, it has coexisted in parallel with the emergency legislation which has been adopted from time to time under emergency powers under the PSO (on which, see above, Section 3.1).

¹⁶⁴ PTA (Sri Lanka) (above n. 163), s. 7(1): ‘Any person arrested under subsection (1) of section 6 may be kept in custody for a period not exceeding seventy-two hours and shall, unless a detention order under section 9 has been made in respect of such person, be produced before a Magistrate before the expiry of such period and the Magistrate shall, on an application made in writing in that behalf by a police officer not below the rank of Superintendent, make order that such person be remanded until the conclusion of the trial of such person, provided that, where the Attorney-General consents to the release of such person before custody before the conclusion of the trial, the Magistrate shall release such person from custody.’

¹⁶⁵ *Ibid.*, s. 9(1): ‘Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for

for subsequent three-month periods, up to a maximum of 18 months.¹⁶⁶ A ministerial order made under section 9 PTA is final and not subject to judicial review.¹⁶⁷ The individual subject to an order issued under section 9 is detained ‘in such place and subject to such conditions as may be determined by the Minister’ and there is no requirement in the PTA that the Minister make the information regarding the place and conditions of detention publicly available.¹⁶⁸ This gap was addressed, at least formally, by a Presidential Directive issued in July 2006, which stipulates, *inter alia*, that families of individuals detained under the Emergency Regulations or the PTA must be allowed to communicate with detainees and that the Sri Lankan Human Rights Commission must be informed of an arrest and of the place of detention within 48 hours.¹⁶⁹ However, as reports on PTA implementation over several decades show, it has served as a key tool of prolonged arrest and detention, giving rise to persistent allegations of torture.¹⁷⁰

In India, successive anti-terrorism laws permitted prolonged detention without charge, albeit with judicial authorisation. In particular, the 1987 Terrorist and Disruptive Activities (Prevention) Act (TADA) and the now repealed 2002 Prevention of Terrorism Act (POTA) allowed detention without charge, for up to a year and 180 days, respectively.¹⁷¹ These extremely prolonged periods of pre-charge detention, coupled with strict standards for release on bail, have resulted in many individuals being detained on the basis of vague allegations.¹⁷² Again, allegations of torture have been a constant feature of TADA and POTA’s application.¹⁷³ Across the border, Pakistan’s Anti-terrorism (Amendment) Ordinance, 2009, allows detention of up to 90 days for interrogation purposes without any possibility of habeas corpus.¹⁷⁴ Detention can be extended, for another 30 days initially, and another 90 days where the court is satisfied that ‘further evidence may be available’ and that ‘no bodily harm has been or will be caused to the accused’¹⁷⁵ though the law does not provide for any effective safeguards in this respect.

a period not exceeding three months at a time, provided, however, that the aggregate period of such detention shall not exceed a period of eighteen months.’

¹⁶⁶ *Ibid.*, s. 9.

¹⁶⁷ *Ibid.*, s. 10: ‘An order made under section 9 shall be final and shall not be called in question in any court or tribunal by way of writ or otherwise.’

¹⁶⁸ *Ibid.*, s. 9.

¹⁶⁹ Presidential Directives on Protecting Fundamental Rights of Persons Arrested and/or Detained, 7 July 2006, text available at http://www.defence.lk/new.asp?fname=20070425_02.

¹⁷⁰ See in particular *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Sri Lanka*, UN doc. A/HRC/7/3/Add.6, 26 February 2008, para. 70.

¹⁷¹ See s. 20(4)(b), Terrorist and Disruptive Activities (Prevention) Act (TADA), Act No. 28 of 1987, available at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/Tada.htm> and s. 49(2), Prevention of Terrorism Act (POTA), Act No. 15 of 2002, available at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm>.

¹⁷² EJP Report (above n. 155), p. 149.

¹⁷³ Human Rights Watch, *Back to the Future: India’s 2008 Counterterrorism Laws*, July 2010, available at http://www.hrw.org/sites/default/files/reports/india0710webwcover_0.pdf, pp. 1 and 6.

¹⁷⁴ Section 9(1) of the Anti-terrorism (Amendment) Ordinance, 2009.

¹⁷⁵ *Ibid.*, s. 15.

Another example is the United Kingdom where, as already mentioned, the permissible maximum length of pre-charge detention has been subject to a number of modifications since 2001. The Terrorism Act 2000 had originally provided for detention for up to forty-eight hours after arrest without charge, which could be extended up to a maximum of seven days where authorised by a judicial authority pursuant to a ‘warrant of further detention’.¹⁷⁶ Thereafter, legislation was passed on a number of occasions extending the maximum permitted period of detention; the longest permitted period of pre-charge detention was for a period of up to twenty-eight days introduced by the Terrorism Act 2006. As noted above, that extension was subject to annual renewal by resolution of Parliament,¹⁷⁷ and was allowed to lapse in January 2011.¹⁷⁸ Subsequently the Protection of Freedoms Act 2012 amended the 2000 Act so as permanently to restore the maximum period of detention to fourteen days.¹⁷⁹ However, that modification was accompanied by a residual power on the part of the executive temporarily to extend the maximum period to 28 days for no more than three months in case of urgency or when Parliament is dissolved.¹⁸⁰

The original period of seven days applicable under the Terrorism Act 2000 already constituted a deviation from the ordinarily applicable rules, under which the normal maximum detention without charge is 24 hours. This can be extended to 36 hours by a senior police officer and then up to a maximum of 96 hours pursuant to an order of a judge.¹⁸¹ However, despite the extension of the maximum permissible period of pre-charge detention, what has remained constant is that an individual suspected of a terrorist offence must be brought before a judge within 48 hours of arrest.¹⁸² The changes in the UK’s legislation have been the result of intense political debates and are reflective of political changes and perceptions of security threats. While extended detention has not been directly linked to torture specifically in the United Kingdom, it has the potential of setting a negative precedent.

4.1.4. Administrative/preventive detention

In the years since 9/11, states have increasingly resorted to administrative detention on national security grounds. This form of deprivation of liberty, also referred to as ‘preventive’ or ‘preventative’ detention, is ostensibly aimed at preventing security threats from materialising rather than bringing a person to trial. This form of detention has been used in countries as diverse as Kenya, Nigeria, Israel, India, Russia, Sri Lanka and Thailand. It is also used in the immigration context, namely holding individuals

¹⁷⁶ Terrorism Act 2000, schedule 8 (available at <http://www.legislation.gov.uk/ukpga/2000/11/contents>).

¹⁷⁷ The maximum period of detention was increased from seven days to fourteen days by the Criminal Justice Act 2003 and subsequently to twenty-eight days by the Terrorism Act 2006 (above n.131).

¹⁷⁸ See A. Horne and G. Berman, *Pre-Charge Detention in Terrorism Cases*, UK Home Affairs Section and Social and General Statistics Section, SN/HA/5634, 15 March 2012, p.2, available at <http://www.parliament.uk/briefing-papers/SN05634>.

¹⁷⁹ Protection of Freedoms Act 2012, s. 57.

¹⁸⁰ Protection of Freedoms Act 2012, s. 58.

¹⁸¹ See PACE 1984, ss. 41-44.

¹⁸² S. 41(3), Terrorism Act 2006 (above n. 131).

(suspects) with a view to deporting or extraditing them, such as in South Africa, the UK and the USA under the USA PATRIOT Act. Administrative detention, besides imprisonment, may cover other forms of deprivation of liberty, including house arrest.

It has long been recognised that administrative detention is highly problematic. It ignores the presumption of innocence, is frequently based on executive assessments, thereby significantly enhancing their powers, and provides limited safeguards. In short, it creates an exceptional regime that leaves persons considered to be a threat to security at the mercy of the authorities. While administrative detention is permitted, albeit with limitations, under international humanitarian law in times of armed conflict,¹⁸³ it can only be applied in exceptional circumstances under international human rights law. Its use is subject to strict safeguards, which entails that it must be regulated by law, necessary and subject to regular judicial review.¹⁸⁴ In the European system, administrative detention on security grounds is not permitted under article 5 ECHR, which means that states wishing to use it must enter a derogation pursuant to article 15 ECHR.¹⁸⁵

Human rights bodies have repeatedly highlighted the link between the use of administrative detention and the existence of an enhanced risk of torture and have urged States to limit the use of administrative detention to an absolute minimum. In the words of the Special Rapporteur on torture:

Administrative detention often puts detainees beyond judicial control. Persons under administrative detention should be entitled to the same degree of protection as persons under criminal detention. At the same time, countries should consider abolishing, in accordance with relevant international standards, all forms of administrative detention.¹⁸⁶

Notwithstanding these concerns, administrative detention regimes have proliferated after 9/11, which is due to a number of factors. Besides an increased emphasis on prevention, the information obtained through intelligence-gathering is frequently of such a nature, particularly the use of secret evidence, that it cannot be used in criminal proceedings. Moreover, evidence obtained in the process may not be admissible or insufficient. The fact that evidence may not be admissible because it has been obtained under torture points to a particularly perverse aspect of administrative detention. The authorities know that a person may not be tried but still decide to detain him or her at their mercy, thus turning the rationale of the criminal justice process on its head. In practice, administrative detention regimes frequently suffer from a number of shortcomings, including their broad scope and limited safeguards.

¹⁸³ See J. Pelic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence', *International Review of the Red Cross*, vol. 87 (2005), No. 858, pp. 375-391.

¹⁸⁴ Human Rights Committee, *General Comment No.8: Right to liberty and security (Art. 9)*, 30 June 1982, para. 4. See also Concurring Opinion of Judge Sergio García Ramírez to the Judgment of the Inter-American Court of Human Rights in *Bayarri v. Argentina, Preliminary objections, merits, reparations and costs*, Judgment of 30 October 2008, Series C No.187.

¹⁸⁵ See, e.g., *Lawless v. Ireland (No. 3)* (App. no. 332/57), ECtHR, Judgment of 1 July 1961.

¹⁸⁶ *Report of the Special Rapporteur on torture* (2002) (below n. 218), para. 26(h).

The Jammu and Kashmir Public Safety Act permits detention of ‘two years from the date of detention in the case of persons acting in a manner prejudicial to the security of the State’.¹⁸⁷ In addition, the Government has broad powers to ‘revoke or modify the detention order at any earlier time, or extend the period of detention of a foreigner in case of his expulsion from the State has not been made possible’.¹⁸⁸ Several provisions of the Act undermine legal safeguards, such as that the grounds of the detention order have to be disclosed to the detained person not later than five days, or in exceptional circumstances ten days,¹⁸⁹ which is incompatible with the right to be informed of the reasons of arrest and the right to challenge the lawfulness of detention without delay (habeas corpus).¹⁹⁰ While an Advisory Board of Judges operates pursuant to the Act, it must hear a detainee in person ‘within eight weeks from the date of detention’,¹⁹¹ which does not grant an effective right to habeas corpus. In practice, these broad powers have given rise to repeated concerns and protests, as they form part of legislative measures that have facilitated arbitrary arrests and detentions, torture and enforced disappearances.¹⁹²

Other preventive detention regimes, some of which are long-standing, such as in Sri Lanka¹⁹³ and Israel,¹⁹⁴ equally have been criticised for the broad powers of the military and others to detain individuals on ‘security’ grounds, limited judicial review, and the long duration of detention, which, besides constituting arbitrary detention, is reported to have facilitated torture committed with impunity.¹⁹⁵ Even comparatively short periods of administrative/preventive detention may be problematic. For example, in Thailand, ‘arrest is permitted if necessary to prevent the person from committing or abetting in the commission of any act that may lead to violent incidence or in order to seek cooperation to pre-empt such violence’.¹⁹⁶ In this sense, detention under the 2005 Emergency Decree is purely preventive in nature. As noted above, the purpose of detention is: ‘to give explanation and instil correct attitude so that the person quits the behaviour or stops abetting the act that may give rise to violence in states of emergency’.¹⁹⁷ This places detainees in a legal black hole where they are dispossessed of the rights guaranteed in criminal law despite being arrested and detained for conduct that would otherwise

¹⁸⁷ Jammu and Kashmir Public Safety Act 1978 (Act No. 6 of 1978, India) 11978, s 18(1)(a)-(b), available at <http://www.unhcr.org/refworld/docid/3ae6b52014.html>.

¹⁸⁸ *Ibid.*, s.18(2).

¹⁸⁹ *Ibid.*, s.13(1).

¹⁹⁰ See, e.g., Art. 9(2) and 9(4) ICCPR.

¹⁹¹ Jammu and Kashmir Public Safety Act 1978 (above n. 187), s.16(1).

¹⁹² *Summary Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1*, UN doc. A/HRC/WG.6/1/IND/3, 6 March 2008, para 14, available at http://www.upr-info.org/IMG/pdf/A_HRC_WG6_1_IND_3_E.pdf

¹⁹³ See Prevention of Terrorism Act, No. 48 of 1979, ss. 9 and 10, which allow for preventive detention of up to 18 months not subject to judicial review.

¹⁹⁴ See Hamoked and B’Tselem, *Without Trial, Administrative Detention of Palestinians by Israel* (Hamoked and B’Tselem, 2009).

¹⁹⁵ *Ibid.* and e.g. *Amnesty International*, ‘Sri Lanka: Briefing to the Committee Against Torture’ Index ASA 37/016/2011 (October 2011), available at <http://www.amnesty.org/en/library/asset/ASA37/016/2011/si/2bb1bbe4-8ba5-4f37-82d0-70cbfec5bb2d/asa370162011en.pdf> +.

¹⁹⁶ ISOC Regulation (above n. 39), para. 3.1.

¹⁹⁷ *Ibid.*, Rule 3.8.

amount to an inchoate criminal offense. Such detention can be extended up to 37 days and is subject to inadequate judicial supervision. Civil society groups reported that over 5,000 persons have been detained under the 2005 Emergency Decree since its promulgation in January 2005 up to October 2011. Notwithstanding the fact that the law requires judicial authorisation of extension of detention every seven days, substantive review seldom occurs and detainees are rarely brought before the judge making the extension determination.¹⁹⁸ This practice clearly eliminates important safeguards against torture, as is evident from the number of allegations made.

Preventive detention is also increasingly resorted to in the context of detention of foreign nationals suspected of involvement in terrorism. Persons falling within this categorisation often face an enhanced risk of torture in the state of nationality; indeed, the fact that they are not safe in their home state may be the very reason why they are abroad. As a result, a state may be prevented from deporting the individual in question to his country of origin due to its obligations under international human rights law, in particular the principle of *non-refoulement*.¹⁹⁹ In such cases, states have resorted to prolonged ‘immigration’ or security detention as an alternative to either bringing charges or deporting a person. This is problematic in so far as such detention may, particularly in the European context, only be used ‘with a view to deportation or extradition’ pursuant to article 5(1)(f) ECHR. As the European Court of Human Rights has emphasised ‘any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress’,²⁰⁰ and further, that if deportation proceedings are not prosecuted with due diligence, an otherwise justified detention may become unlawful.²⁰¹ As a whole, detention during the period in question must be in conformity with the overarching goal of Article 5(1) ECHR which is the protection of the individual against arbitrary detention.²⁰² As a consequence, if an individual cannot be deported because he or she faces a risk of torture or ill-treatment in the country of destination, he or she can no longer be detained on the basis of Article 5(1)(f) ECHR. Such detention can therefore not be used where the prospect of deportation or extradition is remote because of the prohibition of *refoulement*. States have sought to address this challenge by obtaining diplomatic assurances from the receiving state that the person to be deported or extradited will not be subject to ill-treatment. However, jurisprudence and practice show that these diplomatic assurances have frequently been unreliable or ineffective.²⁰³

¹⁹⁸ See Cross Cultural Foundation and the Muslim Attorney Center Foundation, ‘Joint Submission to the Working Group on the Universal Periodic Review of Thailand’ (5 October 2011), available at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/JS8-JointSubmission8-eng.pdf>, para. 5

¹⁹⁹ See in particular Art. 3 CAT.

²⁰⁰ *Chahal v. United Kingdom* (App. no. 22414/93), ECtHR, Judgment of 15 November 1996; *Reports 1996-V*, para. 113.

²⁰¹ *Slivenko v. Latvia* (App. no. 48321/99), ECtHR, Judgment of 23 January 2002; *Reports 2002-II*, para. 146 [GC]; *Singh v. Czech Republic* (App. no. 60538/00), ECtHR, Decision on admissibility of 25 January 2005, para. 61.

²⁰² *Ibid.* and see also, particularly as regards detention of immigrants and asylum seekers, *Deliberation No. 5: Situation regarding Immigrants and asylum seekers*, Report of the Working Group on Arbitrary Detention 1999, UN doc. E/CN.4/2000/4, Annex II (1999), in particular Principle 7: ‘A maximum period should be set by law and the custody may in no case be unlimited or of excessive length’.

