INFORMAL TRANSNATIONAL POLICE-TO-POLICE INFORMATION SHARING: ITS STRUCTURE AND REFORM

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abstract

This thesis examines the informal sharing of information and cooperation between police agencies across international borders, and how it is or should be informed by international human rights law. The author looks at how intelligence-led policing theory has affected transnational policing. A distinction is made between police actions made on domestic soil that have adverse consequences abroad and police actions made on foreign soil that have adverse consequences. The first category of cases is firmly within jurisdiction and covered by domestic and international legal obligations. The second category of cases introduces the concept of the extraterritorial application of international human rights instruments. The theory is illustrated by the case studies of the Bali Nine and of Maher Arar. Finally the author suggests methods of best practice for transnational information sharing and suggests that all government agencies should follow these rules.

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1 Introduction

1. Over the last few decades, a new spirit of police-to-police cooperation has emerged at the transnational level. While this cooperation between national police agencies has come to prominence in the last fifteen to twenty years, it accelerated significantly after the al-Qaeda attacks on US soil in 2001. But counter-terrorism is only one example of the increasing number of criminal activities which are being identified as having an international dimension requiring a transnational police-to-police response. Other such crimes include drug trafficking, child pornography, people trafficking and identity theft.

2. International cooperation takes many forms and is a wide area ripe for legal research and analysis. Increasingly, national police forces post liaison officers to each other's forces and to international and regional police organisations. Police also undertake joint operations across jurisdictions. Police attend international conferences and training courses at the international level, including at training centres set up for this purpose. This essay, however, examines only information sharing across international borders, touching on the other forms of cooperation only when relevant.

3. The growth in transnational cooperation coincides with several global trends, without which the breadth, depth and frequency of international cooperation could not have been so rapid. Foremost among these trends is the introduction and all-pervasive expansion of information technology. Computers have enabled the storage, collation and analysis of ever-increasing amounts of information. This proliferation of information-gathering has spawned its own theory: intelligence-led policing.

4. Intelligence-led policing means different things to different people. At its core the theory is a management tool, which sees 'raw' *information* given to analysts who 'process' it and turn it into *intelligence*. This intelligence is used by police

management to target finite resources as effectively as possible. As such, the theory is underpinned by and promotes the collection of information. This leads to an insatiable desire for information that seems to be based on an undemonstrated belief that the more information fed to analysts, the better will be the resulting intelligence.

5. The growth of telecommunications technology is another significant global trend informing increased transnational police-to-police cooperation. Global telecommunications networks, such as the internet, have allowed police to increase dramatically the pool from which information can be drawn. National police can conveniently and quickly access databases belonging to regional and international police organisations, such as Interpol, Europol and ASEANPOL.

6. This growth in the willingness of police to share information across international borders has largely been without reference to international human rights standards. It is to this latter trend that this essay is directed.

7. Formal transnational cooperation in criminal matters, such as mutual legal assistance and extradition, is largely governed by treaty and domestic statute. Informal transnational cooperation in criminal matters, such as police-to-police information sharing and cooperation in investigations, is largely ungoverned by treaty or statute. For example, there is no international treaty establishing Interpol. However there are signs that this is changing. Over the last decade the Europeans, through the establishment of Europol, have begun to establish a body of bilateral treaties governing transnational police cooperation.

8. This paper will look at this brave new world of informal transnational policing through the prism of two infamous cases: the Canadian case of Maher Arar; and the Australian case of the Bali Nine. These two case studies have brought transnational policing into the consciousness of the public like never before, undermining public confidence in operational policing. The need to formalise transnational policing is important in order to restore public confidence in police and the important work they do across international borders.

9. The second chapter of this paper attempts to define the term informal transnational police-to-police information sharing. It then examines the process of how information is shared by police across international borders, including the role of organisations such as Interpol. The chapter introduces the controversial operational guidelines for the Australian Federal Police (AFP) when cooperating with a police agency from a country that retains the death penalty. The guidelines came to public attention after the AFP shared information that led to the arrest of nine Australian drug traffickers Indonesia. In Canada, the Royal Canadian Mounted Police (RCMP) operate under more formalised procedures when cooperating with countries that violate human rights. These procedures came under judicial scrutiny in the Commission of Inquiry into case of Maher Arar, who was tortured in Syria after Canadian agents shared information with their American counterparts. Finally, this chapter explores the theory of intelligence-led policing, which has influenced information gathering and sharing at domestic and international levels.

10. Chapter 3 looks more closely at the two case studies. Firstly, at how information sharing between the AFP and Indonesian National Police (INP) led to the death sentences of Australian drug smugglers in Indonesia in 2005. Attention is paid to the AFP practice of transnational police-to-police cooperation and how the Australian courts have viewed it. Secondly, this chapter traverses how information sharing between the RCMP and US authorities led to the torture of Maher Arar in Syria in 2002. In particular, the chapter looks at the Arar Commission's findings of RCMP practices, which were found wanting in this case.

11. Chapter 4 looks at the domestic and international obligations of police when they operate across borders. Two main legal scenarios are canvassed. The first is when police travel abroad and act in a foreign jurisdiction. The second is when police act domestically but their actions have adverse human rights consequences abroad. Overarching these scenarios are domestic and international law. The obligations to expose no one to the real risk of execution or torture are examined.

12. Chapter 5 examines the question of whether and how a country's human rights obligations extend to the extraterritorial acts and consequences of its domestic agents. The chapter first examines the legal concept of extraterritorial jurisdiction under public international law and international human rights law. In particular, the view of the International Court of Justice (ICJ) in the *Palestinian Wall case*, which found that a country's human rights obligations extend to all acts done in the exercise of that State's jurisdiction abroad, whether in occupied territory or not. The chapter examines the limited jurisprudence of Canadian, United States and Australian courts on this question. For a more detailed legal analysis, the chapter examines the jurisprudence of the European Court of Human Rights, which is more nuanced and developed than other jurisdictions. The purpose of this detailed analysis is to explore some of the various complexities of jurisdiction and state responsibility raised by transnational cooperation.

13. In the sixth chapter I attempt to draw together some of the legal issues raised in the Bali Nine and Arar cases by suggesting a model of best practice for informal transnational police-to-police information sharing. Many of the suggestions endorse the recommendations of the Arar Commission of Inquiry. Others are specific to Australia and/or Canada. Before making these suggestions, there is a brief examination of police culture and methods for encouraging the adoption of best-practice among rank-and-file police officers. At the end of the chapter, I examine the 'ticking-bomb' scenario and conclude that there are extreme situations in which the public interest outweighs the human rights of individuals.

14. Finally, I suggest that further research is required into the feasibility of extrapolating this best-practice to all transnational agency-to-agency cooperation, not just police-to-police cooperation. The proposed model is a legal framework that expressly requires State agents, whether police, immigration, intelligence, customs or otherwise, to consider the human rights implications of their actions when dealing with countries with questionable human rights records.

2 Informal Transnational Information Sharing in Law Enforcement

15. This chapter first examines what I mean by the term *informal transnational police-to-police information sharing*. It then discusses why information sharing is necessary and legitimate. Then this chapter explores the ways in which information is shared informally between foreign police agencies. This is followed by a brief overview of the theory of *intelligence-led policing* and its relationship to the expansion of transnational police cooperation. Finally, there is an outline of some of the limits placed on this form of international cooperation.

2.1 Preliminary definitions

16. This paper focuses on informal transnational police-to-police information sharing. As a matter of definition, I will briefly deconstruct this phrase and explain how I am using each of its constituent parts in this paper.

17. *Informal*: I am broadly dividing all forms of transnational police-to-police cooperation into two categories: formal and informal. The categories describe the degree of legal formality imposed on the cooperation. I define 'formal' cooperation as that which occurs pursuant to international or bilateral treaties signed by nation states, often incorporated into domestic law and subject to judicial oversight. An example of such structured cooperation is the mutual legal assistance treaty (MLAT), which commonly allows foreign police to request the provision of evidence for court and to request the exercise of coercive powers (such as search or seizure) in a foreign jurisdiction to obtain evidence.[1] Other examples include extradition and anti-money laundering measures. While these

[1] e.g *Treaty between the Government of Australia and the Government of Canada on Mutual Assistance in Criminal Matters* [1990] ATS 11; 1990 *Canada Gazette* Part I, 1582 (entry into force: 14 March 1990); implemented by *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, c.30 (4th Supp.), and *Mutual Assistance in Criminal Matters Act 1987* (Cth).

treaty arrangements are largely expressed in terms of government-to-government cooperation, police-to-police cooperation is occasionally, and increasingly, expressly mentioned at treaty-level.[2]

18. 'Informal' cooperation is, generally, that which is governed neither by statute nor treaty. This is not to say that such arrangements are not governed by written guidelines or agreements between police. There is a vast spectrum of such informal cooperation. At one end of the spectrum is cooperation provided under such semi-formal documents as Memorandums of Understanding, negotiated and signed by the law enforcement agencies (rather the governments) of different nations. At the other end of the spectrum is one-to-one cooperation where individual officers communicate and assist each other, for example over the telephone or by email.

19. *Transnational*: I use this term in a literal sense to mean simply across international borders. This distinguishes cooperation from that which occurs between domestic law enforcement agencies. I prefer this term to 'global', because that term is best reserved to describe multinational policing operations.[3]

20. *Police-to-police*: This form of transnational cooperation occurs between law enforcement agencies. It can be coordinated bilaterally, for example pursuant to Memorandums of Understanding, or multilaterally, the most obvious example of which is Interpol. Police-to-police assistance is but one form of what is more widely known as agency-to-agency assistance. Police can assist other types of agencies, such as the RCMP's cooperation with the CIA in the Arar case.

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[2] for example, the recent 'Lombok Treaty' between Australian and Indonesia is the first formal treaty dealing with agency-to-agency assistance signed by Australia: *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation* (Mataram, Lombok, 13 November 2006) [2008] ATS 3. Article 3 of the Lombok Treaty describes several areas of agency-to-agency cooperation, including law enforcement. In law enforcement, cooperation extends to *inter alia* dialogue, capacity building and joint operations.

[3] e.g. under the auspices of the United Nations as UN Police (formerly UNCIVPOL), <http://www.un.org//en/peacekeeping/sites/police/>.

21. *Information sharing*: There are many forms of transnational police-to-police cooperation. There are joint operations,[4] such as Operation Alliance between the AFP and INP.[5] Another example of cooperation is capacity building, whereby expertise and training is provided to a foreign law enforcement agency. However, this paper deals only with the sharing of information and intelligence, which for brevity's sake I shorten to 'information sharing'. I distinguish between information and intelligence. Intelligence is the valued-added product after pieces of information have been analysed. This difference lies at the heart of intelligence-led policing, which is discussed later in this thesis. Information sharing also occurs orally and in documentary form. Such cooperation might be formal or informal.

2.2 the legitimate need to share information

22. While it is a trite point, it nevertheless needs to be acknowledged that cooperation and information sharing between police across international borders is important. There is a legitimate need to cooperate in the investigation and prosecution of such transnational crimes as terrorism, child pornography, and drug and people trafficking. This is underlined by the observation of his Honour Justice O'Connor, the Arar Commissioner, that:[6]

> Information sharing among agencies allows a more comprehensive picture to emerge. Viewing different pieces of information together may allow a more complete and accurate assessment of the threat being investigated and the steps needed to address that threat. Sometimes, seemingly inconsequential bits of information may take on an importance not otherwise apparent when viewed alongside other information. Broad information sharing is therefore essential to effective prevention.

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[4] the *UN Convention against Transnational Organised Crime* (2000), UNGA res 55/25, encourages parties to formalise joint-investigation cooperation and to ensure that 'the sovereignty of the State Party in whose territory such investigation is to take place is fully respected': Article 19.
[5] Operation Alliance was the joint AFP-INP investigation of the October 2002 Bali terrorist bombings: see, AFP, 'Bali Bombings 2002', archived at <http://pandora.nla.gov.au/pan/34194/20030807-0000/www.afp.gov.au/page70b2.html>.
[6] 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), 102.

23. The consequences of agencies not sharing information were central to the final recommendations of the 9/11 Commission in the USA. As some sociologists had already observed in their research,[7] the 9/11 Commission found that police and security agents were reluctant to share their information with other agencies.[8] The Commission identifies and criticises the prevailing culture wherein a 'need-to-know' must be demonstrated prior to information sharing. The Commission also notes that, while there are institutional risks associated with sharing information '(criminal, civil, and internal administrative sanctions)', there are few rewards for sharing information:

> There are no punishments for *not* sharing information. Agencies uphold a "need-to-know" culture of information protection rather than promoting a "need-to-share" culture of integration.

24. While this is not a transnational example, given that it deals with the sharing of information between US agencies within the same jurisdiction, there are resonances for transnational police cooperation. If information is not shared, or not gathered, then the threat of a serious crime might go undetected, thereby reducing any chance of preventing it. This was certainly recognised by senior executives of the AFP when they increased transnational cooperation in the fight against drug trafficking in the late 1990s.[9]

25. The process of transnational cooperation also needs to be reciprocal. What the Arar Commission observed of information sharing in the context of terrorism-related investigations holds true for all forms of information sharing:[10]

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[7] e.g. Peter Manning, 'Policing new social spaces' in J. Sheptycki (ed) *Issues in Transnational Policing* (2000) 194: referring to the 'conflict and competition' between agencies (both national and transnational) which impacts on police-to-police information sharing.

[8] The 9/11 Commission, *The 9/11 Commission Report* (22 July 2004), 416-7, <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

[9] by the mid-1990s, the AFP was firmly of the view that 'nearly all major crime issues impacting on Australia originate elsewhere' and that international police cooperation was vital in disrupting transnational crimes like drug-trafficking and fraud: Alan Mills (Assistant Commissioner, AFP), 'Organised crime goes global' (1995) 48 *Platypus* 19. See also: David Schramm (Director of International, AFP), 'Isolation no longer a natural security buffer against trans-national crime' (1996) 51 *Platypus* 5.

[10] Arar Commission, *Analysis and Recommendations* (2006) n 6, 102.

> ...information sharing must be reciprocal if it is to be effective. If an agency wishes to receive information from other agencies, it must be prepared to provide information in return. The networks within which terrorism-related information is shared must function on a co-operative basis.

26. This imperative is at the heart of the AFP Commissioner's all-or-nothing approach to information sharing.[11] However, as this paper later argues, such cooperation should not be left solely to the discretion of police and it should have limits. Irrelevant, inaccurate, unreliable or out-of-date information can be dangerous to share. The Arar Commission concluded that sharing such information is potentially dangerous and 'may be worse than not sharing information at all'.[12]

27. There are also legal and human rights implications to be considered. Of course, it is important to consider how police might react to limits being placed on their ability to share information transnationally.[13] All of these issues will be canvassed shortly.

2.3 Informal Information-Sharing Mechanisms

2.3.1 requests for and the spontaneous provision of information

28. Transnational police-to-police information sharing can be instigated in two ways: by a request from a foreign law enforcement agency; or by its spontaneous provision to an agency.

29. A solicited request is more likely to be auditable, because it is more likely to be communicated through a centralised bureau. This is certainly so of requests for mutual legal assistance in criminal matters, which are formal and controlled by treaty and statute. Nevertheless, a request can also be made informally, on an officer-to-officer basis or pursuant to an inter-agency agreement such a memorandum of understanding. This is more likely to occur at the investigatory stage.

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[11] see [80] below.
[12] Arar Commission, *Analysis and Recommendations* (2006) n 6, 104.
[13] see "Police culture and human rights" on p.157.

30. The spontaneous provision of information is also recognised in some international treaties.[14] This involves investigators providing information that they think might be of interest to a foreign agency, such as intelligence about the arrival of a criminal suspect in the foreign jurisdiction.

31. This distinction is significant because formal mechanisms for sharing information often only refer to requests. It is arguable, for example, that Australian MLATs only govern requests for information and not situations involving the spontaneous provision of information. This is because the relevant legislation expressly states that:[15]

> **Section 5**:
>
> The objects of this Act are:
>
> (a) to regulate the provision by Australia of international assistance in criminal matters *when a request is made* by a foreign country for any of the following...;
>
> (b) to facilitate the provision by Australia of international assistance in criminal matters *when a request is made* by a foreign country for the making of arrangements...; and
>
> (c) to facilitate the obtaining by Australia of international assistance in criminal matters.
>
> **Section 6**:
>
> This Act does not prevent the provision or obtaining of international assistance in criminal matters other than assistance of a kind that may be provided or obtained under this Act.

32. This potential loophole makes it possible for requests to be dressed-up, with a nod and a wink, as the spontaneous provision of information. The provision of information pursuant to an informal police-to-police request for information, without a paper trail of the originating request, can easily be characterised retrospectively as spontaneous and unsolicited.

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[14] see for example: Article 11 ("spontaneous information") in *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters* (2001), <http://conventions.coe.int/treaty/en/Treaties/Html/182.htm>; and Article 18 in *Convention Against Transnational Organised Crime* [2004] ATS 12 (entered into force for Australia 26 June 2004).

[15] *Mutual Assistance in Criminal Matters Act 1987* (Cth) ss.5-6.

33. The practice of spontaneous cooperation was explained to a Senate Committee by the AFP Commissioner in this fashion:[16]

> There is no requirement for us to await a request from the other agencies. If we have information we can actually provide the information. So we fully engage those countries with the exchange of information. That ought not come as too much of a surprise with globalisation and the transnational nature of crime. If criminals do not recognise borders and they conduct their operations without any regard for borders, then it is important that the policing agencies work together to ensure that there are no intelligence gaps or information gaps in trying to deal with a crime.

34. While some information sharing might look spontaneous, it might actually be the result of a request. For example, in the Bali Nine case, the AFP spontaneously provided the INP with intelligence that suspected drug traffickers were in Indonesia. In court, the AFP maintained that 'the terms of the MOU [between the AFP and the INP] contemplated the very provision of information by the AFP in circumstances such as in this matter and it could properly be said of the MOU that there was a standing request by Indonesia for such assistance'.[17] This is significant, because if unsolicited information sharing can constitute a 'standing request', then such activity might fall within the jurisdiction of an MLAT treaty. This point was not tested in *Rush v Commissioner*. This is an area ripe for further legal research and analysis.

2.3.2 management of information flows

35. According to Anderson's classic analysis, cooperation between law enforcement agencies can be centralised or decentralised.[18] For the purposes of this paper, it is not significant whether informal information sharing flows through a centralised or decentralised conduit. This is so because the legal structure governing the sharing should remain the same, regardless of the conduit through which the

[16] Evidence of Mick Keelty (AFP Commissioner) to Senate Legal and Constitutional Legislation Committee (31 October 2005), n 165, 168.
[17] *Rush v Commissioner of Police* [2006] FCA 12, [73].
[18] Malcolm Anderson, *Policing the World: Interpol and the politics of international police co-operation* (1989) 172-178.

information flows. The same basic rules for sharing should apply, no matter how the information is communicated.

36. In *Policing the World*, Anderson identifies four models for police-to-police cooperation.[19] When applied to information sharing, all four models describe a tension between two competing priorities: the need to oversee information sharing and the need to provide quick and effective communication of information. In essence, Anderson's models reflect a belief that these two priorities exist in inverse proportion.

37. In Anderson's *centralised model*, all cooperation is coordinated through a single agency, maximising oversight and respect for state sovereignty. For the requesting police, the purpose of this centralisation is to ensure that they know to whom to address requests and can be confident that the requestee has the requisite authority to cooperate. For the requested police, the purpose of centralisation is to ensure that management is aware of cooperation and that shared information is provided in an efficient and consistent manner.[20]

38. In the *decentralised model*, police at all levels can share information and cooperate. This decentralisation increases the efficient flow of information, but little effective oversight is possible. It is plain to see why many investigators prefer this decentralised model: it is quicker, more efficient and there is a lot less paperwork.

39. Anderson's other two models are modified or 'qualified' versions of the first two. Anderson argues that these qualified models more closely resemble police practice. In the *qualified centralised model*, information usually goes through a central agency, but individual police may cooperate directly in special circumstances. Finally, in the *qualified decentralised model*, police may cooperate

[19] Anderson, n 18, 172-178.
[20] e.g. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background Volume 1* (2006), 33.

directly with their foreign counterparts, but are required to keep the central body informed of all such cooperation.

40. Robertson suggests that Anderson's centralised model is essentially strategic in nature;[21] what we would call today an intelligence-led approach. Whereas the decentralised model is tactical; taking an investigative case-by-case approach. Robertson observes that some forms of transnational crime will require the strategic approach, others the tactical:[22]

> This may mean that different crimes will create different forms of cooperation, some centralised and others decentralised, rather than there being a single national blueprint covering all forms of international police cooperation.

41. Robertson's analysis of Anderson's four models might help to explain why both the RCMP and AFP have adopted a qualified centralised model. The adoption of this halfway approach is flexible and adaptable to suit both strategic/intelligence and tactical/investigative ends. For example, in an investigation such as Project A-O Canada, cooperation would ordinarily have been coordinated through the Criminal Intelligence Directorate (CID) in Ottawa. In evidence to the Arar Commission, a senior investigative officer noted unfavourably that information sometimes takes weeks to reach an investigations team via CID.[23] However, under certain circumstances once an investigation is underway, it is possible for investigators to liaise directly with their foreign counterparts, provided that CID is kept informed.[24] The AFP follows a similar qualified centralised model for transnational police-to-police cooperation, centred on the AFP Operations Coordination Centre (AOCC) in Canberra,[25] which operates *inter alia* Australia's National Central Bureau (NCB) of

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[21] Kenneth Robertson (1994), 'Practical Police Cooperation in Europe: the intelligence dimension' in Malcolm Anderson & Monica den Boer (ed), *Policing Across National Boundaries* (London: Pinter 1994), 111.
[22] Robertson (1994), n 21, 111-2.
[23] Arar Commission, Factual Background Vol.1 (2006), n 20, 24.
[24] Arar Commission, *Analysis and Recommendations* (2006) n 175, 131. The Arar case highlighted the need for oversight, to ensure that such cooperation is conducted according to procedural guidelines. In that case, operational officers shared information with the FBI without attaching written caveats.
[25] Australian Federal Police, *Annual Report 2007/2008* (2008), <http://www.afp.gov.au/__data/assets/pdf_file/89127/AFPAnrep2007-08.pdf>, 82.

Interpol.[26] All of this is not to say that completely informal pick-up-the-phone information exchange does not occur, but it is discouraged.

42. The qualified centralised model is also favoured by Interpol in its *Model Bilateral Police Cooperation Agreement*.[27] The Model Agreement provides an obligation, subject to national legislation, to exchange information relating to 'ordinary crimes'.[28] All information exchange, whether provided spontaneously or by request, is to be conducted via the relevant NCBs.[29] Where the request 'cannot be made in good time' via a NCB, then direct police-to-police contact may be made. In such cases, however, both NCBs should be informed of the direct request 'as soon as possible'. The commentary to this provision is enlightening because it highlights Interpol's philosophy of the free flow of information to all members. Though when entering information, members can choose to restrict access to that information to particular parties.[30] The commentary reads in part:[31]

> The purpose of centralizing information exchanged under the Agreement is to make it available to services or States not directly involved in a particular exchange. These services or States can then use this information for other investigations which may turn out to be linked to those at the basis of the initial exchange. Centralizing information is the only way to establish and identify such links. To be truly effective, bilateral or regional co-operation must be part of a worldwide co-operation system...

43. Apart from information sharing, the Model Agreement also provides for a right of cross-border surveillance and pursuit, though these are not considered mandatory provisions.[32] The Model Agreement also contains a confidentiality clause, a personal data protection clause, provisions for joint investigations, forensic and technical assistance and training.

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[26] Australia joined Interpol in 1948 and the first Australian NCB was established in Melbourne, hosted by Victorian Police: AFP, 'Interpol – sixty years in Australia' (2008) 98 *Platypus* 14. In 1975 the NCB was moved to Canberra and in 1979, when the AFP was formed, it inherited the NCB from the old Commonwealth Police.
[27] Interpol, *Model Bilateral Police Cooperation Agreement*, <http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp>.
[28] Interpol, *Model Bilateral Police Cooperation Agreement*, n 27, Article 4.
[29] Interpol, *Model Bilateral Police Cooperation Agreement*, n 27, Article 5.
[30] Joint Committee on the NCA (5 December 1996), n 630, 5 (Raymond Kendall).
[31] Interpol, *Model Bilateral Police Cooperation Agreement*, n 27, Article 5 (commentary).
[32] Interpol, *Model Bilateral Police Cooperation Agreement*, n 27, Article 8 & 9.

44. One important element of the centralised model of transnational policing is the *liaison officer*. Many countries post liaison officers abroad to facilitate cooperation and information exchange with the foreign law enforcement agency. For example, the AFP's International Network boasts 87 international liaison officers in 33 cities across 27 countries.[33] According to AFP Commissioner Mick Keelty, the network is 'the backbone of our international crime fighting strategy'.[34] The RCMP's International Operations Branch has 36 liaison officers in 26 locations around the world.[35]

45. The growth of liaison networks over the last decade has been impressive and reflects the growth of transnational policing. For example, in 1998 there were 28 AFP liaison officers in 16 countries.[36] In 2004, 62 officers were based in 26 countries.[37] Now there are: 87 international liaison officers in 33 cities across 27 countries.[38]

46. Anderson's is not the only model for police-to-police cooperation. His centralised and decentralised models (and their qualified counterparts) are similar to the usage of the term 'formality' by the Cross-Channel Intelligence Conference (CCIC).[39] With respect to information sharing, the CCIC distinguishes between three tiers of transnational police-to-police communication: Formal, formal and informal.[40] These categories are determined by the level of communication (rather than legal formality) at which cooperation occurs and the level of

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[33] AFP, *Annual Report 2007/2008* (2008), n 25, 5.
[34] Australian Federal Police Commissioner Mick Keelty, 'Enhancing security through law enforcement', speech delivered at the Security in Government 2005 Conference (10 May 2005), <http://www.aps.gov.au/media/national_media/national_speeches/2005/security_in_government_2005_conference.html>.
[35] Royal Canadian Mounted Police, 'International Operations Branch' (March 2009), <http://www.rcmp-grc.gc.ca/ip-pi/pdf/iob-soi-eng.pdf> (accessed 31 May 2009).
[36] Australian Federal Police, *Annual Report 1998-1999*, 35 <http://www.afp.gov.au/__data/assets/pdf_file/3680/annualreport98_99.pdf>.
[37] Australian Federal Police, *Annual Report 2004-2005*, 3, <http://www.afp.gov.au/__data/assets/pdf_file/3706/annualreport04_05.pdf>.
[38] AFP, *Annual Report 2007/2008* (2008), n 25, 5.
[39] James Sheptycki, *In Search of Transnational Policing: towards a sociology of global policing* (2002) 28ff.
[40] James Sheptycki, *In Search of Transnational Policing: towards a sociology of global policing* (2002) 28ff.

supervision involved. 'Formal' communication is centralised and occurs at an agency's national headquarters. 'formal' communication occurs at the regional level and involves some amount of oversight. While 'informal' information sharing occurs without supervision on a one-to-one basis.

47. Anderson's centralised model approximates the CCIC's Formal level of communication. Whereas the formal level is a modified model, and the informal is a decentralised model. I have chosen to adopt Anderson's terminology, because adopting the CCIC's terminology would led to confusion, given my usage of the adjectives 'formal' and 'informal' to describe the degree of legal structure in which cooperation occurs (as opposed to the level and oversight of communication/information flows).[41]

2.3.3 memorandums and letters of understanding

48. In the Bali Nine case, AFP agents operated under a memorandum of understanding with their Indonesian counterparts.[42] Written agreements negotiated between police agencies, setting out the terms and conditions of cooperation, often take the form of a memorandum of understanding or an exchange of letters. The latter being more suited to ad-hoc case-by-case cooperation.

49. The AFP has negotiated a considerable number of bilateral Memorandums of Understanding (MOU) covering police-to-police cooperation and the sharing of information and intelligence.[43] Some agreements relate to cooperation in transnational crime generally. Others relate to specific crimes. For example, the

[41] for definition of formal and informal cooperation, see [17] ff.
[42] see [122] ff.
[43] these MOU have been signed with many law enforcement agencies, including: Afghanistan; Brunei; Cambodia; China; Fiji; India; Indonesia; Malaysia; Pakistan; Papua New Guinea; Philippines; Singapore; Thailand; Timor Leste; the United Kingdom; and, Vietnam. Of which only Cambodia, Philippines, Timor Leste and the UK have abolished capital punishment.

AFP has signed several MOU relating to child-sex offences with law enforcement agencies in Asia, the Pacific and South America.[44]

50. The text of each AFP MOU is confidential and is not publicly available,[45] so there is little which can be said about them. However, according to AFP Commissioner Mick Keelty, the AFP can and does offer intelligence spontaneously, that is without waiting for a request, under the terms of these MOU.[46] All information sharing, whether requested or spontaneous, is communicated via the AFP's liaison officers.[47]

51. Because these MOU are confidential, it is not possible to discern whether they contain human rights safeguards or recognise Australia's sovereign right to place conditions on cooperation when it comes to death penalty cases. The need for police secrecy is unclear. While it is necessary that the details of an ongoing police operation should not be disclosed publicly, there is no reason why the 'framework' procedures and rules for all such operations should be treated as a national secret. Their release does not jeopardise any ongoing police operation and the public has a right to know the rules by which its police cooperate with foreign agencies. Any argument for secrecy is undercut by the fact that the MOUs which Australia and Canada have separately negotiated with Europol are publically available on Europol's website.[48]

52. The Arar Commission noted that agreements to cooperate should always be written down, even if at first only in an exchange of letters, and they should be

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[44] Australian Federal Police, *Annual Report 2006/2007* (2007), 4, <http://www.afp.gov.au/__data/assets/pdf_file/61774/AFPAnrep2007.pdf>.
[45] Evidence of Mick Keelty (AFP Commissioner) to Senate Legal and Constitutional Legislation Committee (31 October 2005), n 165, 169. Though, the MOU between Australia (not the AFP) and Europol is publically available (on Europol's website): *Agreement on Operational and Strategic Cooperation between Australia and the European Police Office* (Feb 2007), <http://www.europol.europa.eu/legal/agreements/Agreements/Australia.pdf>. See also: AFP, *Annual Report 2007/2008* (2008), n 25, 5.
[46] Evidence of Mick Keelty (AFP Commissioner) to Senate Legal and Constitutional Legislation Committee (31 October 2005), n 165, 168-9.
[47] Evidence of Mick Keelty (AFP Commissioner) to Senate Legal and Constitutional Legislation Committee (31 October 2005), n 165, 168-9.
[48] see fn 45.

reviewed periodically.[49] Such agreements should make it clear how Canada expects the foreign agency to use the information. This is important because, '[o]nce information is in foreign hands, it will be used in accordance with the laws of the foreign jurisdiction, which may not be the same as Canadian law'.[50]

2.3.4 Interpol and other international bodies

53. International policing is facilitated by several international police bodies, the most significant of which are Interpol and Europol. There are other smaller bodies, such as ASEANAPOL, the Association of South-East Asian Nations Chiefs of Police. ASEANAPOL is a grouping of police chiefs who meet annually to network and discuss common issues. ASEANAPOL has no permanent Secretariat office and it lacks the infrastructure of its two larger counterparts, though there have been discussions to rectify this.[51] Since 2007, ASEANAPOL's database has been accessible via Interpol.[52]

54. Interpol (International Criminal Police Organisation) is not an operational police force.[53] One of its main functions is to act as an information and intelligence clearing house. It is forbidden by its own Constitution to deal with matters of a 'political, military, religious or racial character'.[54] According to its Constitution, Interpol aims:[55]

> (1) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the *Universal Declaration of Human Rights*;
>
> (2) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.

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[49] Arar Commission, *Analysis and Recommendations* (2006) n 175, 320-1.
[50] Arar Commission, *Analysis and Recommendations* (2006) n 175, 320.
[51] Faez Hani, 'Creation of ASEANAPOL Secretariat Discussed' (20 March 2009) *The Brunei Times*, <http://www.bt.com.bn/en/home_news/2009/03/20/creation_of_aseanapol_secretariat_office_discussed>.
[52] Interpol, 'Interpol and ASEANAPOL sign historic information-sharing agreement' (media release) 7 June 2007, <http://www.interpol.int/public/News/2007/Aseanapol20070607.asp>.
[53] Malcolm Anderson, *Policing the World: Interpol and the Politics of International Police Co-operation* (Oxford: Clarendon, 1989). See also: Sheptycki (2004), n 59, 116.
[54] Interpol, *Constitution* (1956), Article 3.
[55] Interpol, *Constitution* (1956), Article 2.

55. Interpol is funded largely by contributions from its members.[56] Its members are not nation-states, but a representative police agency of a nation-state.[57] Contributions are based on criteria such as a country's population and Gross National Product, with a maximum contribution amount.[58] Interpol has been granted Observer Status at the United Nations General Assembly and is treated as a quasi-intergovernmental organisation, despite the fact that it is not underpinned by treaty or controlled by any government.[59] Interpol is recognised in several prominent multilateral treaties, including the Convention against Transnational Organised Crime.[60] It is not accountable to any external body.[61] Though of course, national governments can control what is sent to Interpol by directing their own police how to cooperate. There is also an internal 'independent' five-member Supervisory Board responsible for overseeing the keeping and use of Interpol's records. The membership of the Supervisory Board includes an Executive member of Interpol, a member appointed by the French government and another appointed by Interpol.[62] The complete independence of the Board is questionable given, as Sheptycki observes, only one member is not directly chosen by Interpol or selected from a list of candidates prepared by Interpol.[63]

56. Interpol's role as an information repository and clearing-house is underpinned by a network of National Central Bureaus (NCBs). Each member is obliged to maintain

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[56] Interpol, *Constitution* (1956), Article 38.
[57] Sheptycki (2004), n 59, 119. Sheptycki observes that the identity of Interpol members is ambiguous, though he concludes that 'the RCMP...is a member of Interpol and not the government of Canada'.
[58] Joint Committee on the NCA (5 December 1996), n 630, 5 (Raymond Kendall).
[59] James Sheptycki, "The Accountability of Transnational Policing Institutions: The Strange Case of Interpol" (2004) 19 *Canadian Journal of Law and Society* 107, 117-23
[60] e.g. *Convention Against Transnational Organized Crime 2000*, n 262, article 18; *Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, n 276, article 7; *Convention against Corruption 2003*, n 274, article 46. Note, in these particular cases Interpol is only mentioned in the context of mutual legal assistance, not police-to-police cooperation. However, there is a general reference to Interpol in the *Convention for the Suppression of the Financing of Terrorism 1999* [2002] ATS 23 (entry into force: internationally, 1 April 2002; for Australia, 26 October 2002; for Canada, 10 April 2002), article 18.
[61] generally, see: Anderson (1989), n 53; and, Sheptycki (2004), n 59.
[62] Anderson (1989), n 53, 66.
[63] Sheptycki (2004), n 59, 122.

a NCB through which information and intelligence is exchanged. The main function of a NCB is, in the words of Anderson, 'to act as a link between the police forces in a country and the outside world'.[64] In deference to national sovereignty, they operate independently of Interpol headquarters in Lyon in the sense that no member is obliged to send information to Interpol or to answer requests coming from other members or Lyon.[65] Any such obligations arise from bilateral agreements between the parties, not via Interpol. It is possible for a police agency sending information to Interpol to request that certain countries not have access to the information.[66]

57. For example, in 2007/2008, the Australian NCB processed a total of 25,013 incoming and outgoing messages via Interpol,[67] of which 75% involved the exchange of operational information and intelligence.[68]

58. The European Police Office (Europol) was launched in 1999.[69] It was established due to many different pressures, including increased European administrative integration and dissatisfaction with Interpol.[70] It has five principal aims: "acting as a central point for EU Members States' exchange of criminal information; operational intelligence analysis with a central analytical database; conducting strategic intelligence analysis; spreading best investigative practice; and...supporting transnational operation as conducted by the Member States".[71] Like Interpol, Europol acts as 'an intelligence broker'.[72] In 2007, Europol

[64] Anderson (1989), n 53, 81.
[65] Anderson (1989), n 53, 83.
[66] Joint Committee on the NCA (5 December 1996), n 630, 21 (Raymond Kendall).
[67] AFP, *Annual Report 2007/2008* (2008), n 25, 82.
[68] Evidence of Keelty to Senate Legal and Constitutional Legislation Committee (31 October 2005), n 165, 167.
[69] Paul Norman, 'The Evolution of European Policing Strategies in Response to Transnational Crime' in James Sheptycki & Ali Wardak (eds), *Transnational & Comparative Criminology* (Abingdon: Glasshouse Press, 2006), 323.
[70] e.g. Anderson (1989), n 53, 170.
[71] Norman (2006), n 69, 323-4.
[72] Tom Schalken & Maarten Pronk, 'On Joint Investigation Teams, Europol and Supervision of Their Joint Actions' (2002) 10 *European Journal of Crime, Criminal Law and Criminology* 70, 73.

exchanged 260,463 messages.[73] Unlike Interpol, however, Europol also actively supports joint investigations. Observing that Europol's budget increased by 50% in 2002, Norman noted that the events in the US on 11 September 2001 spurred the growth and importance of Europol.[74]

59. Europol has agreements with many non-European countries and organisations, such as Interpol.[75] Europol has signed agreements with both Australia and Canada.[76] For the AFP (and RCMP) these agreements provide 'unprecedented access to an extensive intelligence information database'.[77] Under the agreement, the AFP and RCMP each post a liaison officer to Europol headquarters in The Hague, where there is direct access to other liaison officers from Interpol, 27 EU countries as well as Australia, Canada, Croatia, Columbia, Iceland, Norway, Switzerland and the United States (FBI, DEA, USPIS, ATF and US Secret Service).[78] This direct access represents a wealth of intelligence, but also a cost saving given that only one liaison officer need be posted to one location rather than many officers to many different locations. The Europol-AFP arrangements have 'contributed significant intelligence' to Europol's Analysis Work Files and initiated an investigation which led to the arrest of several suspects on charges of child pornography.[79]

60. The legal structure of Europol is much sounder than that of Interpol. While Sheptycki's observation that '[c]onstitutionally there is no framework for the governance of transnational policing globally' remains largely true,[80] the

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[73] European Police Office, *Annual Report 2007* (2008), 32, <http://www.europol.europa.eu/publications/Annual_Reports/Annual%20Report%202007.pdf>.
[74] Norman (2006), n 69, 323-4.
[75] see <http://www.europol.europa.eu/index.asp?page=agreements>.
[76] *Agreement on Operational and Strategic Cooperation between Australia and the European Police Office* (Feb 2007), <http://www.europol.europa.eu/legal/agreements/Agreements/Australia.pdf>; *Cooperation Agreement between the Government of Canada and the European Police Office* (2002) <http://www.europol.europa.eu/legal/agreements/Agreements/227746.pdf>
[77] AFP, 'Joining forces with Europol' (2007) 94 *Platypus* 14.
[78] AFP, 'Australia and Europol join forces to combat transnational crime' (2008) 98 *Platypus* 10-11.
[79] Europol, *Annual Report 2007* (2008), n 73, 79.
[80] J. Sheptycki, 'Patrolling the New European (In)security Field' (2001) 9(2) *European Journal of Crime, Criminal Law & Criminal Justice* 144, 158.

governance of Europol within the framework of the European Union affords more oversight. Interpol, the only truly international police cooperation organisation, is not accountable to any democratic national or international institution. As discussed above, Interpol exerts a large influence over its independent Supervisory Board.[81] In terms of data protection, Europol's handling of individuals' data is overseen by a National Supervisory Board in each member country and a Joint Supervisory Board.[82] The Board of Governors of Europol is accountable to the Council of Ministers.[83] Complaints of maladministration against Europol can be submitted with the Office of the European Ombudsman.[84] Europol's annual reports can be scrutinised by the Justice and Home Affairs Committee of the European Parliament, but anecdotal evidence suggests that this is rarely done.[85] However, the accountability for the actions of operational police working through Europol is largely left up to the institutions and parliaments of the state to which investigating officers belong.[86] However, as Dorn observes, from 1 January 2010 the European Parliament acquired a general oversight role of Europol, as its finances move under the umbrella of the main EU budget.[87] This is significant as the European Parliament has signalled that improvements are

[81] [55].
[82] *Europol Convention* (1995) SN 3549/95, articles 23 & 24. For details of present and future data protection mechanisms within Europol, see: Max-Peter Ratzel (Director of Europol), 'Europol tasks: present and future', speech to 10th Anniversary of the Joint Supervisory Body Conference in Brussels (9 October 2008), <http://www.europol.europa.eu/Docs/JSB10thAnniversaryConferenceinBrussels9October2008.pdf>.
[83] Schalken & Pronk (2002), n 72, 79-80.
[84] *Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties* (1994) Adopted by European Parliament on 9 March 1994 (OJ L 113, 4.5.1994, p. 15) and amended by its decisions of 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and 18 June 2008 (OJ L 189, 17.7.2008, p. 25), <http://www.ombudsman.europa.eu/resources/statute.faces>.
[85] Kiron Reid, 'Home Secretary and Improved Accountability of the Police' (2005) 69 *Journal of Criminal Law* 232, 253.
[86] Reid (2005), n 85, 253-4.
[87] Nicholas Dorn, 'The end of organised crime in the European Union' (2009) 51(2) *Crime, Law and Social Change* 283, 284 & 286.

required "as regards Europol's democratic responsibility, especially following the extension of its operational powers".[88]

61. Another important innovation is that the memorandums of understanding on police-to-police cooperation are negotiated between Europol and a state, not Europol and foreign police agencies. This might account for the public availability of these MOUs.[89]

2.3.5 policy and operational guidelines

Australian practice: death penalty situation guidelines

62. Australian practice and policy in relation to transnational police-to-police cooperation has been defined in large part by the drive to police drug trafficking and terrorism 'at the source' in South East Asia. The fact that these offences attract the death penalty in much of the region has proven a significant challenge for Australian police and policy makers, who have preferred respect for the sovereignty of nations over respect for human rights in these matters.

63. The AFP operates transnationally according to statute, ministerial directive and internal guidelines. The *Australian Federal Police Act 1979* (Cth) ('the AFP Act') authorises the AFP to provide assistance and information in transnational policing operations to foreign law enforcement agencies:[90]

> AUSTRALIAN FEDERAL POLICE ACT 1979 - SECT 8
>
> **Section 8: Functions**
>
> (1) The functions of the Australian Federal Police are:
>
> ...
>
> (bf) the provision of police services and police support services for the purposes of assisting, or cooperating with, an Australian or foreign:
>
> (i) law enforcement agency; or

[88] Dorn (2009), n 87, 284.
[89] see [51].
[90] *Australian Federal Police Act 1979* (Cth) s.8(1)(bf).

(ii) intelligence or security agency; or

(iii) government regulatory agency; and

...

(c) to do anything incidental or conducive to the performance of the foregoing functions.

64. By ministerial direction, the AFP must *inter alia* "develop relationships with overseas law enforcement organisations to support international operational and general law and order outcomes that benefit Australia's domestic and international interests".[91] It is also expected to contribute "effectively to the Government's international law enforcement interests including matters involving cooperation to combat transnational organised crime...".

65. In situations where the death penalty might apply, AFP agents operate under a document entitled the *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*.[92] The death penalty situation guidelines have been in existence since 1993.[93] They were revised in September 2006 and again in December 2009. I will refer to the guidelines in place when the Bali Nine were arrested as the 'pre-September 2006' guidelines.[94]

66. The pre-September 2006 and September 2006 guidelines distinguish between cooperation in situations when a person has not yet been charged ('pre-charge') and when a person has been charged or convicted ('post-charge') of an offence subject to capital punishment. In summary, the guidelines:

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[91] *Australian Federal Police Act 1979* (Cth) s.37(2): the Minister in charge of the AFP may direct the AFP how to operate and the Commissioner must comply. For most recent direction, see: *Ministerial Direction* (August 2008), <http://www.afp.gov.au/about-the-afp/operational-priorities/ministerial-direction.aspx>.

