MULTI-NATIONAL COUNTER-TERRORISM EXPERT NETWORK

UN REFORM, THE RULE OF LAW, AND COUNTER-TERRORISM: HOW CAN PAST LESSONS INFORM FUTURE RESPONSES?

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EXECUTIVE SUMMARY

The current reform agenda and identified priorities of the United Nations (UN) Secretary-General present a timely and important opportunity to reassess, strengthen, and develop the UN's pivotal role in *inter alia* counter-terrorist responses.

In particular, it is essential that this agenda is not limited solely or principally to institutional and procedural aspects of the UN's architecture, but rather that equal focus is given to its substantive elements. Both are important and inherently related – measures to strengthen one limb will not achieve their full potential and reach without corresponding and parallel efforts being afforded to the other.

Drawing upon the recent findings and recommendations of a 3+ year multi-national and multi-disciplinary project which examined what the rule of law means in the specific context of counter-terrorism, this report has sought to continue the process of more clearly identifying and specifying particular elements of the substantive rule of law framework within which counter-terrorist responses should occur, and which it is believed should form an important part of this reform process. A recurring theme throughout is the critical and increased role that the UN could play here – in particular the General Assembly and Security Council - to bring greater coherence, clarity, and certainty to the counter-terrorist responses of both states and international organizations, in particular in terms of standard setting and norm development.

First, it has sought to more clearly define the parameters and related norms of the international rule of law framework, not least in the absence of universal agreement regarding the exact meaning of the concept of the rule of law. The correct starting point is believed to be the UN Global Counter-Terrorism Strategy 2006, which benefits from universal consensus as a UN General Assembly resolution, at least in theory if not always in practice. This identifies obligations under the UN Charter, international human rights, humanitarian, refugee, and criminal law as important elements of the applicable framework. The underpinning principles, though, are believed to be much wider, incorporating other principles such as those of legality, necessity, proportionality, equality, non-discrimination, democracy, due process, state and institutional responsibility for wrongful acts, and due diligence.

Second, it has sought to add substantive meaning to the concept of prevention which underpins important aspects of the UN Secretary-General's identified priorities yet is without definition or articulated substantive parameters. Through considering recent examples of practices that states and the UN have sought to bring under the umbrella of prevention – ranging from UN imposed sanctions, to reliance upon anti-terrorist legislation, administrative detention, military courts and commissions, questionable interrogation methods, targeted killing, and expulsions – related rule of law constraints and concerns have been identified. In doing so, it is hoped that these might further inform and encourage the UN - not least the law-making activities of the General Assembly in relation to counter-terrorist matters of pressing rule of law concern - in establishing clearer parameters and identifying related norms for prevention and preventive responses, in particular when the line is crossed from legality to illegality, and what the international community considers to be legitimate and illegitimate.

The final key area considered were trends at the national, regional, and international levels towards increasing the accountability of and reducing existing impunity gaps for not only non-state terrorist actors, but also states and institutional actors in their counter-terrorist responses, to ensure appropriate criminal and civil avenues of justice and reparation for their respective victims. These include both judicial and non-judicial mechanisms, not least due to the inherent limitations of both. With respect to the courts, whilst they remain pragmatic regarding the difficulties facing states in meeting security imperatives, especially by affording them a significant degree of discretion in determining when a public state of emergency exists, nevertheless they remain resolute that states must act in accordance with their rule of law obligations regardless of the severity of the threat. Non-judicial mechanisms play an important part also, such as parliamentary oversight; human rights bodies and experts; and the Office of Ombudsperson to the Security Council's 1267 sanctions regime, although concerns remain here also, including in terms of determining and affording acceptable standards of due process in administrative proceedings. Furthermore, a significant rule of law limitation of both judicial and non-judicial mechanisms remains overcoming some of the practical obstacles, such as the challenge of obtaining adequate levels of disclosure by executives of security sensitive materials. There are a number of ways in which the UN could inform and improve these processes, not only at the rhetorical level, but also through the development of soft law and hard law including treaty making.

1. INTRODUCTION

This policy orientated report is based on important observations, findings, and recommendations made in the course of a three year multi-national, multi-disciplinary project which focused on the rule of law in the context of counter-terrorism. The project's partners are the University of Nottingham, UK (Dr Katja Samuel and Professor Nigel White); the Club of Madrid and its former Secretary-General, Fernando Perpiñá-Robert (80 former heads of state from 56 democratic countries committed to furthering democratic values worldwide); Dr Silvia Casale (formerly President of the Council of Europe's Committee for the Prevention of Torture and UN Subcommittee on Prevention of Torture); and the University of Málaga, Spain (Professor Ana María Salinas de Frías). The project was conceived in 2008 under the umbrella of the World Justice Project, an ambitious independent and politically neutral, multi-national and multi-disciplinary, initiative which aims to strengthen the rule of law worldwide at the local, national, regional, and/or international level within legal and non-legal disciplines (www.worldjusticeproject.org). Support was also received from other institutions, including the International Bar Association Foundation, Inc. During the project, approximately 50 significant experts - with *inter alia* judicial, practitioner, policy-maker, institutional, academic, policing, military, and civil society perspectives, from around the world - informed its substance.