²⁰³ See, e.g., the cases reported by Human Rights Watch, ‘*Empty Promises: Diplomatic Assurances No Safeguard Against Torture*’, April 2004, available at <http://www.hrw.org/en/reports/2004/04/14/empty-promises>, and Amnesty International, *Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ Against Torture*, December 2010, available at <http://www.europarl.europa.eu/document/activities/cont/201101/20110118ATT11882/20110118ATT11882EN.pdf>. See however, *Othman (Abu Qatada) v. the United Kingdom* (App. no. 8139/09), Judgment of 17 January 2012, where the European Court of Human

Administrative detention regimes may not only facilitate torture; administrative detention may also constitute ill-treatment in its own right. Detaining someone for a potentially indefinite period, at the mercy of the executive and without any realistic prospect of release may result in a state of despair and have serious mental consequences for detainees, as transpired in the case of the UK's Belmarsh detention regime pursuant to ATCSA 2001, and has been alleged in the context of Guantánamo Bay.²⁰⁴

4.1.5. Delaying or limiting judicial review

Security legislation typically delays if not excludes altogether access to a judge and judicial review. The lawfulness of detention should normally be subject to judicial review within 48 hours. However, security laws frequently extends this time beyond 72 hours. Under Israel's Incarceration of Unlawful Combatants Law, individuals may be detained for fourteen days before being granted judicial review.²⁰⁵ Sudan's national security law of 2010 is another particularly egregious example, providing for compulsory judicial review after four and a half months only.²⁰⁶ Under Sri Lanka's emergency laws, no provision is made for judicial review in relation to detention that may last up to eighteen months.²⁰⁷

In addition, several laws provide that a prosecutor, rather than a judge, exercises review functions.²⁰⁸ The result of this practice is a shift in power where judges are deprived of their key function, namely promptly and regularly reviewing the legality of detention, which is also recognised as a key safeguard in the prevention of torture. Under international law, detainees suspected of having committed an offence must be brought before a judicial officer promptly. A prosecutor does not qualify as a judicial authority.²⁰⁹ While 'promptly' is not defined, it is normally understood to be within the first 48 to 72 hours following arrest; the passage of 4 days and 6 hours, in contrast, has been considered too long.²¹⁰ In times of emergency, states may derogate from the right to liberty, which allows them to hold a detainee for a longer period without access to judicial review. The rationale behind this practice is that the nature of the crime or the

Rights accepted that, in the applicant's case, the arrangements entered into between Jordan and the United Kingdom as part of the 2005 British-Jordanian Memorandum of Understanding provided sufficient safeguards against torture or inhuman and degrading treatment and that, as a result, Art. 3 of the ECHR would not have been violated were the applicant to be deported to Jordan. It did, however, find that his return would violate Art. 6 of the ECHR – right to a fair trial, because of the risk that evidence obtained under torture would be used in a trial against him.

²⁰⁴ On Belmarsh, see, e.g., *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 19 March 2004*, CoE doc. CPT/Inf (2005) 10, available at http://www.cpt.coe.int/documents/gbr/2005-10-inf-eng.htm#_Toc105559307. On Guantánamo, see, e.g., Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantánamo*, June 2008, available at http://www.hrw.org/sites/default/files/reports/us0608_1.pdf.

²⁰⁵ Section 5, Incarceration of Unlawful Combatants Law, 5762-2002, available at <http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf>.

²⁰⁶ National Security Act 2010 (Sudan) (above n. 74), s. 51(e)-(h). See also above, text accompanying n. 75.

²⁰⁷ See above at Section 3.1.

²⁰⁸ See, e.g., Sudan's National Security Act (above n. 74), s. 51(8).

²⁰⁹ See, e.g., *Vladimir Kulomin v. Hungary*, UN doc. CCPR/C/50/D/521/1992, 22 March 1996, para. 11.3.

²¹⁰ See *Brogan and others v. United Kingdom*, (App. nos 11209/84; 11234/84; 11266/84; 11386/85), Judgment of 29 November 1988, para. 62.

situation is such that the authorities need more time to investigate. In practice, however, the lack of judicial review has frequently given rise to concerns of torture. In response, international human rights treaty bodies have made it clear that, even during a state of emergency, access to judicial review must be given within a few days and must be accompanied by adequate safeguards.²¹¹ The same standards apply to judicial review of other forms of detention, such as administrative detention. The underlying objective is the prohibition of *incommunicado* detention, which places detainees at heightened risk of torture.

4.1.6. Delaying or limiting access to a lawyer of one's choice

While ordinary legislation in many countries does not provide for an unequivocal right of access to a lawyer of one's choice, the right is frequently further curtailed under security legislation. Under Israel's Incarceration of Unlawful Combatants Law, for example, a detainee can be denied access to a lawyer for up to seven days if such access is considered to harm state security requirements.²¹² Under Sudan's National Security Act 2009, a detainee can be denied access to a lawyer indefinitely if such access is deemed to 'prejudice the progress of interrogation, enquiry and investigation'.²¹³ Moreover, access to a lawyer may be restricted where counsel is subject to vetting procedures, such as in relation to Guantánamo Bay.²¹⁴

Restricting access to a lawyer deprives detainees of vital legal assistance. As such, it impacts adversely on their right to challenge the legality of detention and, where detained on criminal charges, his or her right to defend him- or herself, which forms part of the right to a fair trial.²¹⁵ Access to a lawyer of one's choice also helps detainees to lodge complaints and defend their rights more generally. In other words, access to a lawyer provides a crucial bridge to the outside world to minimise the risk of abuse of power.

Access to a lawyer has therefore been identified as a crucial safeguard against torture, such as by the European Committee for the Prevention of Torture (CTP), which noted that, in its experience,

[...] the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer

²¹¹See in particular *Aksoy v. Turkey*, (App. no. 21987/93), ECtHR, Judgment of 18 December 1996, paras. 82-84.

²¹²Incarceration of Unlawful Combatants Law (Israel) (above n. 205), section 6(a): 'The prisoner may meet with a lawyer at the earliest possible date on which such a meeting may be held without harming State security requirements but no later than seven days prior to his being brought before a judge of the District Court, in accordance with the provisions of section 5(a).' For commentary, see United Against Torture (UAT) Coalition, 'Alternative Report for Consideration Regarding Israel's Fourth Periodic Report to the UN Committee Against Torture (CAT)', 1 September 2008, para. 6.15, available at http://www2.ohchr.org/english/bodies/cat/docs/ngos/UAT_Israel42_1.pdf.

²¹³National Security Act (Sudan) (above n. 74), s. 51(2).

²¹⁴See Joint Report issued by four UN Special Rapporteurs, *Situation of Detainees at Guantanamo Bay*, UN doc. E/CN.4/2006/120, 15 February 2006, para. 35.

²¹⁵See, e.g., Art. 14(3)(d) ICCPR, recognizing the right of every person to 'defend himself [...] through legal assistance of his own choosing'.

during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.²¹⁶

Access to a lawyer should be prompt, regular, direct and confidential.²¹⁷ Accordingly, the right of access to a defence lawyer should in principle be ensured both in law and in practice from the very outset of detention.²¹⁸ Importantly, this right should be enjoyed ‘not only by criminal suspects but also by anyone who is under a legal obligation to attend – and stay at – a police establishment, e.g. as a “witness”’.²¹⁹ In genuinely exceptional circumstances, it may be permissible to delay for a very short period a detainee’s access to a lawyer of his or her choice.²²⁰ However, the permissible grounds in this regard are extremely limited, and any limitations on the right of access to a lawyer must be clearly circumscribed, strictly limited in time, and justified by compelling reasons; in any case, restrictions must not unduly prejudice the right of an accused to a fair trial.²²¹ In addition, it is clear that the mere fact that the accused faces serious charges is not in and of itself a sufficient reason for restricting access to a lawyer.²²²

Even in such exceptional circumstances, any restriction to the right of access to a defence counsel of choice must be specifically approved by a judge and can only be regarded as justified when it appears that prompt contact of a detainee with his or her lawyer of choice might raise genuine security concerns.²²³ In addition, even when access to the lawyer of choice is exceptionally delayed, ‘it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association’.²²⁴ In any case, as recently emphasised by the Special Rapporteur on counter-terrorism, ‘in relation to individuals who are deprived of their liberty, access to a lawyer cannot be

²¹⁶ European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), *6th General Report* [CPT/Inf (96) 21] (extracted in *The CPT Standards: Substantive Sections of the CPT’s General Reports* (Council of Europe, October 2001), available at <http://www.cpt.coe.int/en/documents/eng-standards-prm.pdf>), para. 15.

²¹⁷ See Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN doc. CCPR/C/GC/32 (2007), available at <http://www.unhcr.org/refworld/type.GENERAL.HRC.478b2b2f2.0.html>, para. 34. For discussion of the relevant standards, see Association for the Prevention of Torture (APT), ‘The Role of Lawyers in the Prevention of Torture’ (January 2008), available at <http://www.ap.t.ch>.

²¹⁸ According to the Special Rapporteur on torture ‘legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention’ (*Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38*, UN doc. E/CN.4/2003/68, 17 December 2002 (hereinafter ‘*Report of the Special Rapporteur on torture (2002)*’), para. 26 (g)).

²¹⁹ CPT, *12th General Report* [CPT/Inf (2002) 15], para. 41 (extracted in *The CPT Standards* (above n. 216), p. 12).

²²⁰ Report of the Special Rapporteur on torture (2002) (above n. 218), para. 26 (g).

²²¹ *Salduz v. Turkey* (App. no. 36391/02), ECtHR [GC], Judgment of 28 November 2008, paras. 54-55.

²²² *Ibid.*, and see also *Dayanan v. Turkey* (App. no. 7377/03), ECtHR, Judgment of 13 October 2009, para. 32, in which it was held that the systematic exclusion of the right of access to lawyer to individuals accused of certain crimes ipso fact amounted to a breach of Article 6 of the European Convention.

²²³ *Report of the Special Rapporteur on torture (2002)* (above n. 218), para. 26 (g).

²²⁴ See *ibid.*; see also CPT, *6th General Report* (above n. 216), para. 15: ‘[...] in order to protect the interests of justice, it may exceptionally be necessary to delay for a certain period a detained person’s access to a particular lawyer chosen by him. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the police investigation should be arranged.’

delayed in such a way as create a situation in which the detainee is effectively held incommunicado or is interrogated without the presence of counsel'.²²⁵

A further important aspect of the 'right to a lawyer' is that relating to the confidentiality of communications between a detainee and his/her lawyer. This aspect of the right is particularly important if the right to have access to and communicate with one's lawyer is to constitute an effective safeguard against the risk of torture. The ability to freely disclose any torture or other ill-treatment without fear of reprisal is a crucial precondition for the lawyer to be able to bring the allegations of torture or ill treatment before a court or other authority. Although international human rights law allows for some form of monitoring of communications between lawyer and client in particular circumstances,²²⁶ such monitoring must never consist of listening to the content of the conversation between lawyer and client.²²⁷

4.1.7. Secret detention

The lack of custodial safeguards frequently results in incommunicado detention where detainees have no access to the outside world, a fact that may be facilitated by security legislation itself, such as in Thailand, which stipulates that persons are to be detained in specially designated places.²²⁸ Incommunicado detention is a violation of the right to liberty and security and, depending on the case, the right to a fair trial.²²⁹ It is also recognised, in particular in cases of prolonged incommunicado detention, as a violation of the prohibition of torture and ill-treatment.²³⁰ In practice, incommunicado detention frequently facilitates torture and may be an integral part of enforced disappearances.²³¹

In a comprehensive report published in 2010, four Special Rapporteurs found evidence of secret detentions and related violations around the world, both in the context of renditions and in the national application of security legislation, which tally with the findings and experiences of REDRESS working with practitioners and victims of torture. The Special Rapporteurs found in respect of emergencies and anti-terrorism laws that:

States of emergency, armed conflicts and the fight against terrorism – often framed in vaguely defined legal provisions – constitute an 'enabling environment' for secret detention. As in the past, extraordinary powers are today conferred on authorities, including armed forces, law enforcement bodies and/or intelligence agencies, under states of emergency or global war paradigms without, or with very restricted, control mechanisms by

²²⁵ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (hereinafter 'Report on terrorism and fair trial'), UN doc. A/63/223 (6 August 2008), para. 40.

²²⁶ *Ibid.*, para. 39, and sources cited therein.

²²⁷ See 'The Role of Lawyers in the Prevention of Torture' (above n. 217).

²²⁸ 2005 Emergency Decree (Thailand) (above n. 35), s. 12.

²²⁹ See for a brief overview of jurisprudence, Joint Report (above n. 214), paras. 18-27.

²³⁰ *Ibid.*, paras. 31-35.

²³¹ *Ibid.*, paras. 28-30.

parliaments or judicial bodies. In many contexts, intelligence agencies operate in a legal vacuum with no law, or no publicly available law, governing their actions. Many times, although intelligence bodies are not authorized by legislation to detain persons, they do so, sometimes for prolonged periods. In such situations, oversight and accountability mechanisms are either absent or severely restricted, with limited powers and hence ineffective.²³²

These findings suggest that – though clearly not lawful – security legislation creates a situation that facilitates secret detentions. This practice is both enabling, i.e. enhancing control over a person, and disabling, i.e. preventing individuals from monitoring and taking action to hold agents accountable:

Secret detention as such may constitute torture or ill-treatment for the direct victims as well as for their families. The very purpose of secret detention, however, is to facilitate and, ultimately, cover up torture and inhuman and degrading treatment used either to obtain information or to silence people. While in some cases elaborate rules are put in place authorizing “enhanced” techniques that violate international standards of human rights and humanitarian law, most of the time secret detention has been used as a kind of defence shield to avoid any scrutiny and control, making it impossible to learn about treatment and conditions during detention.²³³

4.2. The right to a fair trial

The right to a fair trial is of a complex nature. As highlighted by the Human Rights Committee in relation to article 14 ICCPR, it combines

[...] various guarantees with different scopes of application [including a] general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. [It also] entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law [...]. Paragraphs 2 – 5 of the article contain procedural guarantees available to persons charged with a criminal offence. Paragraph 6 secures a substantive right to compensation in cases of miscarriage of justice in criminal cases [...].²³⁴

Security legislation frequently introduces significant changes to the system of prosecution and trial of security-related offences. In addition to broadening the number of offences subject to prosecution, such legislation is often designed to enable authorities to use evidence that may normally not be admissible because of the way in which it was

²³²Ibid., p. 4.

²³³Ibid., p. 5.

²³⁴ See Human Rights Committee, *General Comment No. 32* (above n. 217), para. 3.

obtained, and restrict the possibility of suspects and accused to defend themselves. It also subjects accused persons to trials before special courts, such as military tribunals or security courts, where they face lengthy punishments that may include the death penalty. It is evident that this administration of ‘security’ justice significantly shifts the power balance between the state and the suspect/accused and therefore undermines the equality of arms inherent in the notion of the right to a fair trial. Unsurprisingly, many of the challenges of post 9/11 legislation concern their compatibility with a right to a fair trial in international law, a right that can only be subjected to limited derogation in times of emergency.²³⁵ The right to a fair trial has a close nexus to the prohibition of torture, particularly in respect of the exclusionary rule, that is the prohibition of using evidence that has been obtained as a result of torture. As emphasised by the Special Rapporteur on counter-terrorism: ‘Experiences from the past [...] have taught that such deviations [from the exclusionary rule], especially in combination with prolonged periods of pre-charge detention, have encouraged the use of methods violating the provisions of article 7 [ICCPR] (torture and any other inhumane treatment).’²³⁶ The following review identifies several developments that reinforce these concerns.

4.2.1. Departure from ordinary evidentiary rules relating to the prohibition of using evidence obtained by torture

Security legislation typically does not stipulate that evidence obtained under torture is admissible in trial proceedings. Rather, laws have changed procedural rules that either allow the use of confessions made before the police, or shift the burden of proof on the accused to show that a confession was not made voluntarily. The principle that evidence obtained by torture should never be admissible in legal proceedings (save in proceedings against the perpetrator of the torture to show that the statement was made) is expressly stipulated in article 15 CAT and has been recognised in the jurisprudence of human rights treaty bodies.²³⁷ The exclusionary rule, which is generally recognised in the domestic legal system of both common law and civil law countries,²³⁸ serves a dual purpose: it protects the presumption of innocence by invalidating self-incrimination and acts as a disincentive to authorities that contemplate using torture as a method of investigation.

²³⁵ Ibid., para. 6, and *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN doc. A/63/223, 6 August 2008, paras. 7-42.