[92] *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (April 2004): "the AFP may provide such [police-to-police] assistance as requested, provided it meets existing policy guidelines, irrespective of whether the investigation may later result in charges being laid which may attract the death penalty".

[93] Senate Legal and Constitutional Legislation Committee, *Budget Estimates*, 24 May 2005, (Justice Minister, Senator Ellison) 59.

[94] it should be noted that the pre-September 2006 guidelines applied in the case of *Rush v Commissioner of Police* [2006] FCA 12.

a. grant police a discretion to cooperate (without reference to the Minister) prior to the laying of charges that could lead to the death penalty; and,

b. allow police, with the permission of the Attorney-General or Minister for Home Affairs, to continue cooperating after capital charges are laid.

67. The distinction between pre-charge and post-charge situations is controversial because not all legal systems demand that arrested suspects be charged and brought before a magistrate as soon as possible. In a country with a civil law tradition, like Indonesia for example, it is possible to arrest and detain someone for months before actually charging them. That is, *before* the Australian legislative framework of mutual legal assistance is enlivened to provide human rights protections and before the broad pre-charge police-to-police discretion is exhausted.

68. The pre-charge guideline provides the AFP with a discretion to cooperate in death penalty situations without reference to the Attorney-General. The discretion was described in the following manner:[95]

> **pre-September 2006**
>
> ...the AFP may provide [police-to-police] assistance as requested, provided it meets existing policy guidelines, irrespective of whether the investigation may later result in charges being laid which may attract the death penalty.
>
> **post-September 2006**
>
> - Police-to-police assistance can be provided, without reference to the Attorney-General or Minister for Home Affairs, until charges are laid for the offence.
>
> - Information provided by the AFP to foreign law enforcement agencies must be in accordance with the *Australian Federal Police Act 1979*, and any other legislation, treaty, convention, Ministerial Direction, agreement, memorandum of understanding, policy, guideline, and practical guide or associated document relevant to the provision of information to foreign law enforcement agencies.

[95] a copy of the pre-September 2006 guidelines, released under freedom of information, is available on the website of the NSW Council for Civil Liberties: <http://www.nswccl.org.au/docs/pdf/afp%20dp%20guidelines.pdf>.

69. The second paragraph of the revised guideline states that shared information must conform to *inter alia* treaty and convention obligations.[96] The AFP seem to interpret this as referring solely to Australia's treaty obligations under the UN anti-crime treaties to cooperate in fighting transnational crime.[97] The AFP appear to ignore the fact that Australia has ratified the *International Covenant on Civil and Political Rights* (ICCPR) and the Second Optional Protocol attached thereto, both of which carry with them an implied obligation not to expose anyone to the real risk of execution.[98] Furthermore, this is contrary to the resolutions of the UN General Assembly that human rights are to be respected in the 'wars' against drugs and terrorism.[99] It is unclear why the balance struck in extradition and mutual assistance law between these competing obligations is not also observed in police-to-police cooperation. In Australian extradition and mutual assistance law, assistance is only provided where it is exculpatory or after an undertaking is made that no one will be executed.[100]

70. The death penalty situation guidelines were modified in December 2009. The reference to treaties and conventions was moved to cover all police-to-police cooperation. The guideline referring to pre-charge situations was redrafted as follows:[101]

> Where no person has been arrested or detained on suspicion of having committed an offence in respect of which the death penalty may be imposed in a foreign country:

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[96] it should be noted that the pre-September 2006 guidelines applied in the case of *Rush v Commissioner of Police* [2006] FCA 12.
[97] see "international treaties" on p.70 ff.
[98] see "To expose no one to the real risk of torture" on p.68.
[99] see [485].
[100] *Extradition Act 1988* (Cth) s.22(3)(c); and, *Mutual Assistance in Criminal Matters Act 1987* (Cth) ss.8(1A) & 8(1B).
[101] see AFP 'New AFP Guidelines released' (Media Release, 18 December 2009) <http://www.afp.gov.au/media-centre/news/afp/2009/december/new-afp-guidelines-released.aspx>. The new guidelines are available at: <http://www.afp.gov.au/policing/~/media/afp/pdf/g/guideline-for-international-death-penalty-situation.ashx>. Prior to arrest or detention, the AFP is responsible for oversight of cooperation. Post-arrest, -detention, -conviction or –sentence, ministerial approval is required.

- Police-to-police assistance can be provided without reference to the Attorney-General or Minister for Home Affairs.
- Requests for assistance with potential death implications will be subject to an approval process.
- Requests for assistance to and from the AFP International Network must be forwarded to the relevant AFP International Desk via an overseas liaison communication, highlighting the issue.
- Requests for assistance through Interpol via the AFP Operations Coordination Centre will also be subject to the approval process.

71. There are two practical changes: AFP agents now require ministerial approval to assist in death penalty cases once a suspect has been arrested or detained; and, 'requests for assistance' prior to arrest or detention must go through an approval process overseen by the AFP Manager International Network or the AFP National Manager Border and International. Redefining 'pre-charge' to 'pre-arrest or detention' narrows the discretion of police and was made in direct response to criticism in the Bali Nine case. Under the old guideline, AFP agents could continue to cooperate in civil law jurisdictions (such as Indonesia) without ministerial approval in relation to a suspect who was arrested or being detained but who had not yet been charged – a period which could extend over several months.

72. It is worth noting that the new 'approval process' remains independent of the Minister. It also refers only to 'requests for assistance' and does not appear to cover spontaneous cooperation, such as that which occurred in the Bali Nine case. It is unclear whether spontaneous cooperation is covered by these guidelines or not.

73. In practical terms, the new guidelines have not made any real difference to how the AFP operate in death penalty situations. According to media reports, senior sources within the AFP admitted as much in September 2010:[102]

[102] Dylan Welch, "New rules 'window dressing', say federal police" (17 Sept 2010) *Sydney Morning Herald* (Sydney) <http://www.smh.com.au/national/new-rules-window-dressing-say-federal-police-20100916-15eqp.html>.

If the Bali situation were repeated today, they say, the federal police could act in the same way and achieve the same result, which would mean Australians facing the death penalty overseas.

74. The post-charge guidelines have also undergone some changes:

pre-September 2006

...where the assistance of the AFP is sought by the police or another law enforcement agency of a foreign country in relation to a matter in which a charge has been laid under the law of that foreign country, for a crime attracting the death penalty, no action is to be taken, nor should any indication be given as to the decision likely to be taken in respect of the request. All such requests are to be notified to the Director International and Operations as soon as possible after receipt. Following consultation with the Attorney-General's Department, the General Manager National Operations will provide the Commissioner and Deputy with such advice as considered necessary in order that advice may be provided to the Minister for Justice and the Attorney-General.

September 2006

After charges have been laid for a crime attracting the death penalty:

- ...The Attorney-General or the Minister for Home Affairs may decide that police-to-police assistance can continue to be provided.

- No action is to be taken, nor should any indication be given as to the decision likely to be taken in respect of the request. All such requests are to be notified to the Manager International Network as soon as possible after receipt.

- Following consultation with the Attorney-General's Department, the National Manager Border and International will provide the Commissioner and the Deputy Commissioner (Operations) with such advice as considered necessary to seek advice from the Attorney-General or the Minister for Home Affairs.

- AFP will seek advice from the Attorney-General or the Minister for Home Affairs on a case-by-case basis to ensure ongoing AFP actions correlate with Australian Government policy and other international obligations.

December 2009

After arrest, or detention, or charge, or conviction of an offence for which the death penalty may be imposed in a foreign country:

- only the Attorney-General or the Minister for Home Affairs may approve the exchange of information on a police-to-police basis

- all requests for the exchange of information are to be notified to the Manager International Network as soon as possible after receipt
- no action is to be taken, nor should any indication be given as to the decision likely to be taken in respect of the request
- following consultation with the Attorney-General's Department, the National Manager Border and International will provide the Commissioner and the Deputy Commissioner (Operations) with such advice as considered necessary to seek advice from the Attorney-General or the Minister for Home Affairs
- the AFP will seek advice from the Attorney-General or the Minister for Home Affairs on a case-by-case basis to ensure ongoing AFP actions correlate with Australian Government policy and other international obligations.

75. The pre-September 2006 guideline for post-charge situations simply required that the Minister be advised of cooperation. However, in practice the Minister's permission was required to continue cooperation.[103] This ministerial discretion is made explicit in the later updated guidelines. No guidance is given to the Minister other than to ensure that AFP practice accords with government policy and international obligations.

76. In terms of police practice, the AFP interprets its pre-charge discretion so broadly that the death penalty guidelines have little or no impact on police investigations. Agents do not appear to be required to consider whether the death penalty will apply. In evidence before the Joint Standing Committee on Treaties, the Acting National Manager responsible for international cooperation observed that:[104]

> ...generally speaking, we would not refuse a police-to-police request because there was a potential that one of the persons subject to the investigation may be subject to a charge that could attract the death penalty some time at a later date.

77. Police give several reasons for this broad interpretation. A regularly expressed reason highlights the sheer volume of information shared, which is in the order of

[103] Evidence of Mike Phelan (AFP National Manager, Border and Intelligence Network) to the Joint Committee on the Australian Crime Commission, *Re: Amphetamines and other synthetic drugs* (5 June 2006) 73.
[104] Evidence to the Joint Standing Committee on Treaties, Commonwealth of Australia, Canberra (4 September 2006) 8 (Tim Morris, Acting National Manager, International & Border, AFP).

13,000 pieces of information transmitted overseas every year,[105] and the impossibility of screening each request or predicting whether any individual piece of information might lead to an arrest for an offence attracting the death penalty.[106] It seems odd that foreign police are not required to explain the nature of the investigation they are undertaking, which should indicate whether there is a real risk of the death penalty being imposed. If the foreign investigation is for drug trafficking in Indonesia or Vietnam, for example, then it is not difficult to conclude that there is a real risk that someone will be executed. It is disingenuous to argue that police have no actual or constructive knowledge of the use to which shared information will be put. The failure to so inquire could constitute recklessness or, in serious cases, negligence.

78. The AFP has also argued that their interpretation of these guidelines has been standard operating procedure since they were introduced in the 1990s. The AFP contends that the guidelines have remained essentially unchanged during both Coalition (conservative) and Labor Party governments.[107] However, according to Mr Duncan Kerr MP, who was Justice Minister when the guidelines were drafted, they were never intended to be standard operating procedure.[108] They were meant to be facilitative. They were originally intended to be used only in exceptional circumstances where there is an imminent threat to human life: the 'ticking bomb' scenario.

79. Furthermore, the AFP follows the same death penalty situation guidelines regardless of the national origin of the agency with which they are cooperating. Speaking of the Bali Nine investigation, the AFP Manager of Border and International network said: "We operate exactly the same way no matter which

[105] Evidence to the Senate Legal and Constitutional Legislation Committee (Budget Estimates), Commonwealth of Australia, Canberra (17 February 2006) 40 (AFP Commissioner Mick Keelty).
[106] Evidence to the Senate Legal and Constitutional Legislation Committee (17 February 2006), n 105, 56 (AFP Commissioner Mick Keelty).
[107] Senate Legal and Constitutional Legislation Committee, *Budget Estimates*, 24 May 2005, 59 (AFP Commissioner Mick Keelty).
[108] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 August 2006, 145ff (Mr Duncan Kerr MP).

country it is. …Had this occurred in Thailand, Cambodia, Vietnam, we'd potentially do exactly the same thing given the same set of circumstances".[109]

80. It is not surprising then that these death penalty situation guidelines were glossed over in the Bali Nine case, given the views of AFP Commissioner Keelty. In deference to the doctrine of national sovereignty, the Commissioner expressed the strong view that police-to-police cooperation is an all-or-nothing proposition:[110]

> We simply cannot dictate to a foreign law enforcement agency as to how they undertake their operations. We simply cannot restrict the areas in which we cooperate. We either cooperate or we do not cooperate.

81. These views have been criticised by the former Justice Minister, Mr Duncan Kerr MP, who found it unbelievable that Australia would cooperate without discrimination:[111]

> ...surely it cannot be the case, as is being proposed, that in all circumstances common sense flies out the window and we do not exercise judgement regarding circumstances in which assistance will be provided. Take, for example, the circumstances in Iran where a 16-year-old girl has been hanged for the offence of having sex with a person when she was not married. There are many countries which have the death penalty for offences that even the most draconian of lawmakers here would not recognise as appropriate, and for our police to say repeatedly and for our ministers to repeat that they are obliged in all instances to pass on information without any regard to the consequences to those who might be affected by it is simply shutting their eyes to the real consequences of that conduct.

82. The flexibility with which these guidelines have been interpreted by police is also reflected in Australian policy. What was once a strong principled opposition to the death penalty, has been slowly whittled away. According to documents obtained under freedom of information legislation, federal Attorney-General Daryl Williams and Justice Minister Senator Amanda Vanstone began watering down Australia's long-standing principled opposition to the death penalty in 1998. In response to a

[109] Wockner & King (2006), n 161, 227.
[110] Evidence of Keelty to Senate Legal and Constitutional Legislation Committee (31 October 2005), n 165, 170.
[111] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 16 August 2006, 146 (Mr Duncan Kerr MP).

foreign serial murder case,[112] Williams and Vanstone decided that a guarantee that no one would be executed would no longer be required in every case of police-to-police assistance. Instead, the Minister would retain a discretion whereby he or she *may* refuse assistance in the absence of such an assurance.[113] Prior to this, Australia had always sought such an assurance.[114]

83. In the last few years, the federal Attorney-General has authorised the AFP to assist in *post*-charge death penalty cases on at least three occasions *without requiring any guarantees that no one will be executed* : in Indonesia, Malaysia and Tonga.[115] The case in Indonesia involved the prosecution of the Bali bombers. The three main terrorist bombers were executed on 9 November 2008.[116] It is unclear whether anyone has been executed as a result of AFP cooperation in Malaysia or Tonga. The new December 2009 guidelines require the AFP Commissioner to report to the Minister for Home Affairs biannually 'on the nature and number of cases where information is provided to foreign law enforcement agencies in death penalty cases'.

84. There has been much criticism of the policy and practice surrounding police-to-police cooperation in death penalty situations. Calls for reform have been made by several prominent individuals and organisations, including the Senate Legal & Constitutional Legislation Committee,[117] the Joint Standing Committee on

[112] FOI docs (December 2007), n 581, f.12.[32].
[113] FOI docs (December 2007), n 581, f.68.[7].
[114] FOI docs (December 2007), n 581, f.68.[8].
[115] Letter from Senator David Johnston (Justice Minister) to Michael Walton (NSW Council for Civil Liberties), 3 August 2007, <http://www.nswccl.org.au/docs/pdf/reply%20from%20Johnston%20(8%20Aug%2007).pdf>.
[116] Tom Allard, 'Bali bombers executed' (9 November 2008) Sydney Morning Herald (Sydney), <http://www.smh.com.au/news/world/bali-bombers-executed/2008/11/09/1226165340305.html>.
[117] Senate Legal & Constitutional Legislation Committee, *Report on Provisions of the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005* (August 2005), <http://www.aph.gov.au/Senate/committee/legcon_ctte/drug_offences/report/report.pdf> (recommendation to review the guidelines).

Treaties,[118] the UN Special Rapporteur on Torture,[119] the Law Council of Australia[120] and the NSW Council for Civil Liberties.[121]

85. In mid-2009, the United Nations Human Rights Committee voiced its concern of Australian law and practice:[122]

> The Committee notes with concern...the lack of a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the Second Optional Protocol.
>
> The State party should take the necessary legislative and other steps to ensure that...it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State...

86. The death penalty situation guidelines also attracted judicial criticism in the Federal Court of Australia. In the case of *Rush v Commissioner of Police,*[123] members of the Bali Nine sought preliminary discovery, prior to commencing action in the Federal Court of Australia against the AFP for negligence and misfeasance in public office, of AFP documents and the identity of decision-makers. The judge dismissed the application on the grounds that any substantive claims brought would be 'purely speculative in character or else would have no

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[118] Commonwealth of Australia, Joint Standing Committee on Treaties, *Report 91* (June 2008), Recommendation 6, [3.21] & [3.27]: "the Committee has concluded that there should be a general review of Australian policy and procedures concerning police-to-police cooperation and other information exchanges, including intelligence sharing arrangements, with a view to developing new instructions to regulate police-to-police and other assistance arrangements not governed by agreements at the treaty level. The instructions should prevent the exchange of information with another country if doing so would expose an Australian citizen to the death penalty" at [3.21].
[119] ABC Radio, 'UN advisor urges Australia to take strong stance against death penalty', *AM* (25 January 2006) <http://www.abc.net.au/am/content/2006/s1554755.htm> (quoting Philip Alston).
[120] Law Council of Australia, 'Bali Nine Case Prompts Call for AFP Guideline Review' (November 2005) *@theLCA*, <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8B6CEA61-1C23-CACD-2241-31E0CF340CD3&siteName=lca>.
[121] NSW Council for Civil Liberties, "Busted: AFP's 'anything goes' policy on death penalty" (media release, 23 August 2005), <http://www.nswccl.org.au/news/show_pr.php?relNum=4&relYear=2005>. The author advises that he chaired the Council's subcommittee against the death penalty at this time.
[122] UN Human Rights Committee, Concluding Observations: Australia (7 May 2009) UN Doc CCPR/C/AUS/CO/5, [20].
[123] *Rush v Commissioner of Police* [2006] FCA 12 (Finn J).

prospects of success'.[124] Ultimately, Finn J observed that the actions of the AFP had not been unlawful, *ultra vires* or exercised with reckless indifference. The AFP and the Australian government saw this finding as vindication that the AFP had done nothing wrong in the Bali Nine case. They ignored the fact that domestic lawfulness is no defence to a violation of international human rights law.[125]

87. What is significant about the *Rush* case is that Finn J prefaced his judgment with a call for the death penalty situation guidelines to be reformed. His Honour's preface reads in part:[126]

> The circumstances revealed in this application for preliminary discovery suggest there is a need for the Minister administering the [AFP Act] and the Commissioner of Police to address the procedures and protocols followed by members of the [AFP] when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country. Especially is this so where the person concerned is an Australian citizen and the information is provided in the course of a request being made by the AFP for assistance from that other country's police force.

88. This judicial call for review seemed to confuse the AFP Commissioner and Justice Minister, both of whom could see no substantive criticism in the existing procedures.[127] However four years later, in 2010, the now retired AFP Commissioner Mick Keelty appeared in an Indonesian court, dressed in a traditional Balinese shirt, to give evidence for one of the Bali Nine in his final death sentence appeal.[128] Mr Keelty was followed by his former Manager for

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[124] *Rush v Commissioner of Police* [2006] FCA 12, [1].
[125] UN Human Rights Committee, *General Comment No. 31* (2004), n 289, [4], citing *Vienna Convention on the Law of Treaties 1969* [1974] ATS 2 (entry into force internationally and for Australia and Canada, 27 January 1980), article 27.
[126] *Rush v Commissioner of Police* [2006] FCA 12, [1].
[127] Hansard, Senate Legal and Constitutional Legislation Committee, Budget Estimates (17 February 2006) 53.
[128] Tom Allard, "Death-row inmate faced fine in Australia, Keelty admits" (17 Sept 2010) *Sydney Morning Herald* (Sydney) <http://www.smh.com.au/world/deathrow-inmate-faced-fine-in-australia-keelty-admits-20100916-15erh.html>.

Border Operations, Mick Phelan, who was dressed in full AFP uniform. According to journalists, this level of assistance to a criminal offender is 'unprecedented'.[129]

Canadian practice

89. Canadian police-to-police practice stands in stark contrast to Australian practice. The Arar Commission revealed the specific guidelines for: (i) sharing information with foreign agencies: and, (ii) cooperating with agencies from countries which violate human rights.

90. It is RCMP policy that all information to be shared with other agencies is screened for relevance, reliability and personal information.[130] Caveats should also be placed on shared information, ensuring that it will only be used for the agreed purpose and that it will not be passed on to other agencies. The Arar Commissioner endorsed these procedures but was critical of the RCMP's failure to implement them during Project AOC.

91. The Commissioner was more critical of the RCMP's written policy restricting cooperation with agencies from countries with a questionable human rights record. The RCMP can also share information with the agencies of countries that violate human rights, but not if the information sharing could have a 'negative human rights connotation'.[131] Such connotations include torture and capital punishment. Unlike Australia, no distinction is made between pre- and post-charge situations: the same rule applies in all circumstances. The full guidelines appear in the RCMP Operational Manual under the title "Enquiries from Foreign Governments that Violate Human Rights":

M. 3. Enquiries from Foreign Governments that Violate Human Rights

[129] Tom Allard, "Ex-police chief tells death sentence appeal Rush played 'minor role'" (16 Sept 2010) *Sydney Morning Herald* (Sydney) <http://www.smh.com.au/world/expolice-chief-tells-death-sentence-appeal-rush-played-minor-role-20100916-15e1v.html>.
[130] Arar Commission, *Analysis and Recommendations* (2006) n 175, 22 & 103-4.
[131] see Arar Commission, *Analysis and Recommendations* (2006) n 175, 346; and, Arar Commission, *Factual Background Vol.1* (2006), n 172, 33.

M. 3. a. The RCMP will not become involved or appear to be involved in any activity that might be considered a violation of the rights of an individual, unless there is a need to comply with the following international conventions:

1. United Nations Conventions on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, article 4(b) or through membership in such bodies as Interpol;

2. the 1979 International Convention Against the Taking of Hostages;

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

4. the 1970 Convention for the Suppression of the Unlawful Seizure of Aircraft (The Hague); or

5. the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo).

M. 3. b. The disclosure of information to an agency of a foreign government that does not share Canada's respect for democratic or human rights may be considered if it:

1. is justified because of Canadian security or law- enforcement interests,

2. can be controlled by specific terms and conditions, and

3. does not have a negative human rights connotation.

92. The Arar Commissioner was critical of the exemptions for UN terrorism-related treaties:[132]

> The need to investigate terrorism and the need to comply with international conventions relating to terrorism do not in themselves justify the violation of human rights. The international conventions cited in the RCMP policy…do not authorize departures from human rights standards protected under various other international instruments Canada has agreed to abide by, such as the *International Covenant on Civil and Political Rights* and the…*Convention against Torture*…

93. Having concluded that the existing policy is inadequate, the Arar Commissioner made the following recommendation with respect to this written policy:

> **Recommendation 14**

[132] Arar Commission, *Analysis and Recommendations* (September 2006), n 175, 346.

> The RCMP and CSIS should review their policies governing the circumstances in which they supply information to foreign governments with questionable human rights records. Information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture. Policies should include specific directions aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.

94. The recommendation is essentially one of risk assessment, requiring the assessment of 'credible risk' of whether cooperation will 'cause or contribute to' torture or 'other human rights abuses'.

Recent changes to Canadian anti-death penalty policy

95. In late 2007 the Harper government publicly announced it had changed its policy and would no longer intervene in clemency applications by Canadians facing the death penalty 'in a democratic country that honours the rule of law'.[133] Assistance would now be provided on a case-by-case basis after reviewing the facts of each case.

96. Though never explicitly confirmed, the change in government policy appears to have been a direct response to the case of Canadian citizen, Mr Ronald Smith. After being convicted of a double murder in the US state of Montana, Mr Smith has been on death row for 25 years. The Canadian government has been assisting him in his legal appeals all that time. After decades of providing Mr Smith with assistance, the government announced that, pursuant to this new policy, it would no longer assist him.

97. Mr Smith brought an application in the Federal Court of Canada for an order that the relevant Minister petition the Governor of Montana to commute the death sentence.[134] During his judgment, Barnes J noted that Mr Smith, being held in the US by US authorities, was beyond the jurisdiction of Canada. All that Mr Smith could hope for was for Canada to use its influence on the Montana Governor.

98. Mr Smith argued that the refusal to seek clemency was a violation of his *Charter* rights and a denial of the Canadian government's duty of fairness. The

[133] *Ronald Smith v Canada* [2009] FCJ 234 (Barnes J), [13] & [35]-[36].
[134] *Ronald Smith v Canada* [2009] FCJ 234.

respondent government argued that the case before the court was not justiciable because the act of petitioning for clemency was an Executive decision based on government foreign policy and therefore was a political, not a legal, matter and therefore could not be reviewed by a court.

99. Barnes J rejected the respondent's arguments on the grounds that the court can examine the decision of a government decision-maker which is based on government policy. His Honour also dismissed the government's argument that foreign policy is a matter for governments and not for courts. His Honour distinguished between decisions *to make* a policy and decisions *made under* a policy. Essentially, a court can examine decisions made by a government decision-maker which is based on clearly-articulated government policy:[135]

> Decisions involving pure policy or political choices in the nature of Crown prerogatives are generally not amenable to judicial review because their subject matter is not suitable to judicial assessment. But where the subject matter of a decision directly affects the rights or legitimate expectations of an individual, a Court is both competent and qualified to review it.

100. Barnes J expressed concern that the government was unable to demonstrate that Mr Smith's case had been carefully considered according to the rules of procedural fairness. Given that the government had assisted Mr Smith for over 20 years, Mr Smith had a reasonable expectation that he would be consulted on the application to his case of this new clemency 'policy'. There was no evidence that the government had consulted him at all. The court found this to be a breach of the duty of fairness and set aside the decision to withdraw support for Mr Smith's clemency petition.[136]

101. Barnes J also expressed concern that the government was unable to produce in court a clearly articulated version of its new policy on clemency. Given the serious nature of the subject matter of the policy, which related to the fundamental right to life, his Honour concluded that there was no 'new' policy. Therefore, the 'old'

[135] *Smith v Canada* [2009] FCJ 234 (Barnes J), [26].
[136] *Smith v Canada* [2009] FCJ 234 (Barnes J), [42]-[43].

policy, which was to seek clemency unconditionally, was still in place. Having come to this conclusion, his Honour declined to examine the alleged breaches of the *Charter* and international obligations, because there was no 'new' policy to measure against these standards.

102. His Honour set aside the decision to withdraw support for Mr Smith's clemency petition on the grounds that the decision was unlawful as it did not apply the correct government policy.[137] The court ordered the Canadian government 'to take all reasonable steps' to support Mr Smith's application for clemency.

103. The government chose not to appeal this decision, but has since published a detailed policy on when it will and will not assist in clemency appeals.[138] Mr Smith's case was decided as a matter of administrative law and the constitutional issue was left undecided. So, it is reasonable to expect that the next Canadian to be refused assistance will launch a constitutional challenge to this new policy based on their constitutional right to life and Canada's international human rights obligations.

2.4 intelligence-led policing

104. To understand the increase in transnational police-to-police cooperation, it is in my view necessary to acknowledge and appreciate the theory of intelligence-led policing. Of course it is not the only force driving transnational cooperation between police, but it is a useful tool in making sense of the imperatives which drive this form of transnational cooperation. In summary: information is the raw input material in the production of intelligence, and there is a perception that the more information one has, the better the end-product (intelligence) will be. This imperative for more information justifies cooperation and information exchange with foreign agencies – even those which violate human rights.

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[137] *Smith v Canada* [2009] FCJ 234 (Barnes J), [58].

[138] see Foreign Affairs and International Trade Canada, "Clemency Intervention – Statement of Procedures", <http://www.voyage.gc.ca/documents/clemency_clemence-eng.asp>.

105. Intelligence-led policing is the pre-eminent contemporary model for domestic policing throughout much of the western world. It is embraced by both the RCMP and AFP.[139] While intelligence-led policing, according to Ratcliffe, has its origins in the twentieth century, by the beginning of the twenty-first century it had been adopted by many of the police forces of the English-speaking world.[140] Ratcliffe attributes the rise of its popularity to many factors, including the increasing complexity of policing, the increased need to cooperate transnationally to address organised and transnational crime, limitations of the traditional model of policing (which focuses on preventative patrols and on criminal investigation and prosecution), changes in technology, increased public-sector managerialism and resource constraints.[141]

106. Defining the intelligence-led model is difficult,[142] but most attempts begin with the assumption that intelligence-led policing is information-driven. Information is gathered from as many sources as possible, stored electronically and accessed by trained intelligence officers who process the information and turn it into what is generally referred to as 'intelligence'. This value-added product helps senior police to identify trends in criminal activity and to plan the most effective distribution of limited police resources based on that intelligence. Ratcliffe recognises that there is no one all-encompassing definition of intelligence-led policing, because the model is practised in many different ways across the globe.[143] But after comparing intelligence-led policing with other policing models, he gives his best approximation:[144]

[139] e.g. Arar Commission, *Analysis and Recommendations* (2006), n 175, Recommendation 1(b), 315.
[140] Jerry Ratcliffe, *Intelligence-Led Policing* (Portland: Willan Publishing, 2008, 2nd ed) 39-40.
[141] Ratcliffe (2008), n 140, 16-23.
[142] Ratcliffe (2008), n 140, 64-5.
[143] Ratcliffe (2008), n 140, 6.
[144] Ratcliffe (2008), n 140, 6 & 89.

> Intelligence-led policing is a business model and managerial philosophy where data analysis and crime intelligence are pivotal to an objective, decision-making framework that facilitates crime and problem reduction, disruption and prevention through both strategic management and effective enforcement strategies that target prolific and serious offenders.

107. Intelligence is a term usually associated with national security agencies, however it is now increasingly utilised by police. According to Robertson, 'intelligence' is not just information or information-gathering. It is a process whereby people's secrets are collected and analysed for the purpose of informing policy-making.[145] So the collection of information in the public domain is not knowledge, but when combined with other secret information it might become intelligence. Gathering and keeping secrets is a key component of intelligence.

108. Throughout this thesis, I use the term 'information' as shorthand for 'information and intelligence'. Strictly-speaking, I see the two as separate. 'Information' is a 'valueless' allegation of fact: it is a piece in a puzzle. Granted, some information is so probative that it might form evidence in its own right, for example surveillance video footage of a clearly-identifiable accused committing a crime. But most information, such as a date of birth, will amount to little in and of itself. 'Intelligence' is value-added knowledge; the product of the analysis of an aggregation of information.

109. One of the assumptions that underpins the intelligence-led policing model is that the more information that can be collected, the better the end-product intelligence will be. No piece of information is too trivial, because its significance might only emerge upon further analysis. The significance, for our purposes, is that a police force with a finite budget can only gather so much information. However, the volume of information can be increased by cooperating and exchanging information with other agencies, both domestic and foreign. This is especially true

[145] Kenneth Robertson (1994), 'Practical Police Cooperation in Europe: the intelligence dimension' in Malcolm Anderson & Monica den Boer (ed), *Policing Across National Boundaries* (London: Pinter 1994), 106-9.

when dealing with transnational crime, where the criminal targets and their activities are spread across more than one sovereign jurisdiction.

2.5 limiting cooperation

110. Police-to-police information sharing is not unlimited. Restrictions have long been placed on the free-flow of information. Some restrictions are institutionalised, while others are more *ad hoc* and have evolved over time. So calls to restrict transnational police-to-police cooperation are not unprecedented and are targeted at practices which are familiar with restrictions.

111. Flowing naturally from the theory of intelligence-led policing is the view that police can more quickly and effectively confront transnational criminal activity if they exchange information in an unimpeded fashion, regardless of consequences. For example, for the AFP Commissioner, transnational cooperation is an all-or-nothing proposition. Defending the AFP's sharing of information with the INP in the Bali Nine heroin smuggling case, Commissioner Keelty told a Senate Committee:[146]

> We simply cannot restrict the areas in which we cooperate. We either cooperate or we do not cooperate.
>
> ...Most of the countries that we deal with in terms of the cooperation, particularly on narcotics matters, do have the death penalty. Indeed, the United States, in some states, has the death penalty. I do not think anybody would be recommending that we stop our cooperation on police-to-police exchange of information intelligence with the FBI.

112. Therefore, it is understandable that any requirements to limit the free flow of information are generally resisted by police.[147] Nevertheless, most police-to-police sharing agreements, including the Constitution of Interpol, reserve to national police a discretion to refuse cooperation. This reflects an institutionalisation of

[146] Evidence of Keelty to Senate Legal and Constitutional Legislation Committee (31 October 2005), n 165, 170.
[147] see "Police attitudes to human rights safeguards" on p.160 ff.

deference to national sovereignty.[148] This discretion recognises that police must operate within the laws of their own jurisdiction:[149]

> In order to further its aims, [Interpol] needs the constant and active co-operation of its Members, who should do all within their power which is compatible with the legislations of their countries to participate diligently in its activities.

113. It should also be noted that, to facilitate the limitation of information sharing, Interpol databases have the ability for the information provider to restrict who can (or cannot) see the information they are sharing with Interpol.[150] Even before sharing information with Interpol, however, national police have a discretion to share the information with Interpol or not.

114. Other restrictions have been recognised over time. For example, after pressure from the European community, many transnational information-sharing arrangements also place privacy restrictions on the exchange of individuals' information.[151]

115. Police are also limited by international law. This is made explicit in the calls of the UN General Assembly that human rights law must be respected in the so-called 'wars' on drugs and terror.[152] Similarly, the 9/11 Commission, which recommended increased information sharing between US agencies, recognised the

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[148] Mick Keelty (AFP Commissioner), Interview, *Four Corners* (ABC TV), 27 March 2006, <http://www.abc.net.au/4corners/content/2006/s1599179.htm>: "It's respecting the sovereignty of other countries. ... it's just a reality of working in the global environment that you have to accept that not everybody has the same laws, not every everybody has the same standards in terms of policing, the same standards in terms of their criminal justice systems...".

[149] Interpol, *Constitution* (1956) Article 31.

[150] Evidence of Raymond Kendall (Secretary-General, Interpol) to Joint Committee on the NCA (5 December 1996), n 630, 21.

[151] e.g. *Cooperation Agreement Between the Government of Canada and the European Police Office*, Article 7, <http://www.europol.europa.eu/legal/agreements/Agreements/227746.pdf>. See: Stanley A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (2005). Historically, see: C. D. Raab, 'Police cooperation: the prospects for privacy', in Anderson & den Boer (eds), *Policing Across National Boundaries* (1994, London); also, M. Spencer, *1992 and All That: Civil Liberties in the Balance* (1990, London).

[152] see [485].

need to couple increased information sharing with measures to protect civil liberties such as individual privacy.[153]

[153] 9/11 Commission Report (2004), n 8, 394-5.

3 Informal Transnational Policing: case studies

116. In this chapter I have chosen two well-known case studies to illustrate how informal transnational policing works and how it can go wrong. The first case study involves information sharing between Australian and Indonesian police during the course of an investigation into drug smuggling. The 'Bali Nine' case, as it became known, resulted in several Australian citizens being sentenced to death in Indonesia. The second case study involves information sharing between Canadian and US police in the immediate aftermath of the September 11 attacks on US soil. The case of Maher Arar resulted in Mr Arar being extraordinarily rendered to, and tortured in, Syria.

117. Both case studies involve the sharing of information across national borders between police which result in adverse human rights consequences. The purpose of these examples is to highlight the kinds of issues which arise in transnational police-to-police information sharing, as well as the lack of external oversight of this increasingly important activity. Unfortunately there are other examples, such as the cases of Dr Mohammad Haneef[154] and Mr Trinh Huu.[155] There are also other examples that involve agency-to-agency cooperation between security agencies, like the cases of Mr Abelrazik[156] and Messrs Almalki, Elmaati and

[154] see: John Clarke QC, *Report of the Clarke Inquiry into the case of Dr Mohamed Haneef: Volume One* (November 2008), <http://www.haneefcaseinquiry.gov.au/>. Dr Haneef was an Indian-born doctor practicing in Queensland. Dr Haneef knew one of the terrorists who attacked Glasgow airport on 30 June 2007. When Dr Haneef attempted to leave Australia a few days later, he was arrested at the airport, then detained and charged with terrorism-related offences. When bail was granted (for want of evidence), Dr Haneef's visa was cancelled and he was deported. Mr Clarkes' inquiry found that the Commonwealth had no evidence with which to charge Dr Haneef and that the Minister for Immigration's actions, while lawful, were 'mystifying': see p.xiii of the Report.

[155] Mr Trinh Huu, an Australian citizen, was arrested in Vietnam in December 2004 in possession of two kilograms of heroin, as a result of joint operation between Australian and Vietnamese police. Mr Trinh was convicted and received a death sentence, which was later commuted: see, Tom Hyland, 'AFP under fire over Vietnam drug arrest' *Sun Herald* (Sydney), 19 February 2006. Similar cases were also reported prior to the arrest of the Bali Nine: see, Kimina Lyall, 'Spare my life, convicted Australian drug trafficker begs Vietnam' (27 December 2004) *The Australian* (Sydney), 6.

[156] Mr Abdelrazik is a Canadian-Sudanese citizen who was arrested in Sudan at the request of CSIS and, unknown to Canada, was subsequently tortured: *Abdelrazik v Canada* [2009] FCJ 656 (Zinn J), [91]-[92]. Abdelrazik was the subject of a UN global travel ban, as a suspected associate of al-

Nureddin.[157] There is insufficient space to cover all of these agency-to-agency cases, which is why I have chosen only two police-to-police examples.

118. I will give the outline of these two case-studies below. I will return to them again in more detail throughout this thesis where they illuminate a particular point.

3.1 Information sharing between AFP and INP: the 'Bali Nine'

119. On 8 April 2005, the AFP voluntarily supplied information to the Indonesian National Police (INP) about several Australian citizens in Bali who were suspected of planning to smuggle heroin from Indonesia to Australia.[158] The AFP liaison officer in Bali sent two formal letters to the INP, requesting that the Indonesians keep the Australian suspects under surveillance and that, should the INP suspect that the organiser and/or couriers were in possession of drugs at the time of their departure for Australia, then the INP should 'take what action they deem appropriate'.[159] Acting on this tip-off, INP officers began a surveillance operation.

120. On 17 April 2005, the INP arrested nine Australians in Bali on charges of heroin trafficking.[160] They were tried in Indonesia and, after prosecution appeals of

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Qaeda. Citing its obligation to respect the UN ban, the Canadian government refused to issue travel documents for Mr Abdelrazik to return from Sudan to Canada. The court found this a breach of Abelrazik's *Charter* right to enter Canada, and ordered his repatriation, which the government then facilitated.

[157] See: Frank Iacobucci, *Report of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (2008), <http://www.iacobucciinquiry.ca/en/home.htm>. Mr Elmaati was detained and tortured in Syria and Egypt, partially on the strength of information provided by the RCMP and CSIS. Mr Almalki was detained and tortured in Syria, indirectly because the RCMP shared its entire investigations database with US law enforcement. Mr Nurredin was detained and tortured in Syria, partially on the strength of information provided to foreign law enforcement agencies by the RCMP and CSIS. Commissioner Iacobucci endorsed the recommendations of the Arar Commission.

[158] the letters were admitted into evidence in an Australian court: see, *Rush v Commissioner of Police* [2006] FCA 12, [22]-[23], <http://www.austlii.edu.au/au/cases/cth/FCA/2006/12.html.

[159] *Rush v Commissioner of Police* [2006] FCA 12, [22] (quoting letter from AFP Agent Paul Hunniford to INP dated 8 April 2005).

[160] *Rush v Commissioner of Police* [2006] FCA 12, [27].

'light' sentences, six of the nine were sentenced to death.[161] On 6 March 2008 on appeal, three of those death sentences were reduced to life imprisonment.[162] The other three remain on death row: two organisers and one 'mule' (courier).

121. Despite public disquiet about the AFP's actions, the AFP was unapologetic and the government supported the police.

3.1.1 Memorandum of Understanding

122. At no point had a formal request been made, by either Australian or Indonesian authorities, under the Mutual Legal Assistance Treaty between Australia and Indonesia.[163] At all times, the AFP agents involved were acting under a Memorandum of Understanding between the AFP and INP.[164] In evidence before a senate committee, AFP Commissioner Keelty made it clear that the sharing of such information is standard operating procedure under the Memorandum of Understanding between the AFP and the INP.[165]

123. It is important to note that the MOU in operation during the Bali Nine case was forged in the heady days after the Australian 'heroin drought', the *MV Tampa* crisis and the September 11 attacks on US soil. This confluence of events at the turn of the century resulted in the AFP's budget being increased almost five-fold (474%) over the decade from 1997/1998 to 2007/2008.[166] Australia needed

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[161] Cindy Wockner and Madonna King, *One-Way Ticket: the untold story of the Bali 9* (2006).
[162] Mark Forbes, 'Bali Three Spared Death' (6 March 2008) *The Age* (Melbourne), <http://www.theage.com.au/news/national/bali-three-spared-death-penalty/2008/03/06/1204402565563.html>.
[163] *Rush v Commissioner of Police* [2006] FCA 12, [30].
[164] *Rush v Commissioner of Police* [2006] FCA 12, [25]. For more about the MOU, see also: Senate Select Committee on a Certain Maritime Incident, *Final Report* (2002), <http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/report/index.htm>, [1.50] & 464-5 (Additional Comments of Senator Faulkner).
[165] Evidence of Mick Keelty (AFP Commissioner) to Senate Legal and Constitutional Legislation Committee (Supplementary Budget Estimates), Parliament of Australia, Canberra (31 October 2005), 170, <http://www.aph.gov.au/hansard/senate/commttee/S8859.pdf>.
[166] Total budget funding for AFP in financial year 1997/1998 was $A255m; in 2007/2008 was $A1.209bn. Sources: AFP, *Annual Report 2007/2008* (2008), <http://www.afp.gov.au/~/media/afp/pdf/a/afp-annual-report-2007-08.ashx>; and, AFP, *Annual Report 1997/1998* (1998), <http://www.afp.gov.au/~/media/afp/pdf/a/afp-annual-report-1997-98.ashx>.

Indonesia's cooperation to combat regional terrorism, drug smuggling and people smuggling at its source. The relationship between the AFP and the INP was seen as crucial and Australia invested a significant amount of time and money supporting and improving that relationship, including establishing the INP Transnational Crime Coordination Centre[167] and the Jakarta Centre for Law Enforcement Cooperation.[168] As members of the Bali Nine discovered, the rights of individuals were given a very low priority in this political climate.

3.1.2 AFP guidelines in death penalty situations

124. In addition to the MOU, AFP agents in the Bali Nine case had internal guidelines to follow. In situations where the death penalty might apply, AFP agents operate under a document entitled the *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*.[169] I have already examined these guidelines in greater detail.[170] But it is worth reiterating that the guidelines permit AFP agents to cooperate at their own discretion prior to criminal charges being laid, i.e. at the investigatory stage. Once charges have been laid, then cooperation can continue only when authorised by the Attorney-General or statute.[171] The guidelines have been widely criticised for being inconsistent with Australia's international obligations with respect to the death penalty.