The project has two significant outputs: a 1200 page book, AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012); and a report, KLH Samuel, ND White, and AM Salinas de Frías, 'Multi-national Counter-Terrorism Expert Network: Report of Key Findings and Recommendations on the Rule of Law and Counter-Terrorism' (Nottingham University, January 2012).[1] The overarching theme of both publications is how legitimate security imperatives may be accommodated within rather than erode the rule of law. Aimed primarily at the governmental and intergovernmental policy-maker and practitioner audience, both publications are intended to be solution orientated, and include the identification of best practices and approximately 180 recommendations.

The purpose of this report is not to rehearse the significant materials of either publication. Rather, it is intended to highlight key areas considered by the project which are believed to be of particular relevance to the UN Secretary-General's current agenda of reform and focus on rule of law matters – the project's overarching focus was on the meaning, parameters, strengths and weaknesses of the rule of law in the context of counter-terrorism. Consequently, only a brief summary is given here in relation to any specific issues that are examined in detail within the book and/or report with references to the relevant sections; nor is this report exhaustive in terms of covering the full scope of the project. Additionally, in a number of places the current authors further develop the project's themes and recommendations with the UN Secretary-General's reform agenda in mind, including in terms of making recommendations as to how the UN might strengthen both substantive and institutional aspects of its existing architecture for counter-terrorist responses.

[1] Available from <http://www.nottingham.ac.uk/hrlc/abouthrlc/operationalunits/securityandhumanrights.aspx>.

2. PRIORITIES IDENTIFIED IN UN SECRETARY-GENERAL'S REFORM AGENDA

In January 2012, the UN Secretary-General presented his five year action agenda to the UN General Assembly in which he identified five key priorities,[2] one of which is of particular relevance to counter-terrorism, namely 'building a safer and more secure world, which includes standing strong on fundamental principles of democracy and human rights'. Two others have importance for terrorism related matters also, namely the need to prevent human rights abuses, which can occur in the context of state responses to terrorism related security imperatives in particular; and 'supporting nations in transition', where there is the need to put both the necessary domestic substantive and institutional architecture in place to respond effectively and in a rule of law compliant manner to *inter alia* terrorist threats and activities.

Much of the current focus, in terms of making recommendations regarding the UN's response to these challenges, is on reforming and strengthening the UN's institutional architecture and mechanisms, including to 'enhance coherence and scale up United Nations counter-terrorism efforts',[3] such as through the creation of a single UN counter-terrorism coordinator. These are without doubt of great importance and every effort should be made to achieve them. Nevertheless, it is suggested here that the hoped for benefits of reform, not least from a rule of law and counter-terrorism perspective, are unlikely to deliver their intended outcomes unless corresponding weight and attention is given to developing and strengthening related substantive norms. An increasingly cross-cutting approach exists that recognizes the interconnectedness between and mutually reinforcing relationship of certain values and principles, not least the relationship between sustainable development and wider issues of justice reflected within the UN Secretary-General's five priorities.[4] In a similar way, it is submitted that the relationship between the substantive and institutional architecture necessary to respond effectively to terrorism is also indivisible and mutually reinforcing – at the national, regional, and international levels. Even if well developed, cohesive mechanisms exist - for example, aimed at more coherent collective responses, better enforcement of anti-terrorism norms, or greater oversight of counter-terrorism responses – they are unlikely to fulfil their true potential, not least in terms of being effective and perceived as legitimate, if the substantive elements are unclear and underdeveloped. The converse is true in that well developed and clear terrorism related norms will not fully realize their objectives if effective mechanisms for their implementation, interpretation, and enforcement do not exist. The UN has a unique role to play here as the global setter of international recognized standards and norms.