²³⁶ *Report on terrorism and fair trial* (above n. 225), para. 32. The relevance of the privilege against self-incrimination to the prohibition of torture is described by Special Rapporteur on counter-terrorism in the following terms: ‘[t]he privilege against self-incrimination is of relevance to the right to a fair hearing in two contexts. It may be a matter that invokes article 14(3)(g) of the International Covenant on Civil and Political Rights through the conduct of an investigative hearing where a person is compelled to attend and answer questions. The issue also arises where methods violating the provisions of article 7 (torture and any other inhumane treatment) are used in order to compel a person to confess or testify. On the latter point, it has been observed that such methods are often used, with a growing tendency to resort to them in the investigation of terrorist incidents or during counter-terrorism intelligence operations more generally. Where such allegations are made out, the Human Rights Committee has not hesitated to find a violation of article 14(3)(g), *juncto* articles 7 or 10’ (ibid., para. 31, original footnotes omitted).

²³⁷ For an excellent overview of the relevant case-law, see T. Thienel, ‘The Admissibility of Evidence Obtained by Torture under International Law’, *EJIL*, (2006) Vol. 17, 349-367.

²³⁸ As noted by the Special Rapporteur on counter-terrorism: ‘Some countries maintain a strict distinction between admissible and inadmissible evidence, often related to trial before a jury that determines issues of fact on the basis of the trial judge’s instructions on issues of law. In such systems, testimonies or other types of evidence may be excluded from the case by the judge as inadmissible. Other legal systems, typically those based on the civil law tradition, may rely on the theory of free evaluation of evidence, albeit with the exclusion of evidence obtained by torture as the exception’ (*Report on terrorism and fair trial* (above n. 225), para. 34).

In Sri Lanka, a confession made to a police officer or to any other person while in police custody is inadmissible in court under the Criminal Procedure Code.²³⁹ However, this rule does not apply to persons detained under Emergency Regulations issued by the President under the PSO.²⁴⁰ Moreover, the Prevention of Terrorism Act (PTA) allows confessions made to a police officer holding the rank of Assistant Superintendent or above to be admissible.²⁴¹ The PTA also shifts the burden of proof to the person alleging that he or she was subjected to torture or ill-treatment to show that a confession was obtained under duress.²⁴² These rules were challenged by N. Singarasa before the Human Rights Committee. Mr Singarasa, who had been tried, convicted and sentenced to 35 years imprisonment under the PTA, alleged that his conviction was based on a confession extracted under torture, an allegation that the trial court had dismissed as unsubstantiated.²⁴³ The Human Rights Committee held that, by placing the burden of proof on the accused to show that his confession had been made under duress, Sri Lanka had violated its obligation under Article 14(2) and (3)(g) of the ICCPR (privilege against self-incrimination), taken together with the right to an effective remedy under Article 2(3) and the prohibition of torture under Article 7.²⁴⁴ When Mr Singarasa sought to enforce the Human Rights Committee's views, the Sri Lankan Supreme Court refused to overturn the applicant's conviction on the basis that the ratification of the Optional Protocol to the ICCPR had been unconstitutional and that the Committee's views were hence not binding.²⁴⁵ The Government of Sri Lanka, meanwhile, has failed to bring the PTA in line with the *Singarasa* ruling. As a consequence, confessions given to police officers in terrorism cases remain admissible. This is of particular concern in light of the fact that, as noted by the Committee against Torture in November 2011, it appears that in most cases filed under the PTA, the sole evidence relied upon consisted of confessions obtained by the police.²⁴⁶ Notably, the PTA has remained in force even after the end of the conflict in 2009.

The Indian experience is also instructive. The general rule of criminal procedure prevents confessions made to police officers from being admitted as evidence in court.²⁴⁷

²³⁹ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Mission to Sri Lanka*, UN doc. A/HRC/7/3/Add.6 (26 February 2008), para. 40.

²⁴⁰ On the PSO and 2006 Emergency Regulations see above, nn. 94 and 97 and accompanying text. For discussion of the exception to the exclusion of admissibility of custodial confessions, see *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Mission to Sri Lanka*, UN doc. A/HRC/7/3/Add.6 (26 February 2008), para. 40.

²⁴¹ See PTA (Sri Lanka) (above n. 163), Part VI, ss. 16(1), 17, and 18.

²⁴² *Ibid.*, s. 16(2): 'The burden of proving that any statement referred to in subsection (1) is irrelevant under s. 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant'. S. 24 of the Evidence Ordinance Act 1985 (available at http://www1.umn.edu/humanrts/research/srilanka/statutes/Evidence_Ordinance.pdf) renders confession caused by inducement, threat, or promise irrelevant.

²⁴³ Human Rights Committee, *Singarasa v. Sri Lanka* (Comm. No. 1033/2001), UN doc. CCPR/C/81/D/1033/2001 (2004), para. 7.4., available at <http://www1.umn.edu/humanrts/undocs/html/1033-2001.html>.

²⁴⁴ *Ibid.*, para. 7.5.

²⁴⁵ *Singarasa v. Attorney General, S.C.*, Spl (LA) No. 182/99; SCM (15 September 2006), available at <http://www.southasiahr.net/pdf/ppv3n4.pdf>.

²⁴⁶ *Concluding Observations of the Committee Against Torture: Sri Lanka*, UN doc. CAT/C/LKA/CO/3-4, 8 December 2011, available at http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4_en.pdf, para. 11.

²⁴⁷ See Indian Evidence Act (IEA) 1872, available at <http://www.vakilno1.com/bareacts/indianevidenceact/indianevidenceact.htm>, s. 25: 'No confession made to police officer shall be proved as against a person accused of any offence'; s. 26: 'No confession made by

In 1987, TADA introduced an exception according to which confessions made before a police officer not lower in rank than a superintendent of police shall be admissible in trial.²⁴⁸ The Indian Supreme Court upheld TADA's constitutionality in 1994 but provided that safeguards must be observed so that confessions are given in a 'free atmosphere'.²⁴⁹ After 9/11, India enacted the (now repealed) Prevention of Terrorism Act (POTA) 2002. Section 32(1) POTA provided that 'a confession made by a person before a police officer not lower in rank than a superintendent of police [...] shall be admissible in the trial of such a person for an offence under this Act or rules made there under'.²⁵⁰ The safeguards under POTA included a requirement that the confession had to be recorded using audio or video recording equipment, and a requirement that it had to be made 'in an atmosphere free from threat or inducement'.²⁵¹ In addition, the individual had then to be produced before a senior judge within 48 hours together with the recording of the original confession in order to confirm the confession and have it recorded by the judge. If at that hearing there was any complaint of torture, the detainee was to be immediately referred for a medical inspection, following which he was to be detained in judicial custody.²⁵² Notwithstanding these safeguards, some commentators noted that, in the particular circumstances in India, 'no amount of safeguards can prevent "torture" of the accused so long as a confession made to a police officer, whatever the rank may be, is made admissible as evidence'.²⁵³ This seems to reflect the fact that once a confession has been made the onus shifts to the accused to disprove it. The Indian Law Commission commented on proposals to extend the mechanism to custodial confessions in relation to any crime,²⁵⁴ stating emphatically that '[...] the day all confessions to police, in all types of offences [...] is permitted and becomes the law, that will be the day of the demise [of] liberty'.²⁵⁵ However, in relation to terrorism offences, it endorsed the underlying security paradigm, arguing that there is 'good reason' for permitting the admission of confessions made to the police,²⁵⁶ and stated that

any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.'

²⁴⁸ TADA (above n. 171), s. 15.

²⁴⁹ The constitutionality of s. 15 of TADA was scrutinized by the Supreme Court in the 1994 case of *Kartar Singh v. State of Punjab*, 1994 (2) SC 423-564. Although the Supreme Court upheld the constitutionality of the Act, the judgment required the introduction of certain safeguards, including in relation to the admissibility of custodial confessions. In this regard, the Supreme Court held that, for custodial confessions to be admissible in evidence, any confession made to the police had to be recorded 'in a free atmosphere' and that, in any case, a suspect had to be recognized the right to remain silent.

²⁵⁰ POTA (above n. 171), s. 32.

²⁵¹ *Ibid.*, s. 32(1) and (3).

²⁵² *Ibid.*, s. 32(4) and (5).

²⁵³ South Asia Human Rights Documentation Centre (SAHRDC), *Prevention of Terrorism Ordinance 2001: Government Decides to Play Judge and Jury* (New Delhi, 2001), p. 82 (in relation to the equivalent provision of the Prevention of Terrorism Ordinance 2001 (POTO), available at <http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTO.htm>, which was formulated in materially identical terms).

²⁵⁴ See in particular Recommendation 37 made by the Malimath Committee on reforms of the Criminal Justice system, in 'Recommendations of the Malimath Committee on Reforms of Criminal Justice System' (April 2003), transcript available at <http://www.pucl.org/Topics/Law/2003/malimath-recommendations.htm>.

²⁵⁵ Law Commission of India, *185th Report – Review of the Indian Evidence Act, 1872* (March 2003), available at <http://lawcommissionofindia.nic.in/reports/185thReport-PartII.pdf>, p. 133.

²⁵⁶ *Ibid.*

[i]n the case of such grave offences, like terrorism, it is normal experience that no witness will be forthcoming to give evidence against hard-core criminals. Further, these offenders belong to a class by themselves requiring special treatment and are different from the usual type of accused. The exception made in cases of ‘terrorists’ should not, in our view, be made applicable to all accused or all types of offences.²⁵⁷

This passage, coming against the background of persistent allegations of torture under India’s anti-terrorism and security legislation, is disconcerting. Singling out offenders as ‘requiring special treatment’ because they are of a ‘different [...] type’ displays a mindset that justifies exceptions to fundamental rules on essentialist, utilitarian grounds without considering the possible consequences, here, the enhanced risk of torture. It may also explain why members of the legal profession fail in their role as guardians of individual rights if they share the underlying perceptions of ‘different types requiring special treatment’.

As noted above, in the USA, the 2001 Order of then President Bush which established Military Commissions in order to try ‘enemy combatants’ permitted the Military Commission to admit normally inadmissible evidence if it would, ‘in the opinion of the presiding officer of the military commission [...], have probative value to a reasonable person’.²⁵⁸ Regulations passed in 2002, likewise permitted the setting aside of the normal rules governing the admissibility of evidence.²⁵⁹ These regulations came under increasing criticism as allegations of torture of ‘enemy combatants’ mounted, and the US Congress passed the Detainee Treatment Act 2005, which, *inter alia*, prohibited the use in any proceedings of evidence obtained by torture and CIDTP.²⁶⁰ Although the Military Commissions Act 2006 set out a clear prohibition of the admission of evidence obtained by torture (whenever it had occurred),²⁶¹ and of statements obtained by CIDTP after the passing of the Detainee Treatment Act 2005,²⁶² in certain circumstances it permitted exceptions. In particular, evidence obtained prior to the Detainee Treatment Act 2005 remained admissible, provided that ‘the degree of coercion is disputed’. It could be admitted by the presiding officer if, in all the circumstances, it was ‘reliable and possessing sufficient probative value’ and ‘the interests of justice would best be served’ by its admission. The provision left a dangerous loophole for prosecution based on evidence that would be clearly inadmissible under international law. Distinguishing between torture and other forms of ill-treatment is alien to the exclusionary rule; no ‘interests of justice’ can serve to change this equation.²⁶³

²⁵⁷ Ibid., pp. 133-134.

²⁵⁸ Presidential Military Order on Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, 66 FR 57833, s. 4(c)(3).

²⁵⁹ Military Commission Order No. 1 (2002), available at <http://www.defense.gov/news/Mar2002/d20020321ord.pdf>.

²⁶⁰ Detainee Treatment Act 2005 (above n. 15).

²⁶¹ Military Commissions Act 2006 (above n. 17), s. 948r (b).

²⁶² Ibid., s. 948r (d).

²⁶³ Ibid., s. 948r (c). For criticism, see *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, Addendum. Mission to the United States of America, UN doc.A/HRC/6/17/Add.3 (22 November 2007), para. 27.

Following the change of Administration, the Military Commissions Act 2009 amended the provisions of the 2006 Act of the same name, so as to prohibit reliance on statements obtained by torture and CIDTP regardless of when in time they were obtained. It also includes greater safeguards for ‘normal’ confessions made by detainees, including a requirement that they be voluntary.²⁶⁴ While the changes made in 2009 constitute progress, earlier attempts to introduce new concepts and distinctions where there should be none provide dangerous precedents of legislative ‘creativity’ bound to undermine the absolute nature of the prohibition of torture.

4.2.2. Weakening of rules in other proceedings

The exclusionary rule applies to criminal proceedings. However, considering their general duty to take all necessary measures to prevent torture, states must ensure that their legislation does not, even if only indirectly, encourage the use of torture. In the UK, specific rules relaxing the standards for admissibility of evidence were introduced for proceedings before the Special Immigration Appeals Commission (SIAC). SIAC is a specialist tribunal, established in 1997, that has jurisdiction to determine specific questions and hear appeals in relation to certain immigration matters, including those which raise questions of national security.²⁶⁵ In 2001, the Anti-Terrorism Crime and Security Act 2001 (ATCSA) was passed, Part 4 of which allowed the potentially indefinite preventive detention of foreign nationals ‘certified’ by the Secretary of State as posing a risk to national security. Individuals could appeal against the certification by the Secretary of State before the SIAC.²⁶⁶ SIAC also had jurisdiction to conduct reviews of the certification within six months of the certification, and at three months intervals thereafter.²⁶⁷ Under the SIAC (Procedure) Rules 2003, special rules applied to the admissibility of evidence, with Rule 44(3) expressly providing that: ‘SIAC may receive evidence which would not be admissible in a court of law.’²⁶⁸

The problematic nature of this rule became evident in a number of cases where certification was challenged. The applicants alleged that the evidence relied upon by the Secretary of State had or might have been obtained by torture of individuals other than the applicant by the agents of a third State. In *A and Others v. Secretary of State for the Home Department*, the House of Lords held that Rule 44(3) could not be interpreted as allowing the admissibility of such evidence and that extremely clear language would be needed in order to achieve that effect.²⁶⁹ In particular, it unanimously held that evidence

²⁶⁴ Military Commissions Act 2009, Title XVIII of the National Defense Authorization Act for Fiscal Year 2010; Pub.L.111-84, 28 October 2009; 123 *Stat.* 2190, available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ84/content-detail.html>, s. 102, substituting a new section 948r into the Military Commissions Act 2006.

²⁶⁵ Special Immigration Appeals Commission Act 1997, available at <http://www.legislation.gov.uk/ukpga/1997/68/contents>.

²⁶⁶ Anti-Terrorism Crime and Security Act 2001 (ATCSA), s. 25, available at <http://www.legislation.gov.uk/ukpga/2001/24/contents>.

²⁶⁷ *Ibid.*, s. 26.

²⁶⁸ Rule 44(3), Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034), available at <http://www.legislation.gov.uk/uksi/2003/1034/contents/made>; an identical provision had been applicable under the previous version of the rules: Rule 20(3), Special Immigration Appeals Commission (Procedure) Rules 1998 (SI 1998/1881).

²⁶⁹ *A. and Others v. Secretary of State for the Home Department* [2005] UKHL 71 (hereinafter ‘*A. v. SSHD* (No. 2)’).

which had or may have been obtained by use of torture was inadmissible. However, the majority also held that there was no burden of proof on the executive to show that evidence had not been obtained by torture; rather, it was for the appellant, or special advocates acting on his behalf, to raise the issue; particular evidence was only to be excluded if SIAC, after enquiry, found that it was established, on a balance of probabilities, that the evidence was in fact obtained by torture.²⁷⁰ If it was not possible to conclude that the evidence had been procured by torture, SIAC was able to take any remaining doubts it might hold into account in evaluating the weight to be given to the evidence.²⁷¹ Although the particular mechanism of appeal against certification to SIAC at issue in *A v. SSHD* no longer exists following the repeal of Part IV of ATCSA 2001, the provision in question relating to evidence before SIAC remains in force. Further, a similar provision applied in relation to control orders under the Prevention of Terrorism Act 2005, and applies to proceedings relating to TPIMs under the Terrorism Prevention and Investigation Measures [TPIM] Act 2011.²⁷²

The ruling of the House of Lords and current rules leave a dangerous loophole. Not placing the burden of proof on the executive to rule out that evidence was obtained by torture may seem reasonable if seen from the perspective of ensuring intelligence cooperation. However, it ignores the realities, particularly the credibility of allegations of complicity in torture in the course of counter-terrorism operations, which raise fundamental concerns about the origins of any evidence introduced in such proceedings. While intelligence operations are by their nature antithetical to transparency, requiring the state to show that its evidence was – on the balance of probabilities – not obtained through torture would, from a policy and practical perspective, act as an important safeguard that addresses a grey area potentially facilitating torture. This is particularly so given that the applicants or special advocates appointed to act on their behalf will frequently not have access to the requisite information.