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[167] see: AFP, *Annual Report 2007/2008* (2008), n 166, 64.
[168] see: AFP answer to Question on Notice No.240 of Senate Legal and Constitutional Committee, Estimates Hearings (31 October 2005), <http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/sup_0506/ag/qon_240.pdf>. For more information, see the Centre's website: <http://www.jclec.com>. The EU has also provided money to build an accommodation complex and to sponsor conferences at the JCLEC: Commissioner Mick Keelty (speech to Law Council of Australia, Canberra) 23 March 2007, 11, <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=E3FB6C79-1E4F-17FA-D2E0-5A83E377CEC0&siteName=lca>.
[169] *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (April 2004): "the AFP may provide such [police-to-police] assistance as requested, provided it meets existing policy guidelines, irrespective of whether the investigation may later result in charges being laid which may attract the death penalty".
[170] see [62] ff.
[171] e.g. under the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

3.2 information sharing between RCMP and US authorities: Maher Arar

125. On 26 September 2002, Mr Maher Arar arrived at John F Kennedy airport in New York City from Tunisia via Zurich, in transit to Montréal.[172] Mr Arar was detained and incarcerated by US authorities. On 8 October 2002, he was formally denied access to the United States on the grounds that he was found to be a member of a foreign terrorist organisation, specifically al-Qaeda.[173] Mr Arar is a dual Canadian-Syrian citizen. Against his wishes and to the surprise of Canadian officials, Mr Arar was removed from the United States to Syria, where he was detained until his release on 5 October 2003.[174] During his detention in Syria, Mr Arar was tortured and kept in degrading and inhumane conditions.[175] After his release from Syrian detention, Mr Arar returned to Canada,[176] where his case was the subject of a Commission of Inquiry into the conduct of Canadian officials in relation to Mr Arar's ordeal.[177]

3.2.1 The Arar Inquiry

126. The Commission of Inquiry, conducted by his Honour Mr Justice Dennis O'Connor, concluded *inter alia* that 'it is very likely that [American authorities] relied on information received from the Royal Canadian Mounted Police (RCMP) in making the decision to remove Mr Arar to Syria'.[178] The Commissioner could not be more

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[172] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background Volume 1* (2006), Ch.2.
[173] Arar Commission, *Factual Background Vol.1* (2006), n 172, 205.
[174] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background Volume 2* (2006), Ch.4.
[175] 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), 9 & 57.
[176] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background Volume 2* (2006), Ch.4.
[177] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. The archived documents of the Commission of Inquiry are available at: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/index.htm>.
[178] Arar Commission, Analysis and Recommendations (2006), n 175, 157.

emphatic, because American authorities declined to testify or provide evidence to the inquiry and therefore the inquiry did not have access to classified information upon which the US removal order was based.[179]

127. After the terrorist attacks on New York City and Washington DC of 11 September 2001 ('the 9/11 attacks'), Canadian security and law enforcement officials moved swiftly to prevent further incidents. The Canadian Security Intelligence Service (CSIS), which suspected Ottawa-resident Mr Abdullah Almalki of terrorist-related activity, transferred its investigation of Mr Almalki to the RCMP. In turn, the RCMP established Project A-O Canada ('Project AOC') to investigate Mr Almalki. Mr Arar came to the attention of Project AOC when, on 12 October 2001, he met Mr Almalki in an Ottawa cafe and they spent the next three hours together.[180] Between this time and his detention at JFK airport in September 2002, Mr Arar was never suspected of committing any offence; he was only ever a person of interest to Project AOC's investigation because of his association with Mr Almalki.[181]

128. Project AOC was different from most traditional criminal investigations for several reasons. First, it was a criminal investigation related to national security matters, rather than being related to the domestic criminal activity with which Project AOC officers were familiar. Second, its primary mandate was to detect and prevent terrorist threats *before* they occurred, rather than to investigate and prosecute a criminal act *after* it had been committed. Third, the sense of urgency following the 9/11 attacks had led to a verbal directive from RCMP headquarters to share information expeditiously with other agencies, including US partner agencies such as the FBI. The Arar Commissioner was critical of the lack of supervision provided to Project AOC officers by senior RCMP officers, given that most Project AOC officers were inexperienced, and had received little or no training, in national

[179] Arar Commission, Analysis and Recommendations (2006), n 175, 156.
[180] Arar Commission, Factual Background Vol.1 (2006), n 172, 53.
[181] Arar Commission, Analysis and Recommendations (2006), n 175, 69.

security-related or preventative-type investigations.[182] However, his Honour was most critical of the manner in which Project AOC shared information with its American counterparts.

129. It should be noted that Justice O'Connor found no bad faith on the part of Project AOC officers.[183] The Commissioner accepted the RCMP's evidence that no one understood that the Americans would remove Mr Arar to Syria.[184] The inquiry report concludes that Project AOC's errors were sloppy work attributable to a lack of training, experience and supervision.[185]

130. The Arar inquiry identified three main problems with the way Project AOC shared information with American authorities. First, that Project AOC failed to follow the standard RCMP procedures for information sharing. Second, some of the information it shared was inaccurate and misleading. Third, Project AOC failed to respect the caveats of other Canadian agencies by passing information provided by those agencies on to other agencies (domestic and foreign) without obtaining permission.

3.2.2 Failure to follow standard procedures

131. Within a few days of the 9/11 attacks, the RCMP had reached a verbal 'free-flow-of-information agreement' with their American counterparts to assist in preventing further attacks.[186] As a result of that agreement, an Assistant Commissioner of the RCMP told his officers to 'share as much information as possible in real time'.[187] This was interpreted by Project AOC officers to mean that they were conducting an 'open book investigation' and could share information without following standard RCMP information sharing procedures.[188] Senior executive officers of the RCMP, however, testified at the inquiry that this was never their

[182] Arar Commission, Analysis and Recommendations (2006), n 175, 75-77.
[183] Arar Commission, Analysis and Recommendations (2006), n 175, 145.
[184] Arar Commission, Analysis and Recommendations (2006), n 175, 140.
[185] Arar Commission, Analysis and Recommendations (2006), n 175, 24, 71-2 & 77.
[186] Arar Commission, Factual Background Vol.1 (2006), n 172, 38 & 41.
[187] Arar Commission, Factual Background Vol.1 (2006), n 172, 39-40.
[188] Arar Commission, Analysis and Recommendations (2006), n 175, 119.

intention and that they had still expected operational officers to follow these standard procedures.

132. The RCMP's standard information sharing procedures require caveats to be placed on shared information to limit its use, and require all information to be screened for relevance, reliability/accuracy and personal information before sharing it. In this context, a caveat is a written note attached to a document stating that the attached document and its contents are the property of the sharing agency, that the information is provided for intelligence purposes only and that neither the document nor its contents may be used for any other purpose or shared with any other agency without first obtaining the permission of the sharing agency. I will discuss the role and usage of caveats in more detail later in this paper.[189]

133. Initially, senior command staff were present when Project AOC officers met with FBI agents.[190] However, from late October 2001, Project AOC developed a direct relationship with the FBI, which intensified over time. Senior RCMP officials and the managers of Project AOC were aware that information shared with the FBI might be passed on to the CIA.[191] Periodically, Project AOC officers had direct contact with CIA agents.[192] When Project AOC shared information with American agencies, it contravened RCMP policy by failing to place written caveats on the documents and by failing to screen the information for relevance, reliability or personal information.[193]

134. In late February 2002, FBI agents were given access to all physical files and material collected by Project AOC, including Mr Arar's file.[194] In April 2002, Project AOC made an electronic copy of all investigation documents on their computer

[189] see [439] ff.
[190] Arar Commission, Factual Background Vol.1 (2006), n 172, 85.
[191] Arar Commission, Factual Background Vol.1 (2006), n 172, 88.
[192] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background Addendum* (2006) 85.
[193] Arar Commission, Analysis and Recommendations (2006), n 175, 65.
[194] Arar Commission, Factual Background Vol.1 (2006), n 172, 88ff.

database, including exhibits, statements, internal memos and reports.[195] The information was given to the FBI on three CDs.[196] This disclosure, of an entire investigation's files, was unprecedented. None of the RCMP officers and executives who testified at the Arar inquiry knew of any other instances.[197] It should be noted that Project AOC was at all times an RCMP investigation. It was never a joint investigation with the FBI.[198] The FBI, and other Canadian and US agencies involved, were being kept informed of Project AOC's progress to facilitate a larger effort to prevent further terrorist attacks. The close relationship between the RCMP and FBI continued after the US removed Mr Arar to Syria. It was only in October 2002, after CSIS stepped in to express its concern about the close contact, that FBI access to Project AOC offices was curtailed.[199]

3.2.3 Inaccurate and misleading information

135. Some of the information shared with the Americans related to Mr Arar. The Arar Commissioner examined all this information and found that it was sometimes inaccurate, inflammatory and unfairly prejudicial to Mr Arar. Justice O'Connor criticised Project AOC officers for overstating Mr Arar's importance to their investigation, having:[200]

> ...variously described Mr Arar as a suspect, a target, a principal subject of its investigation, a person with an 'important' connection to Mr Almalki, a person directly linked to Mr Almalki in a diagram titled "Bin Laden's Associates: Al Qaeda Organization in Ottawa" and a business associate or a close associate of Mr Almalki.

136. As Justice O'Connor observes, in the context of the US response to the 9/11 attacks, it was extremely dangerous to describe Mr Arar in this way. It is important to recall that Arar was never charged with any offence and he was never a suspect of the Project AOC investigation. Mr Arar was only ever a person

[195] Arar Commission, Analysis and Recommendations (2006), n 175, 119.
[196] Arar Commission, Factual Background Vol.1 (2006), n 172, 91-100.
[197] Arar Commission, Analysis and Recommendations (2006), n 175, 119.
[198] Arar Commission, Factual Background Vol.1 (2006), n 172, 112.
[199] Arar Commission, Factual Background Vol.1 (2006), n 172, 112.
[200] Arar Commission, Analysis and Recommendations (2006), n 175, 25.

of interest to the investigation, about whom Project AOC made inquiries and never unearthed any evidence linking him to Al-Qaeda or any terrorist group.

137. In October 2001, Project AOC sent a request to US and Canadian Customs officials to place Mr Arar, his wife (Dr Mazigh) and other individuals on border lookout lists. The request's cover letter describes the subjects of the lookout request as 'a group of Islamic Extremist individuals suspected to being linked to the Al Qaeda terrorist movement'.[201] The request to US authorities would have been placed on US Custom's TECS database. Evidence of one expert witness at the Arar inquiry described this database as 'the mother of all databases', perhaps because there is no automatic removal of information from the database unless requested when the information is entered.[202] Several US agencies have access to this database, including the CIA and the National Central Bureau (NCB) of Interpol in Washington DC.[203] Without the benefit of the testimony of American officials, the inquiry could not determine how or whether this inflammatory misstatement affected the American view of Mr Arar.

138. Another example of Project AOC providing unfair information about Mr Arar to American authorities occurred when Mr Arar was first detained in New York City. At the invitation of the FBI, a Project AOC officer faxed to the FBI a list of investigative questions to be asked of Mr Arar. The information sent to the FBI included an assertion that Mr Arar was in the vicinity of Washington DC on 11 September 2001, when in fact Mr Arar had actually been in San Diego on that day. The fax also indicated that Mr Arar had refused to be interviewed by the RCMP and had 'soon after…departed [Canada] rather suddenly for Tunisia'.[204] This information is untrue and cast Mr Arar in a very suspicious light. Project

[201] Arar Commission, Factual Background Vol.1 (2006), n 172, 62.
[202] Arar Commission, Factual Background Vol.1 (2006), n 172, 61.
[203] the Washington NCB is staffed by US law enforcement officials and is co-managed by the US Departments of Justice and Homeland Security: see UNNCB, 'Who we are', <http://www.usdoj.gov/usncb/whoweare/index.php> accessed 1 April 2009.
[204] Arar Commission, Analysis and Recommendations (2006), n 175, 144.

AOC's fax did not include a written caveat, but it did include an explicit assessment that the RCMP had never been able to link Mr Arar with Al-Qaeda.

3.2.4 Failure to caveat shared information

139. Finally, the inquiry found that Project AOC ignored the RCMP policy to respect caveats and to seek the permission of the caveators before sharing their information.[205]

140. RCMP procedure mandates the use of written caveats when sharing information with foreign agencies wherever the information 'warrants safeguarding' ("designated") or is 'sensitive to the national interest' ("classified").[206] The Arar Commissioner endorsed this policy. As examples of standard RCMP caveats in national security situations, the Commissioner quotes:[207]

> 1. "This document is the property of the RCMP. It is loaned to your agency/department in confidence and it is not be reclassified or further disseminated without the consent of the originator."
>
> 2. "This document is the property of the Government of Canada. It is provided on condition that it is for use solely by the intelligence community of the receiving government and that it not be declassified without the express permission of the Government of Canada."

141. In the Arar case, the RCMP repeatedly failed to caveat information. For example, the three CDs handed to the FBI and containing all of the investigation's documents included caveated documents of CSIS and Canada Customs.[208] This allowed US agents, without reference to the RCMP, to share this information with others, presumably including Syrian and Egyptian agencies.

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[205] the policy in mentioned at: Arar Commission, Analysis and Recommendations (2006), n 175, 106.
[206] Arar Commission, *Analysis and Recommendations* (2006) n 175, 339ff.
[207] Arar Commission, *Factual Background Vol.1* (2006), n 172, 31.
[208] Arar Commission, Analysis and Recommendations (2006), n 175, 124.

4 Legal obligations affecting information sharing

142. The legal framework in which police operate domestically is well-defined. However, the legal framework in which police operate beyond their borders is less well-defined. There are two situations in which policing has international consequences: first, when police travel abroad and act in a foreign jurisdiction; and second, when police act domestically but their actions have consequences abroad.

143. Police can operate as state agents abroad, for example when police physically participate in operations in another country. Complex questions of legal jurisdiction arise in these circumstances. State agents abroad are bound by the law of the country in which they operate, but they also bound by their own domestic law. These two sets of laws sometimes conflict, such as when only one of the legal systems prohibits executions.

144. Police can also take actions within their own domestic jurisdiction that have consequences abroad, including adverse human rights consequences such as exposing someone to the real risk of torture or execution. Questions of conflicting jurisdictions rarely arise in these circumstances because all actions occur domestically. Some aspects of international cooperation in criminal law are well structured legally, such as extradition and mutual legal assistance law – both of which are strictly regulated by statute and treaty. On the other hand, informal transnational police-to-police cooperation is only loosely regulated by domestic legislation and policy.

145. This section briefly examines the domestic role of policing. It then examines the domestic and international legal frameworks which have evolved to regulate it. Issues of international human rights law are dealt with in the next section,

because the role of that area of law in the regulation of policing is less well acknowledged or accepted.

4.1 Domestic Obligations

146. Domestic law defines and limits the powers of modern police. In both Canada and Australia, the national police forces are established in legislation which also sets out the duties and goals of the force.[209] In Canada, the RCMP Act expressly sets out the standards required of every member of the force, including 'to respect the rights of all persons'.[210] There are also constitutional limits, primarily arising from the *Charter of Rights and Freedoms*.[211] I do not intend to trace these obligations in any detail here, only to point out their existence and importance. The AFP Act has no equivalent respect-the-rights-of-all-persons provision; nor is there a single federal legislative or constitutional Bill of Rights.

147. Policing can be seen as an organ of state power. Max Weber once famously wrote that the state is defined by its success at monopolising the legitimate use of force in its territory.[212] Police are one of the state institutions delegated to exercise this monopoly on violence. Friedrichs argues that 'there is no direct link from the legitimacy of force to its physical use'.[213] To extend this legitimacy from theory to practice, Friedrichs traces a "chain of coercion" which connects the legitimisation of force to particular choices (made by the state) of coercive methods. He identifies five links or 'levels' in this chain: discursive; juridical; legitimisation; authorisation; and operational.[214] To maintain its monopoly on

[209] *Royal Canadian Mounted Police Act 1985*, RSC 1985, c.R-10; *Australian Federal Police Act 1979* (Cth). See also: [153]-[155].
[210] *Royal Canadian Mounted Police Act 1985*, RSC 1985, c.R-10, s.37(1). There is also a Code of Conduct (Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, Part III), made pursuant to RCMP Act, s.38.
[211] see e.g. James Stribopoulos, 'In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*' (2005) 31 *Queen's Law Journal* 1 (the role of the judiciary in creating police powers).
[212] Max Weber, *Politics as a Vocation* (1918).
[213] Jörg Friedrichs, *Fighting Terrorism and Drugs: Europe and international police cooperation* (Routledge, London: 2008) 6.
[214] Friedrichs (2008), n 213, 6-7.

violence, the state must control all five levels. Applying these levels to policing, Friedrichs identifies the following stages of the justification for legitimate police violence:[215]

1. *normative discursive conceptualisation of deviant behaviour*: that is, identifying the behaviours which require the intervention of state violence. Or put another way, deciding what is and is not a crime;
2. *juridical legitimisation of crime fighting*: that is, deciding 'what constitutes a legitimate and legal case for enforcement' by police;
3. *selection of appropriate methods for the repression of crime*: for example, whether strip-searching or torture is appropriate;
4. *authorisation for police intervention*: that is, identifying the circumstances under which it is appropriate to exercise these powers; and,
5. *operational law enforcement*: that is, exercising control over operational policing. For example, through bodies which hold police accountable for their actions, such as courts and ombudsmen.

148. Weberian theory, and Friedrichs' analysis, are useful in this thesis to the extent that they offer an insight in to why and how the state defines and limits the powers of police. This is a top-down approach, which places the role for defining legitimate force in the hands of the state. At each of Friedrichs' levels, there is a process of definition *and*, both implicitly and explicitly, limitation. This is a very broad brush, which does not seek to account for the independent actions of individual officers. It does not include, for example, an account for the discretion of police to exercise their powers in any given situation. The Weberian theory exists at a 'macro' level, where the theory seeks to explore how the *state* decides when force is appropriate and how the state legitimises that decision. For our purposes, we can draw from this analysis a conclusion that, politically, it is the state (constituted as government, parliament and courts) that decides what limitations will be placed on policing. There must be a political will to limit policing

[215] Friedrichs (2008), n 213, 6-7.

on any given ground, and those limitations are expressed through policy, legislation and case law.

149. Both the RCMP and AFP must comply with ministerial directions.[216] In Australia, this is done by way of written 'Ministerial Directions',[217] which sets out broad statements of expectations and priorities such as "contributing effectively to the Government's international law enforcement interests including matters involving cooperation to combat transnational organised crime...". The RCMP complies with several ministerial directives, including one on entering into information sharing and cooperation with domestic and foreign agencies.[218]

4.1.1 the role and legal duties of police

150. This short section examines the traditional domestic role of police and the source of their legal authority and duties.

151. In the English-speaking world, the genesis of modern policing is generally attributed to the reforms instituted in England by Sir Robert Peel, who synthesised a uniquely English concept of policing in the establishment of the Metropolitan Police in 1828.[219] Reiner identifies two main schools of thought on the creation of the Metropolitan Police by Peel. In the 'orthodox' view, the Industrial Revolution led to a breakdown in law and order which required the creation of a police force to restore order.[220] The English form of policing had its roots 'in ancient traditions of communal self-policing'.[221] The police, recruited from the general population, as opposed to from the gentry, were the protectors of the poor and working class, who were collectively perceived as the source of most crime. In the 'revisionist' view, the new middle class, having profited from the redistribution of land and the

[216] *Australian Federal Police Act 1979* (Cth) s.37(2); *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s.5(1).
[217] For most recent direction, see: *Ministerial Direction* (August 2008), <http://www.afp.gov.au/services/operational_priorities/ministerial_direction.html>.
[218] Arar Commission, *Analysis and Recommendations* (2006) n 175, 321. See also [455].
[219] R. Reiner, *The Politics of the Police* (Oxford: OUP, 2000, 3rd ed); see also, Peter Manning, *Police Work: the social organization of policing* (Waveland Press: 1997, 2nd ed) 49, 72-9.
[220] Reiner (2000), n 219, 19ff.
[221] Reiner (2000), n 219, 19.

Industrial Revolution, needed a police force to protect their position and property from the working class.[222]

152. Whatever the impetus, the Metropolitan Police became a model for most of the English-speaking world. It is a model based on low-profile legalistic consensual policing. Reiner identifies eight policies that assisted the manufacture of this consent of the public to being policed:[223]

    a. creation of full-time merit-based professional force;

    b. respect for the Rule of Law, i.e. police are subject to the law;

    c. adoption of a strategy of minimal force, whereby force was an option of last resort;

    d. non-political constabulary, independent of government and government policy;

    e. police are not 'above' the citizenry, but citizens themselves;

    f. police perform a public service role;

    g. emphasis on preventative policing by uniformed officers, who visibly patrol the streets to deter crime; and,

    h. cultivating a perception of police as being effective at their 'core mandate of crime control and order maintenance'.

153. Contemporary police forces, like the Metropolitan Police of 1828, are creatures of statute. Their primary functions are laid out in legislation, as are the duties of police officers to perform those functions. All police officers must swear an oath

[222] Reiner (2000), n 219, 27ff.
[223] Reiner (2000), n 219, 51ff.

or affirmation that they will perform these duties.[224] The duties of all RCMP officers, subject to the orders of the Commissioner, include:[225]

> ...the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody.

154. The AFP's enabling Act defines 'police services' as: 'the prevention of crime and the protection of persons from injury or death, and property from damage...'.[226] The function of the Australian Federal Police includes the provision of police services in relation to the laws and property of the Commonwealth 'and the safeguarding of Commonwealth interests'.[227]

155. These duties and functions, it could be argued, constitute statutory duties. This is certainly what the RCMP argued before the Iacobucci Inquiry.[228] This duty is presented with unique challenges as police forces increasing recognise that much of the crime they are fighting requires transnational cooperation. Indeed, in 2005, the AFP Act was amended *inter alia* to clarify 'the scope of the functions of the Australian Federal Police in the current environment of increasingly globalised criminal activity and law enforcement responses...including in criminal investigations and major disaster situations'.[229] As a consequence, the AFP's functions now also include the provision of police services:[230]

> ...for the purposes of assisting, or cooperating with, an Australian or foreign:
>
> (i) law enforcement agency; or
>
> (ii) intelligence or security agency; or

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[224] *Royal Canadian Mounted Police Act 1985*, RSC 1985, c.R-10, s.14(1) & Schedule 'Oath of Office'; *Australian Federal Police Act 1979* (Cth) s.36(3), and Australian Federal Police Regulations 1979 (Cth) Sch 1, forms 2 (oath) & 3 (affirmation).
[225] *Royal Canadian Mounted Police Act 1985*, RSC 1985, c.R-10, s.18(a).
[226] *Australian Federal Police Act 1979* (Cth) s.4(1)("police services").
[227] *Australian Federal Police Act 1979* (Cth) s.8(b).
[228] Iacobucci Inquiry, Report (2008) n 157, 85.
[229] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 2005, 7 (Philip Ruddock, Attorney-General), Second Reading Speech, Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth).
[230] *Australian Federal Police Act 1979* (Cth) s.8(bf), inserted by *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth) Sch.4, s.5.

(iii) government regulatory agency;

156. Police are also subject to other laws, such as the provisions of the relevant Privacy Acts. The RCMP is also subject to the provisions of the constitutional *Canadian Charter of Rights and Freedoms*. As Australia has no equivalent constitutional Bill of Rights, the AFP is not subject to a comprehensive human rights document.[231]

157. In the context of transnational policing, the fundamental question becomes: what should police officers do if they are cooperating with a foreign agency and the laws of that foreign country conflict with the laws and obligations of the officer's own country? Which law should they obey? Should they respect the sovereignty of the foreign country, or obey the law they are sworn to uphold? This is another way of stating the questions discussed in this thesis.

4.2 International Obligations

158. There are two human rights issues which have attracted much controversy recently in the context of transnational policing. The first is torture, in the context of counter-terrorism policing, in the context of a post-September-11 world. Specifically, the RCMP has been criticised for the manner in which it has shared information with US law enforcement agencies. The second issue is the death penalty, in the context of the policing of the international drug trade and counter-terrorism. Specifically, the AFP has been criticised for the manner in which it has shared information with Indonesian and other South-East Asian police forces.

4.2.1 To expose no one to the real risk of execution

159. The obligation to expose no one to the real risk of execution does not appear expressly in any international human rights treaty. Instead, it arises as an implication from state practice and UN treaty law. This is analogous to the *non-refoulement* implications found in extradition and mutual assistance law. In that body of law, bilateral treaties sometimes expressly include protection against

[231] see "Domestic Obligations" on p.57.

refouement. As Gilmore observes, such bilateral treaties sometimes go 'above and beyond' the individual protections found expressly in the UN human rights treaties.[232] However, this level of protection is often only found in the UN human rights treaties by implication.

160. The UN Human Rights Committee is the treaty-based committee responsible for interpreting the ICCPR and the Second Optional Protocol attached thereto.[233] It is therefore appropriate to turn to its jurisprudence on this issue. In 1997, the UN Human Rights Committee found that the Second Optional Protocol obliges ratifying nations not to expose anyone to the real risk of execution for any offence. In 2003, the Committee found that the ICCPR itself places the same obligation on ratifying countries that have already abolished the death penalty.

161. Both the ICCPR and the Second Optional Protocol are silent on the law of extradition. They do not expressly prohibit the extradition of a fugitive to a retentionist nation. There is no mention of extradition in the Special Rapporteur's report on the Second Optional Protocol. In 1994, some members of the UN Human Rights Committee were of the view that the Second Optional Protocol does not affect the law of extradition.[234] However, the Committee's jurisprudence has developed since then.

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[232] William Gilmore, 'The Provisions Designed to Protect Fundamental Rights in Extradition and Mutual Legal Assistance Treaties' in *International Co-operation in Criminal Matters: Balancing the Protection of Human Rights with the Needs of Law Enforcement* (Commonwealth Secretariat, 2001) 67.

[233] Australia recognises the competence of the UN Human Rights Committee to receive and consider complaints by declaration made on 28 January 1993 under ICCPR Article 41 (complaints from States), ratification of the *First Optional Protocol to the ICCPR* (complaints from individuals) and the *Second Optional Protocol to the ICCPR* (Articles 4 & 5). Similarly, Canada also recognises the competence of the UNHRC by declaration made on 29 October 1979 under ICCPR Article 41, and ratification of both Optional Protocols attached to the ICCPR. *First Optional Protocol to the International Covenant on Civil and Political Rights 1966* [1991] ATS 39 (entered into force internationally, 23 March 1976; for Australia, 25 December 1991; for Canada 19 August 1976). *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 1989* [1991] ATS 19 (entered into force internationally & for Australia, 11 July 1991; for Canada 25 February 2006).

[234] *Cox v Canada* (1994) UN Doc CCPR/C/52/D/539/1993 (joint opinion of Herndl & Sadi). See also: William Schabas, *The Abolition of the Death Penalty in International Law* (2002, 3rd ed) 32-33, 187.

162. In 1997, the UN Human Rights Committee heard two important *refoulement* (return) cases against Australia: *ARJ v Australia* and *GT v Australia*.[235]

163. ARJ, an Iranian national, was convicted of drug supply in Australia. After he had served his sentence, Australia wanted to deport him to Iran. Mr J complained to the UN Human Rights Committee, arguing that if Australia deported him to Iran then it would violate his right to life (ICCPR Article 6). On the case before them, the Committee accepted the evidence of Australia that Mr J was not at risk of execution if returned to Iran and therefore found that Australia would not violate the ICCPR by deporting Mr J.

164. On the law, the Committee observed that the ICCPR does not 'necessarily require Australia to refrain from deporting an individual to a State which retains capital punishment'.[236] Relevantly, the beginning of Article 6 of the ICCPR states:

> **Article 6 – Right to Life**
>
> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes…

165. Reading paragraphs 6(1) and 6(2) together, the Committee concluded that Australia would only violate the ICCPR if it exposed Mr J to a real risk of being executed for offences other than 'the most serious crimes'.[237] The Committee defined a 'real risk' as a 'necessary and foreseeable consequence'.[238]

166. It is worth noting that this obligation applies to all state parties to the ICCPR, including those which still practice capital punishment. Capital punishment is not prohibited by international customary law.[239] Nor is it prohibited by the ICCPR, given that article 6(2) expressly contemplates such a penalty. However, it does

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[235] *ARJ v Australia* (1997) UN Doc CCPR/C/60/D/692/1996; and, *GT v Australia* (1997) UN Doc CCPR/C/61/D/706/1996.
[236] *ARJ v Australia* (1997) UN Doc CCPR/C/60/D/692/1996, [6.13].
[237] *ARJ v Australia* (1997) UN Doc CCPR/C/60/D/692/1996, [6.11].
[238] *ARJ v Australia* (1997) UN Doc CCPR/C/60/D/692/1996, [6.8].
[239] see e.g.: *Al-Saadoon & Mufdhi v Secretary of State for Defence* [2009] EWCA Civ 7 (Court of Appeal), [57]-[71] (finding no rule at customary international law prohibiting capital punishment).

not follow that all forms of capital punishment are acceptable or that retentionist countries are permitted to expose people to all forms of capital punishment.

167. A few months after publishing its observations in *ARJ v Australia*, the Committee examined the case of *GT v Australia*.[240] GT, an Australian citizen, was married to Mr T, a Malaysian citizen who was under threat of deportation from Australia to Malaysia. Mr T had been convicted in Australia of importing drugs from Malaysia. After he had served his sentence, Australia wanted to deport him to his homeland. Mrs T complained to the UN Human Rights Committee, arguing that if Australia deported her husband to Malaysia then it would violate his right to life (ICCPR Article 6) because drug offences in Malaysia attract a mandatory death sentence. On the facts before it, a majority of the Committee found no violation of the ICCPR because it accepted Australia's evidence that Mr T would not face execution if returned to Malaysia.

168. On the law, the Committee modified its interpretation of Australia's human rights obligations. The Committee observed that Australia has ratified the Second Optional Protocol, which imposes additional obligations. Whereas the ICCPR imposes an obligation not to expose anyone to the real risk of execution for offences other than 'the most serious crimes', the Second Optional Protocol imposes a broader obligation not to expose anyone to the real risk of execution <u>for any offence</u>.

169. In 2003, the Committee revisited and revised this jurisprudence. The case of *Judge v Canada* involved a US citizen, Mr Judge, who was sentenced to death in the US for murder. Mr Judge escaped his US prison and fled to Canada, where he committed two robberies and was sentenced to 10 years imprisonment. When Canada tried to deport Mr Judge back to the United States, he sent a complaint to

[240] , *GT v Australia* (1997) UN Doc CCPR/C/61/D/706/1996.

the UN Human Rights Committee alleging a violation by Canada of his right to life.[241]

170. The Committee departed from its earlier decision in *ARJ* and reinterpreted paragraphs 6(1) and 6(2) of the ICCPR:[242]

> Paragraph 1 of article 6, which states that "Every human being has the inherent right to life..." is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. ...For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application.

171. Unlike its earlier decision in *ARJ v Australia*, the Committee concluded that paragraph 6(2) only applies to those State parties that 'have not abolished the death penalty'. Therefore abolitionist countries are obliged by paragraph 6(1) to protect life in all circumstances. The implied obligation on all abolitionist countries is that they will not expose anyone to the real risk of execution. This is the same obligation implied under the Second Optional Protocol (*GT v Australia*). The obligation attaches whether an abolitionist party to the ICCPR has ratified the Second Optional Protocol or not.[243]

172. The Committee went on to conclude that Canada (an abolitionist country) would violate Mr Judge's right to life by deporting him to the United States (a retentionist country) without first obtaining a guarantee that Mr Judge would not be executed.

173. It should be observed that this is a negative obligation (an obligation to refrain from an action), not a positive obligation (a duty to act). This point was made in a recent Canadian administrative law case in which a Canadian on death row in the US attempted to use *Judge v Canada* to argue that Canada was obliged to assist him.[244] The Federal Court judge, while not using these words, essentially limited *Judge v Canada* to an obligation to refrain from any action that exposes a person to the real risk of the death penalty in another state.

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[241] *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998.
[242] *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998, [10.4].
[243] *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998, [10.6].
[244] *Ronald Smith v Canada* [2009] FCJ 234, [55] (Barnes J).

174. I also note that in *Judge v Canada* the UN Human Rights Committee states that abolitionist nations are obliged to protect life *in all circumstances*. This language is very general. I would argue that this generality extends the obligation beyond these extradition cases and encompasses all actions by a State and its agents. This includes, for example, the actions of RCMP officers or AFP agents when cooperating or sharing information with foreign police agencies in retentionist countries. This means that extra care must be taken when Canadian and Australian police cooperate with their counterparts from countries like the United States of America, Indonesia and the Peoples Republic of China.

175. Finally, though it has not been asked to decide the issue, it is highly likely that the Committee would conclude that all parties to the ICCPR – both abolitionist and retentionist – must not expose any one to the real risk of a mandatory death sentence – even for 'the most serious offences'. This arises as an implication from the Committee's expressed view that the automatic and mandatory imposition of a death sentence constitutes an arbitrary deprivation of life and, as such, is a violation of an individual's article 6(1) right to life.[245] This arbitrariness cannot be cured or justified by article 6(2). Therefore, an implication must arise that no state party to the ICCPR may expose anyone to the real risk of a mandatory death sentence.

176. In summary, there are two degrees of this obligation for parties to the ICCPR. For those parties which retain capital punishment: they must not expose anyone to the real risk of a mandatory death sentence or of execution for any offence other than for 'the most serious crimes'. For those parties which have abolished the death penalty and/or ratified the Second Optional Protocol: they must not under any circumstances expose anyone to the real risk of execution for any offence.

[245] e.g. *Weerawansa v Sri Lanka* (2009) UN Doc. CCPR/C/95/D/1406/2005.

4.2.2 To expose no one to the real risk of torture

177. The position with respect to torture is more straightforward and less controversial than it is for capital punishment.

178. Torture and cruel, inhuman or degrading treatment or punishment are prohibited by Article 7 of the ICCPR. These forms of treatment are also prohibited by the UN Convention against Torture.[246] The prohibition on torture is absolute[247] and cannot be suspended or derogated during times of public emergency, including times of war.[248] Torture is prohibited during times of war by Article 2 of the Convention against Torture, Article 4(2) of the ICCPR and by the Geneva Conventions which form part of international humanitarian law (the law of armed conflict).[249] The International Criminal Court lists torture as a crime against humanity.[250] So widely is torture condemned by the international community that it has attained the status of a peremptory norm (*jus cogens*), which means that it 'enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules'.[251]

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[246] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984* [1989] ATS 21 (entry into force internationally, 26 June 1987; for Australia, 7 September 1989; for Canada, 24 July 1987).

[247] Convention against Torture, n 246, Article 2(2): 'no exceptional circumstances whatsoever...may be invoked as a justification for torture'. See also: UN Human Rights Committee, *General Comment 20: Article 7* (1992) UN Doc HRI/GEN/1, [3] ('The text of article 7 allows of no limitation.').

[248] ICCPR article 4(2), stating that no derogation may be made with respect to article 7 in times of public emergency.

[249] for a review of Geneva Conventions of 1949 and two attached protocols, which prohibit torture, see: *P v Furundžija* [1998] IT-95-17/1-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), [134]-[142], <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>. See also: Arar Commission, *Analysis and Recommendations* (2006) n 175, 51 & footnotes 5 & 6.

[250] *Rome Statute of the International Criminal Court 1998* [2002] ATS 15 (entered into force internationally and for Canada, 1 July 2002; for Australia, 1 September 2002), article 7(1)(f).

[251] e.g. *P v Furundžija* [1998] IT-95-17/1-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), [153]-[157]. See also: Matt Pollard, *The Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment under International Humanitarian Law: Source Texts* (2007, Association for the Prevention of Torture: Geneva), <http://www.apt.ch/component/option,com_docman/task,doc_download/gid,269/Itemid,59/lang,en/>; and, Arar Commission, *Analysis and Recommendations* (2006) n 175, 52 ('overrides any contradictory customary international law, treaty law or state practice').

179. The Convention against Torture requires states to criminalise the commission of, and participation or complicity in, torture.[252] The Convention also expressly prohibits *refoulement*.[253] The Convention also expressly extends a party's jurisdiction extraterritorially and universally.[254]

180. An implication arises from the Convention that states must not expose anyone to the real risk of torture. According to Professor Peter Burns, a state violates the Convention if it shares information knowing that the information will be used to torture someone.[255]

181. The Arar Commission was unequivocal in its recommendation that '[i]nformation should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture'.[256]

182. Recently, a senior CSIS lawyer who would not rule out cooperation in potential torture cases was publicly contradicted by the head of CSIS before the same House of Commons Committee.[257] The RCMP remains less than absolute, in evidence to the same committee:[258]

> I would like to be clear that there is no absolute ban on the use of any information received by the RCMP. However, we do not use information whose reliability, accuracy, and relevance is suspect. Information knowingly extracted under torture would by definition be unreliable. In the real world, the challenge is to make a judgment on the known facts about whether any particular information received is the result of torture. Our policy is based on making such assessments on a case-by-case basis.

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[252] Convention against Torture, n 246, Article 4.
[253] Convention against Torture, n 246, Article 3.
[254] Convention against Torture, n 246, Article 5. See the excellent analysis of Convention jurisdiction in: Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: a commentary* (2008) 116-7 & 308-21.
[255] Arar Commission, *Analysis and Recommendations* (2006) n 175, 52.
[256] Arar Commission, *Analysis and Recommendations* (2006) n 175, Recommendation 14, 345.
[257] evidence of Mr. Geoffrey O'Brian (Advisor, Operations and Legislation, CSIS) to Standing Committee on Public Safety and National Security, House of Commons (31 March 2009), 15-17. See also: 'Official misspoke; CSIS says it's not involved in torture' (2 April 2009) *The Star* (Toronto), <http://www.thestar.com/article/612514>.
[258] evidence of Chief Superintendent Gilles Michaud (Director General, National Security Criminal Operations Branch, RCMP) to Standing Committee on Public Safety and National Security, House of Commons (31 March 2009), 4.

183. The AFP Commissioner says that the AFP, when acting abroad, attempts 'as best we can' to adhere to Australia's obligations against torture.[259] This statement is less than absolute. However, when the Australian Attorney-General Phillip Ruddock publicly supported the Bush Administration view that sleep deprivation is not torture, Commissioner Keelty stridently contradicted him and stated that it was indeed a form of torture and the AFP did not practice it.[260]

4.2.3 international treaties

184. There are some international criminal law treaties which expressly raise obligations for police-to-police cooperation in the investigation of crime. Many of these are administered by the UN Office on Drugs and Crime (UNODC):[261] the United Nations *Convention Against Transnational Organized Crime* ('the TOC Convention') and the Protocols attached thereto;[262] the anti-drug conventions; and counter-terrorism treaties.

185. The TOC Convention has been ratified by both Canada and Australia.[263] The TOC Convention relates to the 'prevention, investigation and prosecution' of 'serious offences' conducted transnationally by organised criminal groups. 'Serious offences' are those attracting a term of imprisonment of 4 or more years,[264] as well as laundering the proceeds of crime,[265] corruption of public officials,[266] and obstructing the course of justice with respect to these offences. The Convention

[259] Mark Dodd, 'Sleep tactic is torture: Keelty' (5 October 2006) *The Australian* (Sydney) 3.
[260] Mark Dodd, 'Sleep tactic is torture: Keelty' (5 October 2006) *The Australian* (Sydney) 3. The Chief of the Australian Army also contradicted Ruddock publicly on this point: Sarah Smiles, 'Army contradicts Ruddock on torture' (2 November 2006) *The Age* (Melbourne) 2.
[261] website: <www.unodc.org>.
[262] *Convention Against Transnational Organized Crime 2000* [2004] ATS 12 (entered into force internationally and for Canada on 29 September 2003; entered into force for Australia, 26 June 2004). See generally: David McClean, *International Cooperation in Civil and Criminal Matters* (2002, 2nd ed), 221-3.
[263] Canada ratified on 13 May 2002; Australia ratified on 27 May 2004.
[264] TOC Convention, Article 2 ('serious offence').
[265] TOC Convention, Article 6.
[266] TOC Convention, Article 8.

relates to conspiracy, 'organising, directing, aiding, abetting, facilitating or counselling' these proscribed offences.[267]

186. The TOC Convention contains provisions for *inter alia* extradition (Article 16), mutual legal assistance (Article 18) and cooperation with respect to the confiscation of the proceeds of crime (Article 13). Article 19 encourages the establishment of joint investigation teams, under bilateral or multilateral agreements. Article 27 of the TOC Convention requires State Parties to cooperate closely with one another in terms of law enforcement (police-to-police) cooperation:

> States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. Each State Party shall, in particular, adopt effective measures: [*inter alia*] ... to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention...

187. Further, as the UNODC points out in relation to both the TOC Convention and the Convention against Corruption:[268]

> This general obligation to cooperate is not absolute; rather, it is to be conducted consistent with [a State party's] domestic legal and administrative systems. This clause gives States parties the ability to condition or refuse cooperation in specific instances in accordance with their respective requirements.

188. There are three protocols attached to the TOC Convention, relating to people trafficking;[269] migrant smuggling;[270] and, the illegal arms trade.[271] Canada and

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[267] TOC Convention, Article 5.

[268] UN Office on Drugs and Crime, *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) <http://www.unodc.org/unodc/en/organized_crime_convention_legislative_guides.html>, [504]. The identical explanation appears in the legislative guide for the Convention against Corruption: UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2006), [643]. For more on the Convention against Corruption, see [189].

[269] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000* [2005] ATS 27 (entered into force internationally and for Canada, 25 December 2003; entered into force for Australia, 14 October 2005). Australia ratified on 14 September 2005, with a declaration that the treaty does not oblige Australia to admit anyone to, or retain anyone in, Australia.

Australia have ratified the first two and signed the third. A signature indicates an intention to ratify at a later date; upon ratification, a treaty is binding at international law. These protocols supplement the TOC Convention and extend the obligations of the parent convention, relating to law enforcement cooperation, to their subject crimes. Each of the protocols, subject to the parent Convention as well as domestic law and other international obligations, places additional obligations on information sharing, related to the nature of the subject crime, and expressly reserves the receiver's right to restrict the use of such information. For example, Article 10 of the Migrant Smuggling Protocol places additional obligations for information sharing, such as intelligence on the *modus operandi* of organised smuggling groups, the theft of travel documents and the sharing of technology to fight this crime.[272] The Arms Trafficking Protocol also allows for the confidentiality of legitimate commercial information, though it does not penalise the disclosure of such information.[273] These protocols also encourage other forms of transborder cooperation.

189. Article 48 of the UN Convention against Corruption (CAC) also obliges close law enforcement cooperation, in almost identical terms to article 27 of the TOC Convention.[274] The CAC Convention also encourages joint investigative teams, in terms similar to the TOC Convention.[275]

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[270] *Protocol against the Smuggling of Migrants by Land, Sea and Air 2000* [2004] ATS 11 (entered into force internationally and for Canada, 28 January 2004; entered into force for Australia, 26 June 2004).
[271] *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition 2001* [2002] ATNIF 7 (entered into force internationally, 3 July 2005; not in force for Canada or Australia). Canada signed on 20 March 2002; Australia signed on 21 December 2001. As at 1 June 2009, neither Canada nor Australia have ratified this Protocol: UN Treaty Collection, Chapter XVIII (Penal Matters), 12.c, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang-=en>.
[272] Migrant Smuggling Protocol, n 270, article 10. See also: Arms Trafficking Protocol, n 271, article 12; and, People Trafficking Protocol, n 269, article 10.
[273] Arms Trafficking Protocol, n 271, article 12(5): 'If such confidentiality cannot be maintained, the State Party that provided the information shall be notified prior to its disclosure'.
[274] *Convention against Corruption 2003* [2006] ATS 2 (entry into force: internationally, 14 December 2005; for Australia, 6 January 2006; for Canada, 1 November 2007).
[275] Convention against Corruption, n 274, article 49. See also: [186].