Furthermore, an integral element of the notion of the rule of law is that its applicable laws must ensure predictability and certainty, not least to have a power-restraining effect to prevent

[2] UN Secretary-General, 'Secretary-General Presents Five-Year Action Agenda to General Assembly, Highlighting Killer Diseases, Sustainable Development, Preventive Approaches as Priorities' (25 January 2012) SG/SM/14081 GA/11204 (UN Secretary-General's Five-Year Agenda).
[3] UN Secretary-General's Five-Year Agenda (n 2).
[4] In a counter-terrorism context see, for example, Preamble UN Security Council (UNSC) Res 1963 (20 December 2010) UN Doc S/RES/1963, which recognizes 'that development, peace and security, and human rights are interlinked and mutually reinforcing'.

excesses and abuses by the executives (and agents) of both states and international organizations. Indeed, a common denominator detected amongst root causes of terrorism is: no accountable government and no rule of law. As was noted in the project's report:

In terms of what a rule of law based response means, it does not simply require clear, certain, and applicable rules, though these form an important part. The essence of law, especially criminal law, is to circumscribe what it acceptable and what is unacceptable behaviour. If definitions of offences and the other matters mentioned are unclear then the main function of criminal law especially is lost, and the pursuit of other short-term, executive-led goals may take over. More specifically, a legitimate rule of law based response to terrorism is underpinned by fundamental laws and principles drawn from peremptory norms of international law as well as from foundational principles of custom. These include those principles prohibiting torture, discrimination, *refoulement*, arbitrary detention; and those guaranteeing basic due process, rights to information, and freedom of conscience, expression, and religion. A rule of law that pays no regard to the substance of the law does not guarantee a just and sustainable legal order; indeed it guarantees little more than punishment in accordance with the law, often in the absence of its due processes.[5]

Consequently, the primary focus of this report is on identifying those substantive issues considered during the project which are believed to be of greatest importance and relevance to the UN Secretary-General's identified priorities for the next 5 years coupled with his focus on strengthening the rule of law at the national and international levels.

3. WHAT DOES THE RULE OF LAW MEAN AT THE INTERNATIONAL LEVEL IN THE CONTEXT OF COUNTER-TERRORISM?

There is universal agreement regarding the importance of the rule of law, not least for 'the need for universal adherence to and implementation of the rule of law at both the national and international levels and [a] solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States'.[6] This includes 'for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, and acknowledge[ment] that collective security depends on effective cooperation, in accordance with the Charter and international law, against transnational threats'.[7]

[5] KLH Samuel, ND White, and AM Salinas de Frías, 'Multi-national Counter-Terrorism Expert Network: Report of Key Findings and Recommendations on the Rule of Law and Counter-Terrorism' (Nottingham University, January 2012) 10-11.
[6] UN General Assembly (UNGA) Res 66/102 (9 December 2011) UN Doc A/RES/66/102, Preamble.
[7] UNGA Res 66/102 (9 December 2011) UN Doc A/RES/66/102, Preamble. See too para 3 which reaffirms 'the imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter'.

There is, however, no corresponding universally agreed definition of the concept of the rule of law, whether generally or in the specific context of counter-terrorism. Nevertheless, there are a number of clearly identifiable sources of legal principles which make up the applicable international rule of law framework, the primary ones of which are outlined here.

More generally, the project endorses the four universal rule of law principles identified by the World Justice Project, namely that: a government and its officials and agents are accountable under the law; the laws are clear, publicized, stable and fair, and protect fundamental rights; the process by which the laws are enacted, administered, and enforced is accessible, fair and efficient; and access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[8]

In the specific context of counter-terrorism, the correct starting point is believed to be the UN Global Counter-Terrorism Strategy 2006 and the principles which underpin it. Adopted without a vote by the General Assembly in Resolution 60/288,[9] thereby reflecting a baseline of universal consensus and legitimacy, this was the first time that the UN Membership had agreed and adopted a common strategic approach and framework for fighting terrorism. The pivotal importance of the rule of law both underpins and is reiterated throughout its text.[10] In particular, Pillar IV on 'measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism' identifies five key sources of legal principles: international humanitarian, human rights, refugee/asylum, and criminal law,[11] together with the UN Charter.[12] While not perfect in terms of their universal acceptance, implementation, or application, nevertheless most UN Member States are legally bound to adhere to most of these principles by virtue of being States Parties to the applicable international conventions[13] and protocols and/or related customary international law norms. In order to emphasize the significance and uniqueness of these principles, they should not be referred to generically under the mantle of, for example, human rights which is both potentially misleading and unduly restrictive.

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[8] Available at <http://www.worldjusticeproject.org/about/> accessed 16 March 2012. See too the World Justice Project's Rule of Law Index at <http://worldjusticeproject.org/rule-of-law-index/>.

[9] UNGA Res 288/60 (8 September 2006) UN Doc A/RES/288/60 (UN Global Counter-Terrorism Strategy); subsequently reviewed by the UNGA biennially in UNGA Res 62/272 (5 September 2008) UN Doc A/RES/62/272, and UNGA Res 64/297 (8 September 2010) UN Doc A/RES/64/297, both of which have also been adopted on the basis of consensus, and due to be reviewed against during June 2012.