4.2.3. Making it more difficult to challenge evidence

States have increasingly introduced so-called special advocate procedures, or other similar mechanisms designed to prevent a terrorist suspect or his lawyer(s) of choice from having access to material against him or her which is placed before the Court. Under this procedure, only a specially vetted advocate may have access to certain materials.

For instance, in the United Kingdom, a special advocate before SIAC and other courts employing ‘closed’ procedures acts ‘in an Appellant’s interests in relation to any material which an Appellant is prevented from seeing as a result of the Secretary of State’s

²⁷⁰ *A v. SSHD (No. 2)* (above n. 269), paras. 116-121 (*per* Lord Hope); paras. 153-158 (*per* Lord Carswell) and paras. 143-145 (*per* Lord Rodger); paras. 172-174 (*per* Lord Brown). Cf. para. 56 (*per* Lord Bingham), para. 80 (*per* Lord Nichols) and para. 98 (*per* Lord Hoffmann).

²⁷¹ See *A v. SSHD (No. 2)* (above n. 269), para. 121 (*per* Lord Hope) and para. 145 (*per* Lord Rodger).

²⁷² See CPR r. 76.26(4), applicable to proceedings under the Prevention of Terrorism Act 2005 (added by The Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005/656)), and see CPR, r. 80.22(4) (added by The Civil Procedure (Amendment No. 3) Rules 2011 (SI 2011/2970), applicable in relation to proceedings relating to Terrorism Prevention and Investigation Measures under the TPIM Act 2011.

national security and public interest objections'.²⁷³ The rationale behind increased resort to such procedures/mechanisms has been explained by the Special Rapporteur on counter-terrorism as:

In the context of the fight against terrorism, limitations upon representation by counsel of choice are sometimes being imposed out of fear that legal counsel may be used as a vehicle for the flow of improper information between counsel's client and a terrorist organization. This fear is being addressed by States either excluding or delaying the availability of counsel; requiring consultations between counsel and client to be electronically monitored, or to take place within the sight and hearing of a police officer; or appointing special (chosen by State) counsel in place of the person's counsel of choice.²⁷⁴

Resort to special advocate procedures is not *per se* impermissible under international human rights law, as the right to choose one's lawyer is not absolute and domestic law may impose limitations on the right in question when they are justified by a lawful and sufficiently serious purpose and do not go beyond what is necessary to uphold the interests of justice.²⁷⁵ Human rights treaty bodies have recognised that resort to special advocate procedures may in some cases be necessary to guarantee a fair trial whilst protecting essential security interests of the State. The Special Rapporteur on counter-terrorism, for example, notes that 'the appointment of such a special legal counsel may also arise where the disclosure of information redacted for security reasons would be insufficient to guarantee a fair trial and allow the person concerned to answer the case.'²⁷⁶ The European Court of Human Rights has also accepted, in principle, recourse to special panels and the use of special advocates to deal with situations implicating national security.²⁷⁷ However, such procedures pose serious problems if they are either deliberately used to create (or in fact result in) a situation in which the ability of the individual to challenge evidence against him or her on the ground that it has been obtained by torture or ill-treatment is undermined or *de facto* excluded.

In those systems which make use of them, special advocate procedures are most often employed in proceedings relating to immigration or to administrative restrictions on liberty without charge, although their use has also spread to other types of proceedings, including civil claims. Their use in criminal proceedings would normally be deeply

²⁷³ Treasury Solicitor, 'Special Advocates: A Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO), November 2006, available at http://www.attorneygeneral.gov.uk/SiteCollectionDocuments/Special_Advocates.pdf, p. 6, para. 7. For the provision setting out the functions of Special Advocates in relation to proceedings before the High Court under the TPIM Act 2011, see CPR r. 80.20.

²⁷⁴ Report on terrorism and fair trial (above n. 225), para. 38 (footnotes omitted).

²⁷⁵ The Report on terrorism and fair trial (above n. 225), para. 40, notes that '[...] there must be a reasonable and objective basis for any alterations from the right to choose one's counsel, capable of being challenged by judicial review'.

²⁷⁶ Report on terrorism and fair trial (above n. 225), para. 38.

²⁷⁷ *Chahal v. United Kingdom* (App. no. 22414/93), ECtHR [GC], Judgment of 15 November 1996, see paras. 120-122 (in relation to an advisory panel procedure); *Al-Nashif v. Bulgaria* (App. no. 50963/99), ECtHR, Judgment of 20 June 2002, para. 97.

problematic from the perspective of compliance with the principles of equality of arms and the right in criminal proceedings to call and cross-examine witnesses.²⁷⁸

The UK experience is instructive. As mentioned above, ATCSA 2001 allowed the potentially indefinite preventive detention of foreign nationals ‘certified’ by the Secretary of State as posing a risk to national security, with the certification open to challenge before, and subject to review by, SIAC.²⁷⁹ Under the applicable rules of procedure for SIAC, provision was made for ‘closed’ hearings, from which the applicant and his lawyer were excluded, and at which SIAC could hear ‘closed’ evidence which was not provided to the applicant or his lawyer of choice.²⁸⁰ In all cases, a special advocate was appointed to represent the interests of the applicant,²⁸¹ in particular by making submissions to SIAC at any hearings from which the appellant and his representatives were excluded and by cross-examining witnesses at such hearings.²⁸²

Following the invalidation of the mechanism of preventive detention as a result of the decision of the House of Lords in the *Belmarsh* case,²⁸³ and the repeal of Part 4 of ATCSA 2001 and its replacement by the system of control orders under the Prevention of Terrorism Act 2005,²⁸⁴ similar provision for closed hearings and special advocates was introduced for hearings in relation to control orders. The Prevention of Terrorism Act 2005 was repealed in December 2011 by the Terrorism Prevention and Investigation Measures Act 2011.²⁸⁵ The relevant procedural rules concerning proceedings for review of TPIMs essentially reproduce the same scheme of ‘closed hearings’ and special advocates.²⁸⁶

The system of special advocates is closely linked to the fact that the government may have to rely on secret evidence, and is intended to serve as a counter-balance to protect the rights of the individual. However, the system poses an undeniable problem for the individual adequately to challenge the evidence deployed against him or her.²⁸⁷ In addition, special advocate procedures are problematic with regard to challenging evidence that may have been obtained as torture; the actual counsel may not know what he or she challenges for lack of disclosure and the role of special advocates is limited in closed proceedings ‘given the absence of effective instructions from those they

²⁷⁸ See *A v. United Kingdom* (above n. 80), paras. 205-211.

²⁷⁹ ATCSA 2001 (United Kingdom) (above n. 266), ss. 25 and 26.

²⁸⁰ S. 37, Special Immigration Appeals Commission (Procedure) Rules 2003 (above n. 268).

²⁸¹ *Ibid.*, s. 34(3).

²⁸² *Ibid.*, ss. 35(a) and (b).

²⁸³ *A and others v. Secretary of State for the Home Department* (above n. 80); see also the subsequent decision of the Grand Chamber of the European Court of Human Rights in *A v. United Kingdom* (above n. 80).

²⁸⁴ Prevention of Terrorism Act 2005 (United Kingdom), available at <http://www.legislation.gov.uk/ukpga/2005/2/contents>.

²⁸⁵ Terrorism Prevention and Investigation Measures Act 2011, available at <http://www.legislation.gov.uk/ukpga/2011/23>.

²⁸⁶ See CPR Part 80 (added by The Civil Procedure (Amendment No. 3) Rules 2011 (SI 2011/2970)).

²⁸⁷ As to which see the decision of the Grand Chamber of the European Court of Human Rights in *A v. United Kingdom* (above n. 80) in relation to the special advocate regime applicable under the ATCSA 2001, and the decisions of the House of Lords in *MB and AF v. SSHD* [2007] UKHL 46 in relation to control orders, in particular the opinion of Lord Bingham at para. 35.

represent[ed]'.²⁸⁸ This inadequate system of representation may therefore undermine a key deterrent, namely that authorities or agencies have no incentive to rely on evidence obtained as a result of torture because it would be declared inadmissible.

4.3. Barriers to Accountability

Emergency laws and anti-terrorism legislation vest the authorities with considerable powers to take action that may interfere with the life, physical integrity, liberty or other rights of individuals. Extensive powers broaden the scope for abuse, which is evident in the persistent allegations of torture and other violations committed in the application of security legislation. However, with few exceptions, instead of subjecting the forces concerned to closer scrutiny, legislation often provides for the opposite. The laws of several states, such as Bangladesh, India, Pakistan, Sri Lanka, Sudan and Syria, provide forces operating under security legislation with immunity for anything done in the course of their duties.²⁸⁹ The purported rationale for immunity provisions is that personnel need to be protected against frivolous legal action. In addition, trials against members of security forces or soldiers for any crimes committed in the course of operations often fall within the jurisdiction of military or special courts, with states arguing that military or special courts are better placed to try crimes committed by such personnel or in situations of domestic unrest / states of emergency.

The lack of effective complaints procedures – including access to a lawyer and to a judge during detention – immunity laws and special trial proceedings frequently combine to result in impunity.²⁹⁰ These measures therefore often have the same effect as amnesties that bar criminal prosecutions or civil suits. Those amnesties, and measures having an analogous effect, are generally held to be incompatible with the duty to investigate and prosecute serious human rights violations, particularly if they take the form of blanket amnesties.²⁹¹ The detrimental impact of legal obstacles such as immunities to accountability is in practice reinforced by the absence of effective protection for victims, witnesses and human rights defenders.²⁹² Moreover, the notion of 'state secrets' and

²⁸⁸ See submission from nine of thirteen Special Advocates before SIAC referred to in *A v. United Kingdom* (above n. 80), para. 199. The Court found that the system as it operated in the case before it violated Art. 5(4) ECHR because they were not in a 'position effectively to challenge the allegations against them', see *ibid.*, para. 224.

²⁸⁹ For instance, in Sri Lanka, the 1947 Public Security Ordinance granted broad immunities to State agents: see PSO (Sri Lanka) (above n. 94), s. 23. The PSO was later revised and its immunity provisions were thereafter supplemented by the 2006 Emergency Regulations (above n. 97), Regulation 19 of which stipulates that 'No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties'. The laws of the other countries are discussed further below.

²⁹⁰ The notion of impunity has been defined as '[...] the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims'; see the *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (2005), UN doc. E/CN.4/2005/102/Add.1.

²⁹¹ See *Chumbipuma Aguirre et al. v. Peru* (The *Barrios Altos Case*), Inter-American Court of Human Rights, Judgment of 14 May 2001, Series C No. 75, paras. 41-44; *Prosecutor v. Furundžija*, Case IT-95-17/1-T10, ICTY Trial Chamber, Judgment of 10 December 1998, para. 155; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 18. On the position of the Committee Against Torture, see below, n. 298 and accompanying text.

²⁹² REDRESS, *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: A Call to Action*, December 2009, available at <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>.

national security considerations may limit vital access to information. China's Law on Guarding State Secrets, 2010, and its predecessor, for example, has given rise to 'grave concern over the use of this law in general, considering it to severely undermine the availability of information about torture, criminal justice and related issues'.²⁹³ Its broad application 'prevent[ed] the disclosure of crucial information [...] on detainees in all forms of detention and custody and ill-treatment [and] information on groups and entities deemed "hostile organizations"'.²⁹⁴

State's obligations in response to allegations of torture are well developed, as set out in CAT, international and regional treaties as interpreted by their respective monitoring bodies, and international guidelines. Following a complaint or upon receiving credible information that an act of torture may have been committed, states must commence an investigation promptly, impartially and effectively.²⁹⁵ 'Promptly' means without undue delay and expeditious throughout; 'impartially' by an authority that is institutionally independent from alleged perpetrators and without bias; and 'effectively' taking all measures necessary to establish the facts and identify perpetrators.²⁹⁶ Victims of torture and their relatives should be kept informed about the progress of investigations, and have a right to learn the truth about any violations committed, which is particularly important in case of enforced disappearances.²⁹⁷ The overall goal of these obligations is to ensure victims' right to an effective remedy, i.e. justice, and to contribute to the prevention of torture by combating impunity.

4.3.1. Immunity laws

The most obvious obstacle to the obligation to investigate and/or prosecute those responsible for acts of torture is represented by the granting of immunity from criminal

²⁹³ *Concluding Observations of the Committee Against Torture: China*, UN doc. CAT/C/CHN/CO/4, 21 November 2008, para. 15(A), <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CHN.CO.4.pdf>.

²⁹⁴ *Ibid.*, para 15(A)(a).

²⁹⁵ See Art. 12 CAT: 'Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction'; see further Art. 13 CAT, which stipulates that every individual who alleges that he or she has been subjected to torture in the territory under the jurisdiction of the State party has a right to bring a complaint to the competent authority and have the complaint investigated by the authorities promptly and impartially. In this regard, the Committee Against Torture has emphasised that Art. 13 CAT does not require a formal submission of a complaint of torture, but that '[i]t is sufficient for torture only to have been alleged by the victim for [a State Party] to be under an obligation promptly and impartially to examine the allegation'; *Henri Unai Parot v. Spain* (Comm. No. 6/1990), UN doc. A/50/44 at 62 (1995), para. 10.4. On the existence of analogous obligations under Art. 7 ICCPR, see Human Rights Committee, *General Comment No. 20 concerning the Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)*, 10 March 1992, available at <http://www.unhcr.org/refworld/docid/453883fb0.html>, para. 14; *Stephens v. Jamaica* (Comm. No. 373/1989), UN doc. CCPR/C/55/D/373/1989 (1995), para. 9.2. Regional courts have also recognized a duty to investigate allegations of torture and CIDT in a prompt, effective and independent manner: see, e.g., *Aksoy v. Turkey* (above n. 211), para. 92; *Cantoral Benavides v. Peru*, I-ACtHR, Judgment of 18 August 2000, Series C, No. 69 (2000). See also Principle 2, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex to GA Res. 55/89, 4 December 2000, Principle 7, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Annex to GA Res. 43/173, 9 December 1988.

²⁹⁶ See REDRESS, *Taking Complaints of Torture Seriously: Rights of Victims and Responsibilities of Authorities*, September 2004, pp.13-23, available at <http://www.redress.org/downloads/publications/PoliceComplaints.pdf>.

²⁹⁷ For an overview of the relevant case law of international and domestic courts and human rights bodies, see UN Commission on Human Rights, *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, UN doc. E/CN.4/2006/91 (8 February 2006), available at <http://www.unhcr.org/refworld/docid/46822b6c2.html>. Specifically on enforced disappearances, see UN Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*, http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf.

proceedings to state officials involved in counter-terrorism operations. Such immunities are incompatible with states' duty to investigate, prosecute and punish perpetrators of torture. As stressed by the Committee against Torture: 'amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability'.²⁹⁸

In the years since 9/11, some security laws either introduced *ex novo*, or expanded, blanket immunities granted to state agents involved in counter-terrorism operations, such as in Syria, Bangladesh and Pakistan.²⁹⁹ In some cases those immunities are qualified by a requirement that the relevant act had been carried out in good faith and/or in the exercise of official duties. However, under security legislation, it is typically for the executive, that is the relevant ministry or those exercising delegated powers, to sanction prosecutions and therefore to qualify whether or not the act in question was covered by the immunity. This determination principally falls within the discretion of the authorities and is frequently not subject to any or extremely limited judicial review.³⁰⁰

An examination of the operation of immunity laws shows that they have repeatedly led to a lack of justice in individual cases and fostered a climate of impunity. In Thailand, for example, section 17 of the 2005 Emergency Decree grants broad immunity to 'competent officials' deputised by the Prime Minister with powers of arrest, detention, and

²⁹⁸ Committee Against Torture, *General Comment No. 2* (above n. 79), para. 5. In this regard, in the context of the preparation of a General Comment on Art. 14 CAT, the Committee Against Torture reiterated that: '[...] providing immunity to the State party and its agents for acts of torture or ill-treatment is in direct conflict with the obligation of providing redress, compensation, and as full rehabilitation as possible. When impunity is sanctioned by law or exists de facto, it bars victims from seeking redress as it allows the violators to go unpunished and denies victims their rights under article 14'; Committee Against Torture, 'Working Document on Article 14' (Forty-sixth session, 9 May-3 June 2011), available at http://www2.ohchr.org/english/bodies/cat/comments_article_14.htm (hereinafter '*Draft General Comment on Article 14*'), para. 37.