190. There are three main international narcotics conventions: *The Single Convention on Narcotic Drugs* (1961), as amended by the Protocol of 25 March 1972; *Convention on Psychotropic Substances* (1971); and, the *Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988). Australia and Canada have ratified all of these conventions.[276] Both the Single Convention and the Convention on Psychotropic Substances oblige a party to 'ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner'.[277] The Convention against Illicit Trafficking obliges parties to enter into agreements to facilitate 'the secure and rapid exchange of information', 'to cooperate with one another in conducting enquiries, with respect to offences [proscribed by the Convention], having an international character' and to facilitate the establishment of joint investigative teams.[278]

191. In 2008, the Executive Director of UNODC delivered a speech in Vienna to celebrate the 50th Anniversary of the Commission on Narcotic Drugs:[279]

> Finally, last but certainly not least, human rights. Our work is guided first and foremost by the UN Charter that commits signatories to fundamental freedoms, and by the *Universal Declaration of Human Rights*, 60 years old this year.

[276] *Single Convention on Narcotic Drugs 1961* [1967] ATS 31 (entered into force internationally and for Canada, 13 December 1964; entered into force for Australia, 31 December 1967); *Protocol amending the Single Convention on Narcotic Drugs of 30 March 1961, 1972* [1975] ATS 33 (entered into force internationally and for Australia, 8 August 1975; entry into force for Canada, 4 September 1976); *Convention on Psychotropic Substances 1971* [1982] ATS 14 (entered into force internationally, 16 August 1976; entered into force for Australia, 17 August 1982; entry into force for Canada, 9 December 1988); and, the *Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* [1993] ATS 4 (entered into force internationally and for Canada, 11 November 1990; entered into force for Australia, 14 February 1993).
[277] Single Convention on Narcotic Drugs (as amended by 1972 Protocol), n 276, article 35(d); and, Convention on Psychotropic Substances, n 276, article 21(d).
[278] Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, n 276, article 9.
[279] Antonio Maria Costa (Executive Director of UNODC), speech delivered to the 51st session of the Commission on Narcotic Drugs, Vienna (10 March 2008), <http://www.unodc.org/india/cnd_ed_remarks.html>.

> In Article 25 of the Universal Declaration, health is listed as a basic human right. As we emphasize the health aspects of drug control, it stands to reason that implementation of the drug Conventions must proceed with due regard to human rights. Thus far, there has been little attention paid to this aspect of our work. This definitely needs to be amended. Although drugs kill, I don't believe we need to kill because of drugs. The UN drug Conventions have left it to individual states to deal with health care and crime retribution, in relation with the specific cultural and judicial contexts. Mindful of this, today I propose that Member States extend the concept of harm reduction to include the need to give serious consideration to whether the imposition of capital punishment for drug-related crimes is a best practice.
>
> The recent General Assembly moratorium suggests a way forward. More must be done to bridge the gap between international standards and the right of individual nations to decide in this difficult area. As the custodian of the judicial standards and norms set by the World Crime Congresses, UNODC insists on the importance of translating them into national laws and practice.

192. The United Nations lists thirteen major anti-terrorism instruments.[280] Australia and Canada have ratified all but one of the treaties.[281] Several of these treaties contain a general obligation to cooperate in the prevention of their subject crimes by exchanging information generally.[282] This obligation is general and does not refer explicitly to police-to-police cooperation.

193. Canada and Australia are party to other international instruments which create criminal offences and require the transnational cooperation of police. For example, the *Convention on the Rights of the Child*[283] is parent to an optional protocol prohibiting sale of children, child prostitution, child pornography and child sex tourism.[284] Article 6 of this optional protocol obliges parties to provide 'the

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[280] United Nations, 'UN Action to Counter Terrorism: international instruments to counter terrorism', <http://www.un.org/terrorism/instruments.shtml>, accessed 1 June 2009.
[281] see "Appendix 2: International Counter-Terrorism Instruments" for details. As at 1 June 2009, neither Canada nor Australia had ratified the Nuclear Terrorism Convention, which is not yet in force internationally.
[282] e.g. Diplomatic Agents Convention, article 4; Hostages Convention, article 4; Maritime Convention, article 13; Terrorist Bombing Convention, article 15; Terrorist Financing Convention, article 18(3); Nuclear Terrorism Convention (not yet in force), article 7. See "Appendix 2: International Counter-Terrorism Instruments" for full citations.
[283] *Convention on the Rights of the Child 1989* [1991] ATS 4 (entry into force internationally, 2 September 1990; for Australia, 16 January 1991; for Canada, 12 January 1992).
[284] *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2000* [2007] ATS 6 (entry into force internationally, 18 January 2002; for Canada, 14 October 2005; for Australia, 8 February 2007).

greatest measure of assistance in connection with investigations or criminal or extradition proceedings' relating to the offences proscribed by the protocol. Article 10 obliges parties to 'take all necessary steps to strengthen international cooperation...for the prevention, detection, investigation, prosecution and punishment' of the protocol's proscribed offences.

5 Extraterritorial human rights obligations

194. I now turn to the question of whether, and to what extent, a country's international human rights obligations extend to transnational policing. There are two aspects to this question: whether human rights obligations apply to the actions of police abroad (the offshore aspect); and whether human rights obligations apply to the domestic actions of police which have consequences beyond their territorial borders (the onshore aspect). This question requires an examination of the extraterritorial application of international human rights law and the obligations it imposes, if any, on state agents acting abroad and on domestic actions with international consequences.

195. The question of the extraterritorial application of human rights treaties is unsettled at international law. It is a question of public international law.[285] The jurisprudence of the UN Human Rights Committee, International Court of Justice and European Court of Human Rights cannot always be reconciled. I will examine this shortly.

196. There can be no question that transnational policing should respect human rights. This principle can be found in police practice as well as law. For example, it is a founding principle of Interpol. Interpol's Constitution states that its mission is to promote mutual assistance 'in the spirit of the *Universal Declaration of Human Rights*'.[286] The commitment is also reflected in more recent Interpol instruments, such as the *Model Bilateral Police Cooperation Agreement*, which includes in its Preamble this recital: 'Aware of the need for police co-operation to respect human rights'.[287] Indeed, many of the more recent human rights instruments require

[285] Dominic McGoldrick, 'Extraterritorial application of the International Covenant on Civil and Political Rights', in Fons Coomans & Menno Kamminga (ed), *Extraterritorial Application of Human Rights Treaties* (2004) 44.
[286] see [54].
[287] Interpol, *Model Bilateral Police Cooperation Agreement*, <http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp>.

police-to-police cooperation to combat transnational human rights violations such as people trafficking and child pornography.

197. This section deals only with specific obligations found, expressly or by implication, in international human rights law. This is not intended to be an exhaustive examination of all the international legal obligations under which police operate. I focus on two human rights issues which have attracted criticism in transnational policing practice: the death penalty and torture. While the obligations with respect to torture arise as *jus cogens* in international law and expressly in UN treaty law, the obligations with respect to the death penalty arise as implications from state practice and UN treaty law. These obligations are important because they set the parameters within which Australian and Canadian police ought to cooperate transnationally.

198. A state is expected to give more than lip-service to these obligations: a state is expected to do, or refrain from doing, certain things. At international human rights law, a state should respect, protect and fulfil human rights.[288] These obligations derive from the UN Charter and international human rights treaties such as the ICCPR and Convention against Torture.[289] Transnational policing is a

[288] Manfred Nowak, *United Nations Covenant on Civil and Political Rights: commentary* (2005, 2nd ed), [2.18]-[2.20]. See also: Christopher McCrudden, 'Mainstreaming Human Rights' in Colin Harvey (ed), *Human Rights in the Community* (2005, Hart Publishing) 12 (citing Henry Shue, *Basic Rights* (1996)). See also: Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (2006) 66-72; and, Fons Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in Fons Coomans & Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 192-9 (in the context of ICESCR). For a commentary of these obligations under the *European Convention on Human Rights* see: Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (2004) 59ff.

[289] *Charter of the United Nations (1945)* [1945] ATS 1 (entry into force internationally, 24 October 1945; for Australia, 1 November 1945; for Canada, 9 November 1945), Articles 1 & 2. See also discussion in: Skogly, n 288, 74-5. For commentary on ICCPR Art 2, see: UN Human Rights Committee, *General Comment No. 31: the nature of the general legal obligation imposed on States parties* (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, [2]. See also discussion in: Crawshaw et al (2007), n 623, 4-5. A similar purpose is stated in Article 1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* according to which contracting parties are obliged to 'secure to everyone within their jurisdiction the rights and freedoms' set out in the Convention.

function of the state and, unlike military action, there is no reason to believe that human rights law does not apply to transnational policing *at all times*.

5.1 extraterritorial jurisdiction under public international law

199. At public international law, the principle of national sovereignty generally ensures that police acting within their own national territory are free to do whatever they wish, subject to domestic and international law, no matter the consequences beyond domestic borders. There are also several sources of jurisdiction authorising the extraterritorial actions of domestic police, which I cover below briefly.

200. That the State is responsible for the actions of its agents, acting in their official capacity, has long been recognised in customary international law and is codified in Article 4 of the International Law Commission's *Articles on State Responsibility*.[290]

201. At public international law, jurisdiction refers to the right of a state to legislate, enforce and adjudicate its domestic law.[291] A state's right to exercise jurisdiction derives from its sovereignty as a state.[292] There are three forms of jurisdiction: legislative (also called prescriptive or substantive); executive (aka administrative); and, judicial.[293] Legislative jurisdiction is, generally, vested in parliament;

[290] James Crawford, *The International Law Commission's Articles on State Responsibility: introduction, text and commentaries* (2005) 94-5. Note: the ILA's *Articles on the Responsibility of States for Intentionally Wrongful Acts* (2001) do not have force of law. They have only been noted and commended, on three occasions, to States by the UN General Assembly: A/RES/56/83 (12 December 2001), A/RES/59/35 (2 December 2004) and A/RES/62/61 (8 January 2008).
[291] Antonio Cassesse, *International Law* (2005, 2nd ed) 49.
[292] L. Oppenheim, *Oppenheim's International Law: Volume 1 (Peace)* (1992, 9th ed) 457. See also: Ian Brownlie, *Principles of International Law* (1998, 5th ed) 301.
[293] Oppenheim (1992), n 292, 456; and, Brownlie (1998), n 292, 301.

executive jurisdiction in government and its agents, such as police officers; and, judicial jurisdiction in the courts.[294]

202. A state's jurisdiction is primarily territorial.[295] Everyone within a state's territory is subject to its jurisdiction.[296] The definition of territory includes land, domestic waterways, territorial sea and airspace.[297] This basis of jurisdiction is sometimes referred to as the *territoriality principle*. This principle includes criminal offences with a foreign aspect, such as crimes commencing or terminating abroad, or crimes which have a 'real and substantial connection' to a state.[298] This could found a quasi extraterritorial jurisdiction upon which to justify transnational policing activities. For example, AFP involvement in drug trafficking investigations in Indonesia where illicit drugs are likely to be imported into Australia from Indonesia.

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[294] see e.g. *R v Hape* [2007] 2 SCR 292, [58].

[295] Oppenheim (1992), n 292, 458; Brownlie (1998), n 292, 301; and, F. A. Mann, 'The Doctrine of Jurisdiction in International Law, Twenty Years Later' (1984) 3 *Receuil du Cours* 19, 22. See also: *R v Hape* [2007] 2 SCR 292, [61]; and, *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [59].

[296] Oppenheim (1992), n 292, 458; and, Mann (1984), n 295, 22. However, international law recognises that a foreign state has a right to claim exemption from local jurisdiction 'chiefly for itself, its Head of State, its diplomatic envoys, its warships and its armed forces abroad': Oppenheim (1992), n 292, 460-1. The immunity also extends to Heads of Government and Foreign Ministers: *Democratic Republic of the Congo v Belgium* [2002] ICJ 1, [51] & [54]. This immunity belongs to the state (not the bearer of office) and the state may waive this immunity: *DRC v Belgium* [2002], [61]. By virtue of express treaty provision, this immunity does not bar prosecution by certain international criminal tribunals such as the International Criminal Court: *DRC v Belgium* [2002], [61]. In the *DRC v Belgium*, the ICJ found that Belgium had breached international law by issuing an international arrest warrant for the incumbent Foreign Minister of the DRC. Under customary international law, the jurisdiction over diplomatic envoys encompasses the staff of embassies and consulates: *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [59]; and, *Al Skeini v Secretary of State for Defence* [2007] UKHL 26, [97] (per Lord Carswell).

[297] Currie & Coughlan (2007), n 298, 146. See also: *Blunden v Cth* [2003] HCA 73, [74] (Kirby J).

[298] Robert J. Currie & Stephen Coughlan, 'Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?' (2007) 11 *Canadian Criminal Law Review* 141, 146. At 146, Currie & Coughlan describe three theories which 'stretch' territorial jurisdiction to foreign territory, namely: the *initiatory* (subjective) principle; the *terminatory* (objective) principle; and the 'more modern and less orthodox approach' of real and substantial connection, which usually means that 'a significant portion of the activities have taken place' on domestic territory.

203. The exercise of extraterritorial jurisdiction is limited by the sovereign territorial rights of other states.[299] According to an often criticised decision of the Permanent Court of International Justice from 1927, a state can only exercise its jurisdiction outside its territory 'by virtue of a permissive rule derived from international custom or from a convention'.[300]

204. However, international law recognises several exceptions to the territoriality principle. By definition, any exercise of jurisdiction that is not based on the territoriality principle is an exercise of extraterritorial jurisdiction.[301] There are several principles upon which a claim of extraterritorial jurisdiction may be based. The *nationality principle* is well-established in public international law. It grants a state jurisdiction over its nationals abroad.[302] According to Currie and Coughlan, this principle also encompasses permanent residents and foreign citizens serving in a state's military and is commonly asserted by those countries which refuse to extradite their own nationals.[303]

205. Of more recent formulation, and therefore more controversial, are claims of extraterritorial jurisdiction over aliens in foreign territory.[304] The *protective principle* grants a state ('the first state') jurisdiction over aliens who commit, on the territory of another state, offences against the first state. These are generally offences which threaten national security or the 'dignity of the sovereign', but also

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[299] see e.g. *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [59]; *R v Hape* [2007] 2 SCR 292, [62].

[300] *The Case of the S.S. "Lotus"* (1927) PCIJ, Ser. A, No. 10, [18]-[19]. For commentary on the *Lotus* decision, see e.g.: Cassese (2005), n 291, 50-1. For criticism of the *Lotus* decision, see e.g.: Brownlie (1998), n 292, 314.

[301] Rosalyn Higgins, *Problems and Process: international law and how we use it* (1994) 73.

[302] Mann (1984), n 295, 24ff (a *personal* link between state and subject); and, Brownlie (1998), n 292, 306 (based on *who* commits the extraterritorial [criminal] act). See also: Oppenheim (1992), n 292, 462; Higgins (1994), n 2, 73; Currie & Coughlan (2007), n 298, 146-7; and, Bernhardt (1992), n 327, 338. See further, Cassese (2005), n 291, 451, dividing nationality into two classes: *active* nationality, where the accused is a national; and *passive* nationality, where the victim is a national. The latter category is more often referred to as the 'passive personality principle' and I deal with it as such: see also, n 306 below. For judicial comment, see: *R v Hape* [2007] 2 SCR 292, [60]-[64].

[303] Currie & Coughlan (2007), n 298, 146.

[304] Oppenheim (1992), n 292, 466ff.

include crimes such as sedition and counterfeiting.[305] The *passive personality principle* founds jurisdiction over aliens who, in the territory of another state, commit crimes against nationals of the first state.[306] The *universal principle* founds jurisdiction over aliens on foreign territory who commit acts which offend the public policy of the international community.[307] These acts are usually international crimes such as 'genocide, war crimes, crime against humanity, piracy, slavery, aggression [and] torture'.[308] These offences are crimes under international law and need not be defined in domestic law to found universal jurisdiction.[309] Universal jurisdiction is unusual because no link between the state and the impugned foreign act or actor is required.[310] The exercise of universal jurisdiction is often justified by claims of upholding the rule of law in territories where it has ceased to operate effectively.[311]

[305] Brownlie (1998), n 292, 307 (also known as the 'security principle'); Higgins (1994), n 2, 73 (noting that this principle is unproblematic); and, Currie & Coughlan (2007), n 298, 147 (these crimes against 'the dignity of the sovereign' also found jurisdiction for regulating foreign polluters).
[306] Cassese argues that this is a species of the nationality principle, which he calls 'passive nationality' based on the nationality of the victim; as opposed to 'active nationality', where the criminal accused is a national: Cassese (2005), n 291, 451. While there is a certain logic to this categorisation, it should be avoided because it obscures a fundamental underlying difference between the two principles, i.e. that in its *passive* form jurisdiction is asserted over an alien, not a national. For the passive personality principle, see: Oppenheim (1992), n 292, 466ff; Brownlie (1998), n 292, 306ff; Higgins (1994), n 2, 74; and, Currie & Coughlan (2007), n 298, 147 (noting that the USA exercises this jurisdiction regularly).
[307] Brownlie (1998), n 292, 307ff. See also: Oppenheim (1992), n 292, 466ff; Cassese (2005), n 291, 451; Currie & Coughlan (2007), n 298, 147-8; and, *R v Hape* [2007] 2 SCR 292, [61].
[308] Currie & Coughlan (2007), n 298, 148. Brownlie cautiously adds hijacking and narcotics trafficking to this list: Brownlie (1998), n 292, 308. Oppenheim cautiously adds terrorism to this list, as well as 'the most serious violations of human rights such as torture': Oppenheim (1992), n 292, 466ff. The significance of these additions is that they exist at customary international law, independent of treaty law, and may grant jurisdiction to states which have not ratified the relevant international treaties. Cassese notes that universal jurisdiction is controversial because it is open to abuse as a tool to hinder a foreign official from performing his or her lawful duties abroad: Cassese (2005), n 291, 451. While this is true, the doctrine of state immunity will temper such abuse, as in the case of *Congo v Belgium*: see n 296 above.
[309] Brownlie (1998), n 292, 308ff.
[310] see Currie & Coughlan (2007), n 298, 148, noting that the impugned actor is deemed an enemy of humanity (*hostis humani generis*).
[311] Currie & Coughlan (2007), n 298, 165.

206. Extraterritorial jurisdiction can also be conferred by treaty.[312] Where jurisdiction is granted by treaty it is uncontroversial because it is recognised by the consent of the ratifying parties. Such is the complex law aboard civilian ships, aircraft and spacecraft, which generally confers on the state whose flag is being flown exclusive jurisdiction when the vessel is in international waters, airspace or space, and concurrent jurisdiction when within the territory of another state.[313] Universal jurisdiction is increasingly being conferred by treaty, for example over the suppression of terrorist activities,[314] the protection of diplomats, UN personnel and other 'internationally protected persons',[315] the protection of nuclear materials[316] and the protection of human rights.[317]

207. However, all these bases of extraterritorial jurisdiction are subordinate to territorial jurisdiction.[318] In theory, where conflict arises from the concurrent jurisdiction of two or more states, the state with territorial jurisdiction will have precedence. Absent military occupation, a state cannot exercise its jurisdiction on foreign territory without the foreign state's consent, invitation or acquiescence.[319] This accords with the doctrine of state sovereignty and the principle of non-

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[312] see *The Case of the S.S. "Lotus"* (1927) PCIJ, Ser. A, No. 10, [18]-[19] ('jurisdiction...cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom *or from a convention*', emphasis added). For a list of legislative sources of the exercise of Canadian prescriptive jurisdiction of these treaties, see Currie & Coughlan (2007), n 298, 148ff.

[313] Bernhardt (1992), n 327, 338. See also: Oppenheim (1992), n 292, 479ff;

[314] e.g. *Convention for the Suppression of Unlawful Seizure of Aircraft* (1970); *Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation* (1971); *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (1988); *International Convention Against the Taking of Hostages* (1979); *International Convention for the Suppression of Terrorist Bombings* (1997); and, *International Convention for the suppression of the Financing of Terrorism* (1999).

[315] e.g. *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents* (1973); and, *Convention on the Safety of United Nations and Associated Personnel* (1994).

[316] *Convention on the Physical Protection of Nuclear Material* (1980).

[317] e.g. *Convention Against Torture* (1984); and, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2000).

[318] Higgins (1994), n 301, 73. See also: *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [60].

[319] *The Case of the S.S. "Lotus"* (1927) PCIJ, Ser. A, No. 10, [18]. See also: *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [60]; *R v Hape* [2007] 2 SCR 292, [65]; and, Oppenheim (1992), n 292, [137].

interference at international law.[320] This is why the Canadian Supreme Court found that, absent consent of the foreign territorial sovereign, Canadian law cannot be enforced outside of Canada.[321]

208. Because there are several bases for jurisdiction, state jurisdiction is not always exclusive.[322] More than one state may have a legitimate basis from which to assert jurisdiction over property, people or events. For example, a state ('the first state') maintains jurisdiction over its nationals abroad, based on the nationality principle. That jurisdiction is concurrent with the territorial jurisdiction of the foreign state in which a national resides abroad. While the first state is free to exercise its extraterritorial legislative and judicial jurisdiction over its nationals living abroad, an attempt to exercise its executive jurisdiction is more problematic.[323] The exercise of legislative and judicial jurisdiction extraterritorially is rarely controversial because it occurs on the sovereign territory of the first state. In its own territory, a state's parliament is free to pass laws which purport to have extraterritorial application and its courts are free to apply those laws. Generally, controversy only arises when a state seeks to exercise its *executive* jurisdiction outside its territory, especially without the consent of the territorial sovereign.

209. According to Brownlie, extraterritorial acts will only be lawful when a state observes three general principles:[324]

    a. 'there should be a substantial and *bona fide* connection between the subject-matter and the source of the jurisdiction';[325]

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[320] see also: *Democratic Republic of the Congo v Belgium* [2002] ICJ 1, [1].
[321] *R v Hape* [2007] 2 SCR 292, [69].
[322] Brownlie (1998), n 292, 314.
[323] see Currie & Coughlan (2007), n 298, 144; and *R v Hape* [2007] 2 SCR 292, [60] & [64].
[324] Brownlie (1998), n 292, 313.
[325] in *obiter*, Kirby J adopted Brownlie's formulation to extend the territorial limitation on the competence of Australian courts: *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, [105] (Kirby J dissenting). See also: *Blunden v Cth* [2003] HCA 73, [72]-[74] (Kirby J concurring). In a discussion of prescriptive jurisdiction, Oppenheim prefers a slightly different formulation: 'there being between the subject matter and the state exercising jurisdiction a *sufficiently close*

b. the principle of non-interference must be observed; and,

c. accommodation, mutuality and proportionality should inform exercise of this jurisdiction.

210. The principles of accommodation and mutuality derive from what is sometimes called 'the comity of nations'.[326] Since all nations are equal at international law, states should seek to accommodate each other's wishes and exhibit mutual respect. The principle of proportionality requires a state to minimise any interference with the concurrent jurisdiction of another state, in other words to only do what is necessary and no more.[327]

211. In summary, transnational policing is an exercise of extraterritorial executive jurisdiction. For any act of transnational policing to be lawful at public international law, then the consent of local authorities must be obtained and the extraterritorial acts should be grounded in treaty law or one of the recognised jurisdictional principles (territoriality, nationality, protective, passive personality or universal).

5.2 extraterritorial jurisdiction under international human rights law

212. Over the last half century or so, claims that human rights treaties have extraterritorial application have increased. Over that time, a growing consensus has evolved that the legitimacy and pervasiveness of human rights law is underpinned by its universality.[328] Tomuschat, in his essay on the universality of human rights, notes that the concept is often criticised as a uniquely Western

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connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states' (emphasis added): Oppenheim (1992), n 292, 457-8.

[326] see Hersch Lauterpacht, *International Law: Collected Papers – Volume 3 (Law of Peace)* (1977) 222ff (criticising term 'comity of nations' as a redundant synonym for 'international law'). The concept of nations acting as 'good neighbours' is also codified in the Preamble of the UN Charter; while the doctrine of sovereign equality is laid down in Article 2(1) of the UN Charter.

[327] Rudolf Bernhardt, *Encyclopaedia of Public International Law* (1992) Volume 2 (E-I), 341.

[328] see e.g. [5.2.3] re: Ben-Naftali (2006), n 378.

view.[329] In response to such criticisms, Tomuschat quotes former UN Secretary-General Kofi Annan:[330]

> It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so.

213. There are two main bodies charged with interpreting international human rights law: the International Court of Justice (ICJ) and the UN Human Rights Committee. There are other treaty body committees, but they have generally followed the established jurisprudence of the UN Human Rights Committee and the ICJ on the question of jurisdiction. Because the ICJ has, by and large, endorsed the Human Rights Committee's view of extraterritorial jurisdiction, I begin with a review of the Committee's jurisprudence.

5.2.1 UN Human Rights Committee

214. The UN Human Rights Committee is firmly of the view that a State party to the ICCPR can "be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the government of the State or in opposition to it".[331] With respect to article 2 of the ICCPR, the UN Human Rights Committee has commented that:[332]

> ...a State Party must respect and ensure that rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.
>
> ...This principle also applies to those within the power or effective control of the forces or a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

215. This places transnational policing well within the jurisdiction of the ICCPR.

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[329] Tomuschat (2008, 2nd ed), n 384, 69ff.
[330] Tomuschat (2008, 2nd ed), n 384, 94.
[331] *Burgos v Uruguay* (1981) Communication No. 52/1979, [12.3].
[332] UN Human Rights Committee, *General Comment 31* (2004) CCPR/C/21/Rev.1/Add.13, [10].

caselaw

216. The leading cases from the UN Human Rights Committee come from the 1980s and involve what we would today call 'extraordinary rendition': the abduction of people on foreign soil and taking them elsewhere for detention and torture. The offending state party in these cases was Uruguay.

217. While the cases deal with the issue of extraterritoriality in the substantive body of their conclusions, the question is more one of admissibility as it deals with the competence of the Committee to hear the application before it. The first two cases make this mistake, but the third correctly deals with this issue as a preliminary question.

218. In 1976, Uruguayan agents, assisted by Argentinean authorities, arrested, detained and tortured Mr Burgos, who had been granted political asylum in Argentina.[333] Burgos was then unlawfully taken back to Uruguay, where he was held *in communicado*, tortured and put on trial.

219. The Committee had to consider the issue of extraterritorial jurisdiction because Mr Burgos was first arrested and detained in Argentina. The Committee noted that Articles 1 ("individuals subject to its jurisdiction") and 2(1) ("individuals within its territory and subject to its jurisdiction") were no bar to this complaint.[334] With reference to Article 1, the Committee noted that this is not a reference to location of an alleged breach of Covenant rights, but rather to "the relationship between the individual and the State" in relation to such a breach.[335]

[333] *Burgos v Uruguay* (1981) Communication No. 52/1979. This complaint was brought by Mr Burgos' wife against Uruguay. No complaint could be made against Argentina, which was not then a signatory to the First Optional Protocol. Identical reasoning and conclusions were delivered in the case of *Casariego v Uruguay* (1981) Communication No. 56/1979. In that case, Ms Casariego was a Uruguayan exile living in Italy. She and her young family travelled to Brazil, where they were arrested by Uruguayan agents, with the assistance of two Brazilian police officers: at [2.2]. They were separated and taken to Uruguay.

[334] *Burgos v Uruguay* (1981) Communication No. 52/1979, [12.1].

[335] *Burgos v Uruguay* (1981) Communication No. 52/1979, [12.2].

220. In relation to Article 2(1), the Committee said:[336]

> Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.

221. The Committee relied on Article 5(1) of the Covenant to support their view. Article 5(1) states that the Covenant should not be interpreted to imply a right to act in a manner destructive of Covenant rights and freedoms 'to a greater extent than is provided for' in the Covenant. The Committee concluded that:[337]

> ... it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

222. Zwart is critical of the UN Human Rights Committee's reasoning in the Uruguay cases.[338] In these cases, the Committee invoked Article 5(1), which states that nothing in the Covenant can be interpreted to defeat the rights and freedoms guaranteed by the Covenant. This is a purposive interpretative provision, giving precedence to the purpose of the Covenant (to protect human rights). However, Zwart argues that Article 5(1) cannot be invoked if Article 2(1) dictates that the Covenant does not apply because the complaint falls outside Covenant jurisdiction of the State Party: 'Article 5 of the Covenant can only be invoked if the Covenant is applicable, and that was the question the Committee had to answer in the first place'. In other words, the question of jurisdiction is a 'gateway' issue. If there is jurisdiction, then the Committee is competent to hear the complaint and then, and only then, may the Committee examine the Covenant's other provisions (such as Article 5). If there is no jurisdiction, then the Committee is not competent to hear

[336] *Burgos v Uruguay* (1981) Communication No. 52/1979, [12.3].
[337] *Burgos v Uruguay* (1981) Communication No. 52/1979, [12.3].
[338] Tom Zwart, *The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee* (1994, Springer) 95.

the complaint and the text of the Covenant is not relevant. I agree with Zwart's assessment that the Committee's finding is *ultra vires*.

223. Zwart prefers the reasoning which appears in the separate concurring opinion of Committee Member Tomuschat.[339] Mr Tomuschat agreed with the Committee's decision in all but its reasoning on Article 2(1). Mr Tomuschat expresses the view that Article 5 is not relevant to the present case. Tomuschat argued that the term 'within its territory' was intended to recognise that a State Party could not be held responsible for securing Covenant rights in foreign territory where the State Party has no authority or power to act without consent, in accordance with international law and the principles of non-interference and sovereign equality. According to Tomuschat, this was the intent of the drafters of the Covenant. However:[340]

> Never was it envisaged…to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity against their citizens abroad. Consequently, despite the wording of article 2(1), the events which took place outside Uruguay came within the purview of the Covenant.

224. The final Uruguayan case is not a rendition case,[341] but rather a passport case. Ms Montero was a Uruguayan citizen studying in West Berlin (as it was then called). Without giving reasons, the Uruguayan government refused to renew Ms Montero's passport. Ms Montero complained to the UN Human Rights Committee that this constituted a breach of her freedom of movement.

225. Two issues of jurisdiction arose. The first involved Article 2(1) of the Covenant.[342] The second involved Article 1 of the First Optional Protocol, which states that the Committee may hear complaints from people 'within the jurisdiction' of a State Party.[343] The issue centred on whether, because Ms Montero was in West Germany and not physically located in Uruguay, she was within the jurisdiction of Uruguay at the relevant times.

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[339] Zwart (1994), n 338, 95-6.
[340] *Burgos v Uruguay* (1981) Communication No. 52/1979, concurring opinion of Mr Tomuschat.
[341] *Montero v Uruguay* (1983) Communication No. 106/1981.
[342] *Montero v Uruguay* (1983) Communication No. 106/1981, [5].
[343] *Montero v Uruguay* (1983) Communication No. 106/1981, [7.1].

226. The Committee found that Uruguayan jurisdiction was engaged by the impugned actions and, therefore, the Committee was competent to examine the complaint.[344]

227. The Committee was of the view that the right to leave any country, including one's own country, imposed an obligation on both the country of residence and the country of nationality. Only Uruguay can issue a passport to a Uruguayan citizen. The Committee concluded that Article 2 'could not be interpreted as limiting the obligations of Uruguay under article 12(2) [freedom of movement] to citizens within its own territory'. [345] This is clearly a recognition of extraterritorial jurisdiction based on nationality.

228. One final case needs to be examined: *Kindler v Canada*.[346] Like the European Human Rights Court case of *Soering*,[347] this extradition case is more accurately classified as one of state responsibility rather than jurisdiction. This is because the individual concerned is within the sovereign territory of the State Party and, therefore, the question is not one of sovereign jurisdiction but of consequences of sovereign action. Nevertheless, this issue was dealt with by the Committee as a threshold issue of its jurisdictional competence.

229. Mr Kindler was a US citizen sentenced to death in Pennsylvania. He escaped and fled to Canada, where he was arrested. In 1991, Canada extradited Mr Kindler back to the US. Mr Kindler complained to the UN Human Rights Committee that his extradition breached his Covenant rights, including the guarantee against cruel and inhuman treatment or punishment.

230. Canada argued that it was United States law, not Canadian law, which required Mr Kindler's execution and, therefore, Canada could not be held responsible for the

[344] see also *Montero v Uruguay* (1983) Communication No. 106/1981, [9.3]-[9.4].
[345] *Montero v Uruguay* (1983) Communication No. 106/1981, [5].
[346] *Kindler v Canada* (1993) UN Doc CCPR/C/48/D/470/1991.
[347] *Soering v UK* (7 July 1989) ECtHR 14038/88. The UN Human Rights Committee refers to this case at [15.3] of the *Kindler* determination. Zwart argues that the majority in *Kindler* relied heavily on *Soering*: Zwart (1994), n 338, 98 at fn.286.

laws of another country.[348] In an argument reminiscent of the UK's argument in *Soering*, Canada argued that it cannot be held responsible for what another country might do on its own sovereign territory.

231. The Committee rejected this argument in quite broad terms. The Committee did not limits its language to extradition alone, but rather framed its response in terms of decisions 'relating to persons within its jurisdiction':[349]

> If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

232. In short, where a State makes a decision about an individual who is *within jurisdiction* and that decision will, in a certain or purposeful way, have the necessary and foreseeable consequence of violating an individual's Covenant rights in a foreign jurisdiction, then the decision-making State may itself be in breach of the Covenant. This requires a State to ensure it does not expose an individual to 'a real risk of a violation of [their] rights under the Covenant'.[350] A real risk is one that has a necessary and foreseeable consequence of violating an individual's Covenant rights.[351] Extradition is an example of a decision which could have such adverse consequences.[352]

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[348] *Kindler v Canada* (1993) UN Doc CCPR/C/48/D/470/1991, [4.3].
[349] *Kindler v Canada* (1993) UN Doc CCPR/C/48/D/470/1991, [6.2].
[350] *Kindler v Canada* (1993) UN Doc CCPR/C/48/D/470/1991, [13.1].
[351] *Kindler v Canada* (1993) UN Doc CCPR/C/48/D/470/1991, [14.1].
[352] *Kindler v Canada* (1993) UN Doc CCPR/C/48/D/470/1991, [13.2].

233. In 1997, the UN Human Rights Committee found that the Second Optional Protocol to the ICCPR obliges ratifying nations not to expose anyone to the real risk of execution for any offence.[353] In 2003, the Committee found that the ICCPR itself places the same obligation on ratifying countries that have abolished the death penalty.[354] Both these matters are extradition cases, in which the complainant is located physically within the territory of the State Party and, therefore strictly-speaking, no issue of extraterritoriality arises other than what might happen to the complainant once she or he is surrendered to a foreign power.[355] They are analogous to decisions made by police in their own territory that have human rights ramifications abroad.

General Comment 31

234. The Committee summarises its view of the extraterritorial jurisdiction of the Covenant in its *General Comment 31*.[356] The Committee confirms its view that 'within its territory and subject to its jurisdiction' means that:

> ...a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. ... [This principle] applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

235. At the end of this passage the Committee goes further than the European Court of Human Rights (ECHR) by including the actions of nationals assigned to peacekeeping and peace-enforcement missions. In *Behrami v France*, the Grand Chamber of the ECHR found that France was not responsible for the actions of the troops it contributed to an international peace-keeping force in Kosovo because the United Nations, and not France, was the entity exercising authority over the

[353] *ARJ v Australia* (1997) UN Doc CCPR/C/60/D/692/1996. See also [162] ff.
[354] *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998. See also [169] ff.
[355] these types of cases are referred to below as '*Soering* cases'.
[356] UN Human Rights Committee, *General Comment 31* (2004) CCPR/C/21/Rev.1/Add.13, [10].

troops and the region.[357] The ECHR followed this view in *Blagojevic v Netherlands*.[358]

236. I would argue that the Committee's extension of extraterritorial jurisdiction to include national contingents in *all* international peace-keeping operations is too broad. Jurisdiction will turn on the circumstances of each case: *who* has effective control of the troops; from whom do the troops take their orders; and, what arrangements have been made to preserve or abrogate sovereignty over troops?

commentary

237. While it is not expressly acknowledged, the principles of international law have strongly influenced the jurisprudence of the Committee. In *Kindler*, state responsibility was engaged because the individual was already *within jurisdiction*. That is a recognition of sovereign jurisdiction based on the territoriality principle. In the passport case of *Montero*, the nationality principle explains extraterritorial jurisdiction. In the Uruguayan rendition cases, jurisdiction arose with respect to a national abroad from effective control over the national with the consent of local authorities. Extraterritorial jurisdiction might also be found in these rendition cases based on the nationality principle.

238. The Uruguayan cases were cited with approval by the ICJ in the *Palestinian Wall* advice.[359] This is significant because it raises the status of these decisions in international law, given that a court has cited them as support for the extraterritorial application of the *International Covenant on Civil and Political Rights*. The court's view supports the Committee's own conclusion that Israel is responsible for implementing the ICCPR in the Occupied Territories 'to the extent that it [exercises] "effective control"'.[360]

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[357] see [289] below.
[358] see [290] below.
[359] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory - Advisory Opinion* [2004] ICJ 2 (7 July 2004), [109]. See also [240] below.
[360] UN Human Rights Committee (1998) UN Doc CCPR/C/79/Add.3 (18 August 1998), [10]; cited in Tomuschat (2008, 2nd ed), n 384, 130.

5.2.2 International Court of Justice

239. The International Court of Justice has largely adopted the view of the UN Human Rights Committee with respect to Article 2 of the ICCPR:[361]

> ...while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.
>
> ... the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, *vis-à-vis* their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence...
>
> ...[the ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

240. The ICJ expressly examined the issue of the extraterritorial application of human rights treaties in its advisory opinion on the Palestinian Wall.[362] In that case it confirmed the view of the UN Human Rights Committee. The Court's ruling is significant because its jurisprudence constitutes what is called 'hard' international law. In other words, its authority as law is of the highest order.

241. In the Palestinian Wall case, the ICJ was required to determine 'whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory'.[363] The court first rejected the suggestion by Israel that human rights law does not apply in times of armed conflict.[364] The court then turned its attention to the extraterritorial application of human rights treaties.[365]

242. In determining the extraterritorial application of the ICCPR, the ICJ first turned its mind to the wording of Article 2(1) of the ICCPR and whether the phrase 'within its territory and subject to its jurisdiction' should be read disjunctively or

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[361] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory - Advisory Opinion [2004] ICJ 2 (7 July 2004), [108]-[111].
[362] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory - Advisory Opinion* [2004] ICJ 2 (7 July 2004). This was a reference from the UN General Assembly.
[363] *Palestinian Wall* advice (2004), n 362, [102].
[364] *Palestinian Wall* advice (2004), n 362, [102] & [106].
[365] *Palestinian Wall* advice (2004), n 362, [104] & [107]-[111].

conjunctively.[366] The court concluded that the disjunctive interpretation is correct. In coming to this conclusion, the court observed that the object and purpose of the ICCPR made it 'seem natural' that States would be obliged to comply with the ICCPR when a State exercises its jurisdiction in foreign territory. The court also observed that this interpretation was the practice of the UN Human Rights Committee.[367] The Court also found support for this view in the *travaux préparatoires*, which:[368]

> ...show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.

243. Adopting the view of the UN Human Rights Committee, the Court concluded that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.[369] This is a disjunctive reading of article 2(1). The Court also found that two other human rights instruments, the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights, applied extraterritorially.[370] In the Palestinian Wall case, this required Israel to extend its obligations under these human rights treaties to the Occupied Territories. The Court did not find that the construction of a wall, of itself, breached those obligations. However, the Court did find that the course chosen by Israel for the construction of the wall did breach the human rights of the Palestinian residents affected by its construction, including article 12(1) rights of freedom of movement.[371]

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[366] *Palestinian Wall* advice (2004), n 362, [108]-[109]. See also [245] ff.
[367] Palestinian Wall advice (2004), n 362, [109], citing the 'Uruguayan cases' of *Lopez Burgos v Uruguay* (1981) Communication No. 52/1979, *Casariego v Uruguay* (1981) Communication No. 56/1979, & *Montero v Uruguay* (1983) Communication No. 106/1981.
[368] *Palestinian Wall* advice (2004), n 362, [109].
[369] *Palestinian Wall* advice (2004), n 362, [111].
[370] *Palestinian Wall* advice (2004), n 362, [112]-[113].
[371] *Palestinian Wall* advice (2004), n 362, [137]; see also [122] of ICJ's advice for Court's finding that the course of the wall also breaches Israel's duty to respect the self-determination of the Palestinians.

244. In summary, the Court's expression of the extraterritorial application of human rights instruments is very broad. It is not limited to occupied territory. It is only limited to acts done in the exercise of a State's jurisdiction abroad. This confirms the universality of human rights. A State's international human rights obligations extend beyond its territory and apply wherever the State exercises its jurisdiction extraterritorially. So, the bases of extraterritorial jurisdiction recognised at public international law carry with them a State's international human rights obligations. In short, police and other state agents must comply with their state's international human rights obligations, whether they act domestically or abroad. By corollary, both state policy and state practice with respect to transnational policing must comply with a state's international human rights obligations.

5.2.3 conjunctive/disjunctive

245. There is some controversy in the literature on the correct interpretation of the phrase 'territory and jurisdiction' in Article 2 of the ICCPR. Milanovic observes that no other human rights treaty uses this formula.[372] The closest is the Migrant Workers Convention, adopted in 1990, which uses an 'or' not an 'and': "within their territory or subject to their jurisdiction".[373]

246. Dennis argues that the phrase should be read conjunctively: an individual complainant 'must be both within the territory of a State Party and subject to the jurisdiction of that State Party'.[374] This has been the view of State Parties, according to Dennis, and he cites the comments of a US State Department Legal Advisor before the Human Rights Committee.[375] Dennis is critical of the

[372] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) *Human Rights Law Review* 411, 413.
[373] Milanovic (2008), n 372, 413, citing *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990) Article 7.
[374] Michael Dennis, 'Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict and Military Occupation' (2006) 100 *American Society of International Law Proceedings* 85, 87.
[375] Dennis (2006), n 374, 88. Dennis also quotes from a similar view of the Netherlands government, but this deals with the situation of Dutch military officers acting in their capacity as UN peacekeepers in Bosnia and is selectively quoted.

Committee's disjunctive interpretation of 'and' in the limitation clause. He also suggests that both Nowak and Tomuschat express views similar to his.[376]

247. However, the swiftness with which Dennis brushes aside the ICJ's endorsement of the UN Human Rights Committee's earlier decisions on the disjunctive interpretation of Article 2 jurisdiction suggests Dennis has chosen to ignore the hard-law precedential value of the *Palestinian Wall* advice.

248. Dennis' reference to the *travaux préparatoires* is more convincing. He quotes the US representative to the Commission on Human Rights, Eleanor Roosevelt, whose view prevailed over that of others seeking to have the limitation clause to reflect the European formulation of simply 'within jurisdiction'. The dissenting States, including France and Lebanon, were concerned that the effect of this narrow interpretation was that a State is not obliged to protect the Covenant rights and freedoms to its nationals abroad. The US view prevailed throughout the drafting and adoption process. Roosevelt explained the view of the United States by stating that it did not want to be responsible for extending Covenant rights to people within its occupied territories:[377]

> An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying States in certain respects, but were outside the scope of legislation of those States. Another illustration would be leased territories.