[10] See, for example, UN Global Counter-Terrorism Strategy, Action Plan: Pillar II, para 3 ('To cooperate fully in the fight against terrorism, *in accordance with our obligations under international law*…..'); and Pillar IV, Preamble ('Reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy…'), and paras 1-5.

[11] UN Global Counter-Terrorism Strategy, Action Plan: Preamble; Pillar IV, paras 2-5. Also, UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624, Preamble, and para 4; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 para 3.

[12] See, for example, UN Global Counter-Terrorism Strategy, Preamble.

[13] Where UN Member States are not yet states parties to some of the applicable international treaties, they are urged to do so and to implement their provisions within national law at the earliest opportunity. See, for example, UN Global Counter-Terrorism Strategy, Plan of Action: Pillar IV, para 3; and UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 paras 3(d) and (e).

Importantly, these five sources of legal principles do not operate in isolation. Instead, they are increasingly interrelated, influencing the development and interpretation of their respective norms, with international human rights law especially increasingly informing and influencing international humanitarian, international/domestic criminal, and international refugee norms and standards. For example, in situations of armed conflict, many principles of international humanitarian law may not be applied without consideration of human rights.[14] Therefore, the further the distance from the battlefield a particular measure is taken, the greater the expectation that international humanitarian law provisions will be read in a manner that commensurately reads in human rights law norms in terms of its interpretation and application in practice.

Furthermore, these principles are interconnected with other ones also. For example, there is a growing international recognition of the interdependent and mutually reinforcing relationship that exists between those universal principles concerned with the protection of the rule of law, promotion of democracy, and respect for human rights, both for the general maintenance of international peace and security[15] as well as in the specific context of counter-terrorism.[16] As with the concept of the rule of law, though there is general consensus that democracy has now acquired the status of being a universal value and right within the UN system,[17] there is no universal definition or agreement as to its meaning or form. That said, the concept is generally associated with the notion of accountable government, not least in terms of acting as a legal standard or benchmark against which its actions may be measured, and is generally linked to a state's constitutional principles. One would also expect those principles articulated within international conventions – such as freedom of speech, expression, religion, association, and the right to privacy – to be reflected in some form within a democratic framework.[18]

Other important underpinning principles here are those of equality and non-discrimination.[19] These principles have permeated the UN system since its outset, reflected in the Universal

[14] See, for example, UNGA Res 65/208 (21 December 2010) UN Doc A/RES/65/208, Preamble that: '*Acknowledg[es]* that international human rights law and international humanitarian law are complementary and mutually reinforcing' in the context of extrajudicial, summary, or arbitrary executions.

[15] See, for example, Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (2005) UN Doc A/59/2005 (In Larger Freedom Report), paras 127-8; World Summit Outcome, UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1 (World Summit Outcome), para 119; UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 para 2; and UNGA Res 66/102 (9 December 2011) UN Doc A/RES/66/102, Preamble.

[16] See, for example, UN Global Counter-Terrorism Strategy, Preamble; Council of Europe's: Convention on the Prevention of Terrorism 2005 (adopted 16 May 2005, entered into force 1 June 2007), especially the Preamble; and International Summit on Democracy, Terrorism and Security (8-11 March 2005), Madrid Agenda, 'Confronting Terrorism' <http://summit.clubmadrid.org/agenda/the-madrid-agenda.html> accessed 20 March 2012 (Madrid Agenda).

[17] See, for example, In Larger Freedom Report (n 15) paras 128, and 148-9; World Summit Outcome (n 15) paras 119, and 135; UN Press Release 'General Assembly Declares 15 September International Day of Democracy' GA/10655 (8 November 2007).

[18] See, for example, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR): art 17 (privacy); art 18 (freedom of thought, conscience, and religion); art 19 (freedom of expression); and art 22 (freedom of association).

[19] D Moeckli, 'Anti-Terrorism Laws, Terrorist Profiling, and the Right to Non-Discrimination' in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

Declaration of Human Rights 1948 (in particular Article 1), as well as in general regional and international human rights instruments.[20] It is now widely acknowledged that, at the very least, the right to non-discrimination on the grounds of race, sex, and religion binds all states, irrespective of their ratification of human rights treaties, because it has become part of customary international law. Additionally, it would appear that the principle of non-discrimination, although not explicitly listed as such under Article 4(2) International Covenant on Civil and Political Rights 1966, is effectively non-derogable in practice due to its status in Article 4(1) International Covenant on Civil and Political Rights 1966 as a basic requirement for any derogation to be permissible under the Convention.[21] One of the most important aspects of the concept of equality and non-discrimination is the right to equality before the courts. More generally, where people are classified into different groups, a crucial determination becomes whether there are objective and reasonable criteria for these distinctions, usually by applying a two part test which requires that any difference in treatment must: (1) pursue a legitimate aim; and (2) be proportionate. The principle of non-discrimination applies equally to situations of armed conflict, although its exact scope and meaning will need to be determined according to international humanitarian law.