²⁹⁹ See for example, Art. 16 of Syria's Legislative Decree No. 14 of 15 January 1969, pursuant to which employees of the General Intelligence Division were granted immunity from any legal action in respect of actions carried out in the course of their duties, save upon an order of the Director. It appears that no order for a prosecution has ever been issued by the Director since 1969; see Damascus Center for Human Rights Studies, 'Alternative Report to the Syrian Government's Initial Report on Measures taken to Fulfil its Commitments under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', at p. 7. A similar immunity was created in 2008 by Art. 2 of Legislative Decree No. 69 of 30 September 2008 in relation to certain other specific categories of members of the security forces, against whom criminal proceedings can only be commenced upon a decree of the General Command of the Armed Forces (ibid.). A further example is the Action (in Aid of Civil Powers) Regulations (AACPR) adopted in Pakistan in June 2011 which confer judicial and executive authority upon the military for operating in the Federally Administered Tribal Areas (FATA), as well as broad immunity; see S. Nawaz, 'Who Controls Pakistan's Security Forces', Special Report 297, United States Institute of Peace, December 2011, at p. 5. As a consequence, the military exerts a large degree of control in the FATA, which, coupled with the immunity, has the effect of preventing those alleging torture at the hands of the military from having any meaningful recourse to redress. See also Saudi Arabia's 2011 draft Penal Law for Crimes of Terrorism and Its Financing, Art. 38 of which 'exempts [all government officials] from criminal responsibility that may attach to them in carrying out the duties in this law' (the text of the draft Penal Law is available at <http://www.amnesty.org/sites/impact.amnesty.org/files/PUBLIC/Saudi%20anti-terror.pdf>). A particularly striking example of creation of immunity in relation to specific actions retrospectively is constituted by the 2003 Joint Drive Indemnity Act passed by the Bangladesh parliament in the aftermath of Operation Clean Heart, an anti-crime programme undertaken with the involvement of the army between 2002 and 2003. Section 3 of the Act gave protection to members of the Rapid Action Battalion against prosecution before the normal civilian courts for their involvement in any casualty, damage to life or property, violation of rights, physical or mental damage, in the period between 16 October 2002 and 9 January 2003. See Human Rights Watch, 'Ignoring Executions and Torture: Impunity for Bangladesh's Security Forces' (May 2009), available at <http://www.unhcr.org/refworld/docid/4a110ecf2.html>, p. 59.

³⁰⁰ See Communication 379/09 – *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Decision on Admissibility adopted by the African Commission on Human and Peoples' Rights during its 12th Extraordinary Session, 2012, paras. 57, 67, 68.

deportation in cases of emergency situations, including those involving terrorism.³⁰¹ Such officials and persons having identical powers ‘shall not be subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act if such act was performed in good faith, non-discriminatory, and was not unreasonable in the circumstances or exceed the extent of necessity’.³⁰² The provisions on immunity contained in the 2005 Emergency Decree are compounded by those contained in other security laws creating states of exception which have been in force cumulatively since 2004, in particular under the 1914 Martial Law Act, which provides that military personnel are immune from legal action in both the criminal and civil courts.³⁰³ The effect of this immunity is that complaints of torture against members of the forces covered will fail from the outset unless prosecutions are sanctioned by the authorities. In March 2011, Amnesty International reported that, since the beginning of the conflict in 2004, no member of the security forces had been successfully prosecuted for torture or ill-treatment, despite the surfacing of many complaints and an authoritative report of the National Human Rights Commission on 34 specific cases.³⁰⁴

In Kashmir, the prevalence of torture and enforced disappearance has been documented in a series of reports over the last two decades.³⁰⁵ Thousands of Kashmiris have been detained and prosecuted under various pieces of security legislation, particularly Jammu and Kashmir Public Safety Act. In contrast, as confirmed in a response made to a request made by a Kashmiri human rights lawyer under India’s Right to Information Act, not a single prosecution for any of these alleged violations has been sanctioned as of February 2012.³⁰⁶ The situation is no different in other parts of India, such as Manipur, in which special security legislation has been in force for several decades.³⁰⁷

In Sudan, widespread allegations of torture by the army and security forces have been met with almost complete impunity under a web of immunity laws benefiting the army, security forces and the police.³⁰⁸ In an emblematic case of torture alleged to have been

³⁰¹2005 Emergency Decree (Thailand) (above n. 35), s. 17.

³⁰² Ibid.

³⁰³Martial Law Act 1914 (above n. 34), s. 16. On the 1914 Martial Law Act see above, n. 34 and accompanying text. For discussion, see International Commission of Jurists, ‘Report submitted to the Working Group on the Universal Periodic Review of Thailand’, March 2011, available at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/ICJ-InternationalCommissionJurists-eng.pdf>, para 24.

³⁰⁴Amnesty International, ‘Report submitted to the Working Group on the Universal Periodic Review of Thailand’ (above n. 34), pp. 2-3.

³⁰⁵ See, e.g., Human Rights Watch, ‘Everyone Lives in Fear’: *Patterns of Impunity in Jammu and Kashmir*, September 2006, available at <http://www.hrw.org/reports/2006/india0906/india0906web.pdf>.

³⁰⁶ P. Imroz, ‘Patribal judgment: Victory for Impunity? Is this yet another instance of lack of sensitivity towards continued human rights violations in the Valley?’ *Tehelka*, 12 August 2012, available at http://www.tehelka.com/story_main52.asp?filename=Ws040512Kashmir.asp.

³⁰⁷ See REDRESS, Asian Human Rights Commission and Human Rights Alert, *The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the Northeast of India: Sanctioning repression in violation of India’s human rights obligations*, 18 August 2011.

³⁰⁸ See REDRESS, Sudan Democracy First Group, African Centre for Justice and Peace Studies, *Comments to Sudan’s 4th and 5th Periodic Report to the African Commission on Human and Peoples’ Rights: Article 5 of the African Charter: Prohibition of torture, cruel, degrading or inhuman punishment and treatment*, April 2012, (‘Second Alternative Report’) at <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%204th%20and%205th%20Periodic%20Report.pdf>

committed by security forces dating back to 1989, repeated requests to lift immunity have been ignored. The victim, Farouk Ibrahim, brought the case before Sudan's Constitutional Court, challenging the legality of immunity provisions in Sudan's law.³⁰⁹ The Court found that immunity laws do not constitute a denial of the right to litigate (effective remedy) because immunities were conditional and could be lifted by the head of the respective forces.³¹⁰ This was notwithstanding the fact that there is no effective judicial review and despite the well-known practice of not lifting immunity. The ruling therefore effectively constituted an abdication of judicial responsibility.

'Done in the course of one's duties': The Indian Supreme Court's ruling in the *Pathribal* case

A critical factor of the application of immunity provisions is how to interpret the requirement that an act 'was done in good faith in the course of one's duty'. A similar clause was at issue before India's Supreme Court in a case concerning alleged extra-judicial killing in the South Kashmir village of Pathribal³¹¹ – with the reasoning being equally applicable to allegations of torture. The General Officer Commanding as the responsible authority, objected to the institution of criminal proceedings against army personnel by a Special Judicial Magistrate. The Supreme Court had to decide whether section 7 of the Armed Forces (Special Powers) Act 1990, applicable in Jammu and Kashmir, bars such proceedings. Section 7 provides that: 'No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.'

Following a detailed examination of the jurisprudence of Indian courts on the interpretation of the various immunity provisions found in domestic law, the Court summarised the law on the issue of sanctions as follows:

[...] the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the public servant can be shown to have reasonable connection inter-relationship or inseparably connected with discharge of his duty, he becomes entitled for protection of sanction. If the law requires sanction, and the court proceeds against a public servant without sanction, the public

³⁰⁹ *Farouq Mohamed Ibrahim Al Nour v. (1) Government of Sudan; (2) Legislative Body*, Final order by Justice Abbdallah Aalmin Albashir, President of the Constitutional Court, 6 November 2008.

³¹⁰ *Ibid.*

³¹¹ *General Officer Commanding v. CBI and Anr.*, Criminal Appeal No. 257 of 2011, Supreme Court of India, Judgment of 1 May 2012, available at <http://judis.nic.in/supremecourt/helddis3.aspx>.

servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction. Sanction can be obtained even during the course of trial depending upon the facts of an individual case and particularly at what stage of proceedings, requirement of sanction has surfaced. The question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the court. The Legislature has conferred ‘absolute power’ on the statutory authority to accord sanction or withhold the same and the court has no role in this subject. In such a situation the court would not proceed without sanction of the competent statutory authority.³¹²

This interpretation means that it is sufficient for an action to have a reasonable connection to the duty in order for it to benefit from immunity, irrespective of whether it amounts to a serious human rights violation. The Court’s reasoning makes clear that this question is immaterial. The finding that authorities have ‘absolute power’ to determine whether an act was done in the performance of a duty essentially means that the judiciary cannot exercise any effective control. The Court’s judgment reflects the prevailing security paradigm:

Special powers have been conferred upon Army officials to meet the dangerous conditions i.e. use of the armed forces in aid of civil force to prevent activities involving terrorist acts directed towards overawing the government or striking terror in people alienating any section of the people or adversely affecting the harmony amongst different sections of the people. Therefore, Section 7 is required to be interpreted keeping the aforesaid objectives in mind.³¹³

The judgment, by focusing narrowly on the construction of the Armed Forces (Special Powers) Act, 1990, ignores the context in which such laws operate. There is no mention of the history of allegations of serious violations, including torture, made in relation to acts committed under India’s security legislation that are covered by immunity. Neither is there any mention of the impunity that immunity laws have given rise to.

4.3.2. Criminal defences

Article 2(2) CAT provides that: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’ It is therefore generally recognised that there can be no defence for the crime of torture. However, section 1004(a) of the US 2005 Detainee Treatment Act introduced a limited defence for ‘an officer, employee, member of the Armed Forces, or other agent of the United States Government’ who had engaged in ‘specific operational practices, that involve detention and interrogation of aliens who

³¹² Ibid., para. 55.

³¹³ Ibid., para. 11.

the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted'. The provision is clearly aimed at the detention and interrogation using so-called 'enhanced' techniques in the context of the 'war on terror'. The relevant provision stipulates that it shall be a defence that the individual in question 'did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful'. It is further specified that 'Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.' That reference would appear to be intended to make clear that the defence is made out to the extent that reliance was placed on the so-called 'torture memos' produced by the Department of Justice under the Bush Administration. These memoranda expressed the view that particular interrogation techniques did not amount to torture and were not otherwise unlawful under US domestic law.³¹⁴

The 2005 Detainee Treatment Act expressly states that the effect of the provision is not 'to provide immunity from prosecution for any criminal offense by the proper authorities'.³¹⁵ However, it does provide an absolute defence to criminal liability (and to civil claims) in circumstances in which the particular state agent can show that he or she was not aware of the illegality of the conduct in question. It thus, exceptionally, provides a defence of ignorance of the law. The defence is not absolute, insofar as it does not extend to conduct which was either subjectively known to be unlawful by the individual in question, or which objectively 'a person of ordinary sense and understanding' would know was unlawful. This would appear to exclude acts of torture. However, it has created a dangerous grey area in which criminal liability may be excluded for a wide range of acts, including water-boarding, which amount to torture or other CIDTP under international law but were not recognised as such in the 'torture memos'. Such a defence is not only incompatible with article 2(2) CAT. It also runs counter to the general obligation of states to take effective legislative measures to prevent acts of torture (article 2(1) CAT)).

4.3.3. Exclusive jurisdiction of special courts to try alleged perpetrators

Several security laws provide that officials are subject to the jurisdiction of military courts or special courts, such as in India, Peru and Sudan.³¹⁶ Notably, in the *Pathribal* case, the Supreme Court of India had no qualms in finding that the suspects could be prosecuted before a Court Martial, without further sanction, which shows the underlying

³¹⁴ See P. Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values*, Palgrave Macmillan, 2008. For a relatively comprehensive collection of the relevant memoranda, see K. Greenberg and J. Dratel, *The Torture Papers; The Road to Abu Ghraib* (Cambridge University Press, 2005); some of the other memoranda have only been released comparatively recently.

³¹⁵ Section 1004(a), 2005 Detainee Treatment Act (above n. 15).

³¹⁶ Section 125 of the Indian Armed Forces Act, 2006; Peru Legislative Decree 1095, Art. 27, available at <http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/5aa058c278e98a69c12577bd0044dece!OpenDocument>; Sudan National Security Law (above n.74), Chapter VI.

rationale, namely that the army has the right to try those of its own kind and that no protection against ‘malicious prosecutions’ is warranted in such cases.³¹⁷ Such trials raise a series of concerns. A court-martial or special court attached to security forces is primarily an internal forum to maintain discipline and the integrity of the institution. It therefore lacks the independence, transparency and essential elements of criminal justice, including public vindication of the victims, which is vital for the prosecution of crimes – such as torture – that amount to serious human rights violations. Victims frequently lack trust in special courts to deliver justice, which is justified by the poor record of such tribunals in combating impunity. International treaty bodies and UN special procedures have therefore persistently called on states to make officials accused of having committed serious human rights violations subject to the jurisdiction of ordinary courts.³¹⁸

4.4. Reparation

The Committee against Torture has identified a series of obstacles that impede the enjoyment of the right to redress stipulated in article 14 CAT, which include:

[...] inadequate national legislation, discrimination in accessing complaints and investigation mechanisms and procedures for remedy and redress; state secrecy laws, legal doctrines and procedural requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities; as well as the failure to provide sufficient legal aid and protection measures for victims and witnesses.³¹⁹

Several of these obstacles are of a systemic nature. However, a number of them are specific to security laws, particularly immunities that cover civil liability and access to civil proceedings, and the state secrets doctrine. Such provisions and doctrines raise a series of concerns over their compatibility with the right to reparation for torture recognised under international law. This right comprises, procedurally, effective access to justice to pursue claims, and, substantively, a right to obtain recognised forms of reparations, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The right to an effective remedy and reparation is fundamental to the prohibition of torture. Treaty bodies and courts such as the Human Rights Committee and the Inter-American Court of Human Rights have therefore recognised that the right to an effective remedy is non-derogable and applies in times of emergency. With regard to the ICCPR, the Human Rights Committee has noted that:

[Article 2(3)] is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the

³¹⁷ *General Officer Commanding v. CBI and Anr* (above n. 311), paras. 58-65.

³¹⁸ See Human Rights Committee, *General Comment No. 32* (above n. 217). For discussion, see J.C. Gutiérrez Contreras and S. Cantú Martínez, ‘The Restriction of Military Jurisdiction in International Human Rights Protection Systems’, *Sur International Journal on Human Rights*, (2010) vol. 7, issue 13, available at <http://www.surjournal.org/eng/conteudos/pdf/13/miolo.pdf>.

³¹⁹ Committee Against Torture, *Draft General Comment on Article 14* (above n. 298), para. 33.

situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.³²⁰

4.4.1. Immunities excluding individual liability

The right to an effective remedy has been severely undermined by various types of immunity provisions in security legislation. Immunity from criminal proceedings discussed above, by excluding accountability, removes an important element from the right to an effective remedy.³²¹ In addition, such immunity may hamper the pursuit of remedies against the individual perpetrators or the state. In civil law systems, victims are deprived of the opportunity to bring a case as *partie civile* in the course of criminal proceedings. In all systems, the lack of a prosecution is bound to make it more difficult for victims to obtain the requisite evidence to pursue claims effectively.

In practice, security laws often provide for immunity both from criminal proceedings and civil claims. Immunity from civil suits for officials acting under the law concerned may take the form of exempting officers from liability or providing that they shall not be subject to any civil action. An example of the former is Mauritius' Prevention of Terrorism Act 2002, s. 24(8): 'A police officer who uses such force as may be necessary for any purpose, in accordance with this Act, shall not be liable, in any criminal or civil proceedings, for having, by the use of force, caused injury or death to any person or damage to or loss of any property',³²² whilst the latter approach is adopted for instance in section 6(1) of the Emergency Power Ordinance adopted by Bangladesh in 2007.³²³ Another type of immunity provision typically reads like regulation 19 of Sri Lanka's 2006 Emergency Regulations: 'No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.'³²⁴ Article 32 of Uganda's 2002 Anti-Terrorism Act is even broader, providing that '[n]o police officer or other public officer or person assisting such an officer is liable to any civil proceedings for anything done by him or her, acting in good faith, in the exercise of any function conferred on that officer under this Act.'³²⁵

³²⁰ Human Rights Committee, *General Comment No. 29* (above n. 5), para. 14. See also Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of 6 October 1987.

³²¹ See Committee Against Torture, *Guridi v. Spain* (Comm. No. 212/2002), 17 May 2005, available at http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/cat/opt/0/node/4/filename/spain_t5_cat_212_2002.

³²² Prevention of Terrorism Act 2002, Act No. 2 of 2002, text available at http://www.opbw.org/nat_imp/leg_reg/mauritius/Terror.pdf.

³²³ Emergency Power Ordinance, 2007, Ordinance No. 1/2007, text available at <http://bangladesh.ahrchk.net/docs/EPO2007en.pdf>. Section 6(1) provides: 'no action, done by a person in good faith, according to this ordinance or any rule under this ordinance or any provision under such rule, may be challenged in civil or criminal court'.