249. In a response opposing Dennis' views, and in support of the disjunctive interpretation, Ben-Naftali argues that human rights law has evolved over the decades since the drafting of the ICCPR and there is now a wide consensus of the universality of this body of law.[378] Ben-Naftali argues that the disjunctive interpretation 'gives expression to the object and purpose of the [human rights] Conventions which is to protect individuals from the improper exercise of power,

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[376] Dennis (2006), n 374, 89, citing: Manfred Nowak, *U.N. Covenant on Civil and Political Rights: Commentary* (2005, 2nd ed); and, Christian Tomuschat, *Human Rights: between idealism and realism* (2003) 109-11.
[377] cited in Dennis (2006), n 374, 90.
[378] Oma Ben-Naftali, 'The Extraterritorial Application of Human Rights to Occupied Territories' (2006) 100 *American Society of International Law Proceedings* 90.

whereas a narrower, territorially-based meaning, would exclude certain individuals from protection, but not from power'.[379] She then lists five reasons in support of the disjunctive interpretation:[380]

a. it avoids redundancy of terms;

b. it coheres with the jurisdictional clauses of the [Convention Against Torture] and the [Convention for the Elimination of Racial Discrimination], many of the obligations of which overlap with the ICCPR, thus generating the sensible subjection of all major [human rights] treaties to the same jurisdictional regime;

c. it coheres with Article 1 of the first Optional Protocol which authorizes the HRC to review communications from individuals subject to the jurisdiction of state parties, dispensing with the term "territory" altogether;

d. it advances the object and purpose of the treaty - a method of interpretation that, under Art. 31 of the Vienna Convention, carries more weight than the drafters' intent; and,

e. it is highly supported by practice.

250. In reality, Dennis' piece is disingenuous. His citation of Nowak and Tomuschat in support of his 'conjunctive' theory is simply false. Nowak actually criticises the literal (conjunctive) interpretation of Article 2(1) as leading 'to often absurd results' such as Article 12(4) right of a person to re-enter their national territory: a literal interpretation of Article 2(1) would mean that a person outside their country could never allege a breach of Article 12(4) when they are refused re-entry. Nowak instead prefers an interpretation wherein a State might be held accountable for 'persons who are located on their territory and subject to their

[379] Ben-Naftali (2006), n 378, 92.
[380] Ben-Naftali (2006), n 378, 93.

sovereign authority'.[381] This allows for exceptional circumstances where a State has jurisdiction, but not the means to secure the rights of those within its jurisdiction. Such exceptional circumstances include where the sovereign territory of a State is occupied by a foreign force and where a State has jurisdiction over its nationals abroad but cannot be held responsible for human rights violations committed by a foreign sovereign. Nowak argues that a State Party will be responsible for actions abroad which breach the Covenant rights of individuals 'subject to their sovereign authority'.[382] Though Nowak does not express it in this manner, it would appear that the *travaux* debates led to Article 2(1) confusing and eliding jurisdiction with state responsibility, in a manner with which the European Court of Human Rights has had to grapple over the last two decades.

251. With respect to Dennis' claims that Tomuschat supports his literal interpretation of ICCPR jurisdiction: nothing could be further from the truth. In fact, Tomuschat cites Guantanamo Bay as a good example of why disregarding the literal interpretation of Article 2(1) is warranted.[383] Noting the ICJ's advice that the ICCPR applies in the Palestinian territories occupied by Israel, Tomuschat finds the US view on ICCPR jurisdiction 'far from being persuasive' in its attempts to rebut the Human Rights Committee's purposive interpretation.[384] He concludes that Article 2(1) 'should not be misconstrued as a device designed to open up loopholes permitting manipulative curtailment of rights and freedom under the [ICCPR]'.[385]

252. Dennis reads the *Palestinian Wall* decision narrowly. He argues that the ICJ viewed the occupied Palestinian territory as *Israeli* territory, but only for the purposes of its examination of freedom of movement under Article 12(1) of the ICCPR. This argument makes no sense and is disingenuous. The ICJ referred to the Palestinian territory as occupied territory over which Israel had jurisdiction

[381] Nowak (2005), n 376, [2.28].
[382] Nowak (2005), n 376, [2.29].
[383] Christian Tomuschat, *Human Rights: between idealism and realism* (2003, 1st ed) 110-1.
[384] Christian Tomuschat, *Human Rights: between idealism and realism* (2008, 2nd ed) 131-2.
[385] Tomuschat (2003, 1st ed), n 383, 111.

owing to its military occupation. Having found Article 2(1) jurisdiction, the only valid reason to say that particular rights do not apply is if a valid derogation exists. The ICJ acknowledged a valid derogation to article 9, but stated clearly that all 'other Articles of the Covenant…remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory'.[386] To say that the ICJ advice can only be read as confirmation that jurisdiction exists with respect to article 12 makes no sense. State responsibility might be limited by a valid derogation, but either there is jurisdiction or there is not. Jurisdiction cannot apply to some articles and not others. Dennis is simply wrong.

5.3 European Court of Human Rights

253. At the turn of the 21st Century, European jurisprudence was the most nuanced and developed of all jurisdictions. European human rights law does not, obviously, apply to non-European nations such as Canada and Australia, but it does exert an influence on both international and domestic courts and tribunals beyond its borders. So a detailed analysis is warranted to use as a measure against other judicial bodies.

5.3.1 European Convention on Human Rights

254. The European Convention on Human Rights ('the Convention') is a multi-lateral document and applies only to those countries which have ratified it ('the Contracting States').[387] Contracting States are required to secure all Convention rights to everybody 'within their jurisdiction'.[388] The phrase 'within jurisdiction' is interpreted in conformity with the concept of jurisdiction at public international law.[389] This means that jurisdiction is primarily territorial.[390] The Convention has

[386] *Wall* advice, [127].
[387] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, <http://www.jusline.eu/index.php?cpid=f92f99b766343e040d46fcd6b03d3ee8&lawid=7&paid=>.
[388] *The European Convention on Human Rights* (1950), Article 1: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.
[389] e.g. see *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [312].

no application beyond the legal space (*espace juridique*) of the Contracting States.[391] The extent of that legal space is the sum of the jurisdictions of the Contracting States.

255. Therefore the Convention does not usually provide protection for people in the territory of non-Contracting States: for example, prior to their respective ratifications of the Convention, in the European principality of Andorra[392] or in the Serbian capital of Belgrade during the 1999 NATO bombings.[393] In the words of the European Court of Human Rights ('the Court'): 'The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States'.[394]

256. The Court has noted that, in exceptional circumstances, a Contracting State's *territorial* jurisdiction might be limited where the State does not control a part of its territory due to war or rebellion.[395] Despite noting this, the Court has generally found that a Contracting State maintains jurisdiction over any national territory it no longer controls, but that its obligations to secure the Convention rights of people within that territory are limited accordingly.[396]

257. In other exceptional circumstances a Contracting State's jurisdiction, and therefore the legal space to which the Convention applies, will extend extraterritorially. This extraterritorial jurisdiction of States is the subject of this section.

258. Any understanding of the European Court of Human Rights' jurisprudence on the extraterritorial application of the Convention, requires an appreciation of the difference between 'jurisdiction' and 'state responsibility'. The Court's

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[390] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [59]-[61].
[391] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [80].
[392] *Drozd and Janousek v France and Spain* (26 June 1992) ECtHR 12747/87. The Principality of Andorra ratified the Convention on 22 January 1996.
[393] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99. The Republic of Serbia ratified the Convention on 3 March 2004.
[394] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [80].
[395] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [312] ; *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [70].
[396] e.g. *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99.

jurisprudence has evolved a clear differentiation between jurisdiction and state responsibility. Unfortunately, the two are often confused by commentators.[397] Early in the development of this jurisprudence, even the Court often confused the two concepts.[398]

259. The issue of a Contracting State's jurisdiction is a preliminary threshold issue.[399] It is closely linked to a Contracting State having a decisive level of control over land, people and/or property in a foreign territory. On the other hand, state responsibility requires an examination of the merits of a specific allegation.[400] The issue with respect to state responsibility is whether the Contracting State has discharged its negative duties (to refrain from infringing rights) and positive duties (to secure human rights), which is measured by a proportionality test. Because the Convention only requires a State to discharge these duties *within its jurisdiction*, determining the extent of a Contracting State's jurisdiction must, logically, be determined before examining whether a duty has been breached. If the court finds that the alleged violation occurred outside of a Contracting State's jurisdiction, then the Court has no competence to adjudicate an alleged breach because it falls outside the Convention's legal space (*espace juridique*). In short: there can be no state responsibility without jurisdiction, but there can be jurisdiction without state responsibility.

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[397] see the discussion between Lawson and O'Boyle, in which the latter accuses the former of conflating the two concepts: Michael O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: a comment on 'Life After Bankovic' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004). This article is a response to Lawson's own chapter in the same book: Rick Lawson, 'Life After Bankovic: on the extraterritorial application of the European Convention of Human Rights' in Coomans & Kamminga (2004), *op cit*. See also Milanovic (2008), n 372, who correctly and clearly distinguishes the two concepts. Tomuschat also misreads the jurisprudence of the ECHR, incorrectly criticising it for not recognising jurisdiction over individuals a state holds on foreign territory: see Tomuschat (2003, 1st ed), n 383, 108; and Tomuschat (2008, 2nd ed), n 384, 128-9. Tomuschat's misreading in 2008 is odd, given that he discusses the *Loizidou* decision.

[398] e.g. see [264] below in relation to an early decision of the Court in *Cyprus v Turkey* (1975).

[399] e.g. *Loizidou v Turkey* (23 March 1995) ECtHR 15318/89 (preliminary objections), [60].

[400] e.g. *Loizidou v Turkey* (23 March 1995) ECtHR 15318/89 (preliminary objections), [60].

5.3.2 jurisdiction

260. Certain categories of circumstances attracting extraterritorial jurisdiction have been identified by the Court, but the list of categories is not closed. Jurists and commentators have attempted to summarise the recognised categories. I will briefly examine some of these attempts and then propose my own summary. But first, I will review some significant cases in the Court's jurisprudence on extraterritorial jurisdiction.

caselaw

261. In the foundational case of *Cyprus v Turkey* (1975), the government of Cyprus took Turkey to the European Human Rights Commission alleging Turkish human rights breaches in occupied northern Cyprus.[401] This preliminary decision was concerned only with the issue of admissibility, not with the merits of the matter. Turkey challenged the admissibility of Cyprus' application *inter alia* on the ground that the Commission did not have the power to hear the complaint, because of *where* the acts occurred (*ratione loci*). Turkey observed that, because of the wording of Article 1 of the Convention,[402] the Commission was only competent to hear complaints of acts committed *within the jurisdiction* of a Contracting Party. Turkey argued that, because the acts of which Cyprus complained did not occur inside the national territory of Turkey and that Turkey had never annexed northern Cyprus, the alleged acts occurred outside of Turkish jurisdiction. Therefore, Turkey was not obliged to secure Convention rights to people in northern Cyprus.

262. The Commission rejected Turkey's argument, finding that 'jurisdiction' is not limited to a Contracting Party's national territory. Article 1 requires a Contracting Party to secure Convention rights and freedoms to everyone 'under their actual authority and responsibility'.[403] The Commission further explained that:[404]

[401] *Cyprus v Turkey* (26 May 1975) ECommHR 6780/74 & 6950/75.
[402] see n 388.
[403] *Cyprus v Turkey* (26 May 1975) ECommHR 6780/74 & 6950/75, 136.

> ...nationals of a State, including registered ships and aircrafts, are partly within its jurisdiction wherever they may be, and that authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property . Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.

263. The Commission then noted that Turkish troops, under the sole direction of Turkey and following Turkish military law and practice, had entered Cyprus. Therefore, Turkish troops, acting as agents of Turkey, brought any people or property on Cyprus within the jurisdiction of Turkey 'to the extent that they exercise control over such persons or property'.[405] If the actions or omissions of Turkish troops affected the Convention rights of those people in Cyprus within Turkey's jurisdiction, then Turkey would be responsible for those breaches. Having established that the acts complained of fell within Turkey's jurisdiction, the Commission concluded that it had the power (competence *ratione loci*) to hear the merits of Cyprus' complaint.[406]

264. The test of 'authority and responsibility' is a strange test for jurisdiction, because it invokes both jurisdiction ('authority') and state responsibility ('responsibility'). This is, of course, relatively early in the Commission's jurisprudence and the confused legal formula would be reworked over the next few decades. It would have been preferable for the Commission to have used wording like: authority and *capable of attracting* responsibility. The Commission's decision also conflates two types of control, which emerge in later jurisprudence as two distinct categories: (1) control over foreign territory; and (2) control over people and property within a foreign territory.

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[404] *Cyprus v Turkey* (26 May 1975) ECommHR 6780/74 & 6950/75, 136.
[405] *Cyprus v Turkey* (26 May 1975) ECommHR 6780/74 & 6950/75, 137.
[406] in a determination of the merits dated 10 July 1976, the Commission found that Turkey had breached several Convention rights and freedoms. Usually, the matter would then have been referred to the European Court of Human Rights, however Turkey did not at that time recognise the compulsory jurisdiction of the Court. So the matter was sent to the Council of Ministers of the Council of Europe for their consideration. For more, see: Robert Blackburn & Jörg Polakeiwicz, *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (2001, OUP), 227.

265. Another curious ruling of the Commission in *Cyprus v Turkey* (1975) relates to Article 56 of the Convention.[407] Under Article 56, a Contracting State may elect (opt-in) to extend its Convention obligations to some or all of its territories abroad and, further, to recognise the competence of the Court to accept complaints from those territories.[408] The accepted interpretation today is that, without such an express declaration under Article 56, the Convention 'jurisdiction' cannot extend to these territories.[409] However, in *Cyprus v Turkey* the Commission read the Article more broadly, effectively finding that the Article's actual purpose is to ensure that the Convention is read in concert with local culture and customs in non-European territories:[410]

> The Commission does not find that [Article 56] of the Convention, providing for the extension of the Convention to other than metropolitan territories of High Contracting Parties, can be interpreted as limiting the scope of the term 'jurisdiction'…to such metropolitan territories. The purpose of [Article 56] is not only the territorial extension of the Convention but its adaptation to the measure of self-government attained in particular non-metropolitan territories and to the cultural and social differences in such territories; [Article 56(3)] confirms this interpretation. This does not mean that the territories to which [Article 56] applies are not within the 'jurisdiction' within the meaning of Article 1…

266. The matter of *Hess v UK* related to the continuing detention of Adolf Hitler's private-secretary, Herman Hess, at Spandau Prison.[411] The application was brought by Hess' wife, who complained *inter alia* that her husband was being held in solitary confinement: he was the only prisoner in a facility capable of holding 600 people. The prison was located in the British sector of Berlin, where Soviet,

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[407] Article 56 was formerly known as Article 63, and is referred to as such in this case and the later decisions of *Tyrer* & *Thanh*: see, [271] below.

[408] This is different, for example, from the ICCPR, which has no such opt-in mechanism. The ICCPR has an 'opt-out' mechanism in the form of reservations. Controversially, the UN Human Rights Committee is of the view that reservations which are inconsistent with the ICCPR are invalid. See discussion in: Joseph, Schultz & Castan (2004), n 714, [25.14] ff. The controversy arises because the Committee is not constituted as a court and also because there is nothing in the ICCPR expressly granting the Committee the power to declare reservations invalid for inconsistency.

[409] this is the view the Commission took in the later cases of *Thanh* (see [271] below) and *Quark Fishing* (see [287] below).

[410] *Cyprus v Turkey* (26 May 1975) ECommHR 6780/74 & 6950/75, 136-7.

[411] *Hess v United Kingdom* (28 May 1975) ECommHR 6231/73.

American, French and British troops took turns guarding Hess. Mrs Hess also alleged UK responsibility because the agreement between the Four Powers had been signed in London in August 1945. The Commission found that the UK's Convention jurisdiction was not engaged and dismissed the application. Of relevance was the fact that the Four Powers treaty required unanimous agreement of the four parties on all decisions affecting the running of the prison. The Commission found that this quadripartite administration over the prison could not be divided into four separate jurisdictions and, therefore, is not a matter 'within the jurisdiction' of the UK. The Commission also noted in passing that the Four Powers treaty could not attract Convention jurisdiction in any case, because the treaty was ratified before the Convention came into force.

267. The case of *Soering v UK* is not really a case of extraterritorial jurisdiction, but rather of state responsibility in *refoulement* cases.[412] However, it is mentioned here because the Contracting State unsuccessfully raised jurisdictional objections. Soering, residing in the United Kingdom, was the subject of an extradition request on capital charges by the United States, which refused to provide a guarantee that the death penalty would not be sought or applied. Soering alleged that his extradition to the US would breach his Convention rights by exposing him to inhuman or degrading treatment or punishment, due to the conditions on death row in the relevant US state (the 'death row phenomenon').[413] The Court agreed and found that it would be a violation of Mr Soering's Convention rights if the UK extradited him to the US.

268. The UK argued that it was not a Contracting State that would be committing the alleged rights violation, nor would the violation occur within its jurisdiction. Therefore, argued the UK, the Court had no jurisdiction to hear the matter because any potential breach of Convention rights would occur in, and be

[412] *Soering v UK* (7 July 1989) ECtHR 14038/88.
[413] for death row phenomenon, see: Roger Hood & Carolyn Hoyle, *The Death Penalty: a worldwide perspective* (2008, 4th ed) 180-3; and, William Schabas, *The Abolition of the Death Penalty in International Law* (2002, 3rd ed) 141-151.

performed by, the United States and the Court is not competent to adjudicate the actions of a non-Contracting State.

269. The Court found in *Soering* that, because of the 'foreseeable consequences...[and] serious and irreparable nature of the alleged suffering risked', a decision to extradite might engage state responsibility 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[414] The Court reached this conclusion by observing that the purpose and spirit of the Convention is to secure and protect individual rights, and it would be contrary to that purpose and spirit for a Contracting State 'knowingly to surrender a fugitive to another State where there were substantial grounds for believing that [an individual] would be in danger of being subjected to torture, however heinous the crime allegedly committed'.[415]

270. The issue of jurisdiction is not dealt with in *Soering*. The Court moves quickly to the question of state responsibility for the adverse consequences 'suffered outside the jurisdiction of the extraditing State' due to the actions of the receiving State.[416] As the Court observes in *Bankovic*, the applicant in *Soering* was within the territory of the UK and therefore clearly within the UK's jurisdiction.[417]

271. The two separate cases of *Tyrer v UK* (1978) and *Thanh v UK* (1990) are important to a legal understanding of a Contracting State's jurisdiction with respect to its self-governing territories under Article 56 of the Convention.[418] Tyrer was a juvenile UK citizen residing in the Isle of Man, who complained about his judicial sentence of corporal punishment (by lashing) in 1972. The Isle of Man was a self-governing dependency of the British Crown. In 1953, the UK had made an Article 56 declaration with respect to the territory. On the other hand, Thanh

[414] *Soering v UK* (7 July 1989) ECtHR 14038/88, [90]-[91].
[415] *Soering v UK* (7 July 1989) ECtHR 14038/88, [87]-[88].
[416] *Soering v UK* (7 July 1989) ECtHR 14038/88, [85].
[417] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [68].
[418] *Tyrer v UK* (25 April 1978) ECtHR 5856/72; *Thanh et al v UK* (12 March 1990) ECommHR 16137/90. For more information on Article 56, see [265] above.

and his co-applicants were Vietnamese nationals detained in Hong Kong pending deportation back to Vietnam because their refugee status applications were unsuccessful. At the time, Hong Kong was a self-governing British territory, about which the UK had made no Article 56 declaration.

272. On the question of jurisdiction, the Court found that the Isle of Mann fell within the UK's jurisdiction, while the Commission found that Hong Kong did not.[419] The Hong Kong decision was ruled inadmissible because of the absence of an Article 56 declaration. Bound by the express words and purpose of Article 56, the Commission noted that even if it had found that the UK controlled Hong Kong immigration policy, the absence of an Article 56 declaration rendered the Commission incompetent to adjudicate the matter. Because of the Article 56 declaration with respect to the Isle of Man, there were no impediments to UK jurisdiction in the *Tyrer* case.[420] While it is tempting to distinguish these cases on the fact that Tyrer was a subject of Her Majesty Queen Elizabeth II, whereas Thanh was not, these cases were not decided on that point.

273. The decision in *Thanh* seems to contradict the Commission's earlier broad interpretation of Article 56 in *Cyprus v Turkey* (1975),[421] however the reasoning in *Thanh* is later confirmed by the Court in the *Quark Fishing* case.[422]

274. *Thanh*'s case illuminates another important aspect of the Court's jurisprudence. This was a *refoulement* case (*Soering* type case), in which Thanh and his fellow applicants faced deportation to Vietnam, where they alleged there was a real risk of torture or mistreatment. Because the applicants did not fall within the Convention jurisdiction of the UK, the UK was not obliged under the Convention to secure the applicants' rights. This demonstrates starkly the two-step process of

[419] the applicants in *Thanh* did not appeal the Commission's decision to the Court. This is why I am dealing with a Commission decision here.
[420] there was a minor jurisdictional objection unsuccessfully raised before the Court by the UK, which relied on the fact that the Article 56 declaration with respect to the Isle of Man expired in 1976, before the Commission put the matter before the Court. At hearing, the UK withdrew the objection and consented to the Court's jurisdiction in the matter.
[421] see [265] above.
[422] see [287] below.

determining jurisdiction as a preliminary matter, which can render a complaint inadmissible without any assessment of state responsibility.

275. In *Chrysostomos et al v Turkey*, Turkey argued *inter alia* that it had not elected to extend its Convention jurisdiction to northern Cyprus by way of an Article 56 declaration.[423] The Commission found that Article 56 was not applicable because, in the express terms of that Article, it only applies to territories 'for whose international relations [the Contracting State] is responsible' and Turkey had no such internationally-recognised responsibility over northern Cyprus.[424]

276. In *Drozd and Janousek v France and Spain*, the two applicants were convicted of a crime in Andorra.[425] As is often the case in Andorra, the panel of trial judges included a French and a Spanish national sitting as judges of the Andorran court. The applicants argued before the European Court of Human Rights that their trial had been unfair and that, due to the nationality of the trial judges, France and Spain were responsible for these violation of their Convention rights. On this point, the Court did not deal with the substantive complaint, only examining the question of jurisdiction. The Court found against the complainants because Andorra was not a party to the Convention (*ratione loci*), and because the criminal justice system of Andorra was separate from that of Spain or France and the judges were not sitting in their capacity as French or Spanish judges (*ratione personae*). Since the offenders did not fall within the jurisdiction of a Contracting Party to the Convention, the Court was not competent to hear the case.

277. The case of *WM v Denmark* was a consular case in which the applicant complained that the Danish ambassador in communist East Germany had acted contrary to the Convention by declining his application for asylum and by calling East German police to remove him from the Danish Embassy.[426] While the

[423] *Chrysostomos, Papachrysostomou & Loizidou v Turkey* (4 March 1991) ECommHR 15299/89, 15300/89 & 15318/89.
[424] European Human Rights Convention, article 56(1).
[425] *Drozd and Janousek v France and Spain* (26 June 1992) ECtHR 12747/87.
[426] *WM v Denmark* (14 October 1992) ECtHR 17392/90.

complaint was ultimately unsuccessful, the Commission did confirm that the acts of authorised state agents abroad can attract Convention jurisdiction under the authority and control test:[427]

> The Commission notes that these complaints are directed mainly against Danish diplomatic authorities in the former DDR. It is clear, in this respect, from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.
>
> Therefore, in the present case the Commission is satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of Article 1 of the Convention.

278. The case of *Loizidou* clearly demonstrates the separate nature of jurisdiction and state responsibility. Mrs Loizidou , a Greek Cypriot, complained that she was denied access to and enjoyment of her property in northern Cyprus, an area occupied by Turkey. The Court was called upon to determine whether Turkey was responsible for this violation of the applicant's Convention rights. In its first judgment, the Court looked only at the question of jurisdiction.[428] This was a preliminary matter of determining the Court's competence to proceed to the substantive issue of Turkey's responsibility for the violations.[429]

279. In determining the jurisdictional issue, the Court applied an 'effective control' test because of Turkey's military presence in the region. Since Turkey acknowledged that Mrs Loizidou's complaint stemmed from the fact of its occupation of the area and the actions of Turkish troops in preventing her access to her property, the Court concluded these acts fell within Turkish jurisdiction. However the Court stressed again that the question '[w]hether the matters complained of are

[427] *WM v Denmark* (14 October 1992) ECtHR 17392/90, [1].
[428] *Loizidou v Turkey* (23 March 1995) ECtHR 15318/89 (preliminary objections), [60]-[61].
[429] *Loizidou v Turkey* (23 March 1995) ECtHR 15318/89 (preliminary objections), [60].

imputable to Turkey and give rise to State responsibility are thus questions which fall to be determined by the Court at the merits phase'.[430]

280. The next northern Cyprus case is highly significant because it is an appeal to the Grand Chamber of the European Court of Human Rights, consisting of seventeen judges of the Court including its President.[431] In *Cyprus v Turkey* (2001), Cyprus alleged that Turkey continued to deny Convention rights to Greek, Turkish and gypsy Cypriots resident in, or displaced from, northern Cyprus.[432] Applying the effective control test, the Grand Chamber again rejected Turkey's submission that it was not responsible for the acts of the local administration, which Turkey claimed was independent of the Turkish state. Then the Grand Chamber went further, to explain that 'effective control' meant that Turkey's Convention jurisdiction could attach not only to the acts and omissions of Turkish nationals, but also to the acts and omissions of local administrators:[433]

> Having effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention... and that violations of those rights are imputable to Turkey.

281. The Grand Chamber observed that, since the government of Cyprus was unable to secure these rights in northern Cyprus, a decision that the region was not within Turkey's jurisdiction would leave the residents of northern Cyprus unprotected by the Convention. This would 'result in a regrettable vacuum in the system of human-rights protection in the territory'.[434] The Grand Chamber then went on to impute Turkish responsibility in several substantive violations.

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[430] *Loizidou v Turkey* (23 March 1995) ECtHR 15318/89 (preliminary objections), [64].
[431] pursuant to Article 43 of the Convention. Only matters raising a 'serious question' of interpretation or general importance may be heard by the Grand Chamber: Article 43(2). The Grand Chamber is the highest appellate configuration of the Court and its decisions are final: Article 44(1).
[432] *Cyprus v Turkey* (10 May 2001) ECtHR 25781/94.
[433] *Cyprus v Turkey* (10 May 2001) ECtHR 25781/94, [77].
[434] *Cyprus v Turkey* (10 May 2001) ECtHR 25781/94, [78].

282. The case of *Bankovic* was also an appeal to the Grand Chamber and the Grand Chamber's decision was delivered *per curiam*.[435] In *Bankovic*, the six applicants brought an application on behalf of deceased Serbian relatives complaining of breaches of the right to life and freedom of expression. The victims had been killed during the bombing of Belgrade by NATO aircraft in 1999. The Grand Chamber dismissed the case, finding that the victims were not within the Convention jurisdiction of any Contracting State. The Grand Chamber stressed that the concept of jurisdiction is essentially territorial and that extraterritorial jurisdiction 'is exceptional and requiring special justification in the particular circumstances of each case'.[436] The applicants had argued *inter alia* for another exceptional category of extraterritorial jurisdiction to be recognised. The Grand Chamber characterised the proposed category as bringing within jurisdiction 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt'.[437] The Grand Chamber refused to recognise this category, rejecting the applicants' submission that jurisdiction is *proportionate* 'to the level of control exercised in any given extra-territorial situation'. Though the Grand Chamber did not use these words, it effectively rejected this argument because the applicants were proposing that the test for state responsibility should be used for jurisdiction. As the Grand Chamber majority pointed out, this renders the issue of jurisdiction 'superfluous and devoid of any purpose'.[438] The Grand Chamber rejected the applicants' further submission that the 'effective control' of airspace was a limited form of 'effective control' of a territory, which therefore attracted a limited form of jurisdiction and limited form of state responsibility. The Grand Chamber observed that this was just a variation of the first proportionality argument.[439] The Grand Chamber also observed that the applicants were not within the legal space

[435] '*per curiam*' ('by the court') means that all seventeen judges agreed with the final decision; that there were no dissenting judges at all. This lends the decision a strong precedent value.
[436] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [61].
[437] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [75].
[438] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [75].
[439] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [76].

(*espace juridique*) of the Convention, because at the relevant time they were not within the territory of a Contracting State or foreign territory occupied by a Contracting State.[440]

283. The case of *Ilascu v Moldova & Russia* was an appeal to the Grand Chamber.[441] The applicants complained of their treatment and lengthy imprisonment in the Moldovan province of Transdniestria. In the early 1990s, Moldova gained its independence from the former Soviet Union. During this time, the province of Transdniestria declared independence from Moldova, supported to varying extents by the USSR and later the Russian Federation. Neither Moldova nor the international community recognise the province's independence. Mr Ilascu and several other applicants were arrested in 1992, charged with crimes against the Transdniestrian state and convicted. Mr Ilascu was released from prison in May 2001, the other three applicants remained in prison. The Grand Chamber was called upon to decide whether Moldova or Russia is responsible for these actions of provincial officials. The Grand Chamber's final decision was technical and complex. The issues of jurisdiction and state responsibility were very closely related and the Grand Chamber dealt with them in the same judgment.

284. In relation to Moldova, the Grand Chamber explained that, where a Contracting State does not exercise authority over some of its territory due to the specific circumstance of a 'separatist regime' (whether backed by foreign troops or not), then the scope of its jurisdiction in that territory is reduced but not eliminated. This reduced jurisdiction accordingly reduces the state's responsibility. The State will still have certain positive obligations to take 'appropriate and sufficient' measures, such as 'all legal and diplomatic means available' to the Contracting State, to ensure that the people in the separatist territory continue to enjoy their Convention rights and freedoms.[442] The Grand Chamber found that Moldova still had jurisdiction over the province, despite the presence of Russian and rebel

[440] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [80].
[441] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99.
[442] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [333].

troops, and could still be held responsible for some breaches of the applicants' Covenant rights. Moldova was responsible for any breaches attributable to it and which were made *after* it became bound by the Covenant (*ratione temporis*). The Grand Chamber found against Moldova in the limited circumstances where it failed to sufficiently exercise its positive obligations to the applicants. Specifically Moldova had failed to raise the applicant's cases in negotiations brokered by Russia.

285. With respect to the Russian Federation, the Grand Chamber found that Russian troops in the rebel Moldovan province had arrested and handed over the applicants to the separatist regime in full knowledge of the consequences for the applicants' human rights. This satisfied the 'authority and control' test and attracted Russian jurisdiction, however Russia could not be held responsible under the Convention because it was not bound by the Convention at the relevant time (*ratione temporis*).[443] The Grand Chamber also found that the separatist administration only survives because of the significant political, military, financial and economic assistance provided by Russia. According to the Grand Chamber, this attracted Russian jurisdiction by satisfying the 'effective control' test, and even if it did not, the circumstances satisfied a new standard of 'decisive influence' over a foreign separatist administration.[444] This could make Russia responsible under the Convention for the actions taken after 5 May 1998 (the date on which Russia ratified the Convention) by its own agents in the region and by the separatist administration, but also for actions taken *before* 5 May 1998 by the same actors, where the consequences of those prior actions have a continuing affect on the applicant's human rights.[445] For example, Russia was held responsible for conditions of Mr Ilascu's ongoing detention and the treatment he received from 1992 through to 2001, but not for what happened at Mr Ilascu's

[443] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [384].
[444] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [392].
[445] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [386]-[394].

trial which ended in 1993 and was not therefore 'continuing' at the time of Russia's ratification of the Covenant in 1998.

286. In the case of *Issa*, six women from northern Iraq brought applications on behalf of deceased family members, all of whom were shepherds.[446] In 1995 Turkish troops invaded northern Iraq, during which time the non-combatant shepherds were killed and mutilated. The Court dismissed the applications on the grounds that Turkey did not have jurisdiction over the disputed area at the relevant time. The Court first applied the 'effective control' test, distinguishing this case from the Northern Cyprus cases. While Turkey had approximately the same number of troops in Cyprus and Iraq, it did not occupy the entire region of Iraq, it did so only for a short time and it did not establish a local administrative authority or border checkpoints. The Court next looked at the 'authority and control' test and found that it was not satisfied to the requisite standard ('beyond reasonable doubt') that Turkish troops had killed the victims, because there was doubt about whether Turkish troops were active in the relevant area at the relevant time. Accordingly, there was no jurisdiction, the killings fell outside the *espace juridique* of the Convention and the case was dismissed.

287. In the case of *Öcalan v Turkey*, the Grand Chamber effectively affirmed the "authority over people" test expounded in *WM v Denmark*:[447]

> The Court notes that the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport.
>
> It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey.

[446] *Issa et al v Turkey* (3 March 2005) ECtHR 31821/96.
[447] *Öcalan v Turkey* (12 May 2005) ECtHR (Grand Chamber) 46221/99, [91].

288. In *Quark Fishing v UK*, the applicant complained about the actions of UK officials which resulted in the applicant company failing to obtain a fishing licence for the water of the Atlantic island of South Georgia.[448] South Georgia is a British overseas territory. The applicants submitted that the 'effective control' test applied to engage the UK's Convention jurisdiction. The Court rejected this, noting that there was no relevant Article 56 declaration with respect to the territory. The Court made it clear that the absence of an Article 56 will be fatal to an application. In essence, such an absence will take precedence over the 'effective control' test of *Bankovic* because it relates to the purpose and operation of an express provision of the Convention:[449]

> This "effective control" principle...does not...replace the system of declarations which the Contracting States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. ... Bankovic, a decision of the Grand Chamber, emphasises the regional basis of the Convention and the exceptional nature of extensions beyond that legal space (§ 80). The situations which it covers are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56 (former Article 63), extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible.

289. In *Behrami v France*, Mr Behrami complained that France, which commanded the local military contingent of the UN military force in Kosovo, was responsible for not clearly marking the minefield into which his son fatally strayed.[450] This was an appeal to the Grand Chamber. The Grand Chamber found the complaint inadmissible because the acts of French troops were attributable to the authority exercising overall control of the region at the time, which was the UN and not France. Therefore, pursuant to the *Monetary Gold* principle,[451] the Grand

[448] *Quark Fishing Ltd v UK* (19 September 2006) ECtHR 15305/06.
[449] *Quark Fishing Ltd v UK* (19 September 2006) ECtHR 15305/06, 4-5.
[450] *Behrami v France* (2 May 2007) ECtHR 71412/01 & *Saramati v France et al* (2 May 2007) ECtHR 78166/01, [153].
[451] *Monetary Gold Removed from Rome in 1943*, ICJ Reports 1954, 19 (it is "a well-established principle of international law...that [an international court] can only exercise jurisdiction over a State with its consent", at 32). The *Monetary Gold* principle is a principal of public international law.

Chamber was not competent to adjudicate on the matter because the UN is not a Contracting Party to the Convention.

290. More recently, in the case of *Blagojevic v Netherlands*, the applicant complained of his treatment before the International Criminal Tribunal for the Former Yugoslavia (ICTY), sitting in the Hague.[452] Mr Blagojevic argued that the ICTY was located within the national territory of Netherlands and, therefore, that Contracting State was responsible for securing his Convention rights. Applying the Grand Chamber's decision in *Behrami*, the Court found that overall control of the process was exercised by the United Nations, which is 'a legal personality separate from that of its member states and is not itself a Contracting Party' and therefore the Court lacks jurisdiction *ratione personae*.[453] This represents another limitation on jurisdiction within the national territory of a Contracting State.

291. Finally, in *Al-Saadoon and Mufdhi v UK,* the applicants were Iraqi nationals arrested separately by UK military forces in UK-occupied southern Iraq in 2003.[454] From December 2003 to December 2008, the applicants remained in a UK-run detention facilities in Iraq. The detention facilities were initially established by military force, but later the sovereign Iraqi authorities recognised the exclusive control and authority of the UK over these facilities. In December 2007, Iraqi authorities requested that the applicants be transferred to them for trial. The applicants took action in the UK courts, arguing that their surrender would amount to *refoulement* on the ground that they would face charges attracting the death penalty. On 31 December 2008 Iraqi recognition of exclusive UK control of the Iraqi detention facilities expired. In 30 December 2008, the applicants were transferred to Iraqi authorities.

[452] *Blagojevic v The Netherlands* (9 June 2009) ECtHR 49032/07.
[453] *Blagojevic v The Netherlands* (9 June 2009) ECtHR 49032/07, [36].
[454] *Al-Saadoon & Mufdhi v UK* (30 June 2009) ECtHR 61498/08.

292. The UK Court of Appeal had found that the applicants did not fall within the Convention jurisdiction of the UK.[455] Leave to appeal to the House of Lords was refused. The European Court of Human Rights ruled separately on the jurisdictional and substantive issues.[456]

293. The applicants in *Al-Saadoon* argued that, for the entire period from their arrest through to their transfer to Iraqi authorities, they fell within the Convention jurisdiction of the UK. The UK argued *inter alia* that it had no choice other than to hand over the applicants to the sovereign power of the territory on which the detainees were held, as the sovereign power had requested. This was because, once the Iraqi government no longer recognised exclusive British authority over the detention facilities, it would have been unlawful to deny the request of the sovereign power. On the facts, the Court found that the UK had 'total and exclusive control' over the facilities at the relevant time and, therefore, the applicants fell within the UK's Convention jurisdiction. For the Court, this was a straight-forward application of the 'authority and control' test. The legality defence, raised by the UK, was not a matter for the preliminary determination of jurisdiction, but for the later merits determination of state responsibility.[457]

analysis

294. The case of *Bankovic* seemed to stir much controversy among European legal commentators. Many authors were critical of the Grand Chamber's 'restrictive view' of jurisdiction.[458] They also seemed concerned by the doctrine of the legal space *(espace juridique*) of the Contracting Parties.[459] This latter concern is something I do not understand, because I read the concept of legal space as little

[455] *Al-Saadoon & Anor, R (on the application of) v Secretary of State for Defence* [2009] EWCA Civ 7.
[456] *Al-Saadoon & Mufdhi v UK* (30 June 2009 & 2 March 2010) ECtHR 61498/08.
[457] *Al-Saadoon & Mufdhi v UK* (30 June 2009) ECtHR 61498/08, [89].
[458] e.g. Michal Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52(3) *Netherlands International Law Review* 349, 370.
[459] e.g. Gondek (2005), n 458, 375ff; and, Sigrun Skogly, *Beyond International Borders: states' human rights obligations in international cooperation* (2006, Intersentia) 179-80.

more than a synonym for the sum of the jurisdictions of the Contracting Parties. Given that extraterritorial jurisdiction is elastic, in the sense that it will expand and contract according to the circumstances of a case, the *espace juridique* is not a fixed legal space but also correspondingly elastic.

295. In his 2008 paper, Milanovic argues that the term 'jurisdiction' in human rights treaties is not the same concept as jurisdiction in general international law. He argues that it refers 'solely [to] a sort of factual power that a state exercises over persons or territory'.[460] This is Milanovic's sole test for jurisdiction. This leads him to conclude that the European Court of Human Rights was wrong to find Moldovan jurisdiction in *Ilascu*. While this is an interesting theoretical approach, it does not assist in a complete understanding of the Court's jurisprudence.

296. In a 2004 collection of papers on the extraterritorial application of human rights treaties, several authors attempted to summarise the Court's jurisprudence on the extraterritorial Convention jurisdiction of Contracting Parties. I will examine two of those authors' attempts. Cerna summarises the categories of circumstances which would result in a violation of the Convention extraterritorially.[461] The chapter is written after the case of *Bankovic* (2001),[462] but before an equally important case of *Ilascu* (2004) involving Moldova and Russia.[463] While her first category is accurate, the second is loose and requires modification after *Ilascu*, and the third is superficial and contributes nothing to the understanding of jurisdiction:[464]

> (1) ... ['the Soering cases']...if lawful acts committed within the territory of a state (such as extradition or deportation determinations) were likely to give rise to actual violations outside the state's territory;

[460] Milanovic (2008), n 372, 417.
[461] Christina Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System', in Coomans & Kamminga (2004), n 397, 147; citing Professor Hurst Hannum, "Bombing for Peace: Collateral Damage and Human Rights", American Society of International Law (ASIL) Proceedings (March 2002), 97-8.
[462] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99.
[463] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99.
[464] Cerna (2004), n 461, 147.

> (2) ...in territories that are under [a state's] 'effective control', even if the territories are outside the state; and
>
> (3) ... as in the Issa v Turkey case, where neither the Court nor Turkey questioned that the Convention applied to Turkish forces operating in Iraq, a state not party to the Convention...

297. In the same 2004 collection of papers, Lawson summaries the caselaw into four categories.[465] This is a version of his earlier three-category summary of 2002,[466] modified to accommodate the *Bankovic* decision. Unfortunately, these categories are confused because they do not clearly differentiate between jurisdiction and state responsibility. This failure is the focus of O'Boyle's justified criticism of Lawson's paper.[467] Respectfully, I must say that Lawson has misread *Bankovic*. Though of course, that is easier to say with the advantage of several subsequent cases which have clarified *Bankovic* considerably. The four categories identified by Lawson are:[468]

> (a) The 'northern Cyprus situation', where one state party to the Convention...exercises effective overall control over part of the territory of another state party to the Convention...
>
> (b) The 'Kosovo situation': same as (a), but [occupied territory belongs to a state which] is not a part to the Convention...
>
> (c) The 'intra-European temporary operation', where agents of one state party to the Convention exercise de facto control over persons and property abroad in a more or less limited, incidental, ad hoc fashion in the territory of another state party to the Convention...
>
> (d) The 'external temporary operation': same as (c), but [occupied territory belongs to state which] is not a party to the Convention...

298. In relation to Lawson's first two categories, there is nothing in the Court's caselaw to support the bifurcation of these categories. Whether the foreign territory belongs to a Contracting or non-Contracting State is irrelevant. If a Contracting State exercises effective control over foreign territory, then that territory will fall

[465] Lawson (2004), n 397, 121-3.
[466] Rick Lawson, 'Jurisdiction and Extraterritorial Acts" in Gérard Kreijen, *State, Sovereignty and International Governance* (2002, OUP) 296-7.
[467] O'Boyle (2004), n 397.
[468] Lawson (2004), n 397, 121-3.

within the Contracting State's jurisdiction and will become part of the legal space in which the Convention operates. In the Kosovan case of *Behrami*, in which judgment was handed down after Lawson published, the Court found that effective *overall* control was exercised by the United Nations, which is not a party to the Convention, and not by individual contributing states such as France.[469] In relation to Lawson's third and fourth categories, again there is no caselaw to support this bifurcation. Whether authority is exercised over people and property on the territory of a Contracting or non-Contracting State is irrelevant. Jurisdiction attaches to the fact of authority and control, independent of geography. This is certainly the view taken by the UK House of Lords, which found that the UK's Convention jurisdiction could attach under certain circumstances in occupied Iraq.[470] Interestingly, Lawson has not included the so-called '*Soering* cases' in his summary, though he did include them in his 2002 summary.

299. In the House of Lords case mentioned above, Lord Brown identifies four categories of exceptions to the rule that jurisdiction is primarily territorial. Based on his Lordship's reading of the European Court of Human Rights' decision of *Bankovic*, those four categories are:[471]

> (i) Where the state "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]" ... (i.e. when otherwise there would be a vacuum within a Council of Europe country, the government of that country itself being unable "to fulfil the obligations it had undertaken under the Convention" ...(as in Northern Cyprus).

[469] *Behrami v France* (2 May 2007) ECtHR 71412/01 & *Saramati v France et al* (2 May 2007) ECtHR 78166/01, [113]-[114]: 'KFOR was a multinational and international security presence so that at no time did any respondent State exercise effective overall control over a part of Kosovo. ...at the relevant time, the [UN Security Council] exercised the powers of government in Kosovo...'.
[470] *Al Skeini v Secretary of State for Defence* [2007] UKHL 26. Finding no jurisdiction where UK troops, while on patrol in an Iraqi urban area in Iraq (over which they had no effective control), shot dead 5 people; but jurisdiction where an individual was taken prisoner, detained and beaten to death whilst in the custody of UK troops.
[471] *Al Skeini v Secretary of State for Defence* [2007] UKHL 26, [109] (Lord Brown).