In addition to substantive norms, rule of law based counter-terrorist responses are concerned with procedural aspects of the rule of law in practice, including that both formal judicial proceedings, as well as non-judicial administrative processes, are fair and afford appropriate levels of due process and safeguards.[22] With respect to the former, these should adhere to the strict standards and safeguards specified for the right to a fair trial under Article 14 International Covenant on Civil and Political Rights 1966, not least regarding the requirements of independence, impartiality, and competence. Although it may technically be lawful and legitimate to lower some of these standards for terrorism related cases in limited circumstances, in practice any special criminal procedures often undermine basic human rights protections, including the ordinary due process guarantees of a criminal trial, or permit excessive and disproportionate criminal sanctions and, therefore, should be avoided. Similarly, minimum safeguards and rights are provided for under international humanitarian law, including Article 75 Additional Protocol I 1977[23] in times of international armed conflict and Article 6 Additional Protocol II 1977[24] for

[20] For example, arts 2-3, and 26 ICCPR; art 14 and Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights 1950); arts 1 and 24 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978); and arts 2-3, 18(3)-(4), and 28 African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986).

[21] See further, for example, UN Human Rights Committee, 'CCPR General Comment No. 29: States of Emergency (Article 4)' (24 July 2001) CCPR/C/21/Rev.1/Add.11, para 8.

[22] See further, for example, E Myjer, 'Human Rights and the Fight against Terrorism: Some Comments on the Case Law of the European Court of Human Rights'; S García Ramírez, 'The Inter-American Court of Human Rights' Perspective on Terrorism'; I Kane, 'Reconciling the Protection of Human Rights and the Fight against Terrorism in Africa'; and N El Khoury, 'Implementing Human Rights and Rule of Law Aspects of the UN Global Counter-Terrorism Strategy: The UNODC/TPB Experience', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

[23] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) (Additional Protocol I).

non-international armed conflict. In non-judicial, administrative proceedings – which often have similar hallmarks to criminal justice proceedings not least in terms of potentially significant consequences for the persons concerned, but without the formal safeguards - there is an increasing expectation that the same or similar rights and protections will be available unless there are very good justification for not doing so. (See, for example, Section 6.3.2 below).

In addition to specific provisions, other more general principles are of equal importance here, such as: the existence of a functioning legal system vis-à-vis courts, judges, prosecutors, and defence lawyers, as well as competent and disciplined police who adhere to international professional and human rights standards while simultaneously respecting local customs and culture; accountability to the law, which are also related to the importance of the separation of powers between the executive, legislature, and judiciary to prevent undue influence being exercised by one arm of government upon another; legal certainty, such as with respect to the clear drafting of domestic anti-terrorism legislation; avoidance of arbitrariness, not least in terms of ensuring appropriate judicial safeguards for suspected terrorists; as well as procedural and substantive transparency.

The importance of security to both states and the UN system is fully recognized. This means that the value of security and its inherent imperatives may be incorporated into the international rule of law framework where this is not already the case.[25] For example, international humanitarian law is premised on the exceptional situation of armed conflict and the need for states to protect themselves while not inflicting unnecessary suffering upon either combatants or protected persons (generally the civilian population). International human rights law, reflected in Article 4(1) International Covenant on Civil and Political Rights 1966, recognizes the security imperatives of genuine situations of heightened tension where, for example, particular terrorist threats or activities are so serious that they may be considered to constitute a 'public emergency' which 'threatens the life of the nation'. This enables the executive to respond to such security imperatives by temporarily and proportionately adjusting its legal system to provide increased security, including through the reinstatement of law and order, and to decrease the protection of non-derogable rights and freedoms for as long as the exigencies of the situation require this. Such exceptional measures, whether during times of peace or armed conflict, should be underpinned by other more generally applicable principles, in particular those of legality, necessity, and proportionality. Therefore, for example, any suspension of normal human rights protections under Article 4(1) International Covenant on Civil and Political Rights 1966 should be absolutely necessary and proportionate on the particular facts, for the minimum period of time required to achieve its objectives, and should not be unlawful such as suspending any rights

[24] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) (Additional Protocol II).