³²⁴ Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006 (text available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=country&docid=45af76a62&skip=0&coi=LKA&querysi=emergency%20regulations&searchin=title&display=10&sort=date>).

³²⁵ 2002 Anti-Terrorism Act (Uganda), text available at <http://www.icj.org/IMG/ATA.pdf>.

Short of immunities, the US 2005 Detainee Treatment Act, in addition to providing a defence of ignorance of the law in relation to criminal proceedings,³²⁶ provided a similar defence in relation to civil claims, which may be invoked by agents who committed acts of ill-treatment or torture against detainees.³²⁷ Moreover, section 7 of the 2006 Military Commission Act, in addition to excluding an application for the writ of habeas corpus, effectively precluded any recourse to other ordinary civil remedies to individuals who were or had been detained at Guantánamo Bay.³²⁸

Immunity provisions exempting officials from liability or excluding recourse to civil action frustrate any redress against the individual perpetrator from the outset. As the *Pathribal* judgment showed, terms such as acting ‘in good faith’ ‘or ‘in furtherance of an Act’, are often construed broadly, which means that they would normally exclude any civil action in relation to anything done in the course of interrogations or custodial situations, including torture. Where individual officers enjoy immunity, the availability of reparation would depend on whether the victim can take legal action against the state. However, irrespective of whether this is possible and of the question of who should ultimately bear responsibility, depriving a victim of the opportunity to bring proceedings against the alleged perpetrator removes an important element of satisfaction inherent in the right to reparation. Equally important, it fails to serve as deterrent for individuals acting under security laws. On the contrary, individual immunity sends a message that the state will provide cover for any acts done, including serious human rights violations. It therefore forms an important element in the *quid pro quo* of security operations, by which states allow forces to do the ‘dirty work’ with the understanding that whatever is done will not result in adverse consequences for those concerned because they acted to further the interest of the state.

4.4.2. Immunities excluding state liability

The effect of immunity granted to individual officials is compounded where security laws exclude the possibility of obtaining compensation from the State. There are a few examples of post 9/11 security laws that modify pre-existing position by expressly excluding state liability for violations committed by state agents in the context of counter-terrorism/security operations. Limitations upon the liability of the State are normally either a general principle of the domestic legal system, or specifically set out in pre-existing legislation. However, one example of an attempt to exclude the liability of the state specifically in relation to damage caused in the context security operations is section 6(2) of Bangladesh’s 2007 Emergency Power Ordinance, which provides that ‘no

³²⁶ Detainee Treatment Act 2005 (above n. 15), s. 1004(a). For discussion, see above, Section 4.3.2.

³²⁷ Detainee Treatment Act 2005 (above n. 15), s. 1004.

³²⁸ Section 7 of the Military Commission Act 2006 amended the relevant provision governing the jurisdiction of federal courts in relation to habeas corpus (28 USC 2241), by substituting a new sub-section (e) which provided that ‘(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination. (2) Except as provided in [section 1005(e)(2) and (3) of the Detainee Treatment Act 2005], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.’

action, done in good faith by the government, according to this ordinance or any rule under this ordinance or any provision under such rule, and any resultant damage due to the action, may be challenged in civil or criminal court'.³²⁹ The effect of that provision is compounded by the exclusion of any civil or criminal challenge to any action done by state agents on the basis of the Ordinance,³³⁰ with the effect to exclude any possibility of civil redress.

Recourse to such provisions excluding liability of the state for acts of agents involved in security operations has a long history as Thailand's Martial Law Act 1914, which excludes any liability for actions of the Military Authority, shows. Section 16 of the Act provides that 'No compensation or indemnity for any damage which may result from the exercise of powers of the military authority as prescribed in sections 8 to section 15 may be claimed from the military authority by any person or company, because all powers are exercised by the military authority in the execution of this Martial Law with a view to preserving, by military force, the prosperity, freedom, peace and internal or external security for the King, the nation and the religion.'³³¹ Legislation excluding liability of the state contradicts the right to an effective remedy and reparation under international human rights law unless the judiciary interprets it in such a way as to exclude immunity for claims relating to human rights violations, such as torture, from its scope. Where legislation is not interpreted in such a restrictive fashion, it privileges anything done in relation to security concerns to such an extent that it turns any damage caused into a sacrifice that individuals will have to bear for the collective good. In the case of torture, this rationale adds insult to injury.

4.4.3. Obstacles deriving from doctrines of 'state secrets'

A particular challenge to the pursuit of redress for torture has been the invocation of the doctrine of 'state secrets', which may either be provided for in legislation or otherwise applied by the judiciary. Based on the need to protect the sensitivity and secrecy of information, the doctrine has been used to hear cases in *camera*, bar the disclosure of certain information or dismiss a case altogether.

International human rights law recognises that there may be circumstances in which a state has legitimate concerns or values which need to be protected at the expense of the open nature of court proceedings.³³² However, the scope of the state secrets doctrine in at least some states extends beyond matters of publicity of proceedings or disclosure of documents to become a substantive bar that frustrates claim in relation to certain activities. This applies in particular to counter-terrorism cases where states have

³²⁹2007 Emergency Power Ordinance (Bangladesh) (above n. 323).

³³⁰ See section 6(1), 2007 Emergency Power Ordinance (Bangladesh) (quoted above, n. 329).

³³¹Martial Law Act 1914 (above n. 34).

³³² For instance, under Article 14 of the ICCPR, '[...] the press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires [...]'].

persistently invoked state secrets and national security considerations to preempt parliamentary or judicial scrutiny.³³³

The US government has relied on the ‘state secrets’ doctrine as a means of securing the dismissal of a number of high-profile civil claims that concerned allegations of torture and other violations committed in the course of renditions and in detention. The state secrets doctrine, which is essentially a judicial creation, was originally formulated by the Supreme Court as a narrow principle creating a privilege enjoyed by the Government against disclosure of certain documents concerning matters related to national security.³³⁴ However, following 9/11 it has been developed by the US federal courts as imposing a bar to civil claims which necessarily imply the consideration of matters of national security, with the result that such claims are simply dismissed *in limine*.³³⁵ Consequently, it has proved virtually impossible for victims of torture to have effective access to US courts and to obtain reparation.

This approach stands in contrast to other jurisdictions where special procedures have been introduced to hear cases involving security issues. For example, under Canada’s 2001 Anti-Terrorism Act, although a new ground for non-disclosure of documents was created based on considerations of state secrecy and national defence, the final decision on disclosure has been left to the courts.³³⁶ The same is true in the United Kingdom under the scheme of public interest immunity certificates. Notably, in the *Binyan Mohamed* case, the UK courts held that the UK government was required to disclose documents received by the UK security services from the US relating to the claimant’s allegations that he had been tortured.³³⁷ That decision was reached despite the argument by the UK government that the information in question had been provided by the US subject to the ‘control’ principle (i.e. on the understanding that it would not be disclosed except with its consent), and that disclosure would damage intelligence cooperation in the future and therefore be detrimental to the UK’s national security.

³³³ Parliamentary Assembly of the Council of Europe Report, ‘Abuse of state secrecy and national secrecy: obstacles to parliamentary and judicial scrutiny of human rights violations’, CoE doc. 12714, 16/09/2011, para. 5, available at http://www.assembly.coe.int/ASP/Doc/DocListingDetails_E.asp?DocID=13548.

³³⁴ See *United States v. Reynolds*, 345 U.S. 1 (1953); for discussion, see L. Fisher, *In The Name of National Security: Unchecked Presidential Power and the Reynolds Case* (University Press of Kansas, 2006)

³³⁵ See *El-Masri v. Tenet*, 437 F.Supp. 530 (E.D. Va. 2006); 479 F.3d 296 (4th Cir. 2007); *cert. denied*, 552 U.S. 947; 128 S.Ct. 373 (2007), where the Court of Appeals for the 4th Circuit held that the claim could not be established without disclosure evidence subject to the narrow privilege against disclosure, and accordingly dismissed the claim on that basis; see also *Arar v. Ashcroft*, 414 F.Supp. 2d 250 (E.D.N.Y. 2006); *aff’d* 532 F.3d 157 (2d Cir. 2008); 585 F.3d 559 (2d Cir. (en banc) 2009); *cert. denied* 130 S.Ct. 3409 (2010); *Mohamed et al. v. Jeppesen Dataplan, Inc.*, N.D. Ca., 30 May 2007; *aff’d*, 614 F.3d 1070 (9th Cir., *en banc*, 2010; (reversing 579 F.3d 943 (9th Cir., 2009)); *cert. denied* 131 S.Ct. 2442 (2011), in both of which it was held by the relevant Courts of Appeals that the State secrets doctrine required the dismissal of claims involving consideration of matters implicating questions of national security.

³³⁶ See Canada Evidence Act 1985, s. 38.06 (as amended by the Anti-Terrorism Act 2001): ‘(1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information. (2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.’

³³⁷ See *R (Binyan Mohamed) v SSFCA (No. 1)* [2008] EWHC 2048 (Admin), (revised 31 July 2009); *R (Binyan Mohamed) v SSFCA (No. 4)* [2009] EWHC 152 (Admin); and *R. (Binyan Mohamed) v SSFCA* [2010] EWCA Civ. 65.

The requirement that the public interest in disclosure and the openness of proceedings should be balanced against considerations of national security has the potential to limit significantly the adverse impact of state secrecy doctrines and similar arguments on the right to an effective remedy. In the UK, for example, individuals who had been detained at Guantánamo Bay brought civil proceedings against a UK intelligence agency alleging complicity of UK agents in their torture by the USA.³³⁸ The UK government attempted to persuade the courts to adopt a closed procedure when hearing the case so as to protect supposed national security interests; the procedure proposed would have prevented the claimants as well as their legal representatives from being present during the hearing, and from seeing the detailed judgment (which would not have been published). In November 2009, the High Court held that it possessed the power to adopt the procedure proposed, despite the clear limitation this would impose on the ability of the claimant effectively to pursue a remedy.³³⁹ However, the Court of Appeal subsequently reversed that decision. It held that the right to fair trial required that a civil claim must, save in exceptional circumstances, normally be heard in open court so as to enable the claimant to know and respond to the defence case and that the reasons for the judgment should be made known to the claimant.³⁴⁰ As a direct consequence of the judgment of the Court of Appeal, the UK government agreed to settle the claim, paying compensation to the claimants. This practice has also been followed in other cases where the UK government preferred to settle cases out of court rather than defend a claim which would ventilate issues implicating national security.³⁴¹ Subsequently, the UK government responded by proposing legislation to address the issue, the Justice and Security Bill, published in May 2012. The Bill proposes introducing closed procedures in relation to proceedings involving sensitive material implicating national security, using a system of special advocates, and excluding the possibility of obtaining disclosure from the security services of information provided by the intelligence services of other States.³⁴² The Bill, if enacted, would seriously limit the availability of redress before UK courts of those alleging to have suffered torture or related violations in the course of counter-terrorism operations.³⁴³

³³⁸ *Al-Rawi v Security Service* [2009] EWHC 2959 (QB).

³³⁹ *Ibid.*

³⁴⁰ *Al-Rawi v Security Service* [2010] EWCA Civ. 482.

³⁴¹ Information obtained by REDRESS.

³⁴² Note also the provisions of CPR Part 80 applicable to proceedings under the TPIM Act, which disapplies the normally applicable rules of disclosure (CPR r. 80.22(1)), and expressly provides that closed material (and, in an appropriate case if the Court requires one to be produced, a summary of such closed material) is not to be ordered to be disclosed if disclosure would be 'contrary to the public interest' (CPR, r. 80.25(5), (6) and (8)). In that regard CPR r. 80.1(4) provides that 'disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom or the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest'. (CPR, r. 80.1(4)). In addition, where the Court refuses an application to treat material as closed material (or orders the provision of a summary of closed material), the Secretary of State is entitled nevertheless to refuse to disclose the material in question or the summary; however, the result of such a refusal is that if the court considers that the material or summary is relevant to a matter before it and would be of assistance to the other party, the court may inter alia, order the withdrawal of the matter from consideration, and in any case, that the material cannot be relied upon in the proceedings (CPR r. 80(7)).

³⁴³ See REDRESS, Justice and Security *Green Paper: Consultation, Submission by the Redress Trust*, 6 January 2012, available at <http://www.redress.org/downloads/publications/Justice%20and%20Security%20Green%20Paper%20Consultation%20REDRESS%20submission%20-%20Copy.pdf>.

Legislation or judicial practices that bar outright claims alleging torture and other ill-treatment on the basis of considerations of state secrets or national security negate and hence violate the right to an effective remedy. Even where lesser limitations are involved, the impact on the effectiveness of the right to a remedy can be severe. Limitations on disclosure of documents and the use of closed hearings from which the victim is excluded necessarily impacts upon the right of victims to know the truth, and inhibit their ability to adequately pursue cases, thereby substantially shifting the power in favour of the state. The UK Justice and Security Bill sets a bad precedent in this regard. Unsurprisingly, it has been the subject of scathing criticism. Adopting and implementing such legislation may well result in a situation described by the late Lord Bingham when discussing the relationship between the executive and judiciary: ‘There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live.’³⁴⁴

³⁴⁴ T. Bingham, *The Rule of Law* (Allen Lane, 2010), p. 65.

5. Security regimes, discrimination and the rule of law

Security laws have one basic rationale in common, namely that there is a threat to security which is so serious as to justify exceptional measures. This rationale raises difficult questions of perceptions and fact: How is security understood? Is it the security of the state and its organs, which may be equated with the institutions of a repressive regime, or is security broader, including human rights and the well-being of people?³⁴⁵ Moreover, what constitutes a threat to such security, in other words what is the threshold for applying special measures?

A White Paper published by the South African government in 1995 captures the different meanings of ‘security’ well:

The traditional and more narrow approach to security has emphasized military threats and the need for strong counter-action. Emphasis was accordingly placed on the ability of the state to secure its physical survival, territorial integrity and independence, as well as its ability to maintain law and order within its boundaries. In this framework, the classic function of intelligence has been the identification of military and paramilitary threats or potential threats endangering these core interests, as well as the evaluation of enemy intentions and capabilities. In recent years, there has been a shift away from a narrow and almost exclusive military-strategic approach to security. Security in the modern idiom should be understood in more comprehensive terms to correspond with new realities since the end of the bipolar Cold War era. These realities include the importance of non-military elements of security, the complex nature of threats to stability and development, and the reality of international interdependence.³⁴⁶

While predating 9/11, the White Paper sets out clearly the fundamental challenge of how to understand security, which will consequently inform responses to perceived threats. Being clear about the understanding of, and approach to, threats to security is crucial because they frequently serve as entry points that justify exceptions from the rule. As a result, the process by which and through whom ‘security’ and ‘threats’ are defined will determine what type of security regime will be in place. In practice, this process is often decidedly one-sided with security services defining the agenda. As was noted by the UN Development Program (UNDP):

Security policies – both internal and external – are at the centre of power relations within and among societies. Yet they are also usually the area where civil society, the government and its oversight institutions have the least say.³⁴⁷

³⁴⁵ See in this context in particular A. Edwards and C. Ferstman, ‘Humanising non-citizens: the convergence of human rights and human security’, in A. Edwards and C. Ferstman (eds.), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010), pp. 3–46.

³⁴⁶ South Africa, *White Paper on Intelligence*, 1995, available at <http://www.info.gov.za/whitepapers/1995/intelligence.htm>.

³⁴⁷ UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (Oxford University Press, 2002), p. 89.

This applies equally to the factual assessment that provides the material justification to take measures aimed at protecting ‘security’ from ‘threats’. In practice, the process of determining whether a threat actually exists is critical though fraught with difficulties. Due to the nature of security threats, public scrutiny is often limited. The adoption of security laws will have to be based on trust that security services rely on information that justifies exceptional measures, for example claims in the UK that there are serious threats to security and that extended pre-charge detention was needed effectively to investigate terrorism-related offences. In authoritarian regimes, recourse to security laws may respond to threats to state institutions or may simply constitute an exercise of bringing the power of the state to bear against any opposition, including peaceful one. Where the rationale of a threat to security is invoked and security laws enacted, their existence and operation frequently have profound adverse consequences for human rights protection and the rule of law, by turning the exceptional into the norm. Two features of security laws are critical in explaining their adverse impact, i.e. further empowering the executive on the one hand and, in so doing, enhancing the vulnerabilities of the individuals targeted on the other.

Security laws are typically based on the assumption that the authorities concerned need to be vested with broader powers to combat the threat(s) identified. These forces are frequently the military and/or security forces, which are given policing powers, leading to a militarisation or securitisation of law enforcement. The broad powers conferred are often complemented by immunities that shield the relevant authorities from any accountability; this serves to enable state organs to act without any restraints, gives them notice that the state is fully supportive of their activities – and may be seen as compensating for doing the ‘dirty’ work.