> (ii) "Cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state [where] customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction" ...
>
> (iii) Certain other cases where a state's responsibility "could, in principle, be engaged because of acts ... which produced effects or were performed outside their own territory" .... *Drozd v France...*is the only authority specifically referred to in *Bankovic* as exemplifying this class of exception to the general rule...
>
> (iv) The *Soering...*line of cases, ...[which] involves action by the state whilst the person concerned is "on its territory, clearly within its jurisdiction" ...

300. With respect, his Lordship's first point appears to be a misreading of the Court's concept of legal space in *Bankovic*. The applicants in *Bankovic* had sought to rely on the Court's reasoning in *Cyprus v Turkey* (2001), in which the court found Turkish jurisdiction and noted that to find otherwise would leave 'a regrettable vacuum in the system of human rights protection' in northern Cyprus.[472] The applicants in *Bankovic* argued that the Convention had an '*ordre public* mission' and that to find they fell outside its protection would "leave a regrettable vacuum in the Convention system of human rights' protection".[473] The Court rejected this, explaining that the 'regrettable vacuum' to which it referred in *Cyprus v Turkey* (2001) would have resulted because the residents of the region, who but for Turkish occupation would have been protected by the Convention, would find themselves unprotected. This was unacceptable to the Court. In essence, occupation of a Contracting State's sovereign territory does not remove the territory from the Convention's *espace juridique*. All Cypriots are still protected by the Convention by virtue of Cyprus' ratification. If I might be so bold, this is a species of what the common law calls 'legitimate expectations'. The Court distinguished the facts of *Bankovic* essentially because the residents of Belgrade had no legitimate expectation of falling within the Convention's *espace juridique*: Serbia was not and had never been a Contracting State. This is what the Court meant when it said that the Convention is primarily regional and does not apply to

[472] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [79]-[80], referring to: *Cyprus v Turkey* (10 May 2001) ECtHR 25781/94, [78].
[473] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [79].

the whole world. It would be an error to assume that those under the effective control of a Contracting State on non-European territory would not also have legitimate expectations of falling within jurisdiction.

301. In relation to Lord Brown's second point, which is also a direct quote from *Bankovic*, it is a shame that his Lordship appears unaware that the Court was summarising its exposition of the law in *Cyprus v Turkey* (1975). The 1975 decision is much broader than the brief summary in *Bankovic*, referring to 'authorised agents of a State, including diplomatic or consular agents and armed forces'.[474] Again, in reference to the third category, while it is true that the *Bankovic* Court only referred to *Drozd*, in the latter it referred to a long line of authority.[475] Finally, I cannot agree with his Lordship's final category as a test for extraterritorial jurisdiction, because it is a category of state responsibility. Lord Brown himself acknowledges that these cases do not involve "the exercise of the state's jurisdiction abroad" and it is disappointing that he includes it nevertheless.

302. Before I present my own attempt to summarise the Court's caselaw on extraterritorial jurisdiction, I note that the list of categories of circumstances which engage extraterritorial jurisdiction is not closed. My summary only attempts to summarise the caselaw as it stood at the time of the Arar case and the Bali Nine. I note that the '*Soering* cases' are not extraterritorial jurisdictional cases, because the individual to be refouled is already within jurisdiction. These *non-refoulement* cases are best dealt with below under the more appropriate heading of 'state responsibility'. I also note that a Contracting Party's Convention jurisdiction will

[474] *Cyprus v Turkey* (26 May 1975) ECommHR 6780/74 & 6950/75, 136. For full quote, see [261] above.
[475] *Drozd and Janousek v France and Spain* (26 June 1992) ECtHR 12747/87, [91], citing examples of Commission decision on admissibility in: *X v the Federal Republic of Germany* (25 September 1965) ECommHR 1611/62 (Yearbook, vol. 8, p. 158); *Hess v. the United Kingdom* (28 May 1975) ECommHR 6231/73 (Decisions and Reports (DR) no. 2, p. 72); *Cyprus v Turkey* (26 May 1975) ECommHR 6780/74 & 6950/75 (DR 2, p. 125); *X & Y v Switzerland* (14 July 1977) ECommHR 7289/75 and 7349/76 (DR 9, p. 57); and, *W. v. the United Kingdom* (28 February 1983) ECommHR 9348/81 (DR 32, p. 190). For an account of many of these early cases, see: Tom Zwart (1994) n 338, 109ff; see also, *Al Skeini v Secretary for Defence* [2004] EWHC 2911 (first instance decision).

only extend to its external territories if the Contracting Party has made a declaration under the Convention to this effect.[476]

303. On one final note, an individual can fall under the jurisdiction of more than one Contracting State, such as the applicants in *Ilascu* who fell under both Moldovan and Russian jurisdiction. However in these circumstances, the extent of each State's responsibility to an individual within jurisdiction is not necessarily identical. Early on in its jurisprudence, the Commission also recognised the concept of 'joint responsibility', in which two or more parties share equal control over a territory or person and in which all decisions must be joint and unanimous. In these circumstances, such as the detention of Herman Hess in Spandau prison, jurisdiction is joint and non-severable, leading to the conclusion that one party alone cannot be held responsible for any act or omission and therefore Convention jurisdiction does not attach. In *Ilascu*, both respondent parties were Contracting States at the time of the application. In the case of *Hess*, the USA and USSR, which held joint responsibility with the UK and France, were not Contracting States, but the Commission's decision did not turn on this fact. It might be that, if all respondent nations are Contracting States, then an applicant falls within some form of 'joint jurisdiction'. But this is pure speculation and, unfortunately, the exact parameters of joint jurisdiction remain unclear.

304. Having reviewed the Court's relevant caselaw, I conclude that the Court's jurisdiction identifies four distinct categories in which a Contracting State's 'jurisdiction' will extend extraterritorially:[477]

    a. when a Contracting State exercises effective overall control of a foreign territory ('effective control test' of *Loizidou*);

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[476] *Thanh et al v UK* (12 March 1990) ECommHR 16137/90; *Quark Fishing Ltd v UK* (19 September 2006) ECtHR 15305/06. See [271] & [287] above.

[477] the applicants in *Al-Saadoon & Mufdhi v UK* (30 June 2009) ECtHR 61498/08 at [71] argued along similar lines, referring to (in my order): 'the effective control over an area exception', 'the State agent authority exception', and 'the diplomatic exception'. Gondek (2005), n 458 at 370-5, also (but less obviously) reduces the caselaw to the same three categories (in my order): 'territorial control'; 'control over persons'; and, 'exceptions...recognised in international law and treaties'.

b. when a Contracting State exercises a decisive influence over a foreign administration in another Contracting State ('decisive influence test' of *Ilascu*);

c. when agents of a Contracting State exercise authority over a person and/or property in a foreign territory ('authority over people or property test' of *WM* and *Öcalan*); or

d. when, and to the extent that, customary international law or a treaty recognises extraterritorial jurisdiction ('international law exceptions').

305. The effective control test for a Contracting State's Convention jurisdiction is closely linked to control over foreign territory, either by way of military action or by agreement or acquiescence of the foreign sovereign power.[478] Under such circumstances the Contracting State is obliged to secure all the Convention rights of everyone within the occupied territory over which it exercises effective control. The occupation of foreign territory can be long-term, as in the case of Turkey in northern Cyprus, or short-term, as in the case of Turkish military incursions into northern Iraq. Furthermore, agents of a Contracting State who control foreign territory, but who act under the command and control of an international body (such as the UN Security Council) will not attract the Convention jurisdiction of a Contracting State because the State is not the body exercising effective total control.

306. Jurisdiction also attaches in situations where a Contracting State exercises 'decisive influence' over the administration of a separatist regime in another Contracting State.[479] Presumably jurisdiction does not attach where a decisive influence is exercised over a separatist regime in a non-Contracting State. This is because the people in that region have no legitimate expectation of protection under the Convention.

[478] *Bankovic et al v Belgium et al* (12 December 2001) ECtHR 52207/99, [60].
[479] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [392].

307. The authority and control test for jurisdiction is closely linked to the agents of a Contracting State exercising authority and control, lawfully or unlawfully, over people and/or property in foreign territory over which the Contracting State does not exercise effective control. The foreign territory is not restricted to the region of Europe. This application of jurisdiction is designed to ensure that a Contracting State cannot 'perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[480] In stating this reason, the Court cites *inter alia* the UN Human Rights Committee's decision in *Lopez Burgos*. The case of *Al-Saadoon* is a clear case of UK troops exercising authority and control over individuals in the foreign sovereign state of Iraq, by virtue of holding the individuals in detention. Another example of agents exercising jurisdiction is judges of a Contracting State performing a judicial function on foreign soil in their capacity as judicial officers of that Contracting State.[481] Likewise in *Issa*, if there had been enough evidence of Turkish authority and control over the alleged victims, then Turkish Convention jurisdiction would have extended to the deceased men on Iraqi soil.

308. In relation to the fourth category of cases, these involve little pockets of extraterritorial jurisdiction recognised by international law and treaty law. This includes embassies and consulates (under customary international law)[482] and on board ships and aircraft registered in, or flying the flag of, a Contracting State and in international waters or airspace (under treaty law).[483] These exceptions arise because a Contracting State's Convention jurisdiction is, according to the Court, interpreted in conformity with the concept of jurisdiction at public international law.[484]

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[480] *Issa et al v Turkey* (3 March 2005) ECtHR 31821/96, [71].
[481] *Drozd and Janousek v France and Spain* (26 June 1992) ECtHR 12747/87. See [276] above.
[482] e.g. *Al Skeini v Secretary of State for Defence* [2007] UKHL 26, [97] (per Lord Carswell).
[483] see also [59]-[60].
[484] e.g. see *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [312]. For a view that this is incorrect, see Milanovic (2008), n 372, 417.

5.3.3 state responsibility

309. The extent of state responsibility is beyond the scope of this thesis, however I briefly cover it for completeness' sake and where it is relevant to the issues of torture (Maher Arar) and the death penalty (Bali Nine).

caselaw

310. The facts of *Soering* are discussed above.[485] It is best to view *Soering* as a *non-refoulement* case.[486] Many commentators, and even the early Court, categorise *Soering* as a jurisdiction case, but it is best to recognise it as a matter of state responsibility. *Soering* is authority for the proposition that state responsibility may attach to the decision of a Contracting State to extradite an individual (who by definition is already within jurisdiction) to a country where there is a real and substantial risk that the individual's *fundamental* Convention rights could be violated. The concept of *fundamental* Convention rights is significant, because *Soering* was decided as a 'death row phenomenon' case, turning on a violation of the prohibition of cruel and inhuman treatment and punishment. The decision was not based on capital punishment as a violation of the right to life.

311. The Court noted that not all of the extra-jurisdictional breaches of Convention rights attracts state responsibility.[487] State responsibility only attaches to those Convention rights which enshrine 'the fundamental values of the democratic societies making up the Council of Europe'.[488] The guarantee against torture and inhuman and degrading treatment or punishment is such a fundamental right because no exceptions or derogations are permitted, even in times of war or national emergency.[489] The prohibition on torture is absolute and no one should ever be extradited to face the real risk of torture. The standard is reduced when

[485] see [267].
[486] while *Soering* is an extradition case, its principles have been extended to include expulsion as well: *Cruz Varas et al. v Sweden* (20 March 1991) ECtHR 15576/89, [70]. See also: *Vilvarajah et al v UK* (30 October 1991) ECtHR 13163/87, 13164/87, 13165/87, 13447/87 & 13448/87.
[487] *Soering v UK* (7 July 1989) ECtHR 14038/88, [86].
[488] *Soering v UK* (7 July 1989) ECtHR 14038/88, [85].
[489] *Soering v UK* (7 July 1989) ECtHR 14038/88, [88].

considering the guarantee against inhuman and degrading treatment and punishment. An assessment of what constitutes such conditions is required to achieve:[490]

> ...a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

312. However, in exceptional circumstances, state responsibility will attach to any decision to extradite 'in circumstances where the fugitive has suffered or risks suffering a flagrant denial' of a Convention right which 'holds a prominent place in a democratic society'.[491] The example the Court in *Soering* gives is the right to a fair trial.[492] In the circumstances of Soering's case, however, there was no such demonstrated risk associated with Soering's potential trial in the United States. As already stated, the *non-refoulement* principle attached to the 'death row phenomenon' in this case.

313. The facts of *Drozd v France* are covered above.[493] While most of the application was deemed inadmissible for want of jurisdiction, one ground was ruled admissible against France. For centuries, offenders convicted in Andorra have served their sentence in a French prison. Drozd argued that this detention in France was unlawful because *inter alia* the French courts had not satisfied themselves that the trial in Andorra complied with Convention standards. The Court, applying *Soering*, found that the French courts did not have to do this. However, the Court reiterated that 'Contracting States are...obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of

[490] *Soering v UK* (7 July 1989) ECtHR 14038/88, [89].
[491] *Soering v UK* (7 July 1989) ECtHR 14038/88, [113].
[492] see also: *Drozd and Janousek v France and Spain* (26 June 1992) ECtHR 12747/87, [110].
[493] see [276] above.

justice'.[494] The Court dismissed this complaint on the grounds that there was no evidence of a flagrant denial of justice.

314. In its second judgment in Mrs Loizidou's case, concerning the merits of the application, the Court clearly stated that a Contracting State could be held responsible for the acts and omissions of its agents 'which produce effects outside their own territory'.[495] Because Turkey exercised effective control over northern Cyprus, the Court found that local non-Turkish administrators were subordinate to the Turkish authorities and, therefore, Turkey could be held responsible for the acts and omissions of these subordinate local administrators.[496] Presumably a determination of whether Turkey was responsible for the actions of a local administration would only be made if there was little or no military presence and after a determination of whether Turkey exercises control over the administration and its policies. But this further examination was not necessary in this instance, because of the overwhelming military presence.

315. In *Osman v UK*, Mrs Osman and her son (Ahmet) brought an application alleging that the UK had failed to protect them and the deceased Mr Ali Osman from a dangerous private citizen.[497] The applicants and the deceased were all British citizens living in London, so no jurisdictional issues arose. Ahmet Osman attended a school at which Mr Paul Paget-Lewis taught. Paget-Lewis was obsessed with the adolescent Ahmet Osman. A series of inappropriate and criminal acts committed by Paget-Lewis were reported to police by the applicants, school authorities and other members of the public. The police took several months to investigate these allegations and, before police could arrest and charge Paget-Lewis, he obtained a sawn-off shotgun and shot four people in their homes: killing Mr Ali Osman and the son of the school's Deputy Principal; and wounding Ahmet Osman and the

[494] *Drozd and Janousek v France and Spain* (26 June 1992) ECtHR 12747/87, [110].
[495] *Loizidou v Turkey* (18 December 1996) ECtHR 15318/89 (merits), [52].
[496] *Loizidou v Turkey* (18 December 1996) ECtHR 15318/89 (merits), [56].
[497] *Osman v UK* (28 October 1998) ECtHR 23452/94 (Grand Chamber). See also Lawson (2004), n 397, 106 (though, Lawson incorrectly identifies this as a jurisdiction case, rather than a state responsibility case).

Deputy Principal. The applicants alleged before the Grand Chamber that the UK had failed to take all 'appropriate and adequate measures' to secure the Convention right to life of Mr Osman and Ahmet Osman from the 'real and known danger which Paget-Lewis posed'.[498]

316. The Grand Chamber first set out the relevant principles of law in relation to a Contracting State's positive obligation to secure the Convention right to life to everyone within their jurisdiction:[499]

> ...bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, [this positive] obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice...

317. Having established the principles which must be balanced in any determination of the breach of this Convention right, the Grand Chamber next turned to the requirement of a Contracting State's knowledge with respect to a particular breach:[500]

> ...where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their [positive] duty to prevent and suppress offences against the person..., it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

318. So before a Contracting State can be said to have breached this positive obligation, two circumstances must be satisfied. First, there must be real or constructive knowledge, on the part of the State, of a real and immediate risk to

[498] *Osman v UK* (28 October 1998) ECtHR 23452/94, [101].
[499] *Osman v UK* (28 October 1998) ECtHR 23452/94, [116].
[500] *Osman v UK* (28 October 1998) ECtHR 23452/94, [116].

an individual. Second, the State must have failed to use what power it has in the situation, to the extent that can be reasonably expected, to avoid that risk. The Grand Chamber rejected the UK's submission that gross negligence or wilful disregard was the requisite standard of state responsibility.

319. The Grand Chamber summarised the applicant's burden of proof in this fashion:[501]

> ...it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

320. In *Cyprus v Turkey* (2001), Cyprus asked the Grand Chamber to recognise Turkish jurisdiction over the acts and omissions of private individuals in northern Cyprus. Having already found that Turkey had jurisdiction and an obligation to secure all Convention rights in the region,[502] the Grand Chamber found that Turkish responsibility extended beyond the actions of its own nationals to include the acts and omissions 'of the local administration which survives by virtue of Turkish military and other support'.[503] The Grand Chamber further noted, in relation to Turkey's state responsibility for the acts and omissions of private individuals in northern Cyprus, that: [504]

> ...the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention.

321. In several cases determining a State's responsibility for an alleged violation of the Convention, the Court has referred to and relied on the work of the International Law Commission (ILC) on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. In *Ilascu*,[505] the Grand Chamber cited the ILC's Draft Articles with approval and accepted it as authority for the principle that a State may be held responsible for the acts and omissions of its agents even when

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[501] *Osman v UK* (28 October 1998) ECtHR 23452/94, [116].
[502] see [280] above.
[503] *Cyprus v Turkey* (10 May 2001) ECtHR 25781/94, [77].
[504] *Cyprus v Turkey* (10 May 2001) ECtHR 25781/94, [81].
[505] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [319]-[321].

those agents are acting outside their authority.[506] Or as the Court put it: "a State's authorities are strictly liable for the conduct of their subordinates".[507] The Grand Chamber also cited with approval the ILC's Draft Articles, and associated commentary, on the duration of state responsibility for a breach of an international obligation.[508] In *Behrami*, the Grand Chamber again turned to the ILC's Draft Articles, but in a more comprehensive manner and as authority for the principles relating to the responsibility of international organisations and States.[509] Specifically, the Grand Chamber adopted the ILC's concept of 'attribution' in relation to identifying the entity responsible for any given act or omission.[510] This willingness of the Grand Chamber to adopt the Draft Articles demonstrates an approval of their status as authority as a codification of international law on state responsibility.

322. The applicants in *Bader v Sweden* were Kurds who had unsuccessfully sought asylum in Sweden on the grounds that they faced persecution if returned to Syria.[511] Bader argued that he faced a substantial risk of execution if deported to Syria, in violation of his Convention rights to life (Article 2) and to be free of inhuman treatment or punishment (Article 3).[512] The Court then traversed its jurisprudence and concluded that *refoulement* is prohibited by the Convention where Article 3 violations are likely, following *Soering*.[513] With reference to capital punishment, the Court stated that the Convention does not necessarily prohibit *refoulement* in all death penalty cases.[514] This is because, while Europe is a

[506] ILC Draft Principles, Article 7.
[507] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [319].
[508] ILC Draft Principles, Articles 14 & 15, cited in *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [320]-[321].
[509] *Behrami v France* (2 May 2007) ECtHR 71412/01 & *Saramati v France et al* (2 May 2007) ECtHR 78166/01, [28]-[34].
[510] *Behrami v France* (2 May 2007) ECtHR 71412/01 & *Saramati v France et al* (2 May 2007) ECtHR 78166/01, [121].
[511] *Bader et al v Sweden* (8 November 2005) ECtHR 13284/04.
[512] contrary to Articles 2 (right to life) & 3 (freedom from torture and cruel or inhuman treatment or punishment) of the Convention.
[513] see also: *Öcalan v Turkey* (12 May 2005) ECtHR (Grand Chamber) 46221/99, [162]-[175].
[514] *Bader et al v Sweden* (8 November 2005) ECtHR 13284/04, [41]-[42].

"death penalty free zone", the right to be free of capital punishment is only made a non-derogable right under Protocol 13 attached to the Convention, which has not been ratified by all European nations.[515] Nevertheless, a Contracting State's state responsibility might be engaged where the death sentence was the result of an unfair trial. In short, the Convention prohibits *refoulement* in circumstances where 'an alien...has suffered or risks suffering a flagrant denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty'.[516] In Mr Bader's case, the Court considered his trial in Syria to be unfair and summary in nature. Accordingly, the Court concluded that his *refoulement* would violate Articles 2 and 3 of the Convention.

323. In *Al-Saadoon and Mufdhi v UK*,[517] the Court observed that Protocol 13 establishes by implication a non-derogable right not to be subjected to the death penalty. The Court found that ratification of Protocol 13, therefore, removes the death penalty exception to Article 2 (right to life) of the Convention, thereby elevating Article 2 to the status of a "fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe".[518] Consequently, for those Contracting States that have ratified Protocol 13, the principle of *non-refoulement* now encompasses this implied right not to be subjected to the death penalty. This extended the rulings in *Soering* and *Bader* (both "death row phenomenon" cases based on Article 3) and closely follows the UN Human Rights Committee's finding in *ARJ v Australia*.[519]

324. In *Al-Saadoon and Mufdhi v UK*, the applicants were Iraqi nationals arrested and detained by UK military forces in UK-occupied southern Iraq in 2003 on suspicion

[515] as at July 2009, Armenia, Azerbaijan, Latvia, Poland, Russia had not ratified Protocol No. 13 concerning the abolition of the death penalty in all circumstances: <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/>.
[516] *Bader et al v Sweden* (8 November 2005) ECtHR 13284/04, [42].
[517] *Al-Saadoon & Mufdhi v UK* (2 March 2010) ECtHR 61498/08. The earlier decision of 30 June 2009 was a jurisdictional hearing, see [291] ff above.
[518] *Al-Saadoon* (2010), fn 517, [118].
[519] see [162] ff.

of murdering UK nationals in Iraq. The general facts are set out above.[520] Further and relevantly, in August 2004 Iraq reintroduced the death penalty for murder, and in November 2004 the UK and Iraq signed an MoU on the continued detention of prisoners by UK forces and their transfer upon request to the Iraqi authorities.[521] Justifying the transfer of the inmates to Iraqi officials in December 2008, the UK argued that international law required it to respect the sovereignty of Iraq and to transfer the suspects for trial. The UK referred to the domestic decision of B.[522] The Court distinguished the case of B on the grounds that B had voluntarily sought refuge in the British consulate in Melbourne, whereas the Iraqi detainees had been involuntarily arrested and detained by the UK. Referring inter alia to the 2004 MoU, the Court found that, from the date Protocol 13 entered into force for the UK (1 February 2004), the UK "should not [have entered] into any arrangement or agreement which involved it in detaining individuals with a view to transferring them to stand trial on capital charges or in any other way subjecting individuals within its jurisdiction to a real risk of being sentenced to the death penalty and executed".[523] Furthermore, as the UK had originally arrested and detained the Iraqi nationals, the UK "was under a paramount obligation to ensure that the arrest and detention did not end in a manner which would breach the applicants' rights under Articles 2 and 3 of the Convention [right to life and freedom from torture and inhuman or degrading treatment or punishment] and Article 1 of Protocol 13 [abolition of capital punishment and the implied right not to be subjected to the death penalty]".[524] Having found violations of the Covenant Articles 2 and 3, the Court ordered the UK to seek a guarantee that the men would not be executed, and awarded compensation and costs.

[520] see [291]-[293] above.
[521] *Al-Saadoon* (2010), fn 517, [23]-[25].
[522] see [336] below.
[523] *Al-Saadoon* (2010), fn 517, [137].
[524] *Al-Saadoon* (2010), fn 517, [140].

analysis

325. The European Court of Human Rights has developed its own jurisprudence on state responsibility, based on established principles of international law. Since the adoption of the ILC's Draft Articles on State Responsibility, the Grand Chamber has shown a willingness to adopt the Draft Articles as an authoritative codification of that international law of state responsibility.

326. In essence, once the Court has determined that a complaint falls within the Convention jurisdiction of a Contracting State, the legal focus shifts to the Contracting State's state responsibility for the alleged Convention violation. This state responsibility consists *inter alia* of negative obligations 'to refrain from interfering with the enjoyment of rights and freedoms guaranteed [by the Convention]' and positive obligations to secure all the Convention rights to everyone within jurisdiction.[525]

327. A Contracting State must discharge its positive obligations by taking all 'appropriate and sufficient' measures. But it is not required to go beyond what is possible and proportionate in the circumstances. The Court has acknowledged that it is not its role to dictate appropriate measures to Contracting States. This is an alternative formulation of the 'what can reasonably be expected' standard.[526] In the discharge of these positive obligations:[527]

> ...regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden.
>
> ...Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case.

[525] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [313].
[526] see [329] below, referring to *Osman v UK.*
[527] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [332], [334].

328. These positive obligations must not place 'an impossible or disproportionate burden' of responsibility on a Contracting State. For example, the scope of these positive obligations might be limited in cases where part of the national territory of a Contracting State is not under its effective control, however even with such limitations a Contracting State is required to take 'all appropriate measures' within its power to discharge these obligations in the occupied or rebellious region.[528] The scope of these positive obligations will also be limited when agents of the Contracting State operate in the territory of a foreign State, simply because the Contracting State's agents must respect the sovereignty of that foreign nation by obeying local law.

329. To satisfy the Court that a Contracting State has breached its positive obligations to protect an individual's right to life, an applicant must 'show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge'.[529]

330. State responsibility also extends to the actions and omissions of subordinate local administrators in a foreign territory over which a Contracting State has jurisdiction. This is so, even if those administrators are not nationals of the Contracting State. To the extent that a Contracting State, in these circumstances of foreign occupation, colludes or acquiesces in the actions of private individuals which violate Convention rights, the Contracting State may be held responsible for those actions.[530]

331. A Contracting State's state responsibility may also extend to acts which have 'sufficiently proximate repercussions' on Convention rights, 'even if those repercussions occur outside its jurisdiction'. Of course, the individual complainant must be *within* jurisdiction to begin with in such cases. This class of case deals with acts or omissions made *within* jurisdiction, which have adverse consequences *outside* jurisdiction. The *non-refoulement*, or *Soering*-type cases, are of this class.

[528] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [313] & [332].
[529] *Osman v UK* (28 October 1998) ECtHR 23452/94, [116].
[530] *Cyprus v Turkey* (10 May 2001) ECtHR 25781/94, [81].

332. The principle of *non-refoulement* applies to the actions of a Contracting State where a decision to expel, extradite or surrender an individual within its jurisdiction to another State in circumstances where there are substantial risks of a breach of the individual's fundamental Convention rights. The Court has recognised that fundamental rights are those which are *inter alia* considered fundamental at international law or because they are non-derogable in the Convention or its attached Protocols. The Court recognises the application of the principle of *non-refoulement* in all cases where there are 'substantial grounds for believing that [an individual]...faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment', as a violation of Article 3 of the Convention.[531] The Court recognises the *non-refoulement* principle in death penalty cases, at least for those Contracting States that have ratified Protocol 13, as a violation of Article 2 of the Convention (right not to be executed).[532] The Court also acknowledges the *non-refoulement* principle in all cases where there has been, or is a risk of, a flagrant breach of the right to a fair trial, as a violation of Article 6 of the Convention.[533]

5.4 Inter-American Commission on Human Rights

333. The Inter-American Commission on Human Rights has also recognised extraterritorial exercise of jurisdiction. It favours a test along these lines: "when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues".[534] The nexus is power and authority over individuals, no matter where that occurs.

[531] *Ilascu et al v Moldova & Russia* (8 July 2004) ECtHR 48787/99, [317].
[532] *Al-Saadoon* (2010), fn 517.
[533] *Öcalan v Turkey* (12 May 2005) ECtHR (Grand Chamber) 46221/99, [166]. See also: *Bader et al v Sweden* (8 November 2005) ECtHR 13284/04, [42].
[534] *Armando Alejandre Jnr v Cuba ("Brothers to the Rescue")* (29 Sept 1999) IACHR 86/99, [25].

5.5 Other domestic courts

5.5.1 United Kingdom

334. The question of human rights jurisdiction was unsettled in the United Kingdom. In the leading case of *Al Skeini v Secretary of Defence*, the House of Lords followed the European Court of Human Rights.[535] However, lower courts in the UK have had difficulty reconciling the common law with the *Human Rights Act* and *European Convention on Human Rights*.

335. In *Al Skeini* family members of six Iraqis killed by UK forces in Iraq sought relief from British courts. The majority in the House of Lords decision relied on Bankovic to conclude that the first five appellants, whose family members had been killed while UK troops were patrolling urban areas, were not within jurisdiction.[536] The majority found that UK troops did not have effective control of the areas in which they were patrolling[537]. However, the sixth Iraqi was killed while he was under detention in a UK military base in Iraq and was, therefore, within jurisdiction. In this case, the House of Lords had difficulty reconciling the European decision of *Issa* with *Bankovic*. This appears to be because their Lordships did not accept the 'authority and control' test over individuals, while recognising the 'effective control' test over territory.[538] In 2011, the Grand Chamber of the European Court of Human Rights found that the UK had jurisdiction in all six cases under the 'authority and control' test on the grounds that the UK had assumed the responsibility for security in this area of Iraq and "through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of

[535] *Al Skeini v Secretary of State for Defence* [2007] UKHL 26. Finding no jurisdiction where UK troops, while on patrol in an urban area in Iraq, shot dead 5 people; but jurisdiction where an individual was taken prisoner and beaten to death in detention by UK troops.
[536] *Al Skeini v Secretary of State for Defence* [2007] UKHL 26 (Lord Rodger, Baroness Hale & Lord Carswell; Lord Brown (six appellant only within jurisdiction of *European Convention of Human Rights* but not *Human Rights Act*); and, Lord Bingham dissenting).
[537] e.g. *Al Skeini v Secretary of State for Defence* [2007] UKHL 26, [97] (Lord Carswell): extraterritorial jurisdiction requires 'high degree of control'.
[538] e.g. *Al Skeini v Secretary of State for Defence* [2007] UKHL 26, [82] (Lord Bingham).

such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom".[539] The Grand Chamber went on to find that the UK had breached its procedural duties in the investigation of the deaths in all five cases.

336. In the case of *B*, the UK Court of Appeal examined the extent of extraterritorial jurisdiction on consular premises. The applicants in this case were two juveniles who had arrived in Australia with their mother by boat in 2001. The Australian government had refused them asylum on the grounds that it did not believe their claims that they were Afghan Hazaras. The boys escaped from an immigration detention centre in the Australian desert and sought asylum in the British Consulate in Melbourne. Asylum was refused and the boys were returned to Australian authorities. The boys appealed this administrative decision in the British courts.

337. In the UK Court of Appeal, two preliminary jurisdictional issues arose.[540] The first issue involved whether the European Convention on Human Rights applied to the actions of the British consular officials in Melbourne. The second issue concerned whether the *Human Rights Act* applied to the actions of British consular officials in Melbourne.

338. Delivering the decision of the Court, Lord Phillips examined the jurisprudence of the European Court of Human Rights from *X v Federal Republic of Germany* through to *Ocalan v Turkey*, recognising the importance of the exceptional nature of extraterritorial jurisdiction as identified in *Bankovic*. Lord Phillips then examined the nature of jurisdiction that diplomatic and consular officials exercise. Relying principally on *WM v Denmark*, Lord Phillips concluded that the protection afforded the boys in the British Consulate brought them under the authority of British consular officials and attracted Convention jurisdiction.[541] For separate reasons based on domestic considerations, his Lordship also concluded that the acts of

[539] *Al-Skeini v UK* (7 July 2011) ECtHR (Grand Chamber) 55721/07, [150].
[540] *R(B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [25].
[541] *R(B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [66].

British officials in Melbourne fell within the jurisdiction of the *Human Rights Act*.[542] Having found jurisdiction, the Court moved on to consider whether these instruments had been breached.

339. It is important to understand that the consular officials were not accused of any action which violated the boys' Convention rights. Rather, the complaint was that by allowing Australian officials to arrest the boys, the British consular officials had exposed the boys to the real risk of a violation of their Convention rights, specifically that Australian officials would return them to mandatory immigration detention in the desert where the boys faced cruel, inhuman or degrading treatment.[543] In this light, the court saw this issue as one of state responsibility: when does a country have a duty to provide refuge on foreign soil. Lord Phillips concluded that this duty arises, and is defined, in international law. This duty arises when a fugitive faces 'the risk of death or injury as the result of lawless disorder'. But, in deference to the principle of territorial sovereignty, consular officials must hand over a fugitive as requested by the lawful sovereign, unless the requesting state 'intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity'.[544] In *obiter dicta*, Lord Phillips speculated that the threshold at international law for granting diplomatic asylum might be lower than this.[545] When applying this law to the facts, his Lordship reformulated the legal threshold as 'immediate likelihood of experiencing serious injury'[546] and, later, as a 'perceived risk to the physical safety of the applicants…[which] was immediate and severe' that refusing asylum would violate consular duties under international law.[547] On the facts, this appeal was dismissed because the threat faced by the boys in the hands of Australian authorities was not so severe as to constitute an unacceptable violation of human rights.

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[542] *R(B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [79].
[543] *R(B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [80].
[544] *R(B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [88].
[545] *R(B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [89].
[546] *R(B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [89].
[547] *R(B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [93].

340. B's case was followed by the English Court of Appeal in *Al-Saadoon*.[548] In this case, the court found that the UK, if bound by treaty, must return a person held by it in foreign territory (Iraq) to the local government unless such surrender would result in a crime against humanity. As the death penalty is not a crime against humanity at international law, the UK must comply with its treaty obligations and hand a suspect over to face the real risk of capital punishment. This decision found no Convention jurisdiction. However, the European Court of Human Rights overruled this decision and found jurisidiction based on authority and control.[549] This ends the line of English authority limiting Convention jurisdiction where authority and control is not in question.

5.5.2 United States of America

341. Owing to the executive and legislative response in the United States to the terrorist attacks of 11 September 2001, the United States Supreme Court has had to deal with several cases involving the extraterritorial jurisdiction of US legislation and the US Constitution. While a narrow reading might limit these cases to the unique circumstances of Guantanamo Bay, it is possible to see a broader trend toward adapting a control test.

342. *Rasul v Bush* was the first Guantanamo Bay case to come before the Supreme Court.[550] The case dealt with the issue of the extraterritorial reach of US statutory law. The Supreme Court majority found US courts had jurisdiction in Guantanamo Bay because, by treaty with Cuba, US authorities have "complete jurisdiction and control" over the territory.

[548] *Al-Saadoon & Mufdhi v Secretary of State for Defence* [2009] EWCA Civ 7 (Court of Appeal).
[549] *Al-Saadoon & Mufdhi v Secretary of State for Defence* [2009] EWCA Civ 7 (Court of Appeal). This decision has been appealed to the European Court of Human Rights, see [**Error! Reference source not found.**] above.
[550] *Rasul v Bush* (2004) 542 US 466. The case of *Hamdi v Rumsfeld* (2004) 542 US 1, was not a case about jurisdiction, because it did not involve Guantanamo Bay. It confirmed the constitutional rights of an American citizen captured in Afghanistan & transported to South Carolina, where he was held on a naval brig.

343. The two Australian and 12 Kuwaiti applicants sought habeas corpus review of their detention at the US naval base at Guantanamo Bay, Cuba. The naval base was on the sovereign territory of the Republic of Cuba, which was leased to the United States. The terms of the lease included a provision that 'the United States shall exercise complete jurisdiction and control' over the leased territory.[551]

344. The jurisdictional question was summarised by the majority in this way:[552]

> The question now before us is whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty'.

345. The source of habeas jurisdiction upon which the applicants relied was legislation passed by Congress.[553] The government argued *inter alia* that 'congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested'.[554] However, the government conceded in argument that the federal courts would have jurisdiction to hear a claim for statutory relief made by a US citizen held at Guantanamo Bay.[555] The question really came down to one of whether the legislation applied to aliens. Since there was no express exclusion of aliens in the statute, the majority concluded that the statutory writ of habeas corpus applies to anyone in US custody, both citizen and alien.[556] The majority drew further support for their conclusion from the long common law history of the writ, which applies to any territory "under the sovereign's control".[557]

346. Another interesting argument relied on by the majority, but expressed in terms of control over territory, amounts to an in-the-custody-and-control argument. The writ of habeas lies against the gaoler not the prisoner.[558] Therefore, so long as the gaoler 'can be reached by service of process' (i.e. served with court papers),

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[551] *Rasul v Bush* (2004) 542 US 466, 471.
[552] *Rasul v Bush* (2004) 542 US 466, 475.
[553] s.2241 of title 28, *United States Code*.
[554] *Rasul v Bush* (2004) 542 US 466, 480.
[555] *Rasul v Bush* (2004) 542 US 466, 481.
[556] *Rasul v Bush* (2004) 542 US 466, 480-1.
[557] *Rasul v Bush* (2004) 542 US 466, 482.
[558] *Rasul v Bush* (2004) 542 US 466, 478-9.

the federal courts have jurisdiction to hear the matter. Such service of process is possible at Guantanamo Bay because the territory is under the 'complete jurisdiction and control' of the US. Here, jurisdiction is not founded on sovereign territory, but control of the relevant territory. Given that habeas lies against those holding the detainees in custody at Guantanamo Bay (as agents of the US military), it follows that the court has jurisdiction to hear the matter.[559]

347. The federal habeas statute limits the courts jurisdiction to the 'territorial jurisdiction' of the United States. This was potentially fatal to the applicant's claims. In the pivotal passage, the majority appears to extend the meaning of 'territorial sovereignty' to incorporate the concepts of both sovereign territory and territory over which jurisdiction and control is established by other means (such as by lease or treaty):[560]

> Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

348. Much in this case turned on the terms of the lease, as evidence of jurisdiction and the extraterritorial application of US laws. The lease demonstrated that the US controlled the territory in which the applicants were detained. This brought the area within the 'territorial jurisdiction' of the United States, a somewhat larger concept than '*sovereign* territorial jurisdiction'.

349. In *Boumediene v Bush* issues similar to *Rasul v Bush* arose, but this time relating to the extraterritorial reach of the US Constitution with respect to Guantanamo detainees.[561] The majority found that it is sufficient for the United States to exercise *de facto* sovereignty over a territory in order for extraterritorial jurisdiction to exist.

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[559] *Rasul v Bush* (2004) 542 US 466, 483-4.
[560] *Rasul v Bush* (2004) 542 US 466, 480.
[561] *Boumediene v Bush* (2008) 128 S Ct 2229.

350. In 2005, in response to the Supreme Court's decision in *Rasul v Bush*, Congress had passed the *Detainee Treatment Act*, which amended the habeas statute and purported to remove the right of aliens held at Guantanamo to seek a habeas writ in any US court.[562] In the place of habeas, the Act instituted habeas-like procedures. The Combatant Status Review Tribunal (CSRT) was created to review a detainee's detention and to determine a detainee's status as an 'enemy combatant'. A detainee had limited appeal rights to the US Court of Appeals.

351. The US Constitution prohibits the suspension of habeas corpus, except 'when Cases of Rebellion or Invasion the Public Safety may require it'.[563] The main issues in this case were whether this Suspension Clause applied to the *Detainee Treatment Act* and, if so, whether the 'habeas-like' procedures were adequate. If the procedures of the CSRT were inadequate, then they would amount to an unconstitutional suspension of habeas corpus if the Suspension Clause applied.

352. The government contended that the US Constitution did not extend to non-citizens outside of US territory. The government argued that the applicants could not seek constitutional relief because (1) they are non-citizens designated as enemy combatants and (2) because they are held outside the sovereign territory of the United States.[564]

353. The government also took the view that historically the writ of habeas corpus ran only to the King's sovereign territory.[565] Since Guantanamo Bay is located outside the sovereign territory of the United States, the writ did not run there and the constitutional Suspension Clause cannot apply to the detainees.[566]

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[562] in *Hamdan v Rumsfeld* (2006) 548 US 1, the Supreme Court majority held that these amendments did not apply to applications already on foot when Congress passed the changes. Note: in *Hamdan v Rumsfeld*, the issue of jurisdiction was not litigated. The case dealt with the procedures and legality of the military commissions set up to try detainees at Guantanamo Bay.
[563] Article I(9)(2).
[564] *Boumediene v Bush* (2008) 128 S Ct 2229, 2244.
[565] *Boumediene v Bush* (2008) 128 S Ct 2229, 2248. The applicants argued that the writ runs with the King's officers.
[566] *Boumediene v Bush* (2008) 128 S Ct 2229, 2251.

354. In response to this argument, the Supreme Court majority clarified its rather confused definition of 'territorial sovereignty' from *Rasul v Bush*. In *Boumedine*, the majority made a clear distinction between *de jure* sovereign territory and *de facto* sovereign territory. The majority deferred to the government's view that Cuba is the *de jure* sovereign of Guantanamo Bay.[567] However, the majority confirmed the view in *Rasul v Bush* that the United States 'maintains *de facto* sovereignty over this territory', due to the US' 'complete jurisdiction and control over the base'.[568]

355. The majority rejected the government's assertion that habeas runs only to territory over which the United States has *de jure* sovereignty.[569] The majority noted that, arising principally from a line of cases known as the Insular Cases,[570] the Court's jurisprudence states that the Constitution extends completely over those territories which the US intends to incorporate into the Union. While in territories which the US does not intend to govern indefinitely and which are therefore likely to gain independence (e.g. occupied Germany and Japan after the Second World War), the government is expected to guarantee 'certain fundamental personal rights declared in the Constitution'.[571] The majority also observed the obvious separation of powers problems with the government's view:[572]

> The necessary implication of the [government's] argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

[567] *Boumediene v Bush* (2008) 128 S Ct 2229, 2252-3.
[568] *Boumediene v Bush* (2008) 128 S Ct 2229, 2253.
[569] *Boumediene v Bush* (2008) 128 S Ct 2229, 2253.
[570] see *Boumediene v Bush* (2008) 128 S Ct 2229, 2254ff.
[571] *Boumediene v Bush* (2008) 128 S Ct 2229, 2255.
[572] *Boumediene v Bush* (2008) 128 S Ct 2229, 2258-9 (footnotes omitted).

> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution". Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."
>
> These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.

356. During their reasoning the majority referred again to the Insular cases and distinguished Guantanamo Bay from US-occupied Germany or the US colony of the Philippines:[573]

> Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.

357. The majority saw no problems arising from the concurrent jurisdiction of the US and Cuba over Guantanamo, since the terms of the lease grant to the US complete and total control of the territory.[574] While it must abide by the terms of the lease treaty with Cuba, 'the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base'.[575]

358. The majority of the court concluded that the constitutional protection of habeas corpus extended to the non-citizen detainees at Guantanamo Bay.[576] Having disposed of the jurisdictional question, the majority then went on to find that the habeas-like procedures of the *Detainee Treatment Act* were an inadequate

[573] *Boumediene v Bush* (2008) 128 S Ct 2229, 2261.
[574] *Boumediene v Bush* (2008) 128 S Ct 2229, 2261.
[575] *Boumediene v Bush* (2008) 128 S Ct 2229, 2261.
[576] *Boumediene v Bush* (2008) 128 S Ct 2229, 2262.

substitute for habeas corpus and, therefore, amounted to an unconstitutional suspension of habeas corpus.[577] The CSRT process was inadequate because detainees did not have access to a lawyer or all the evidence against them.[578] The appeal rights were also deemed inadequate for many reasons, including the inability of a detainee to present exculpatory evidence gathered since the CSRT hearing.[579]

5.6 Australian Practice

359. After the terrorist bombings in Bali in 2002 and 2005, the Howard government authorised police-to-police cooperation between Australian and Indonesian police. Assistance was provided for both the investigation[580] *and prosecution*[581] of the terrorist offences. Australian government action was premised on legal advice to the Australian government that:[582]

> The obligations under the ICCPR (and therefore also the OP) apply to "...individuals within [Australia's] territory and subject to its jurisdiction". This Department has previously advised that, in its view, the ICCPR and OP do not apply to individuals outside of Australia's territory or not subject to Australia's jurisdiction. In the Bali attacks, the issue of Australia's obligations under the ICCPR and OP do not arise.