[25] See further, for example, J Pejic, 'Armed Conflict and Terrorism: There is a (Big) Difference'; C Landa, 'Executive Power and the Use of the State of Emergency'; C Martin, 'The Role of Military Courts in a Counter-Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

explicitly excluded from derogations under Article 4(2) International Covenant on Civil and Political Rights 1966.[26] Significantly too, any exceptional measures should be within the law, not exceptional to the law. Generally they should be avoided, not least because they more often than not lead to the violation of fundamental rights, including the 'normalization' of what should be temporary suspensions of human rights protections.[27]

Another related rule of law principle is the corresponding obligation upon states to adequately meet their national security imperatives to ensure the safety of inhabitants on their territory, including from the threat of terrorist activities and attacks. Indeed, it might be argued that human rights jurisprudence encourages a preventive tendency in counter-terrorism in that states are expected to fulfil their due diligence obligations[28] by protecting individuals from all forms of human rights abuse, not only by their own officials but also by terrorist actors. There are also other principles which govern access to justice and reparations for victims, both victims of terrorist attacks as well as those of security imperative related violations (see Section 6.4 below). Many of these are found in General Assembly resolutions, for example 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law',[29] and the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'.[30]

The scope of the examination of rule of law principles in operation is important also. Although much of the focus has traditionally been on individuals (including increasingly on non-state actors) and state actors, the scope needs to be broadened to consider each of the three legal actors recognized in international law equally, which include international organizations. Not only do the latter play a crucial role in the development, interpretation, and sometimes enforcement of counter-terrorism norms and policies, but there is an increasing expectation that such organizations will themselves be models in terms of reflecting and adhering to such standards and principles within their own institutional responses even where they might not technically be states parties to the relevant obligations (for example, international human rights treaties). This is reflective of wider discourse and trends towards ensuring greater accountability and closing existing or potential impunity gaps at every level, which include states and international organizations in their counter-terrorism policies and practices. Therefore, while the UN has a pivotal role to play in terms of overseeing compliance with the rule of law at the national and

[26] For example, no derogations are permitted to the right to life (art 6 ICCPR), or to the prohibition against torture, degrading or inhuman treatment (art 7 ICCPR).

[27] International Commission of Jurists Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, 'Assessing Damage: Urging Action', Executive Summary (Geneva, 2009) 6, <http://ejp.icj.org/IMG/ExecSumm.pdf> accessed 1 March 2012, which refers to the normalization of exceptional responses.

[28] For example, the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy' Framework (21 March 2011) UN Doc A/HRC/17/31, para 6 which refers to the 'duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication'. This was endorsed by the UN Human Rights Council: (16 June 2011) UN Doc A/HRC/RES/17/4.

[29] UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147.

[30] UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34.

international levels, it is imperative that it both fully recognizes and reflects its own institutional responsibilities and commitments in this regard.

More specifically, in the context of the UN is the expectation that its organs will adhere to the purposes and principles underpinning the UN Charter. This is reflective of other principles of general international law which should also be regarded as forming part of the rule of law framework applicable to counter-terrorism. These include those principles governing the direct or indirect responsibility of states[31] and international organizations[32] for internationally wrongful acts or omissions. States are responsible for the wrongful acts or omissions of state organs and agents, and for those of private actors when performing inherently governmental functions, which are performed under the effective control of the state. Similarly, international organizations are directly responsible for the wrongful acts or omissions of their agents, and of state organs under their effective control. In addition to direct responsibility for wrongful acts or omissions, states and organizations are also responsible for any failure to exercise due diligence to prevent violations of international law by private actors. Such principles are an important constraint on the counter-terrorists strategies of both type of actor, whether they are conducted through state/ institutional agents or through private contractors.

One final observation concerns the interpretation and application of these principles to a counter-terrorist context. Although these bodies of principles, and their related institutions and mechanisms, are generally well established, nevertheless an important underlying tension remains that most of them were not developed specifically to respond to terrorism and counter-terrorism. Therefore tensions and sometimes uncertainty exists regarding the exact manner in which particular norms should be interpreted and applied in these specific contexts. This is illustrated by the relatively new phenomenon of transnational terrorism which does not fit comfortably within the legal regimes governing international or non-international armed conflicts, sometimes requiring analogies to be drawn in the absence of explicitly applicable rules. While it would appear that a corpus of counter-terrorism law is emerging, this is considered to be still in its relative infancy and not to be sufficiently well defined or developed, clear or consistent, to be treated as a coherent self-contained international anti-terrorism legal regime.

If the agenda of UN reform is to be comprehensive and, therefore, more likely to meet the Secretary-General's identified priorities relating to security as referred to in the previous section, the following recommendations are made:

[31] International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (2001), Annex to UNGA Res 56/83 (12 December 2001), as corrected by UN Doc A/56/49 (Vol 1)/Corr.4), UN Doc A/RES/56/49.
[32] International Law Commission, 'Draft articles on the responsibility of international organizations', Yearbook of the International Law Commission (2011) vol II, Part Two.