In practice, these factors frequently combine to result in typical features of ‘security regimes’, namely (i) militarisation of an area characterised by increased recourse to security checks, arrests and detentions, which often prompt local protests, resulting in further escalation of measures, intensification of conflicts and allegations of serious human rights violations which are commonly met with impunity. Examples of such developments abound, for example in the North-East of India and Kashmir, in the largely Tamil populated North-East of Sri Lanka, in the southern provinces in Thailand, at various points in the Kurdish areas in Turkey and Chechnya in Russia, and in Israel and the occupied territories to name but a few;³⁴⁸ (ii) erosion of institutions as a result of militarisation or of prevailing security paradigms where existing institutions undergo substantial changes. The predominance of security and military forces and recourse to extraordinary measures diminishes the role of law enforcement agencies and sets negative precedents that may influence the way all agencies operate. This applies particularly where the line between security and law-enforcement becomes blurred and resort is had to para-military forces, such as the Rapid Action Battalion in Bangladesh,³⁴⁹

³⁴⁸ See Asian Human Rights Commission, ‘Special Edition: Militarisation & Impunity in Manipur’, *Article 2* (December 2006), Vol. 5, No. 6, available at <http://www.article2.org/pdf/v05n06.pdf> and REDRESS, AHRC and Human Rights Alert (above n. 307).

³⁴⁹ See AHRC, ‘Bangladesh 2008: Insidious militarisation and illegal emergency’, in *Article2* (December 2008), Vol. 7, No. 4, available at <http://www.article2.org/mainfile.php/0704>.

and the emergency regulations in Sri Lanka that allow military personnel to perform law enforcement functions.³⁵⁰ It also applies where security agents ignore the law, including in situations where no adequate legal framework is in place, such as in Kenya;³⁵¹ (iii) enhanced vulnerability flowing from militarisation, a security based approach to law enforcement, limited safeguards and impunity (see below).

Security legislation typically refers to certain acts rather than explicitly defining the persons subject to it. Some laws, such as in Israel and China, refer to certain groups, such as ‘terrorist organisations’,³⁵² which may be designated as such by the authorities.³⁵³ Other examples are emergency laws, such as Peru’s legislative decree 1095. This decree was enacted by Congress in 2010 to enable the Armed Forces, pursuant to a declaration of a state of emergency, to confront a ‘hostile group’.³⁵⁴ Decree 1095 applies to a ‘hostile group’, which is defined as ‘being minimally organized, having the capacity and intention to confront the State in a prolonged manner by means of fire arms, pointed and sharp items or blunt objects in quantities, and participating in the hostilities or collaborating in their realization.’ According to the Special Rapporteur on Counter-Terrorism, this definition ‘is so broad that it would encompass social protest movements not carrying firearms, and, consequently, trigger the application of international humanitarian law in situations of low-level violence not amounting to an armed conflict’.³⁵⁵

Legislation may also specifically target foreign nationals, such as the UK’s ATSCA 2001, which provided for the indefinite detention only of foreign nationals. The law had to be repealed after the House of Lords held that the derogation entered by the United Kingdom to Article 5 ECHR was invalid as it was impermissibly discriminatory.³⁵⁶

Even where security laws are on their face neutral and not obviously directed against a particular group of persons, their application have raised repeated concerns about targeting and profiling. Many emergency laws are applied only to certain areas, and have in practice resulted in the targeting of a specific minority group or a particular community. Suspicions harboured against certain members of the group constituting a threat often lead to an indiscriminate targeting of the whole group, or some of its members, particularly young able-bodied men seen as potential insurgents. In Thailand, the various laws have been in operation in the Yala, Pattani and Narathiwat provinces, as well as neighbouring Songkhla province, which are largely inhabited by Malay

³⁵⁰ Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005, available at <http://www.unhcr.org/refworld/country,,NATLEGBOD,,LKA,,471712342,0.html>.

³⁵¹ See REDRESS, *Kenya and Counter-Terrorism: A Time For Change*, 2009, <http://www.redress.org/downloads/country-reports/Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf>.

³⁵² On China’s Criminal Law in this respect, see *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to China*, UN doc. E/CN.4/2006/6/Add.6, 10 March 2006, para. 34.

³⁵³ Israel’s Prevention of Terrorism Ordinance No 33 of 5708 (1948) as amended, http://www.mfa.gov.il/MFA/MFAArchive/1900_1949/Prevention+of+Terrorism+Ordinance+No+33+of+5708-19.htm.

³⁵⁴ See *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Mission to Peru*, UN doc. A/HRC/16/51/Add.3, 15 December 2010, para. 32.

³⁵⁵ *Ibid.*

³⁵⁶ See *A and others v. Secretary of State for the Home Department* (above n. 80).

Muslims.³⁵⁷ In India, the Armed Forces (Special Powers) Acts operate in the North-East and in Jammu and Kashmir, with the population in both areas being ethnically different from the majority of the population elsewhere in the country.³⁵⁸ In Sri Lanka, the emergency legislation and anti-terrorism laws have been consistently applied against the Tamil minority,³⁵⁹ whilst Sudan's security legislation has been used to specifically target Darfurians.³⁶⁰ In Israel, Palestinians have been the subject of preventive detentions and allegations of torture have frequently characterised detention under security laws.³⁶¹ The reality that members belonging to a certain group suspected of engaging in acts of terrorism face a higher risk of arrest, detention and torture has also been evident in the case of Chechen women in Chechnya.³⁶² In Peru, young (20-39 year old) members of the Quechua-speaking 'indigenous peasants' have reportedly been specifically targeted by emergency and security laws and suffered violations in the process.³⁶³ The Special Rapporteur on Counter-Terrorism, following his visit to Peru, expressed his concern that

[...] social conflicts in the country are often generated by State-driven development strategies aimed at the exploitation of natural resources and their adverse environmental, social, economic and cultural impact as experienced by indigenous peoples and peasant communities. [I]ndigenous leaders have been charged with terrorist offences for what clearly appears to be peaceful activities in defence of their livelihood. Such instances, which may reflect a trend of criminalizing social protest in Peru, confirm highly worrying tendencies to apply the broad definition of terrorism used in article 2 of Decree Law No. 25.475 on acts that are not related to actual terrorism.³⁶⁴

³⁵⁷ See Network for Youth Development and Capacity Building et al, 'Joint CSO Submission to the Office of the High Commissioner for Human Rights', 5 October 2011, available at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/JS9-JointSubmission9-eng.pdf>, para. 23.

³⁵⁸ In particular, the Armed Forces (Special Powers) Act 1958 accords wide powers to the armed forces in specific states in its North-East region, whilst police officers have greater powers in Kashmir under the Jammu and Kashmir Public Safety Act 1978 (Act No. 6 of 1978) even after its recent amendments in 2011. The text of the laws in question is available at http://www.satp.org/satporgtp/countries/india/document/actandordinances/armed_forces_special_power_act_1958.htm, and <http://www.unhcr.org/refworld/docid/3ae6b52014.html>.

³⁵⁹ See Amnesty International, *Locked Away: Sri Lanka's Security Detainees*, 13 March 2012, pp. 14, 16, available at <http://files.amnesty.org/archives/asa370032012eng.pdf>.

³⁶⁰ *Report of the Special Rapporteur on the situation of human rights in the Sudan*, Sima Samar, UN doc. A/HRC/9/132 September 2008, paras. 27-30.

³⁶¹ See, e.g., *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, UN doc. A/66/370, 22 September 2011; Human Rights Watch, *West Bank: Reports of Torture in Palestinian Detention*, 20 October 2010, available at <http://www.hrw.org/news/2010/10/20/west-bank-reports-torture-palestinian-detention>.

³⁶² In this regard, the UN Special Rapporteur on torture noted in 2008 that 'in the North Caucasus, women have become even more vulnerable to human rights violations due to the counter-terrorist strategy adopted in response to suicide bombings allegedly committed by Chechen women'; see *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Manfred Nowak: Addendum, UN doc. A/HRC/7/3/Add.2, 18 February 2008, para. 72.

³⁶³ See Amnesty International, *Peru: The Truth and Reconciliation Commission – A First Step Towards a Country Without Injustice*, 25 August 2004, available at <http://www.amnesty.org/en/library/info/AMR46/003/2004>, pp. 10-11.

³⁶⁴ *Report of the Special Rapporteur* (above n. 110), para. 34 (footnotes omitted).

The fact that the competent authorities operating under security legislation are often external and may not speak the local language may further aggravate the situation, reinforce stereotypes and result in further discrimination.

With few exceptions, such as the UK's 2001 ATCSA, anti-terrorism legislation does not openly discriminate against particular groups. However, suspects of terrorism are typically associated with a particular group seen as being more likely than others to engage in terrorist acts. Following the events of 9/11, this applied in particular to Muslims. There have been repeated concerns about targeting of members of this group, resulting in an enhanced likelihood of them being subject to arrest, detention and torture in the process.³⁶⁵ For example, Fouad Al-Rabiah, a Kuwaiti known for his charitable work, ended up in Guantánamo Bay in 2002 after having been handed over to US forces by Afghan villagers. At Guantánamo Bay, he was deprived of sleep and threatened with indefinite detention. He eventually confessed to having had a leading role in al-Qaeda. However, during subsequent habeas corpus hearings before the US Federal Court, it became clear that the confessions contradicted witness statements and were barely credible. The Court refused to accept the Government's explanation that the confessions should be accepted as true, as even Mr Al-Rabiah's US interrogators did not believe them.³⁶⁶ His case is one of several examples where the mere fact of being a Muslim man of a certain age was sufficient to bring a person within the Kafka-esque security regime, which applied a self-serving logic even in cases where it was entirely clear that there was no factual basis justifying the initial targeting and arrest and detention.³⁶⁷

Security legislation has at times facilitated profiling. An example is the Canadian Anti-terrorism Act 2001.³⁶⁸ The Act introduced a new section 83.01 into the Criminal Code, which defines the term 'terrorist activity'. The definition contains a fairly long list of specific crimes,³⁶⁹ which should be accompanied by proof of intent to cause damage to, *inter alia*, life or property³⁷⁰ and by a specific 'terrorist' intent.³⁷¹ In addition, the definition requires proof that the actions in question were committed 'in whole or in part for a political, religious or ideological purpose, objective or cause'.³⁷²

That clause was defended by the government as a means to restrict the ambit of crimes of terrorism.³⁷³ Nevertheless, concerns were expressed by members of the Canadian

³⁶⁵ See, e.g., T. Choudhury and H. Fenwick, *The impact of counter-terrorism measures on Muslim communities* (Equality and Human Rights Commission, 2011), available at http://www.equalityhumanrights.com/uploaded_files/research/counter-terrorism_research_report_72.pdf.

³⁶⁶ *Al-Rabiah v USA*, 658 F Supp 2d 11 (DDC, 2009), at 42.

³⁶⁷ See for example Center for Human Rights and Global Justice and Asian American Legal Defense and Education Fund, *Under the Radar: Muslims Deported, Detained, and Denied on Unsubstantiated Terrorism Allegations* (New York: NYU School of Law, 2011), available at <http://www.chrgj.org/projects/docs/undertheradar.pdf>.

³⁶⁸ Anti-Terrorism Act 2001 (Canada) (above n. 126).

³⁶⁹ S. 83.01(1)(a), Canadian Criminal Code.

³⁷⁰ *Ibid.*, s. 83.01(1)(b)(ii).

³⁷¹ *Ibid.*, s. 83.01(1)(b)(i)(B).

³⁷² *Ibid.*, s. 83.01(1)(b)(i)(A).

³⁷³ See *Main Report of the Special Senate Committee on the Anti-terrorism Act* (above n. 136), pp. 11-14; see also, *ibid.*, section III.

Senate in reviewing the legislation that the definition of terrorist activity, as such, required police and security agencies to investigate that a terrorist act had been committed for a political, religious or ideological purpose, objective or cause. This was seen to encourage if not necessitate enquiry into the personal beliefs of those under investigation and created a high risk of racial or religious profiling.³⁷⁴ The Human Rights Committee also expressed its concerns in that regard,³⁷⁵ whilst others noted that the consequence of the creation of motive-based ‘terrorist’ offences is that the politics and religion of suspects become the fundamental issue in every Canadian terrorism trial and in every terrorism-related police investigation.³⁷⁶ In order to avoid implementation of the law in a manner which violated the principle of non-discrimination, the Senate Special Committee on the Anti-terrorism Act emphasised the need to interpret the Act in light of the Canadian Charter of Rights and Freedoms and the Canadian Human Rights Act, both of which prohibit discrimination in the application of Canadian laws.³⁷⁷ Contrary to the opinion of the Senate Special Committee, the corresponding House of Commons Committee recommended that the motive clause be retained,³⁷⁸ a position which was subsequently endorsed by the Government. In fact, at the time of drafting of the legislation, the Government had opposed any amendment to include an express non-discrimination clause in the ATA. Instead, an interpretative clause (section 83.01(1.1) of the Criminal Code) was inserted, which provided that:

[f]or greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition ‘terrorist activity’ in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

Although this provision may be interpreted as an attempt to respond to concerns that the ATA might be used against protesters or to target Muslims,³⁷⁹ it is far from clear that it achieves its aim. Quite apart from being somewhat tautological, it does not clearly preclude ethnic profiling. The process of profiling members of certain groups entails their higher susceptibility to being singled out and targeted by those vested with extraordinary powers under security legislation. It also has broader repercussions in terms of public perceptions; where someone belongs to a group posing a threat, he or she is more likely to become the subject of prejudice and the benefit of the doubt may shift to the

³⁷⁴Ibid., pp. 11-14.

³⁷⁵ See *Concluding Observations of the Human Rights Committee: Canada*, UN doc. CCPR/C/CAN/CO/5 (20 April 2006), para. 12: ‘[t]he Committee, while noting the existence of a social protest protection clause, expresses concern about the wide definition of terrorism under the Anti-Terrorism Act. The State party should adopt a more precise definition of terrorist offences, so as to ensure that individuals will not be targeted on political, religious or ideological grounds, in connection with measures of prevention, investigation and detention.’

³⁷⁶ K. Roach, *September 11: Consequences for Canada* (McGill-Queen’s University Press, 2003).

³⁷⁷ *Main Report of the Special Senate Committee on the Anti-terrorism Act* (above n. 136), p. 21.

³⁷⁸ House of Commons Subcommittee on the Review of the Anti-terrorism Act, *Rights, Limits, Security: A Comprehensive Review of the Antiterrorism Act and related issues* (March 2007), available at: <http://cmte.parl.gc.ca/cmt/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=199086>, p. 9. Canada, Government response: Seventh Report of the Standing committee on Public Safety and National Security, *Rights, Limits, Security: A Comprehensive Review of the Antiterrorism Act and related issues* (Presented to the House on 18 July 2007) at 3, available at www.justic.gc.ca/en/anti_terr/rep/_hc/index.html.

³⁷⁹ See K. Roach, *The 9/11 Effect: Comparative Counter-terrorism* (Cambridge University Press, 2011), p. 379.

authorities, i.e. ‘better safe than sorry’. This creates an atmosphere in which there is potentially greater tolerance towards violations against those posing a threat, which may even result in those in authority and others seeking to justify the very act of torture itself. Yet, even without such far-reaching claims, it is clear that such an atmosphere facilitates violations as it limits public willingness to oppose the use of security measures, if not torture itself. This applies in particular where ‘suspects’ belong to minorities or are foreign nationals. In its most extreme form, this atmosphere results in the dehumanisation of those suspected of constituting a threat. Dehumanisation has been described as attributing ‘extremely negative characteristics [...] to another group, with the purpose of excluding it from acceptable human groups and denying it humanity’.³⁸⁰ It can be seen as a form of moral exclusion, namely placing persons ‘outside the boundary in which moral values, rules, and considerations of fairness apply’.³⁸¹ The denial of the identity and humanity of another person inherent in dehumanisation has frequently been associated with acceptance of a lower threshold for the use of violence. Elements of dehumanisation are evident in the context of the application of security legislation where members of certain groups are frequently labelled as ‘dangerous, fanatic or inhuman’. These attributes, which are often associated with the term ‘terrorist’, mean that those seen to belong to the category are different. An example of legally enshrining this difference is the use of the term ‘unlawful enemy combatant’ with a view to justifying the application of a separate legal regime.³⁸² This difference, which is also based on the perceived hostility of members of the group towards everyone else and/or the state, justifies subjecting ‘terrorists’ to treatment that would not be acceptable if meted out to ordinary citizens. In turn, this creates a climate where utilitarian notions hold sway, which undermines the protection that the legal system may be able to provide.³⁸³ Security legislation may therefore literally place its targets outside the protection of the law, which in turn facilitates violations not covered by the legislation itself, such as secret detention, renditions and similar practices. Torture, as a measure of power imbalances, is often the inevitable outcome of greatly enhancing executive powers without accountability and transparency on the one hand while devaluing individuals and groups as right-holders, both as a matter of law and public perception, on the other.