[577] *Boumediene v Bush* (2008) 128 S Ct 2229, 2274.
[578] *Boumediene v Bush* (2008) 128 S Ct 2229, 2269.
[579] *Boumediene v Bush* (2008) 128 S Ct 2229, 2273-4.
[580] Under the new MOU signed with the INP earlier in 2002 (see n 164), the AFP quickly offered its investigative and forensic assistance. Within a week of the Bali bombings in 2002, official documents were publicly signed in Jakarta establishing an investigative task force, jointly headed by the Indonesian National Police (INP) and the AFP. The task force was called Operation Alliance: Kerry O'Brien, 'Indonesia, Aust join forces in Bali investigation', *7:30 Report* (ABC-TV), 16 October 2002, <http://www.abc.net.au/7.30/content/2002/s703502.htm>.
[581] the AFP prepared 20 victim impact statements to be used in the death penalty sentencing proceedings of the Bali bombers. See Attorney-General's Department, 'Assistance with criminal investigations in death penalty cases' (9 April 2003) 2: released by the Attorney-General's Department under the *Freedom of Information Act 1982* (Cth) to the New South Wales Council for Civil Liberties (December 2007), f.84 ("folio 84"), <www.nswccl.org.au/docs/pdf/dpfoi.pdf>.
[582] NSWCCL, FOI docs, n 581, f.82.

360. Further advice from government lawyers appears to define the conditions under which a person, outside of Australia's territory, is not "subject to Australia's jurisdiction" :[583]

- all charges are laid by foreign authorities abroad;
- the persons charged are not Australian citizens;
- the persons charged have not been extradited or otherwise removed from Australia's territory or jurisdiction; and
- the persons charged are 18 years or over.

361. The first point ensures that Australian judicial jurisdiction is not invoked. The second point acknowledges the nationality principle at public international law. The third point acknowledges *Soering*-type cases. The fourth point acknowledges Australia's obligations under the *Convention on the Rights of the Child*. However, the Australian view is that, assuming none of these four conditions are satisfied, then assistance can be provided in death penalty cases.

362. It should be noted that, consistent with this legal advice, the Australian government sought and obtained from the United States a guarantee that the Guantanamo Bay detainees Mamdouh Habib and David Hicks would not be executed.[584]

363. The Australian government which succeeded the Howard administration did not significantly change this view. In response to question from the UN Human Rights Committee, the Rudd government did not acknowledge that Australian agents acting abroad (in territory over which they exercise no control) are required to comply with the ICCPR. It only acknowledges that such agents must comply with Australian domestic law with extraterritorial application. This means that

[583] Letter from Justice Minister Chris Ellison to AFP Commissioner Mick Keelty (20 February 2003). See: NSWCCL, *Australia and the Death Penalty: A guide to confidential government documents obtained under FOI* (2008), <http://www.nswccl.org.au/docs/pdf/dpfoi%20guide.pdf>, [31].
[584] on the *Khadr*-type question of whether a government has a duty to assist its nationals abroad, see: *Hicks v Ruddock* [2007] FCA 299, [93] (dismissing government application to strike out an application by David Hicks for an order requiring Australia to repatriate him to Australia). Ultimately, the Federal Court never heard the case because Mr Hicks withdrew his application, after he was returned to Australia.

Australian agents acting abroad may assist in death penalty cases, given that the only relevant domestic legislation is *the Mutual Assistance in Criminal Matters Act*, which does not apply to all forms of cooperation (e.g. direct police-to-police assistance) and which authorises assistance in death penalty cases with ministerial approval.[585] Nor does the reply acknowledge the implied obligation to ensure Australia exposes no one to the real risk of execution for any offence.

5.7 Canadian jurisprudence

364. In Canada, the Supreme Court has rejected the 'effective control' test for extraterritorial application of the *Charter*. While recognising the extraterritorial application of legislative and judicial jurisdiction, the Supreme Court has constrained the operation of executive extraterritorial jurisdiction with a 'consent' test. Canadian law, including the *Charter*, may only be applied on foreign territory where the foreign sovereign power consents to its application. There is one recognised exception to this rather narrow interpretation: where Canadian officials abroad act contrary to Canada's international obligations, the *Charter* will step in to protect Canadian citizens by restricting the unlawful activity of Canadian agents.

365. Mr Hape, a Canadian citizen, was the subject of an RCMP anti-money laundering investigation. With the permission of local authorities and acting under the supervision of local police, RCMP officers undertook covert searches of Mr Hape's office in the archipelago of the Turks and Caicos Islands, a British Territory in the Caribbean. At Mr Hape's trial in Canada on charges of money laundering, the Crown adduced evidence that had been obtained during those searches, but did not adduce the warrants authorising those searches. Mr Hape argued unsuccessfully at trial, and again unsuccessfully before the Ontario Court of Appeal, that the evidence was inadmissible on the ground that the searches were

[585] Commonwealth of Australia, *Replies to the list of issues (ccpr/c/aus/q/5) to be taken up in connection with the consideration of the fifth periodic report of the government of Australia* (21 January 2009) UN Doc CCPR/C/AUS/Q/5/Add.1.

conducted without a warrant and therefore violated his *Charter* guarantee to be free from unreasonable search and seizure.

366. The sole issue in the appeal before the Supreme Court was 'whether the *Canadian Charter of Rights and Freedoms* applies to extraterritorial searches and seizures by Canadian police officers'.[586] While all the Justices of the Supreme Court dismissed Mr Hape's appeal, their reasons revealed a Court deeply divided on the issue of the extraterritorial reach of the *Charter*. The majority declared that the *Charter* can only have extraterritorial reach where a Canadian agent abroad acts where there is 'an exception to the principle of sovereignty', such as when a foreign power consents to the application of the *Charter* in its territory.[587] Three dissenting Justices found this test too narrow, criticised the consent test and preferred a 'control test'.[588] This minority thought the law required Canadian agents, no matter where they are in the world, to comply with the *Charter*. This 'control test' does not prohibit the participation of Canadian agents in foreign investigations which offend the *Charter*, but the test directs that Canadian agents must not take a 'primary or directing role' in such circumstances.[589] Binnie J, in a separate judgment, preferred the Court's earlier legal test from *Cook*, which stated that the *Charter* applied to the actions of Canadian agents abroad where those actions did not 'generate an objectionable extraterritorial effect' by interfering with the sovereignty of the state in which they act.[590]

367. The majority observed that the Canadian Constitution places no jurisdictional limits on the Charter.[591] However, they concluded that both international law and the principle of the comity of nations nevertheless limit the operation of the

[586] *Hape v R* [2007] 2 SCR 292, [1] & [24].
[587] *Hape v R* [2007] 2 SCR 292, [113] (McLachlin CJ and LeBel, Deschamps, Fish & Charron JJ).
[588] *Hape v R* [2007] 2 SCR 292, [178] (Bastarache, Abella & Rothstein JJ).
[589] *Hape v R* [2007] 2 SCR 292, [154] & [162] (Bastarache, Abella & Rothstein JJ).
[590] *Hape v R* [2007] 2 SCR 292, [181]-[182] (Binnie J). However, the majority in *Hape* criticised the *Cook* decision: see [83]-[95]. Therefore, *Hape* effectively replaces the rule from *R v Cook* [1998] 2 SCR 597.
[591] *Hape v R* [2007] 2 SCR 292, [33].

Charter extraterritorially.[592] Canada may not interfere in the affairs or territory of other nations. However, in *obiter* the majority observed that this respect for sovereign equality of nations and the principles of non-interference and territoriality has its limits in criminal investigations:[593]

> In an era characterized by transnational criminal activity and by the ease and speed with which people and goods now cross borders, the principle of comity encourages states to co-operate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so. At the same time, states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. That deference ends where clear violations of international law and fundamental human rights begin. If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international co-operation and the comity of nations.

368. A corollary of this observation is that the actions of Canadian agents abroad, beyond the reach of the *Charter*, might be unlawful where they violate Canada's international obligations.[594] This would cover instances where fundamental human rights are breached, such as the prohibition on torture. In the following year, the Supreme Court was to confirm this corollary as law in the case of Omar Khadr.

369. In 2002 Mr Omar Khadr, a 15 year-old Canadian citizen, was captured by US forces in Afghanistan and sent to the US military facility at Guantanamo Bay as an 'unlawful enemy combatant'. On various occasions in 2003 and 2004, Mr Khadr was interviewed at Guantanamo Bay by Canadian intelligence and foreign affairs officials, who shared the information obtained from these interviews with US officials. In 2005, Mr Khadr was indicted before a US military commission on charges of murdering a US soldier in battle by throwing a grenade and of

[592] *Hape v R* [2007] 2 SCR 292, [40]-[41].
[593] *Hape v R* [2007] 2 SCR 292, [52].
[594] *Hape v R* [2007] 2 SCR 292, [101].

conspiring with al-Qaeda to launch terrorist attacks against US forces in Afghanistan. Mr Khadr denied all charges.

370. In order to prepare his defence, Mr Khadr asked the Canadian government for copies of all the information it held about these charges, including the information gathered during his interviews at Guantanamo Bay. The government refused and Mr Khadr sought a declaration (of mandamus) from the Canadian Federal Court ordering the Canadian government to disclose this material to him. As a preliminary matter, the Federal Court of Appeal ordered that all relevant documents be delivered unredacted to the Court for judicial review. The government appealed this preliminary decision to the Supreme Court.

371. Before the Supreme Court, Mr Khadr argued that he has a right to view these documents, under section 7 of the *Charter*, which requires Canadian officials to conduct themselves 'in conformity with the principles of justice' when someone's liberty is at stake.[595] The government, relying on *Hape*, argued that the *Charter* did not apply to the actions of Canadian officials at Guantanamo Bay because the US had not given its consent for Canadian law to apply.

372. The Supreme Court explained that, while it had been divided in *Hape* on the extent of the *Charter*'s extraterritorial application, the Court had nevertheless been united on the point that the principle of "comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations".[596] So if a Canadian participated in US activities at Guantanamo Bay which were contrary to Canada's international obligations, then the *Charter* would apply to the extent of that participation. However, if US activities at Guantanamo Bay were not contrary to Canada's international obligations, then *Hape* dictates that the *Charter* cannot apply to Canadian participation because the US had never consented to the *Charter* applying at Guantanamo Bay.

[595] *Canada (Minister for Justice) et al v Omar Khadr et al* [2008] 2 SCR 125, [29].
[596] *Canada v Khadr* [2008] 2 SCR 125, [18].

373. At this point the Supreme Court was confronted with the difficult question of whether it is appropriate for a Canadian court to adjudicate the legality of a foreign process. However, in this instance, the Canadian Supreme Court simply deferred to two significant decisions of the US Supreme Court concerning the detainees at Guantanamo Bay, which:[597]

> ...held that the detainees [at Guantanamo Bay] had illegally been denied access to habeas corpus and that the procedures under which they were to be prosecuted violated the Geneva Conventions. Those holdings are based on principles consistent with the Charter and Canada's international law obligations. In the present appeal, this is sufficient to establish violations of these international law obligations, to which Canada subscribes.

374. The Canadian Supreme Court noted that Canada was bound at international law by the same Geneva Conventions and that the Canadian *Charter* and other treaty obligations recognised the law of habeas corpus.[598] As CSIS had conducted its interviews at Guantanamo and shared the relevant information with the Americans at the time covered by these US Supreme Court decisions, specifically during 2003 and 2004, the Canadian Supreme Court had no difficulty concluding that CSIS' participation in that process was contrary to Canada's international obligations. This meant that the *Charter* applied in Mr Khadr's case. It is important to note that the Court did not decide whether the interviews, of themselves, violated the *Charter*, nor whether the handing over of the information, of itself, violated the *Charter*. Under different circumstances these activities may have been lawful. However, the Court concluded that, by sharing the information from the Khadr interviews with the Americans at Guantanamo Bay, where processes were contrary to international law (as confirmed by the US Supreme Court), Canadian officials became participants in processes contrary to Canada's international obligations. This engaged the extraterritorial operation of the *Charter*.[599]

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[597] *Canada v Khadr* [2008] 2 SCR 125, [21], citing *Rasul v Bush* (2004) 542 US 466 (re: *habeus corpus*) & *Hamdan v Rumsfeld* (2006) 126 S. Ct. 2749 (re:Geneva Conventions).
[598] *Canada v Khadr* [2008] 2 SCR 125, [25]-[26].
[599] *Canada v Khadr* [2008] 2 SCR 125, [27].

375. By participating in the unlawful processes at Guantanamo Bay, Canada had breached Mr Khadr's constitutional rights to liberty and personal security. In these circumstances, the *Charter* imposes 'a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen'.[600] As a consequence, the Canadian Crown was required to disclose to Mr Khadr all records of the interviews and all material given to the Americans as a direct consequence of the interviews, subject to national security and other public policy considerations.[601] The matter was remitted to the lower court to determine which documents could be released to Mr Khadr.[602]

376. The lower court decision is significant because, after reviewing all the Khadr interview material, the court came to an astounding conclusion: Canada was aware of Mr Khadr's torture at Guantanamo Bay and failed to take steps to stop it.[603] (It is no wonder that the government fought so hard to keep the material from the court, Mr Khadr and the public.) As a matter of public interest, the court ordered the government to release the bulk of the interview material. Subsequently, the taped interviews were broadcast on national television,[604] showing a scared young man asking for help.

377. In *Slahi v Canada*, two non-citizen applicants sought disclosure of their records of interview with Canadian officials at Guantanamo Bay.[605] The facts were essentially identical to Mr Khadr's except that these applicants were not Canadian citizens. This proved fatal to their applications. Because they failed to establish a nexus to Canada such as citizenship or being within Canadian territory, the

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[600] *Canada v Khadr* [2008] 2 SCR 125, [31].
[601] *Canada v Khadr* [2008] 2 SCR 125, [37] & [41].
[602] *Canada v Khadr* [2008] 2 SCR 125, [38]. The Federal Court ordered that the videos of the interviews be released. The videos were broadcast on Canadian national television.
[603] *Khadr v Canada* [2008] FC 807 (Mosley J).
[604] see e.g.: cbcnews.ca, "'You don't care about me', Omar Khadr sobs in interview tapes" (15 July 2008) <http://www.cbc.ca/canada/story/2008/07/15/khadr-tapes.html>.
[605] *Slahi v Canada (Minister of Justice)* [2009] FCJ 141 (Blanchard J).

Federal Court dismissed their case.[606] This case confirms that the *Charter* will only protect Canadian citizens, where the foreign government consents to the application of Canadian law or where Canadian agents act contrary to Canada's international obligations. The status of permanent residents was not raised in this case, but it is likely that permanent residency might establish a sufficient nexus to Canada to engage extraterritorial protection.

378. In summary, if Canadian police were to participate in activities contrary to Canada's international obligations, then the *Charter*'s extraterritorial jurisdiction could conceivably be invoked. In *Soering*-type cases of domestic actions resulting in human rights violations abroad, *Charter* rights would be engaged.

5.8 some final comments

379. The question of the extraterritorial application of domestic and international human rights law is a complicated one. The first question arising is the question of jurisdiction: which domestic or international obligations, laws or treaties are being invoked; whether the impugned actions occurred domestically (with adverse consequences on foreign soil) or extraterritorially; and whether the impugned actions of state agents are justiciable under the invoked law. If jurisdiction is found, then the question turns to the state's responsibility for the particular actions in any given case.

380. Most obviously there are decisions made within jurisdiction that have extraterritorial consequences. For example, the letters and list of questions composed by Canadian agents in Mr El-Maati's case and handed to foreign agents who used the information to torture and interrogate Mr El-Maati.[607]

381. It might also be argued that the actions of AFP officers in Australia assisting Indonesian police in the Bali Nine case would, by analogy, fall into the *Soering* line

[606] *Slahi v Canada* [2009] FCJ 141, [48].
[607] see [420] & [428].

of cases: domestic actions resulting in extraterritorial violations of human rights.[608] In either case, a complaint could be made to the UN Human Rights Committee under the First Optional Protocol to the ICCPR alleging breaches of the ICCPR and/or Second Optional Protocol.

382. But there are also decisions taken and actions made by domestic agents who are located overseas. Most of the caselaw deals with military situations, in which the question of whether a country's military forces have control over the territory in which they are operating or which they occupy. In relation to police operations, close attention needs to be paid to precisely where these decisions and actions are taken, because embassies on foreign soil are recognised as sovereign territory. It is supposed that the infamous 'Bali Nine' letters written by Federal Agent Paul Hunniford, the AFP Senior Liaison Officer in Bali, to the Indonesia National Police were probably written from his desk in the Australian Consulate.[609] If this is in fact true, then the letters would have been written within Australia's jurisdiction.[610]

383. It is also worth noting that the mode of sharing or cooperation – whether it is formal or informal – is not relevant to any examination of jurisdiction or state responsibility for the actions of state agents.

384. More generally, some authors have argued that States have an obligation not to interfere in individuals' human rights through their extraterritorial actions. This implication flows, it is argued, from the "principles, purposes and specific provisions of the UN Charter", which calls on Member States to promote, protect

[608] see also *Al Skeini v Secretary of State for Defence* [2007] UKHL 26, [132].
[609] *Rush v Commissioner of Police* [2006] FCA 12.
[610] AFP officers exercise power under the *Australian Federal Police Act 1979* (Cth) and the *Crimes Act 1914* (Cth). Bother Acts apply extra-territorially: AFPA s.5A(1) and CA s.3A. These powers are exercised on a foreign territory with the consent of the foreign government. This consent can be on a case-by-case basis or under the terms of an MOU or treaty. For example, the AFP operated with the INP in Indonesia after the Bali Bombings in 2002 under a joint operation "Technical Agreement" (MOU). Thus, the AFP exercises its Australian powers overseas (by consent), which is a clear exercise of Australian jurisdiction (by consent).

and respect human rights.[611] As a normative principle, this argument carries some weight. However, as a legal principle, this argument fails to consider the complexities of jurisdiction.

[611] Sigrun Skogly, *Beyond National Borders: States' human rights obligation in international law* (2006) 79; citing Roxström, Gibney & Einarsen, "The NATO Bombing Case: One Step Forward or Two Steps Back?" (2005) *Boston University Journal of International* Law, 118.

6 Best Practice: informal information sharing

385. After reviewing law and practice for informal transnational police-to-police information sharing, I now look at best practice. In this discussion, I want to examine how to construct best practice guidelines for transnational police-to-police cooperation. Not surprisingly, the guidelines are closely modelled on the RCMP procedures with the modifications suggested by the Arar Commissioner. This is because the RCMP procedures are quite good – and the AFP have not publicly released their procedures. I acknowledge the heavy debt owed to the work of that Commission. Particular emphasis will be placed on screening requests from countries with poor human rights records and examining the human rights implications of cooperation. I will also discuss situations in which it might be possible to override these guidelines, and the appropriate procedures to ensure accountability.

386. Due to space constraints, I will not present a detailed analysis of EU attempts to formalise cross-border police cooperation, in the form of the Schengen Convention, the Convention establishing Europol and other instruments.[612] For example, there are provisions in the EU Mutual Assistance in Criminal Matters Convention for cross-border pursuits, joint investigation teams and covert surveillance.[613] However, when these are instructive, then they will be mentioned briefly.

6.1 Police culture and human rights

[612] e.g. Chantal Joubert & Hans Bevers, *Schengen Investigated: a comparative interpretation of the Schengen Provisions on international police cooperation in the light of the European Convention on Human Rights* (1995); Stephen Skinner, 'The Third Pillar Treaty Provisions on Police Cooperation: Has the EU Bitten Off More than It Can Chew?' (2002) 8 *Columbia Journal of European Law* 203; and, Nicholas Dorn (2009), n 87.

[613] see McClean (2002), n 262, 224-236. Note: in May 2009, Canada and the US signed an agreement to jointly crew patrol boats on their shared waterways, thereby allowing cross-border pursuit of criminals engaged in *inter alia* human, drug and weapons smuggling: 'US, Canada sign border patrol pact' (27 May 2009) *Boston Globe* (Boston) A.2.

387. One question worthy of brief examination at this point is: how are rank-and-file police likely to interpret and respond to any minimum human rights standards and accountability mechanisms for transnational policing? This is important because, as sociologists have observed, rank-and-file police sometimes deviate from black-letter law in their day-to-day tasks.[614]

388. As already discussed, an intelligence-led policing culture is not likely to respond favourably to any measures that restrict information exchange.[615] Such resistance can be seen from the rank-and-file AFP Association, which expressed its frustration at the introduction of death penalty assurances in extradition law as an impediment to the swift and efficient operation of international police cooperation.[616]

389. There is a more practical concern related to refusing to share information. For information sharing to be effective, it must be reciprocal: 'If an agency wishes to receive information from other agencies, it must be prepared to provide information in return'.[617] Or as a senior AFP officer put it: transnational cooperation 'is very much a two-way street'.[618] The general concern is that anything that stops or slows the flow of information across borders infringes on the sovereignty of other nations *and* risks reducing the amount of information flowing back.

390. Bayley observes that police reform succeeds best when it has police on-side.[619] He urges reformers to take this into account and to attempt to eliminate any impact on the effectiveness of operational policing:[620]

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[614] e.g. R. Reiner, *The Politics of the Police* (2000, 3rd ed) 171-4.
[615] see [104] ff.
[616] see [396].
[617] Arar Commission, *Analysis and Recommendations* (2006) n 175, 102.
[618] Wockner & King (2006), n 161, 227.
[619] David Bayley, 'Police Reform as Foreign Policy' (2005) 38(2) *Australian and New Zealand Journal of Criminology* 206.
[620] Bayley (2005), n 619, 213.

> ...because reducing crime and disorder is what police have been taught to believe is their institutional mission, they reflexively discount reform proposals that they think impinge negatively on enforcement effectiveness... Reformers need, therefore, to confront head-on the likely effect of reform on law-enforcement... Reform has a much better chance of succeeding if it can be shown to be effectiveness-neutral or, preferably, effectiveness-enhancing.

391. Reiner has a similar view. He believes that new police rules should not elicit a defensive response in police, because this will mean that such rules will not be 'co-opted' into police culture.[621] Reiner notes that 'black-letter law' is transformed by the filter of police culture before emerging as 'blue-letter law', the rules by which police carry out their day-to-day tasks. He notes two schools of sociological thought on this process. The 'presentationalists' believe that black-letter law is used to justify police action, but that it does not inform actual police practice. In this model, police subculture is key to understanding police action, not black-letter law. For example, in any attempt to address police racism, education of police will achieve better results than a top-down reform of law enforcement procedures. The other school of thought belongs to the 'structuralists', who believe that police deviance from black-letter law does not come from rank-and-file officers, but is rather encouraged by senior officers, judges and politicians who do not correct deviance. Presumably, in the structuralist model, reform of institutional racism must be addressed by figures of authority.

392. Reiner notes that the 'relationship between legal rules and police practice is complex'.[622] He identifies four indirect and subtle functions of formal rules and accountability mechanisms in the regulation of police work. First are *constitutional* functions, whereby police work is subordinated to democracy and the rule of law. Second are *co-optive* functions, wherein rules which are tailored to avoid a defensive response in police are more likely to be adopted into police culture. Third are *communicative* functions, which seek to keep open channels for routine

[621] Reiner (2000), n 614, 175-6.
[622] Reiner (2000), n 614, 176.

communication and complaint by police. Fourth are *control* functions, which provide visible penalties for demonstrated deviance.

393. Crawshaw et al argue that policing and human rights are not incompatible:[623]

> At a theoretical level there is no tension between human rights and policing. ...Policing should not be a negative factor in the protection of human rights, and one of the great tasks of police leaders is to develop and sustain a human rights culture within police organisations'.

394. Crawshaw argues that police should protect and respect human rights, investigate (serious) human rights violations, and are entitled to respect of their own human rights.[624] Much of what police already do relates to the protection, respect and investigation of human rights. However, the authors stress that by securing respect for the human rights of police officers, this could assist in instilling a human rights culture in the rank-and-file.[625] Crawshaw is not just talking about guarantees of security of person, but also rights such as procedural fairness in disciplinary hearings, and also employment rights such as fair pay.

395. In summary, if a black-letter law response to human rights and transnational policing is too far-removed from operational police culture and practice, then it is unlikely to become part of the 'blue-letter law' of operational policing and it might have little effect at all, irrespective of accountability mechanisms. In the same vein, any reform which reduces the effectiveness of information sharing is likely to meet stiff resistance from senior and rank-and-file officers. However, a human rights message might be better received by police if it is expressed in universal terms, owed to police as individuals as well as owed to others.

6.1.1 Police attitudes to human rights safeguards

396. There is considerable resistance from within the AFP to statutory changes requiring a death penalty guarantee in extradition cases. In 1997, the president

[623] R. Crawshaw, B. Devlin & T. Williamson, *Human Rights and Policing* (2nd ed, 2007) 26.
[624] Crawshaw et al (2007), n 623, 26-9.
[625] Crawshaw et al (2007), n 623, 27.

of the AFP Association[626] expressed concern to the *Daily Telegraph* that Australia would become a 'safe haven' for murderers and terrorists. He also expressed concern about the time it takes to obtain a death penalty guarantee:[627]

> If the Government wants to take a moral position on capital punishment that is up to them. However, our members are not happy with the delays now experienced in taking out provisional arrest warrants on people wanted overseas.

397. These comments from 1997 came about the same time as leaks to the *Daily Telegraph* about the extradition of a Philippines-born US citizen living in Australia and wanted in the US for murder-related charges.[628]

398. According to media reports, there is also considerable pressure on Australia from US law enforcement officials to do away with death penalty guarantees in extradition cases.[629]

399. In 1996, the Interpol Secretary-General Raymond Kendall addressed an Australian parliamentary committee about the work of Interpol.[630] During that session, he was asked about Australia's recent legislative amendments to mutual assistance law requiring death penalty guarantees. He was not well briefed on the topic and only responding to what he was being told, but Kendall described the requirement to obtain such undertakings as 'counter-productive'.[631] He argued such transnational police-to-police cooperation was analogous to international trade and human rights should not be linked to it.[632] He also offered this opinion:[633]

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[626] the AFP Association is a professional rank-and-file association and is not part of the AFP itself.
[627] Les Kennedy, 'Loophole left three to rot in jail', *Daily Telegraph* (Sydney), 19 April 1997, 19.
[628] Les Kennedy, 'Execution threat kept fugitive free', *Daily Telegraph* (Sydney), 15 April 1997, 4.
[629] Morgan Ogg, 'Murder suspect extradited', *Daily Telegraph* (Sydney), 20 Sept. 1997, 15.
[630] Commonwealth of Australia, Joint Committee on the National Crime Authority, *Committee Hansard* (5 December 1996), <http://www.aph.gov.au/hansard/joint/commttee/j5963242.pdf>.
[631] Joint Committee on the NCA (5 December 1996), n 630, 22 (Raymond Kendall).
[632] Joint Committee on the NCA (5 December 1996), n 630, 21 (Raymond Kendall).
[633] Joint Committee on the NCA (5 December 1996), n 630, 21 (Raymond Kendall).

> I can well understand a refusal to extradite in a case where the country that is requesting extradition does apply the death penalty to a person who is convicted of a certain offence in that country. But I fail to see why the exchange of information should be affected by that because there are two levels of decision here. I think the decision to extradite is a legal decision which will be taken after due study of the issue, but I do not see why that should affect the exchange of information on a subject when you know full well that you do not have to extradite the person at the end of the day.

400. What can be drawn from this superficial review of media and parliamentary reports is that police, understandably, are concerned about any measure that impedes the efficient flow of cooperation and information with foreign agencies.

6.2 request assessment

401. A request for information can be received at a centralised location, or by a liaison officer posted abroad, or in a more direct police-to-police fashion. Once received, an assessment should be made of whether the request will be granted. In the interests of efficient police-to-police cooperation, this initial filter should be kept as stream-lined as possible. Initially it should be screened to determine if it is really a request for police-to-police assistance, or whether it is in fact a request for mutual legal assistance. If it is a request for information in admissible form or for the exercise of coercive powers (such as the execution of a search warrant), then the appropriate mutual legal assistance legislation should be complied with.[634]

402. If, however, the request is for police-to-police assistance, then an important question needs to asked: if the information is provided, is it likely that the information will be used to violate an individual's human rights? This involves a

[634] See *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, c.30 (4th Supp.); and, *Mutual Assistance in Criminal Matters Act 1987* (Cth). See also: Christopher Murray & Lorna Harris, *Mutual Assistance in Criminal Matters: international co-operation in the investigation and prosecution of crime* (2000); and, Elaine Krivel, Thomas Beveridge & John Hayward, *A Practical Guide to Canadian Extradition* (2002), Appendix B ('Mutual Legal Assistance in Criminal Matters Act'); and, Robert Currie, 'Peace and Public Order: International Mutual Legal Assistance the "Canadian Way"' (1998) 7 *Dalhousie Journal of Legal Studies* 91; and, McClean (2002), n 262, 213-8 (UN model treaty), 196-203 (Commonwealth Scheme) & 172-88 (European Convention & Protocols) & 224-236 (EU Convention).

general assessment of the requestor's human rights record and a specific assessment of the use to which the requested information will be put.

403. The Arar Commissioner places this test under the general heading of examining content relevance.[635] However, I think it is important to separate explicitly an assessment of *content* from an assessment of the *requestor*. This will better allow the decision maker to focus on the individual country's human rights record and the likely uses to which the information, if provided, would be put. It is, of course, likely that, during an assessment of content relevance, these same questions will be asked for each piece of information that could potentially be shared.

404. To assist them to assess both the requestor generally and the request on a case-by-case basis, liaison officers and other officers cooperating with foreign agencies require human rights training.

6.2.1 abandoning the 'need-to-know' principle?

405. RCMP information sharing policies require an assessment of whether the requestor needs to know the requested information. In essence, an assessment whether the information 'is expected to further an ongoing investigation' on a case-by-case basis.[636] The Arar Commissioner did not find this requirement 'particularly helpful'.[637] His Honour thought that an assessment of content for its *relevance* to the requestor's investigation was more meaningful. Justice O'Connor also noted the 9/11 Commission's criticisms of the 'need to know' culture.[638]

406. The 9/11 Commission associated the need-to-know approach with the outdated Cold War assumption that 'the risk of inadvertent disclosure outweighs the benefits of wider sharing'.[639] The Commission was critical of a culture where one domestic agency kept information from another. The Commission recommended

[635] Arar Commission, *Analysis and Recommendations* (2006) n 175, 104 & 335.
[636] Arar Commission, *Factual Background Vol.1* (2006), n 172, 32-3.
[637] Arar Commission, *Analysis and Recommendations* (2006) n 175, 334 & 136 (fn 57).
[638] 9/11 Commission Report (2004), n 8, 417.
[639] 9/11 Commission Report (2004), n 8, 417.

increasing incentives for agencies to share information with each other. Caution must be exercised when extrapolating this criticism to transnational policing. The Commission was criticising the stonewalling of information sharing between domestic agencies, not between American and foreign agencies. It is unlikely, had it addressed the issue of transnational cooperation, that the Commission would have been as enthusiastic and permissive about sharing information with foreign agencies.

407. Nevertheless, the criticism that a culture of open information sharing is preferable to a 'need-to-know' culture has some merit. A need-to-share approach is more consistent with international obligations to cooperate in matters of transnational crime.[640] Of course, that does not mean that need-to-share equates to a share-without-discrimination policy. The AFP appears to favour a share-without-discrimination policy.[641] When discussing police-to-police information sharing, the senior AFP officer in charge of transnational policing told journalists: [642]

> We operate exactly the same way no matter which country it is. ...We do not have the ability, nor the desire, to pick and choose which countries we will deal with, depending on the laws of those countries and how they will deal with offenders for offences that occurred in their own country.

408. However, as the Arar Commissioner observed, caution needs to be exercised when sharing information to ensure that other considerations, such as a country's international human rights obligations, are observed and discharged.[643] This requires an assessment of the requestor's human rights record and the use to which the shared information is likely to be put.

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[640] e.g. 'to facilitate the secure and rapid exchange of information': TOC Convention. See [186].
[641] in relation to sharing with domestic agencies, including ASIO, see: Mick Keelty (AFP Commissioner), 'Can intelligence always be right?', speech to 13th Annual Conference of the Australian Institute of Professional Intelligence Officers (20 Oct 2004), <http://www.afp.gov.au/media/national_media/national_speeches/2004/13th_annual_conference_of_the_australian_institute_of_professional_intelligence_officers>. See also: Laurence Street QC, Martin Brady & Ken Moroney, *The Street Review: A Review of Interoperability Between the AFP and its National Security Partners* (2007), <http://www.afp.gov.au/__data/assets/pdf_file/71833/The_Street_Review.pdf>.
[642] Wockner & King (2006), n 161, 227. See also, [164].
[643] see also comments of Duncan Kerr MP at [31] above.

6.2.2 assessment of human rights and usage

409. The RCMP's current policy, which applies to 'governments that violate human rights', was criticised by the Arar Commissioner on several grounds. The Commission recommended that the review be redrafted to ensure that information is 'never…provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture'.[644] Similarly, information received from a country with a questionable human rights record should be clearly marked as such and treated with great caution.[645]

410. There appears to be no similar requirement for AFP agents to assess a requesting country's human rights record or the use to which shared information will be put. In the case where agents must consider if the death penalty would be involved, the death penalty guidelines must be consulted. When allegations of torture are made, as in the case of Australian Mamdouh Habib who reported that he'd been tortured in Egypt and Guantanamo Bay, it appears to be standard AFP procedure to report the allegations to the Department of Foreign Affairs and Trade (DFAT).[646] This is because the welfare of detainees is seen as a consular issue, not a police matter.

411. It is at this stage that it would be appropriate to alert the requestor that an undertaking would be required that no one will be executed or tortured as a result of cooperation. Of course, the provision of an undertaking would need to be assessed for credibility. The requirement to seek an undertaking should apply to requests from foreign agencies, as well as request to foreign agencies or the spontaneous provision of information. For example, AFP agents would require a

[644] Arar Commission, *Analysis and Recommendations* (2006), n 175, 345. See also: [238] above.
[645] Arar Commission, *Analysis and Recommendations* (September 2006), n 175, 348-9.
[646] in May 2002 at Guantanamo Bay, during an interview with AFP officers, Mr Habib raised allegations that he had been tortured by people who 'spoke the Egyptian language'. The AFP, believing it was the responsibility of the Department of Foreign Affairs and Trade (DFAT) to investigate, informed DFAT of Mr Habib's allegations of torture: Evidence of Mick Keelty (AFP Commissioner) to Senate Legal & Constitutional Legislation Committee (15 February 2005) 7-8. For details of Mr Habib's treatment: Mamdouh Habib, *My Story: the tale of a terrorist who wasn't* (2008).

death penalty undertaking before spontaneously providing information in a matter attracting the death penalty in Indonesia, such as drug trafficking or terrorism.

412. The need for police to screen for potential human rights violations is demonstrated by cases such as the Canadian torture cases and the Australian Bali Nine case. The Australian case is quite straight forward: AFP agents, who spontaneously provided information to the INP under an existing MOU, knew that the activities of the Bali Nine involved the trafficking of heroin, which attracts the death penalty in Indonesia. Such information should not have been shared without first securing a guarantee that no one will be executed.

413. The AFP appears to have very low standards when it comes to screening information to be shared with foreign agencies. Speaking of the Bali Nine case, the AFP Commissioner told a Senate Committee that:[647]

> We cannot give over a piece of information, have [the police operation] become a broad operation and then say, 'Look, we are sorry about that – can we take that information back, please?'.

414. This information was provided spontaneously to the INP, prior to the arrest of any suspects. In fact, it appear that the Indonesians were unaware of the suspects, until informed by the AFP.[648] The intelligence was provided under the police-to-police MOU existing between the two agencies.[649] The text of the MOU is not public, but it appears that it fails to include a provision stating that any information or cooperation provided by Australian officials under the agreement is provided on the condition that it will not be used for the investigation of an offence that might attract the death penalty, unless a guarantee that no one will be executed is provided. Given that the information was provided spontaneously

[647] evidence to the Senate Legal and Constitutional Legislation Committee (17 February 2006), n, 41 (AFP Commissi 105oner Mick Keelty).
[648] Evidence of Keelty to Senate Legal and Constitutional Legislation Committee (31 October 2005), n 165, 170: 'On 8 April 2005, [the AFP] provided information to the Indonesian National Police. As a result of that, the Indonesian National Police *commenced* an operation on 13 April 2005. On 17 April 2005, a number of arrests were made in Indonesia' (emphasis added).
[649] Evidence of Keelty to Senate Legal and Constitutional Legislation Committee (31 October 2005), n 165, 170.

in the Bali Nine case, and that the AFP liaison officer involved would have been well aware that the offence attracted the death penalty, this information should not have been handed over until a guarantee had been secured that no one would be executed. If Indonesia chose not to provide such a guarantee, then the information should never have been handed over. Such a procedure is recognised in European Conventions and even exists in some of the international treaties to which Australia is a party.[650] Spontaneous cooperation should first secure a guarantee that no one will be executed. If such a guarantee is not forthcoming, then the information should not be shared.

415. This approach is endorsed by the United Nations Special Rapporteur on Torture, Mr Philip Alston:[651]

> It's a matter of saying we have a strong opposition in Australia to the death penalty, and we would condition our cooperation on your not applying the death penalty when you are operating on the basis of information or assistance provided by us.

416. Such a procedure does not offend the sovereignty of a foreign nation, which can take the assistance or leave it. Nor does this solution compromise Australia's sovereign right to insist that Australian resources will not be used to assist another country to execute anyone. This solution does not mean that Australia stops cooperating with foreign law enforcement agencies. Nor does it mean that international criminals will walk free. This solution only ensures that when suspects are convicted they will not face the death penalty.

417. In the case of Mr Arar, it is hard to fault RCMP officers for assuming that Mr Arar would be sent back to Canada from New York. Prior to the events of 11 September 2001 it would have been unthinkable that the US would kidnap a Canadian citizen travelling on a Canadian passport and render him for torture to Syria. The shift in the US' human rights policy was swift and secretive, including

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[650] see n 14.
[651] ABC Radio, 'UN advisor urges Australia to take strong stance against death penalty', *AM* (25 January 2006).

the introduction of torture and extraordinary rendition.[652] Though, of course, this does not excuse the failure to follow established information sharing procedures or to train staff adequately.

418. The screening of requests for human rights implications could be done in a narrow or broad fashion. The screening tests could be directed at avoiding specific violations, such as execution or torture. This is the current approach of the AFP's death penalty guidelines. More broadly, the RCMP's current guidelines speak of 'negative human rights connotation[s]'. The Arar Commissioner recommended that policies be formulated that seek to eliminate 'any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability'.[653] Given the international obligation to respect, protect and fulfil human rights,[654] it is preferable to follow the broader Canadian example.

419. It is also worth recalling that Interpol's databases are capable of restricting who can or cannot view information shared with Interpol.[655] This mechanism should be employed to ensure that countries with questionable human rights records will not have access to Interpol records, at least not without specifically requesting the originating country. Such restrictions need to be placed on information at the time it is entered into the Interpol database.

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[652] on extraordinary rendition, see e.g.: e.g. European Parliament, 'resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners', 14 February 2007, A6-0020/2007, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0020&language=EN&mode=XML>. On torture, see e.g.: Barak Obama (US President), 'Remarks by the President on National Security' (21 May 2009), speech at the National Archives (Washington DC), <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/>.

[653] recommendation 14, see [93].

[654] the UN Human Rights Committee, commenting on Article 2, stated that Article 2 imposes a general obligation 'to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction': UN Human Rights Committee, *General Comment No. 31* (2004), n 289, [3]. According to Nowak, the obligation to respect human rights is a negative obligation as it requires forbearance on the part of the State Party; while the obligation to fulfil and protect human rights involve positive obligations, requiring the State Party to actively secure these rights: Nowak (2005), n 376, [2.18]-[2.20].

[655] see [56] & [113].

420. It is also important to perform this screening on all incoming *and outgoing* requests for police-to-police assistance. Before deciding to send a request for assistance to a foreign country, an assessment should be made of that country's human rights record and the use to which it might put the details contained in the request. For example, in the case of Mr Elmaati, Commissioner Iacobucci found no evidence that the RCMP had considered Syria's poor human rights record before sending a letter to Syria linking Elmaati to al-Qaeda and requesting assistance.[656] Such a lapse, failed to follow RCMP procedures and likely exposed Mr Elmaati to extreme abuse.

6.2.3 training in human rights and information sharing

421. If officers are to screen requests for police-to-police assistance on human rights criteria, then staff will need to be trained and regularly updated on the human rights records of countries with which they cooperate. The Arar Commissioner noted that the RCMP liaison officer in Rome, who handled liaison with Syria in the Arar case, was never trained about Syria's human rights record.[657] His Honour recommended that RCMP training should include courses on human rights and cooperating with countries with poor human rights records.[658]

422. If time is of the essence and officers have not had such training or little experience in information screening, then it is important that they be supervised. This was one of the major factual findings of the Arar Commission in relation to

[656] Both the Arar and Iacobucci Commissions were also critical of the use of Elmaati's confession as evidence in the application for search warrants in Canada: Iacobucci Inquiry, Report (2008) n 157, 138-140; and, Arar Commission, Factual Background Addendum, n 192, 99. The confession was placed before the judge, but "did not mention [Syria's] poor human rights record or the fact that the information might be the product of torture": Arar Commission, Factual Background, Addendum, n 192, 99. This is an example of information obtained from foreign sources, and in which there is no rigorous assessment of the accuracy of the information or the reliability of the source. See also, Iacobucci Inquiry, Report (2008) n 157, 350.
[657] Arar Commission, *Analysis and Recommendations* (2006) n 175, 214.
[658] Arar Commission, *Analysis and Recommendations* (2006) n 175, 325-6 (recommendation 3).

Operation AOC: that management failed to supervise untrained and/or inexperienced staff.[659]

423. Training officers in how to screen effectively and adequately will assist in encouraging acceptance among operation police of this impediment to the free flow of information.[660] As Crawshaw also observes, the obligation to provide human rights training is contained in article 10 of the Convention against Torture.[661] The UN Human Rights Committee has found a similar obligation in the ICCPR.[662]

6.3 content assessment

424. As the Arar Commissioner observed, there is a need for caution when sharing information.[663] Sharing outdated, inaccurate or unreliable information can have serious consequences, as it did in the case of Maher Arar. Some police-to-police arrangements also require that the information be current and accurate.

425. The Arar Commissioner made the following recommendation:[664]

> **Recommendation 8**
>
> The RCMP should ensure that, whenever it provides information to other departments and agencies, whether foreign and domestic, it does so in accordance with clearly established policies respecting screening for relevance, reliability and accuracy and with relevant laws respecting personal information and human rights.