Recommendations:

- Both the substantive and procedural/institutional aspects of the UN architecture relevant for counter-terrorism must be afforded equal importance, as well as be examined and progressed in parallel.
- The scope must focus equally on individuals/non-state actors, states, and international organizations.
- The scope of the substantive rule of law norms applicable to a counter-terrorism context should not focus predominantly on UN Charter and human rights norms. Instead, the concept of the rule of law needs to be interpreted more widely and articulated more explicitly to also incorporate international humanitarian law, international/domestic criminal law, and international refugee law, not least in order to be consistent with the UN Global Counter-Terrorism Strategy. Furthermore, other key principles should also be included, not least democratic principles (for example, freedom of speech, expression, religion, association, and the right to privacy); state and institutional responsibility; due diligence; legality; necessity; proportionality; and non-discrimination.
- In order to highlight and endorse the significance and uniqueness of these principles, they should not be referred to generically under the mantle of human rights which is both potentially misleading and unduly narrow.

4. THE ROLE OF THE UN AS INTERNATIONAL LAW-MAKER AND STANDARD SETTER ON RULE OF LAW MATTERS

A recurring theme throughout the project has been the pressing need for the UN and its organs to claim back at least some of the ground lost during the last 10 years, not least due to its central role in the maintenance of international peace and security, and the promotion of international cooperation.[33] To this end, there is a pressing need for the UN to re-establish itself as a principal creator, implementer, and upholder of the rule of law and its accompanying body of rights and obligations, including in terms of the norms, standards, and mechanisms that it advocates for states which, to the greatest extent possible for an international organization, should be reflected within its own substantive and procedural practices. The UN needs to become a model international actor on rule of law matters,[34] not least in adhering to the obligations of its own UN Charter as well as those arising under other international instruments - in spirit where it cannot technically be a state party - which are central to its collective efforts to maintain international peace and security.

[33] See, for example, UNGA Res 58/317 (5 August 2004) UN Doc A/RES/58/317.

[34] This is recognized by the UNGA. See, for example, UNGA Res 66/102 (9 December 2011) UN Doc A/RES/66/102, Preamble: '*Convinced* that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and of its Member States'.

One way in which this may be done is through its institutional law-making activities on rule of law norms underpinning counter-terrorism responses. Unlike other specific areas of international law, such as international humanitarian law applicable in armed conflict, or international criminal law applicable to grave violations of international law, there is as yet no fully coherent international legal regime governing terrorism and responses to terrorism as previously noted. This is largely, although not solely, attributable to the continued inability of the international community to reach agreement on a universal definition of terrorism, and therefore to adopt a consistent approach to terrorism and counter-terrorism. Consequently, there is much work that could be done here in terms of plugging gaps and bringing further coherence, certainty, and meaning to the existing bodies of norms and frameworks in existence from the national to international levels, even in the absence of a universal definition.

Both the General Assembly and the Security Council have different yet complementary roles and approaches in relation to the development and implementation of the international legal framework. Despite these, there have been some recent signs of synergy, between the executive and security-driven hard law produced by the Security Council, and the general, human rights, focused norms produced by the General Assembly,[35] towards a more coherent body of UN law. This is important for ensuring greater legitimacy of counter-terrorist responses; and for placing the UN, as the most legitimate representative of the international community, at their centre.

With respect to the Security Council, it has taken on a new, or at least extended, role here, some of which has been positive, such as the increased ratification of international anti-terrorism conventions by Member States in response to Security Council Resolution 1373,[36] and its increased engagement and pro-activity on terrorism related matters in the post 9/11 era compared with its approaches prior to the 9/11 terrorist attacks. These have not, however, been without their related concerns and controversies. For example, in the context of national legislative responses to Security Council Resolution 1373, one particular concern has been the failure of the Security Council at the time to provide a working definition of terrorism to ensure some degree of consistency and coherence between states' subsequent anti-terrorist legislative activities; this was not provided until some three years later in Security Council Resolution 1566,[37] after which time many states had already adopted the necessary legislation on the basis of their own differing national definitions of terrorism. Consequently, in the absence of a universal definition of terrorism, a tapestry of diverse, often ambiguous, not easily harmonized, national approaches exist which can hinder rather than facilitate bilateral or multinational cooperation.