³⁸⁰ D. Bar-Tal, *Shared Beliefs in a Society: Social Psychological Analysis* (Thousand Oaks, 2000), pp. 121-2.

³⁸¹ S. Opatow, ‘Moral Exclusion and Injustice: An Introduction’, *Journal of Social Issues*, (1990) Vol. 46, p. 1, at 1.

³⁸² See, e.g., Israel’s Incarceration of Unlawful Combatants Law (above n. 205), and the notorious debate on the qualification of foreign terrorist suspects as ‘unlawful enemy combatants’ by the USA; for discussion, see for discussion, see S. Borelli, ‘Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”’, *International Review of the Red Cross*, (2005) Vol.87, no. 857, pp. 39-68.

³⁸³ Bingham (above n.344), pp. 133-159.

6. Responses

Following objections to the UN Security Council's approach in resolution 1373(2001), which provided the legal foundation and impetus for the proliferation of security legislation whilst all but ignoring human rights, there is now general agreement that any such legislation needs to be fully compatible with international human rights standards.³⁸⁴ Yet, as this report and other reviews have demonstrated, states either continue to apply security legislation that falls far short of these standards or adopt laws that – on their face or in their implementation in practice – fail to ensure respect for human rights.³⁸⁵ In the rather vague words of the Security Council Committee, when commenting on the global survey of the implementation of resolution 1373, '[i]n virtually all regions, States continue to face challenges in ensuring the compliance of their counter-terrorism measures with all their obligations under international law, including international human rights, refugee and humanitarian law.'³⁸⁶ The examples explored in this report clearly demonstrate the difficulty of adopting and applying security legislation that is compatible with international human rights standards. They strongly support the general proposition that such laws should be a measure of last resort and should only be adopted where strictly necessary and in particular where other approaches, namely ordinary law enforcement measures, have proved inadequate.

Where security legislation is resorted to, a series of factors will determine the extent to which it may give rise to concern from a human rights perspective. The process by which such laws are adopted is critical. At one end of the spectrum, the law-making process may provide the opportunity for a broad range of actors, including civil society, the media, national human rights institutions and parliamentarians, to debate the issues and scrutinise draft legislation. Conversely, the legislative procedure may be little more than a formality which in effect rubber stamps what the executive has already decided is required. It is clear that there is a broad range of intermediate situations between those two extremes, with greater or lesser involvement of various actors. The variety in the scope for involvement of the legislature and civil society applies both to the initial decision on the approach to be adopted in countering a terrorist threat, e.g. declaring a state of emergency or adopting exceptional anti-terrorism measures, and its continuation, particularly where either or both are subject to periodic renewal. The former approach provides the best possible guarantees that concerns are accommodated, particularly where

³⁸⁴ In particular, since SC Res. 1456 (2003), in which the Security Council stressed that 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law [...]' (para. 6), resolutions relating to terrorism clearly recognise the need to take account of human rights obligations when adopting measures to combat terrorism. See, e.g., SC Res. 1624(2005), para. 4 and SC Res. 1963 (2010), Preamble and para. 10: 'Reminds that effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort, notes the importance of respect for the rule of law so as to effectively combat terrorism, and thus encourages [the Counter-Terrorism Committee Executive Directorate] to further develop its activities in this area, to ensure that all human rights issues relevant to the implementation of resolutions 1373 (2001) and 1624 (2005) are addressed consistently and even-handedly including, as appropriate, on country visits that are organized with the consent of the visited member State.'

³⁸⁵ See also the parallel findings made in other reviews, particularly EJP Report (above n. 155) and Human Rights Watch, *In the Name of Security* (above n. 103).

³⁸⁶ *Global Survey of the implementation of Security Council resolution 1373(2001) by Member States*, see UN doc. S/2011/463, 1 September 2011, Annex, para. 18.

a vibrant civil society and media is in place, though their role will also depend on the extent to which key actors and the media are receptive to taking human rights concerns seriously in times of heightened anxiety.

One of the key strategic choices to be addressed in situations involving serious security threats is what approach to take. Frequently, the main question posed is whether the extant legal framework, particularly criminal law, is sufficient to counter threats or whether extraordinary measures are needed. Although this is essentially a political question, responses are equally influenced by certain ‘cultures’, namely, depending on the system concerned, the degree to which security considerations are able to hold sway and the ease with which political elites are able to have resort to security measures, with or without the backing of the public. The fact that the UK invoked a state of emergency following 9/11, whereas other European states did not, is telling in this regard, even taking into account that the UK was objectively more exposed to terrorist attacks than other states.³⁸⁷ Where states of emergency are declared or anti-terrorism laws adopted, it is sustained political opposition, a change in circumstances or the taking of a strong stance by the judiciary that may be able to bring about changes to ensure human rights protection and adherence to the rule of law. While courts play a crucial role in this regard, it must equally be recognised that their record is ambiguous, and the judiciary may at times be reluctant to intervene in what are seen as highly sensitive areas of political choices based on secret information.³⁸⁸

The substantive requirements for any security legislation in respect of the prohibition of torture are well established. The prohibition of torture is absolute and states have to take measures at all levels to prevent torture. This general obligation requires states to scrutinise any legislation carefully with a view to ensuring that all possible precautions have been taken to respect the prohibition of torture. The contours of the resulting obligations are sufficiently clear. This applies in particular to accountability and the availability of effective remedies, which arguably have not received the attention they deserve given the – undoubtedly important – focus on safeguards. Many of the measures taken by states by way of security legislation are clearly incompatible with the prohibition of torture. Incompatible measures include provisions providing immunity from criminal prosecution, creating defences to criminal liability, including potentially even for acts amounting to torture, and making security forces and the military subject to the jurisdiction of special or military courts, including for acts of torture. The same applies to provisions that exclude or limit civil liability or doctrines, such as the state secrets doctrine, that may prevent torture victims from pursuing effective remedies and obtaining adequate reparation, contrary, in particular, to articles 2(3) ICCPR and 14 CAT.

³⁸⁷ See also *A and others v. United Kingdom* (above n. 80), para. 180, where the ECtHR found it ‘striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al’Qaeda’, while holding that doing so fell within the UK’s margin of appreciation under Art. 15 ECHR.

³⁸⁸ For discussion, see E. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press, 2007); S. Tierney, ‘Determining the State of Exception: What Role for Parliament and the Courts?’, *Modern Law Review*, (2005) vol. 68, 668–673; D. Cole, ‘Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis’, *Michigan Law Review*, (2003) vol. 101, 2565–2595; R.M. Chesney, ‘State Secrets and the Limits of National Security Litigation’, *George Washington Law Review*, (2006–2007) vol. 75, 1249; for an excellent overview of practice pre-9/11, see E. Benvenisti, ‘*Inter Armas Silent Leges?* National Courts and the “War on Terrorism”’, in A. Bianchi (ed.) *International Law and Terrorism* (Hart Publishing, Oxford, 2004), p. 307.

The obligations of States are also well recognised in respect of safeguards, particularly custodial safeguards, but are at risk of being compromised because the right to liberty and security may be the subject of derogation. As a consequence, states may take measures that relax safeguards, such as the right to promptly bring someone before a judge or access to a lawyer of one's choice. While human rights treaty bodies and courts have circumscribed the latitude available to states in this regard, it still constitutes an area in which states are most likely to deviate from recognised standards, exposing individuals to an enhanced risk of torture as well as violations of their right to a fair trial. In addition, grey areas such as preventive detention, which may still be considered lawful provided that adequate safeguards are in place, have in practice greatly expanded the scope of persons subject to security legislation and – in the absence of adequate safeguards – frequently exposed them to torture.

Beyond examining the compliance of security legislation with the various elements of the prohibition of torture, it is important to look at such legislation in context. This requires a detailed analysis of how such legislation fits within a legal system, i.e. whether adequate protection and accountability mechanisms are provided for, including an independent judiciary, and how the law in question is applied in practice. In this latter context, particularly important is an assessment of the extent to which the law in question facilitates violations. It is clear that security legislation further enhances vulnerability in particular in systems in which the rule of law is already weak and fails to provide adequate protection. However, in all systems, accountability requires that the forces operating under security legislation are subject to enhanced scrutiny. The Maher Arar inquiry in Canada is instructive in this regard.³⁸⁹ Following Mr Arar's rendition and torture in Syria, in which Canadian law enforcement agencies, namely the Royal Canadian Mounted Police, played a crucial role, Canada undertook a major review of its system – as the one that had been in place had clearly failed – and the Commission of Inquiry established recommended far-reaching reforms, particularly in respect of independent review mechanisms.³⁹⁰

Ultimately, security legislation cannot be divorced from the unique position of security institutions within the political and legal system of each state, and in particular the level of democratic control to which they are normally subjected. In that regard, the United Nations Development Programme (UNDP) has identified a set of principles in this regard, which comprise: (i) the authority of elected representatives; (ii) operating within the confines of law and adherence to human rights standards; (iii) transparency in form of making information available; (iv) demarcation of mutual rights and obligations between agencies; (v) political and financial control by civil authorities; (vi) monitoring by civil society; (vii) professional training of security services; and (viii) prioritising of fostering regional and local peace.³⁹¹ While these principles are admittedly somewhat general, the

³⁸⁹ See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006), available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf.

³⁹⁰ See S. Farson and R. Whitaker, 'Public Inquiries in Canada: Making Espionage, Organizational Culture, Wrongdoing, and Mass Murder Transparent', in S. Farson and M. Phythian (eds.), *Commissions of Inquiry and National Security: Comparative Approaches* (Praeger, 2011), pp. 29-54, at pp. 44-45 for an assessment of the impact of the Arar Commission.

³⁹¹ United Nations Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (UNDP/Oxford University Press, 2002), available at http://hdr.undp.org/en/media/HDR_2002_EN_Complete.pdf, p. 90. Similar

overriding concern for transparency and accountability of security institutions is clear. The nature of security legislation, and the levels of political and societal control applicable to security institutions, are therefore invariably also a reflection of the relative power that security and military institutions enjoy in a society. As recent practice clearly shows, where security and military institutions are not subject to sufficient restraints, those who happen to come within the scope of their operations are at a heightened risk of torture, followed by a denial of justice.

principles are identified in the Report of the Secretary-General, *Securing peace and development: the role of the United Nations in supporting security sector reform*, UN doc. A/62/59-S/2008/39, 23 January 2008, para. 15.

7. Recommendations

To States:

- Undertake a full review of security legislation in force, with a view to ensuring compatibility with international human rights obligations. This review should include an examination of how the practical application of security legislation has resulted in allegations of torture and other ill-treatment, and whether responses to such allegations have been adequate, both in terms of putting in place guarantees of non-repetition and in ensuring effective investigation, accountability of the alleged perpetrators and justice for victims of torture;
- Make the adoption of security laws subject to procedural safeguards that limit the material/personal scope for their application and the possibility of extended or indefinite application:
 - In case of emergency laws, the declaration of a state of emergency resulting in the application of emergency laws should ideally require a decision by parliament, either to declare the state of emergency or to subsequently confirm such declaration where adopted by the executive. The application of the state of emergency should be subject to periodic renewal at short intervals (3-6 months), requiring substantial parliamentary majorities (at least 2/3) to ensure that there is parliamentary debate and support for the extension of an emergency. Further, the decision to declare an emergency, and in particular, the existence of the conditions constituting an emergency, should be subject to judicial review.
 - The relevant legislation should define the term ‘emergency’ as clearly as possible; the constitution or the relevant statutory law should clearly specify that the existence of a state of emergency does not justify derogation from absolute rights, such as the prohibition of torture, and key procedural safeguards, particularly the right to an effective remedy.
 - In case of anti-terrorism legislation, its adoption should follow the ordinary law making process unless extraordinary circumstances justify recourse to expedited law making. Anti-terrorism legislation, or parts thereof, in particular provisions governing arrest and detention, should be subject to sunset clauses according to which they lapse after a certain period of time unless renewed. The inclusion of sunset clauses ensures that these measures are subject to parliamentary debate and have continuing parliamentary support. Further, anti-terrorism laws should be subject to judicial review as to their compatibility with binding international human rights standards.

- Security legislation should seek to define as clearly as possible key terms, such as ‘terrorism’ or ‘terrorist acts’ that determine its scope of application, including, in particular, the range of persons who may be subject to the legislation.
 - Security legislation should be drafted in such a way that its terms are in conformity with international human rights standards and should contain the necessary safeguards to minimise the risk that its application will result in human rights violations, particularly torture.
- Put in place custodial safeguards so as to minimise the risk of torture. Where rights are derogated from or qualified in security legislation, such as the right to be brought before a judge promptly or access to a lawyer of one’s choice, exceptions need to be clearly defined and within the limits developed in international jurisprudence. Pre-charge detention should be subject to explicit and short time limits;
 - Limit recourse to administrative detention in situations where the purported aim relied upon to justify it is unlikely to be fulfilled in practice, such as detention of foreign nationals for deportation purposes where it is clear that they cannot be deported due to the prohibition of *refoulement*;
 - Minimise (if not altogether exclude) recourse to preventive detention as an alternative to criminal law enforcement;
 - Ensure adequate enjoyment of defence rights and the right to legal representation in torture related proceedings, and refrain from introducing measures that unduly restrict the possibilities for individuals to challenge evidence that may have been obtained as a result of torture;
 - Adopt a policy aimed at ensuring justice, accountability and full redress for any human rights violations, particularly torture, committed in the course of application of security legislation,
 - Put in place oversight mechanisms to ensure that security services and other forces are subject to adequate public scrutiny;
 - Put in place adequate systems of inquiry, investigation and prosecution, as well as an adequate system for ensuring that full reparation is made to victims;
 - Repeal, or not resort to laws granting immunity from criminal accountability for acts done in the course of operations conducted under security legislation;

- Exclude the possibility of reliance on defences to criminal liability that may be used to escape full accountability for human rights violations, particularly acts of torture;
 - Ensure that forces operating under security legislation are subject to the jurisdiction of the ordinary courts for any crimes committed against civilians or persons other than military personnel;
 - Repeal, or not resort to immunity laws that exclude civil liability, whether for individual State agents, or for the State itself, or both, for acts done in the course of operations under security legislation;
- Ensure that adequate and effective remedies are available in respect of any measures adopted under security legislation. Refrain from adopting legislation that unduly limits recourse to effective remedies. This includes limiting the ability of lawyer to challenge evidence, or invoking doctrines, such as the state security doctrine, that result in the dismissal of proceedings irrespective of, and without enquiry into, the merits of the underlying substantive claim.

To the Judiciary:

- Be fully cognisant of the scope of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under international law when applying security legislation or ruling on challenges pertaining to such legislation;
- Use all available powers to apply international human rights standards and draw on best practices with a view to ensuring maximum protection of those facing detention under security legislation, as well as criminal accountability for those responsible for violations, and justice for victims of torture and related violations;
- Exercise rigorous scrutiny of the detention of suspects or others detained under security legislation (including preventive detention), to minimise the risk of torture, including by seeking to establish whether there is evidence that detainees may have been subjected to torture;
- Examine carefully any claims that materials should not be disclosed due to its provenance or due to security considerations, and ensure that any procedures followed do not violate the right to a fair trial and/or unduly restrict the right to an effective remedy.

To Civil Society/Lawyers:

- Scrutinise national security legislation as to its compatibility with the state's international human rights obligations, particularly in relation to torture, and call for an amendment and repeal where appropriate;

- Document the detrimental impact of the application of security legislation, particularly in respect of targets, number of persons affected, types of violations and extent to which access to justice is possible;
- Consider challenging security legislation falling short of the standards of international law or domestic protections of fundamental rights before national courts or mechanisms, and, where this proves to be unsuccessful, before available regional or international human rights treaty bodies;
- Bring inadequate security legislation, or problems arising in its implementation, to the attention of relevant bodies, both at the national and international level, including by means of shadow reports to treaty bodies such as the UN Human Rights Committee and allegation letters or urgent actions to special procedures, such as the UN Special Rapporteur on Torture or Special Rapporteur on Counter-Terrorism and Human Rights or other procedures as appropriate.

To the appropriate United Nations bodies:

- Provide adequate resources for the creation of a database of existing security legislation and its judicial interpretation worldwide;
- Provide analysis of compatibility of security legislation with the prohibition of torture and request necessary changes;
- Constructively engage with states with a view to repealing inadequate security legislation or providing advice on the adoption of security legislation where contemplated.

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