426. Interpol places emphasis on 'accuracy and relevance' of information placed on its databases.[665]

427. Ideally, once a request is determined to be for police-to-police assistance and unlikely to expose anyone to a real risk of a human rights infringement, the

[659] Arar Commission, *Analysis and Recommendations* (2006) n 175, 24 & 77.
[660] see Crawshaw et al (2007), n 623, 375.
[661] see Crawshaw et al (2007), n 623, 375.
[662] UN Human Rights Committee, *General Comment No. 20: concerning prohibition of torture and cruel treatment or punishment* (10 March 1992) UN Doc. CCPR/C/21/Rev.1/Add.13, [10].
[663] Arar Commission, *Analysis and Recommendations* (2006) n 175, 103.
[664] Arar Commission, *Analysis and Recommendations* (2006) n 175, 22 & 103-4.
[665] Interpol, *Rules on the processing of information for the purposes of international police co-operation*, Article 5.3(a), <http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/info/default.asp>.

requested information should be collated and each item of information screened for relevance, accuracy, reliability and data protection. Again, these steps closely follow the recommendations of the Arar Commissioner, who examined these issues in detail.

428. Content assessment is equally valid for the assessment of information obtained from a foreign source. This is particularly important when the foreign country has a questionable human rights record and the information might have been obtained under torture or other threats. It is a simple matter of public policy that such information should be treated with scepticism. A written assessment of the accuracy and reliability of the information should be attached to such information, in order to alert others who read it. Unfortunately, as was seen in the Arar case, RCMP officers, seeking a search warrant, relied on confessions obtained by Syria from Mr Elmaati. The application did not alert the judicial officer to the nature of the evidence or Syria's poor human rights record.[666] Similar use of questionable confessional material has been used by Australian authorities to support a decision to deny Australian torture victim Mamdouh Habib his passport.[667]

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[666] see n 656.

[667] *Habib v Director-General of Security* [2009] FCAFC 48 (24 April 2009). This appeal (to the Full Court of the Federal Court of Australia) was dismissed on the grounds that the appellant was afforded procedural fairness by the Administrative Appeals Tribunal (AAT), which had found that the oral evidence of Mr & Mrs Habib was not credible when checked against material obtained *inter alia* in Guantanamo Bay. Tellingly, the Full Court expressly observed that Mr Habib's lawyers did not raise the issue of the AAT accepting into evidence and relying upon confessions made by Mr Habib in Guantanamo Bay (at [80]). Though not tendered as evidence in this matter, Habib 'confessed' to US military officials at Guantanamo Bay that he 'knew about the September 11 attacks in advance, had trained in martial arts with two of the core terrorists [groups] and planned to later hijack a plane himself': Martin Chulov, 'Aussie admitted knowledge of 9/11 plot: US', *The Australian* (Sydney), 8 October 2004, 1. Despite these serious allegations, Mr Habib was released from Guantanamo Bay without charge in January 2005 (shortly after his allegations of torture and rendition were made public in a US court): Liz Foschia, 'Mamdouh Habib returns to Australia', *PM* (ABC Radio), 28 January 2005, <http://www.abc.net.au/pm/content/2005/s1291428.htm>; and, Marian Wilkinson, 'What Should We Believe?', *Sydney Morning Herald* (Sydney), 14 January 2006, <http://www.smh.com.au/news/national/what-should-we-believe/2006/01/13/1137118970093.html>.

429. Content assessment is referred to specifically in the police-to-police agreements between Europol and the RCMP and the AFP.[668] For example, article 10 of the Europol-AFP agreement requires an assessment of the reliability of the source and of the information being shared to be attached to all shared information. If such an assessment is missing, then any attempt by the recipient to make its own assessment must involve the supplying agency.

430. The importance of screening information is self-evident. Because it is not always possible to predict how the information will be used once it has been shared, it is important that the information be accurate and precise. The Arar Commissioner was critical of the lack of precision in some of the documents shared with American authorities: the terms 'suspect' and 'person of interest' were used interchangeably; and emotive terms like 'Islamic Extremist' and 'jihadist' were also used.[669]

6.3.1 relevance

431. Each piece of information to be shared should be screened for relevance, with respect to the original request. In essence, the test for relevance provides a nexus between the request and the information to be shared. Each piece of information should only be shared if: first, it falls within the scope of the request; and second, it is connected to the investigation being undertaken by the requesting agency. This assumes that the request articulates the parameters of the subject investigation.

The Arar Commissioner was of the view that relevance should be measured in terms of "a possible connection or use to the recipient's investigation".[670] His Honour was of the view that the threshold for relevance need not be too high,

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[668] *Agreement on Operational and Strategic Cooperation between Australia and the European Police Office* (Feb 2007), article 10, <http://www.europol.europa.eu/legal/agreements/Agreements/Australia.pdf>; *Cooperation Agreement between the Government of Canada and the European Police Office* (Nov 2005), article 5, <http://www.europol.europa.eu/legal/agreements/Agreements/227746.pdf>.
[669] Arar Commission, *Analysis and Recommendations* (2006) n 175, 86 & 113-4.
[670] Arar Commission, *Analysis and Recommendations* (2006) n 175, 136, fn 57.

assuming that reliability, accuracy, privacy and human rights assessments are made and caveats are used.[671]

6.3.2 reliability of source and accuracy of information

432. As with reliability, it is important that information be accurate.

433. As Justice O'Connor observes: "sharing unreliable or inaccurate information does not provide a sound foundation for identifying and thwarting real and dangerous threats to national security and can cause irreparable harm to individuals'.[672] It does the reputation of a police agency no good if the information it shares is unreliable. So it is in the best interests of an agency to classify for reliability.[673] Or, in his Honour's words: 'Providing unreliable or inaccurate information to other agencies is in no one's best interests and can create potentially serious problems for those who rely on it and possibly those who are the subjects of the inaccuracies'.[674]

434. The Arar Commissioner stressed several times the importance of information being accurate and precise.[675] As his Honour observes, police should take special care not to overstate or misrepresent information, because 'statements made by police officers tend to be taken at face value'.[676] The Commissioner was critical of the inaccuracies contained in some of the information about Mr Arar that Project AOC shared with the Americans. He was concerned that it 'was inflammatory and unfairly prejudicial' to Mr Arar.[677] Commissioner Iacobucci had similar concerns about the reliability and accuracy of information shared about Mr Almalki, Mr Elmaati and Mr Nureddin.[678]

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[671] Arar Commission, *Analysis and Recommendations* (2006) n 175, 335.
[672] Arar Commission, *Analysis and Recommendations* (2006) n 175, 335.
[673] the RCMP already does this, in the *2001 Criminal Intelligence Program Guide*: see Arar Commission, *Analysis and Recommendations* (2006) n 175, 324 & 335-6.
[674] Arar Commission, *Analysis and Recommendations* (2006) n 175, 104.
[675] e.g. Arar Commission, *Analysis and Recommendations* (2006) n 175, 25-6.
[676] Arar Commission, *Analysis and Recommendations* (2006) n 175, 25.
[677] e.g. Arar Commission, *Analysis and Recommendations* (2006) n 175, 24.
[678] Iacobucci Inquiry, Report (2008) n 157, 350-1, 369, 375.

435. An assessment of the reliability of the *source* of shared information should be included with any shared information. This is in addition to an assessment of the reliability of the *content* of the shared information. This is important as it alerts the recipient of the information as to how cautiously they should approach the information. Furthermore, in many ways it is important that the source be assessed before the content can be accurately assessed. As the Arar Commissioner observes, 'reliability relates primarily to the source of the information'.[679]

6.3.3 privacy provisions

436. Raab observes that data protection has two distinguishing elements that are sometimes in conflict with each other: privacy protection and data security.[680] The former is about protecting the privacy of individuals by, for example, recognising an individual right to view and correct private data kept by police. The latter is about maintaining the confidentiality of data held by police through protecting data and computers from 'hacking, unauthorised access, corruption of data, or other damage'.[681] Raab argues that both forms of data protection are important and need to be addressed.

437. While originally developed in Europe,[682] this dual-purpose view now prevails in most jurisdictions and both the RCMP and AFP are bound by domestic privacy legislation.[683] As a matter of best practice, privacy should be considered in all police-to-police arrangements due to the importance of individual privacy. In relation to mutual legal assistance, a European provision for personal data

[679] Arar Commission, *Analysis and Recommendations* (2006) n 175, 335.
[680] C. D. Raab, 'Police cooperation: the prospects for privacy', in Malcolm Anderson & Monica den Boer (eds), *Policing Across National Boundaries* (1994, London), 124.
[681] Raab (1994), n 680, 124.
[682] see e.g. M. Spencer, *1992 and All That. Civil Liberties in the Balance* (1990, London) ch 3; and, Raab (1994), n 680. Specifically for Canada, see: Stanley A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (2005).
[683] *Australian Federal Police Act 1979* (Cth) s.60A, *Privacy Act 1988* (Cth); and, *Privacy Act*, R.S.C. 1985, c. P-21.

protection stipulates that such data can only be used for evidentiary purposes with the consent of the source agency or individual involved.[684]

438. Another factor that affects the integrity of personal data kept on file is that it will, over time, become out-of-date. This is best remedied by giving shared information a 'use-by' date, as discussed below.

6.4 content control: caveats

6.4.1 generally

439. As well as assessing the quality of shared content, it is also important to attempt to exercise control over that content once it is shared. It is not possible to guarantee that, once in the hands of others, information will not be misused.[685] Therefore it is important to assert ownership of information and place conditions on the use of information before it is shared. In Canada, this is commonly done by way of caveats. In Australia, the position has been less clear and more worrying.

440. When sharing information internationally, Interpol practice recognises that ownership of any information in its databases remains in the hands of the contributor.[686] The information source may alter and delete their information. The information source may also restrict access to certain parties and/or deny access to others.

441. The Arar Commissioner was unequivocal in his recommendation:[687]

Recommendation 9

[684] see McClean (2002), n 262, 235.
[685] see Kenneth G. Robertson (1994), n 145, 108-111.
[686] Interpol, *Rules on the processing of information for the purposes of international police co-operation*, Article 5.4, <http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/info/default.asp>.
[687] Arar Commission, *Analysis and Recommendations* (2006) n 175, 22 & 103-4.

> The RCMP should never share information in a national security investigation without attaching written caveats in accordance with existing policy. The RCMP should review existing caveats to ensure that each precisely states which institutions are entitled to have access to the information subject to the caveat and what use the institution may make of that information. Caveats should also generally set out an efficient procedure for recipients to seek any changes to the permitted distribution and use of the information.

442. The standard caveat used by the RCMP ensures that the information will not be passed on to other agencies without RCMP approval. This provides the RCMP with some level of control over how the information is used. Caveats are not legally enforceable, but it is in the best interests of the receiving agency to observe them. The Commissioner recommended that, when a caveat is breached, an objection should be lodged with the breaching agency and the Foreign Minister of the breaching country.[688]

443. The AFP is more relaxed in its approach and is resigned to the loss of control of information once it has been shared. The AFP has indicated that they sometimes place conditions on information shared with foreign agencies, though this is not standard practice.[689] When asked about this process, the acting National Manager of AFP International and Border told a Senate Committee:[690]

> At the end of the day, we cannot do an audit of a foreign law enforcement agency. We have to respect their sovereignty but we have overseas police liaison officers... They work quite closely with the local police, so we will get an indication if a rampant or systemic breach has occurred of any conditions we may have placed on the use of information.

444. So what does a caveat look like? There are many conditions which can be imposed by a caveat. However, there are some commonly recognised caveats: for example, a condition that that the shared information may only be used for the purpose for which it was requested. Another common example is that the shared information must not be passed on to any other agency. Another common caveat

[688] Arar Commission, *Analysis and Recommendations* (2006) n 175, Recommendation 12.
[689] Evidence to Joint Standing Committee on Treaties, Canberra, 4 September 2006, 7 (Federal Agent Tim Morris, Acting National Manager, International & Border, Australian Federal Police).
[690] Evidence to Joint Standing Committee on Treaties, Canberra, 4 September 2006, 7 (Federal Agent Tim Morris, Acting National Manager, International & Border, Australian Federal Police).

is that, if the recipient agency wishes to alter these terms, they must contact the originating agency and ask for permission.

445. A caveat is not legally binding, but any foreign agency that breaches the caveat risks its reputation as a reliable partner in international law enforcement.[691] The mandatory use of caveats helps to ensure that an agency maintains control of the information it shares.

446. The Arar Commission stressed the superiority of written over oral or 'implicit' caveats, noting that 'those who are considering breaching a caveat, which is a type of agreement, will be less likely to do so in the face of a clear and express written directive'.[692]

6.4.2 exercising control over information retention and deletion

447. Though not raised by the Arar Commissioner, another important caveat condition expresses the need to control *when* the recipient agency should delete the information. This might be upon request or after a certain amount of time.

448. Information needs to be revisited on a regular basis. Police intelligence is affected by its input data and it is important that such data is accurate. One dimension of information's accuracy is its currency. Introducing a 'use-by date' on shared information ensures that it is accurate and current. If a recipient agency wishes to retain the information, then it should be required to contact the source agency and re-request it. This will require the source agency to provide updated information. This process might reveal important developments of which the recipient agency might otherwise have been ignorant, such as the arrest, conviction or flight of a person of interest.

449. Such conditions are recognised in the bilateral Europol agreements with the RCMP and AFP.[693] Both agreements require the other agency to delete information

[691] e.g. Iacobucci Inquiry, Report (2008) n 157, 350.
[692] Arar Commission, *Analysis and Recommendations* (2006) n 175, 105-106.
[693] n 76. The US Customs database (TECS) is also capable of limiting the time that data is retained, see: Arar Commission, *Factual Background Vol.1* (2006), n 172, 61.

when requested. However, the time-limits are more vague. The Europol-RCMP agreement requires personal information to be retained only as the recipient 'has a relevant use' for it, 'if not legally required to retain it for a longer period'.[694] The Europol-AFP agreement requires personal information to be deleted after six months if the recipient party has no use for it.[695] Ultimately, the vagueness of these provisions is unsatisfactory because it could result in 'stale' information remaining on the recipient agency's file.

6.4.3 responding to breaches of caveats

450. The Arar Commissioner recommended that the breach of caveats by recipient agencies should be dealt with at a very high level. Specifically, his Honour recommended:[696]

> Where Canadian agencies become aware that foreign agencies have made improper use of information provided by a Canadian agency, a formal objection should be made to the foreign agency and the foreign minister of the recipient country.

451. The Commissioner stressed the need to object to the foreign agency and diplomatically. Such an objection is not necessarily a negative exercise. As his Honour notes:[697]

> Objections to breaches of caveats may prompt productive discussions about misunderstandings concerning information-sharing agreements with foreign agencies and the scope of caveats. They may lead to constructive remedial measures to make caveats and information-sharing agreements clearer and more effective.

6.4.4 Improving Australian practice

452. Given the AFP's unwillingness to caveat information, the Minister could direct the AFP that all information shared across borders contain a written caveat stating that the information:

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[694] Canada-Europol agreement, n 76, article 7(6).
[695] Australia-Europol agreement, n 76, article 8(2).
[696] Arar Commission, *Analysis and Recommendations* (2006) n 175, Recommendation 12, 344.
[697] Arar Commission, *Analysis and Recommendations* (2006) n 175, 344.

- should not be passed to any other agency (international or domestic) without permission of the AFP;
- should not be used for any purpose other than the purpose for which it is provided; and,
- should be deleted after 6 months, or earlier if requested.

6.5 written cooperation agreements

453. The Arar Commissioner made a formal recommendation that all national security-related cooperation agreements between the RCMP and other agencies, both foreign and domestic, 'should be reduced to writing'.[698] The need for written agreements was particularly acute in the Arar case. After the September 11 terrorist attacks in the United States, RCMP officers from Project AOC shared unprecedented amounts of information with US agents. Project AOC members were under the impression that written caveats were no longer required ('caveats were down'), but that a mutual legal assistance request would be required if the shared information was needed for court.[699] The RCMP officers thought of Project AOC as an 'open-book investigation', in which all information could be shared with their American counterparts without screening for accuracy or relevance. Information was first shared verbally, then later in documentary form. Officers believed that RCMP information sharing policies did not need to be followed, including caveats and respect for third party caveats (respecting the caveats of other agencies).[700] The Arar Commissioner was critical of this misunderstanding of official policy. While his Honour accepted that there might be circumstances in which there is an urgent need to establish a verbal cooperation agreement, Commissioner O'Connor was critical that the terms of the Project AOC agreement

[698] Arar Commission, *Analysis and Recommendations* (2006) n 175, Recommendation 2(e), 321.
[699] Arar Commission, *Factual Background Vol.1* (2006), n 172, 45.
[700] Arar Commission, *Factual Background Vol.1* (2006), n 172, 45-6.

were not committed to paper and distributed, and that no expiry date was set on the verbal agreement.[701]

454. Though the Commissioner never expressly makes comment, it could be said that a short review date should be set for such informal case-by-case agreements. This will encourage the drafting of a more formal document in the medium term. By the time of the review date, a draft MOU or letters of understanding should be ready for consideration or the informal cooperation agreement might be scrapped if the urgent need has passed.

455. In 2002 the Canadian Solicitor General issued a directive requiring the RCMP to reduce agreements with foreign agencies to writing, and to obtain legal and foreign affairs advice.[702] The directive required the RCMP to keep a register of all such agreements and to review the agreements regularly. In evidence to the Inquiry, the RCMP Deputy Commissioner expressed his view that the directive did not refer to day-to-day operational police-to-police cooperation.[703] Commissioner O'Connor disagreed, arguing that the agreements contemplated by the directive applied more generally.[704] While it was not necessary for agreements to be 'unduly formal or lengthy' or applicable to each piece of information exchanged, his Honour believed that "written agreements should set out a general approach within which 'day-to-day' exchanges may take place".[705]

6.6 dealing with exceptions

456. It is important, when drafting guidelines for police-to-police cooperation, that they not be completely inflexible. Crisis situations do arise, such as the days and weeks immediately following 9/11 or the Bali bombings, in which it is not in the

[701] Arar Commission, *Factual Background Vol.1* (2006), n 172, 49.
[702] Arar Commission, *Analysis and Recommendations* (2006) n 175, 321.
[703] Arar Commission, *Analysis and Recommendations* (2006) n 175, 322.
[704] Arar Commission, *Analysis and Recommendations* (2006) n 175, 322.
[705] Arar Commission, *Analysis and Recommendations* (2006) n 175, 322.

public interest for police to follow standard operating procedure. The very nature of policing can, unlike the courts, require immediate action to prevent harm.

457. However, such exceptions to standard operating procedure, should be contemplated in internal guidelines. Exceptions should be dealt with on a case-by-case basis. There should be no blanket exception for a particular type of offence, such as terrorism.[706] Given the serious consequences which could flow from overriding established procedure, accountability should be an important factor involving consultation with the Minister, who should report exceptional circumstances to Parliament as soon as possible.

458. In relation to weighing potential benefits of cooperation against any potential human rights violations, there will be limits. For example, the prohibition on torture is absolute and is so fundamental a value that 'it can never be legally justified'.[707] On the other hand, there might be extreme circumstances under which cooperation in death penalty cases is justifiable. While the right to life is also a fundamental non-derogable human right, I conclude below that there may be circumstances in which the public interest will trump this individual right and cooperation in death penalty cases could be acceptable. This suggests a complex hierarchy of human rights to be considered before a Minister makes a decision to override existing cooperation procedures.

6.6.1 credible and imminent threat to human life: an exception?

459. In short, this section deals with the 'ticking bomb' scenario. It concludes that this scenario does not justify cooperation where there is a real risk of torture, but it might justify cooperation where there is a real risk that someone will be executed.

460. The AFP's death penalty guidelines were never originally intended to be standard operating procedure, but were meant only to cover exceptional circumstances in

[706] see Arar Commission, *Analysis and Recommendations* (2006), n 175, 347.
[707] Arar Commission, *Analysis and Recommendations* (2006) n 175, 51ff & 346.

which there is an imminent threat to human life: the 'ticking bomb' scenario.[708] In all other circumstances, the AFP should not put anyone at real risk of execution. This is a matter of both practicality and principle.

461. However, there are instances where Australian agents could be in possession of credible information suggesting that explosive devices have been planted in a crowded public place in a foreign country which retains the death penalty. It would be criminally negligent not to pass that information on immediately if to do so would save lives. In these circumstances, the Minister should have the power to authorise cooperation with foreign agencies without a guarantee that the death penalty will not be sought or carried out. As an extra safeguard, the Minister should be required to inform Parliament that she or he has exercised this discretion.

462. The requirement of *imminence* to this exception should be stressed. If there is time to seek a request that no one will be executed as a result of information sharing or cooperation, then that request should be made. However, if time is of the essence to save human lives, then the Minister should have the power to authorise police to share the information without a guarantee that the death penalty will not be sought or carried out. I note the need for ministerial approval and the need for the Minister to inform Parliament that she or he has done so.

463. Another requirement to be stressed is an assessment of the *credibility* of the intelligence suggesting an imminent threat. If it is not highly credible, serious consideration should be given to requesting a no-capital-punishment guarantee before the cooperating with foreign agencies.

464. Accordingly, the AFP death penalty guidelines should be reviewed to ensure that they are not misinterpreted as standard operating procedure, but exceptional operating procedure. It should also be clear that information may only be provided in non-exceptional death penalty situations (both pre- and post-charge)

[708] see [78].

when either: there is a guarantee from a competent foreign body that no one will be executed; or, when such cooperation is exculpatory.

465. Torture, on the other hand, should not be the subject of this exception. The prohibition on torture is absolute. The Arar Commission was unequivocal in its recommended that '[i]nformation should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture'.[709] CSIS Director Jim Judd endorsed this view, when he publicly repudiated the following statement from a senior CSIS lawyer:[710]

> The simple truth is that if we get information that can prevent something like the Air India bombing, the twin towers, or whatever, frankly, that is the time we will use [information obtained under torture], despite the provenance of that information.

466. So the obvious question arises: why should torture and death penalty cases be treated differently? At first glance, they are both the subject of non-derogable human rights guarantees and both singled out for their own specific human rights treaties. It seems to me that the answer lies in the way in which the information was gathered.

467. Information obtained under torture is the product of a human rights violation and is highly unreliable. The Canadian torture cases are just another example of the unreliable nature of information extracted this way. Given this lack of credibility, such information could not satisfy the test for a 'credible and imminent threat to human life'. Police could never be certain that acting on such information would actually save lives, or simply divert resources away from other important problems. Nor can such information ever be obtained (under torture) without violating human rights.

468. With respect to capital punishment, circumstances are different. Assuming the intelligence is credible and obtained in a lawful fashion, it would be negligent not to act on that intelligence; not to save human lives. An abolitionist country like

[709] Arar Commission, *Analysis and Recommendations* (2006) n 175, Recommendation 14, 345.
[710] see [181].

Canada and Australia would still not cooperate in the subsequent investigation and prosecution, unless a guarantee is forthcoming.

469. Both the right to life and the right to be free from torture are *jus cogens* at international law.[711] However, while the prohibition on torture is absolute at international law, the right to life is qualified by a codified exception recognising the death penalty for the 'most serious crimes'.[712]

470. A further distinction is that information extracted under torture can only be obtained extra-judicially. Whereas, lawful execution will only occur after a judicial determination of guilt and sentencing procedures.

471. To summarise, it is the way the intelligence is gathered that distinguishes the two scenarios. In the torture scenario, a human rights violation is committed to obtain (questionable) intelligence. In the death penalty scenario, credible intelligence is available of an imminent human rights violation and to do nothing is worse than sharing the information.

472. This leads to the conclusion that there is a hierarchy of human rights.[713] The only other human right with *jus cogens* status is the prohibition on slavery.[714] Police should also refuse to cooperate in cases where it would assist the slave trade. Police should also exercise caution in relation to other non-derogable rights, such as the guarantees against imprisonment for failure to fulfil a contractual obligation and against retrospective criminal laws, and the freedoms of thought, conscience

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[711] for torture, see [177]. For right to life, see: Paul Gormley, 'The Right to Life and the Rule of Non-derogability: peremptory norms of *jus cogens*' in B. G. Ramcharan (ed), *The Right to Life in International Law* (1985, M. Nijhoff).

[712] see Rick Lines, The Death Penalty for Drug Offences: a violation of international human rights law (2007; International Harm Reduction Association, London) 20, citing: Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Bacre Waly Ndiaye), Report (1996) UN Doc. E/CN.4/1997/60, [91] ('...the death penalty should be eliminated for crimes such as economic crimes and drug-related offences.'); and, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Philip Alston), Report (2007) UN Doc. A/HRC/4/20, [51]. Special Rapporteur Alston (2007) cites: A/50/40, para. 35 (1995) (Sri Lanka); A/55/40, para. 13 (2000) (Kuwait).

[713] see Geoff Gilbert, *Transnational Fugitive Offenders in International Law: extradition and other mechanisms* (Martinus Nijhoff, 1998), 151.

[714] the prohibition on genocide is a violation of the right to life (*jus cogens*). For slavery, see: Gormley (1985), n 711, 140; and, Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: cases, materials and commentary* (2004, 2nd ed), [10.01].

and religion.[715] Ultimately, implications for any other human rights obligations should be weighed in the balance against the public interest.

6.7 implementation

473. One of the great challenges for transnational policing today is living up to its commitment to human rights. The international legal framework of transnational policing has largely developed in a culture of respect for national sovereignty, at the expense of individual rights. As this model is likely to continue into the foreseeable future, ethical standards and police accountability will continue to be the responsibility of domestic law. However, there are some improvements that could be made to transnational policing at the international level.

474. The likelihood of a treaty-based codification of standards for transnational policing is unlikely in the short term, especially given the example of Interpol's inability to draft a treaty. However, a UN Rapporteur on transnational policing could be established under the auspices of the United Nations Economic and Social Council (ECOSOC), perhaps attached to the United Nations Office on Drugs and Crime (UNODC) or the Office of the High Commissioner for Human Rights. Such a Rapporteur could be asked to research, draft and encourage the adoption of 'best practice' guidelines for transnational policing, similar to the guidelines established for best practice in *inter alia* policing and treatment of prisoners.[716] Another helpful initiative could be sponsored by the Office of the High Commissioner for Human Rights: namely, an international forum for domestic arms-length police oversight bodies to meet and exchange experiences and expertise.

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[715] ICCPR, n 233, article 4(2).

[716] *Standard Minimum Rules for the Treatment of Prisoners* (1957) approved by ECOSOC Resolutions 663 C (XXIV) of 31 July 1957 & 2076 (LXII) of 13 May 1977; and, *Code of Conduct for Law Enforcement Officials* (1979) UNGA Resolution 34/169 of 17 December 1979. For a full list of human rights standards in the administration of justice, see: <http://www2.ohchr.org/english/law/index.htm>.

475. The UN has adopted model treaties for international assistance in criminal matters: namely, extradition and mutual legal assistance.[717] It makes sense for a third model treaty to deal with transnational policing, another increasingly important form of international assistance in criminal matters. Alternatively, a model police-to-police agreement, perhaps based on Interpol's model bilateral agreement[718] or the recent Europol agreements, could be drafted to incorporate important human rights protections such as an understanding that all cooperation is provided on the understanding that any assistance will not be used to breach an individual's rights, such as through torture or execution. By placing this caveat at the MOU or even treaty-level, the need to evaluate human rights factors on a case-by-case basis would be greatly alleviated.

6.8 centralisation of decision making: internal oversight

476. Another important recommendation of the Arar Commission is that the existing centralisation of information sharing decisions be maintained and improved.[719] His Honour notes that centralisation provides many useful purposes, including: as a check that information sharing procedures are being applied consistently; as a level of review and accountability; as a management tool 'allowing coordination of investigations'. Commissioner O'Connor also noted that the RCMP needs to be adequately resourced to implement this recommendation.[720]

477. The centralised unit also acts as one contact point for international agencies, making the exchange of information more efficient, by reducing the time to identify the correct agency and office to approach for information.

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[717] *Model Treaty on Extradition* (1990), adopted by General Assembly (GA) Resolution 45/116 (1990) and amended by GA resolution 52/88 (1997); and, *Model Treaty on Mutual Legal Assistance in Criminal Matters* (1990), adopted by General Assembly (GA) Resolution 45/117 (1990) and amended by GA resolution 53/112 (1998).
[718] see [42]-[43].
[719] Arar Commission, *Analysis and Recommendations* (2006) n 175, Recommendation 7, 332-4.
[720] the AFP has a similar centralised unit, hosting *inter alia* Australia's NCB, see: [41].

478. The new AFP death penalty guidelines provide for internal oversight prior to someone being arrested or detained.[721] All requests must be sent through the International Desk/AFP Operations Coordination Centre (AOCC) in Canberra. A decision to cooperate must be authorised by the AFP's Manager International Network or the National Manager Border and International.

6.9 the need for external oversight

479. While internal oversight is important, there is a need for external oversight to ensure public confidence in transnational policing. Such external oversight could be provided by either a parliamentary or statutory body, regularly auditing police practice. The Arar Commissioner also recommended that all information sharing practices and arrangements be subject to review by an independent, arms-length body.[722]

480. According to the Paul Kennedy, Chairman of the independent Commission for Public Complaints Against the RCMP (CPC), the CPC was unable to say in 2009 whether 'the RCMP has implemented the recommendations of Justice O'Connor, or if such recommendations, if implemented, are either being adhered to or are adequate to achieve their stated purpose'.[723] This is due to legislative restraints on the CPC, which allow the RCMP to withhold information from the oversight body. Despite the recommendations of the Arar Commission and a separate report on

[721] AFP, *AFP Practical Guide on international police-to-police assistance in potential death penalty situations* (December 2009): <http://www.afp.gov.au/policing/~/media/afp/pdf/g/guideline-for-international-death-penalty-situation.ashx>.
[722] Arar Commission, *Analysis and Recommendations* (2006) n 175, Recommendation 10.
[723] Evidence of Paul Kennedy to Standing Committee on Public Safety and National Security, House of Commons (5 March 2009), 1.

the governance of the RCMP,[724] there was still no independent body which can come in and audit RCMP operations and policy in the mid-2000s.[725]

481. This is why ministerial oversight is also a useful form of external oversight. The new AFP death penalty guidelines provide for external oversight once a person is charged, convicted or sentenced.[726] All cooperation must be approved by the Attorney-General or Home Affairs Minister. A bi-annual report of all cooperation (both pre- and post-charge) must be sent to the Minister.

6.10 Australia-specific requirements

6.10.1 Amending the AFP Act

482. I recommend that the AFP Act and death penalty guidelines should be amended to ensure the protection of human rights and Australia's compliance with its international obligations. Unlike Canada, or any other common law jurisdiction, Australia does not have a comprehensive national legislative or constitutional Bill or Charter of Rights. This is the Federal Court could find that the AFP had acted lawfully in the Bali Nine case.[727]

483. Surprisingly, in 2006 the federal Attorney-General's Department expressed the view that police are not bound by Australia's human rights obligations under the *International Covenant on Civil and Political Rights* (ICCPR) or *Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty*.[728] The

[724] David Brown QC, *Rebuilding the Trust: Report of the Task Force on Governance and Cultural Change in the RCMP* (December 2007), <http://www.publicsafety.gc.ca/rcmp-grc/_fl/Task_Force_Report-English.pdf>: see Recommendation 3, recommending the 'creation of an Independent Commission for Complaints and Oversight of the RCMP'.
[725] Evidence of Paul Kennedy to Standing Committee on Public Safety and National Security, House of Commons (5 March 2009), 1.
[726] AFP, *AFP Practical Guide on international police-to-police assistance in potential death penalty situations* (December 2009): <http://www.afp.gov.au/policing/~/media/afp/pdf/g/guideline-for-international-death-penalty-situation.ashx>.
[727] see [86].
[728] Joint Standing Committee on Treaties, *Hansard* (4/9/2006) 13 (evidence of Joanne Blackburn, First Assistant Secretary).

Department argued that those treaties have not been adopted into domestic law and are, therefore, not legally binding.

484. The AFP took the view that, irrespective of Australia's international human rights obligations, it is obliged by Australia's international obligations to cooperate and share information with foreign law enforcement agencies. The AFP points to Australia's treaty obligations under various UN anti-drug and anti-terrorist treaties.[729]

485. However, the UN has made it abundantly clear that human rights must be respected in the "wars" against drugs and terror. In 2002, the UN General Assembly stressed that "respect for all human rights is and must be an essential component of measures taken to address the drug problem".[730] In 2001, the UN General Assembly reaffirmed that "all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards".[731]

486. To remedy this culture of ignoring human rights, section 8 of the AFP Act should be amended to add a core operational function to 'respect and protect human rights'.[732] Concurrently, it is important that human rights training be updated, in order to encourage a human rights culture among rank-and-file police.[733]

487. This is not so revolutionary, considering that the enforcement and protection of human rights is being increasingly recognised as one of the core functions of policing.[734] This is especially so in the realm of transnational policing, in which

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[729] e.g. Joint Standing Committee on Treaties, *Hansard* (4/9/2006) 2 (evidence of FA Tim Morris, Acting National Manager, International and Border, Australian Federal Police).
[730] UN General Assembly, *International cooperation against the world drug problem* (24 January 2002) UN Doc. A/RES/56/124.
[731] UN General Assembly, *Human Rights and Terrorism* (13 February 2002) UN Doc. A/RES/56/160.
[732] the phrases 'respect human rights' and 'protect human rights' are taken from the *UN Charter*. They also appear in Victoria's *Public Administration Act* (2004) s.7(1)(g), which binds Victorian police.
[733] for more detail, see [391] & [423].
[734] Crawshaw et al (2007), n 623, 26: 'the protection of human rights is a police function'. See also: J. Sheptycki, *In Search of Transnational Policing: towards a sociology of global policing* (2002) 156.

law enforcement agencies are increasingly policing international human rights treaties, such as the conventions against people trafficking and child pornography.[735]

488. The AFP death penalty guidelines should also be modified to ensure that they are not misinterpreted. It should be clear that information may only be provided in all death penalty situations (both pre- and post-charge) when either: there is a guarantee from a competent foreign body that no one will be executed; or, when such cooperation is exculpatory. The only exception should be when there is an imminent threat to human life, and then only with ministerial approval and a report to Parliament.

489. Had these changes to the AFP Act and death penalty guidelines been in place when the AFP volunteered information to the Indonesian police about the Bali Nine,[736] the outcome would have been very different. In all potential capital cases, the requirement for a condition that the assistance will not lead to anyone's execution should be mandatory.

490. Such a mandatory requirement could be legislated or it could take the form of a ministerial direction to the AFP. Section 37(2) of the AFP Act grants the Justice Minister the power to direct AFP general policy. The AFP Commissioner *must* comply with the Minister's directions.[737]

491. It is, of course, important not to be absolutist about this. There will be exceptional circumstances in which lives can imminently be saved by the exchange of information or other cooperation. In those cases, ministerial approval should be required.

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[735] e.g. *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* [2007] ATS 6 (entered into force 8 February 2007); and, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime* [2005] ATS 27 (entered into force 14 October 2005).

[736] Paul Toohey, 'Death Dealing: a secret AFP memo may have doomed the Bali Nine', *The Bulletin* (Sydney), 16 November 2005, <http://bulletin.ninemsn.com.au/bulletin/site/articleIDs/4D99AA1EC72B3763CA2570B8007F2B0B> .

[737] *Australian Federal Police Act 1979* (Cth) s.37(4).

7 Some Final Remarks for Further Research

7.1.1 Agency-to-Agency legislation

492. While this paper is about transnational police-to-police cooperation, many of the lessons could be extrapolated and applied to other agency-to-agency cooperation. Other agencies which cooperate transnationally include immigration, customs, intelligence and financial tracking agencies. The potential exists for human rights violations to occur when such cooperation arises. Such transnational inter-agency cooperation is increasing, as confirmed by Mr Jack Hooper, Assistant Director of Operations for CSIS:[738]

> "compromising al-Qaeda operations requires an unprecedented level…of cooperation between police, law enforcement, immigration officials and the like, not just domestically, but internationally as well."

493. Extradition and mutual legal assistance are governed by statute,[739] have built-in human rights safeguards and provide for judicial oversight and review of decisions.[740] They are sometimes referred to as 'formal assistance'.

494. Transnational agency-to-agency assistance, sometimes referred to as 'informal assistance', is not governed by statute. There is often no recourse to the courts for a person aggrieved by such assistance, as was demonstrated when members of the Bali Nine took the AFP to court.[741]

495. To correct this anomaly, a framework Agency-to-Agency Assistance Act could be drafted, providing human rights safeguards and legal remedies and formalising this form of international assistance.

496. An Agency-to-Agency Assistance Act only needs to set out the legal framework for international cooperation, it does not need to micro-manage such assistance. It

[738] Arar Commission, *Analysis and Recommendations* (2006) n 175, 102.
[739] *Extradition Act 1988* (Cth) and *Mutual Assistance in Criminal Matters Act 1987* (Cth).
[740] the extradition process includes a hearing before a Magistrate. Decisions made under the mutual assistance Act can be reviewed by a court under the ADJR Act.
[741] *Rush v Commissioner of Police* [2006] FCA 12 (Finn J).

sets the boundaries for assistance, in which agencies may operate according to their own discretion.

497. The legislation should bind all Australian agencies, including the military. Australia's human rights obligations under the Convention Against Torture and the Second Optional Protocol are non-derogable – even in times of war.[742]

498. An Agency-to-Agency Assistance Act should provide that assistance which has a negative human rights connotation should never be provided to countries that violate human rights.[743] The Act should state that assistance should not be provided if it exposes anyone to the real risk of execution or torture.

499. The Act should include an exception for death penalty situations in which there is an imminent threat to human life. Under such exceptional circumstances, there should be a ministerial discretion to assist. However, Parliament should be informed. This exception should not apply to torture.

500. The Act should stipulate that all information shared with foreign agencies must contain a written caveat restricting its use. Information collected by Australia belongs to Australia and we should maintain control of it.

501. The Act should provide that all agency-to-agency treaties and MOU are subject to the Act. The Act should require that all such treaties and MOU contain an express clause that all cooperation takes place, and all information is shared, on the understanding that no one will be executed or tortured. This also eliminates the need to obtain guarantees on a case-by-case basis.[744]

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[742] *Convention Against Torture* Article 2(2): 'No exceptional circumstances whatsoever, whether a state of war or a threat of war…or any other public emergency, may be invoked as a justification for torture'. *Second Optional Protocol to the ICCPR* Article 6(2) (Australia did not enter a war-time reservation under Article 2 when acceding to the Protocol).

[743] this is the test used in Canada for police-to-police assistance: see [91].

[744] police complain that the need to obtain death penalty guarantees adds frustrating delays to the work of obtaining extradition and providing assistance: e.g. Les Kennedy, 'Loophole left three to rot in jail', *Daily Telegraph* (Sydney), 19 April 1997, 19. By including these guarantees at the treaty-level, there is no need to obtain individual guarantees on a case-by-case basis, thus saving valuable police time and resources.

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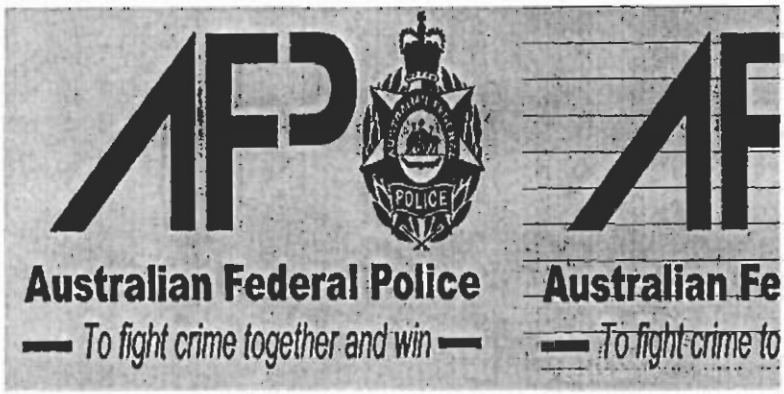
Appendices

Appendix 1: International Counter-Terrorism Instruments

				entered into force		
treaty	**date**	**aka**	**ATS**	**internationally**	**Australia**	**Canada**
Convention on Offences and Certain Other Acts Committed On Board Aircraft	1963	(Aircraft Convention)	[1970] ATS 14	4 December 1969	20 September 1970	5 February 1970
Convention for the Suppression of Unlawful Seizure of Aircraft	1970	(Unlawful Seizure Convention, aka Hijacking Convention)	[1972] ATS 16	14 October 1971	9 December 1972	24 July 1972
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation	1971	(Civil Aviation Convention, aka Montréal Convention)	[1973] ATS 24	26 January 1973	11 August 1973	26 January 1973
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents	1973	(Diplomatic agents Convention)	[1977] ATS 18	20 February 1977	20 July 1977	20 February 1977
International Convention against the Taking of Hostages	1979	(Hostages Convention)	[1990] ATS 17	3 June 1983	20 June 1990	3 January 1986
Convention on the Physical Protection of Nuclear Material[745]	1980	(Nuclear Materials Convention)	[1987] ATS 16	8 February 1987	22 October 1987	8 February 1987
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Extends and supplements the Montreal Convention on Air Safety)	1988	(Airport Protocol)	[1990] ATS 39	6 August 1989	22 November 1990	1 September 1993
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[746]	1988	(Maritime Convention)	[1993] ATS 10	1 March 1992	20 May 1993	16 September 1993
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf[747]	1998	(Fixed Platform Protocol)	[1993] ATS 11	1 March 1992	20 May 1993	16 September 1993
Convention on the Marking of Plastic Explosives for the Purpose of Detection	1991	(Plastic Explosives Convention)	[2007] ATS 25	21 June 1998	25 August 2007	21 June 1998
International Convention for the Suppression of Terrorist Bombings	1997	(Terrorist Bombing Convention)	[2002] ATS 17	23 May 2002	8 September 2002	3 May 2002
International Convention for the Suppression of the Financing of Terrorism	1999	(Terrorist Financing Convention)	[2002] ATS 23	1 April 2001	26 October 2002	10 April 2002
International Convention for the Suppression of Acts of Nuclear Terrorism	2005	(Nuclear Terrorism Convention)	[2005] ATNIF 20	7 July 2007	n/a[748]	n/a[749]

[745] as at 1 June 2009: amendments not in force; ratified by Australia 17 July 2008; not signed by Canada.
[746] as at 1 June 2009: amendments not in force.
[747] as at 1 June 2009: amendments not in force.
[748] Australia signed 14 September 2005. As at 1 June 2009, Australia has not ratified.
[749] Canada signed 14 September 2005. As at 1 June 2009, Canada has not ratified.

Appendix 2: AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations



AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations

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AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations

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The Attorney-General in consultation with the Minister for Justice has determined that in future Australia will exercise a discretion when considering foreign requests for mutual assistance in criminal matters where the request relates to a charge attracting the death penalty under the law of the requesting country. In the exercise of that discretion, assistance may be refused in the absence of an assurance from the requesting country that the death penalty would not be imposed or carried out. The Attorney-General has decided that this policy will also apply to police to police requests.

Consistent with the Attorney-General's decision, in future the following will apply in relation to AFP cooperation with overseas law enforcement agencies:

- police to police cooperation may continue on the present basis ie, the AFP may provide such assistance as requested, provided it meets existing policy guidelines, irrespective of whether the investigation may later result in charges being laid which may attract the death penalty.

- where the assistance of the AFP is sought by the police or another law enforcement agency of a foreign country in relation to a matter in which a charge has been laid under the law of that foreign country, for a crime attracting the death penalty, no action is to be taken, nor should any indication be given as to the decision likely to be taken in respect of the request. All such requests are to be notified to the Director International and Operations as soon as possible after receipt. Following consultation with the Attorney-General's Department, the General Manager National Operations will provide the Commissioner and Deputy with such advice as considered necessary in order that advice may be provided to the Minister for Justice and the Attorney-General.

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