Clearly, some aspects of the Security Council's law-making functions should inherently be more limited than those of the General Assembly, because its outputs are not the product of consensus or near consensus within the wider UN Membership and, therefore, do not always benefit from the same degree of perceived legitimacy and acceptance. Therefore, for example, it would not be

[35] See, for example, the UNGA annual resolutions on the 'protection of human rights and fundamental freedoms while countering terrorism': UNGA Res 66/171 (19 December 2011) UN Doc A/RES/66/171; UNGA Res 65/221 (21 December 2010) UN Doc A/RES/65/221; and UNGA Res 64/168 (22 January 2010) UN Doc A/RES/64/168.
[36] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
[37] UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566.

the correct forum in which to try to resolve the universal definition of terrorism debate. From a rule of law perspective, it is of the utmost importance that in all of its activities, including law-making, that the Security Council acts in a manner which is fully consistent with its own obligations under the UN Charter. This includes Article 24(2) which requires it to fully respect and uphold the purposes and principles of the UN, including 'principles of justice and international law',[38] and 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.[39]

Although it would appear that the Security Council's activities and outputs are being increasingly informed by international criminal justice objectives and norms - as suggested by the manner and circumstances of the creation of the Special Tribunal for Lebanon[40] - which is a positive development, nevertheless more remains to be done in terms of the Security Council's concern for *inter alia* human rights issues of which it is a primary guardian. More specifically, the rule of law requires further progress to be made here, in tandem, at two levels: the strengthening of the substantive content of the Security Council's outputs, including but not limited to human rights norms; and that its procedural processes be reformed to ensure adherence to fundamental rule of law standards, not least those basic safeguards and standards specified under human rights law. As previously noted, and as confirmed in the jurisprudence of, for example, the European Court of Human Rights, the substantive rights and the procedures for their protection are of equal importance from a human rights perspective.

While it is also important to further strengthen review mechanisms of Security Council actions – such as the Office of the Ombudsperson to the 1267 sanctions regime, and International Court of Justice (examined in detail in Section 6.3 below) – ultimately the most credible method of strengthening rule of law compliance, not least for reasons of legitimacy, is for the Security Council to demonstrate the necessary levels of political will for change, and for there to be an internally rather than externally driven reform agenda.

With respect to the General Assembly, it is fully cognizant of its own law-making function, not least 'in encouraging the progressive development of international law and its codification'.[41] It has taken some opportunity to clarify and reinforce key norms of relevance to counter-terrorism (although not necessarily confined to these contexts), in particular where fundamental rights are being violated like the right to life or the prohibition against torture. Here, its concern is preventive in the sense of wanting to bring an end to practices that violate fundamental rights and protections, close impunity gaps, and increase the effectiveness of accountability mechanisms.

With respect to the right to life, the General Assembly has passed a number of resolutions since 2001 on extrajudicial, summary, or arbitrary executions - most recently General Assembly Resolution 65/208 in 2011[42] - motivated by a deep concern for the increasing number of civilians and persons *hors de combat* being killed during situations of armed conflict and internal strife.

[38] Art 1(1) UN Charter 1945.
[39] Art 1(3) UN Charter 1945.
[40] UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757.
[41] UNGA Res 66/102 (9 December 2011) UN Doc A/RES/66/102.
[42] UNGA Res 65/208 (21 December 2011) UN Doc A/RES/65/208.

Unlike many of its resolutions, the General Assembly has been uncharacteristically robust in its condemnation of such practices (para 1), 'which represent flagrant violations of human rights or a negative impact on the enjoyment of human rights, particularly the right to life' (Preamble). It is especially concerned that states 'take effective action to prevent, combat and eliminate the phenomenon in all its forms and manifestations' (para 2), including through the conduct of impartial investigations and, where appropriate, subsequent prosecution of those concerned (para 3). From a law-making and standard setting perspective, the resolution is longer and more detailed than many General Assembly norms, including in terms of specifying, explaining, and affirming some of the core elements of the applicable norms and their meaning in practice, and in articulating how current levels of impunity should be addressed. Although this resolution is of general application, clearly its core principles and standards apply equally to any employment of lethal force within a counter-terrorist context.

Similarly, the General Assembly has also adopted a number of resolutions that reiterate, in unequivocal terms, the prohibition against torture and other cruel, inhuman or degrading treatment or punishment - most recently in General Assembly Resolution 65/2005 in 2011[43] - and which condemn such practices (para 1). Although the resolution is of general application, it is evident from its content that counter-terrorist responses were also in the minds of the drafters, not least through the references to situations of international or non-international armed conflict, and public emergencies (Preamble). Once again, the General Assembly reaffirms applicable legal norms, including the customary and peremptory nature of the prohibition (Preamble), and the wide scope of their application, which include: the treatment of detainees generally; not permitting any evidence which is the product of torture to be relied upon in court; enforced disappearances; and *non-refoulement.* As before, primary concerns are how to prevent such practices, in terms of legal mechanisms of restraint as well as practical measures like training, bringing perpetrators to account, and ensuring reparation for any victims. The General Assembly has also adopted a resolution which condemns practices of enforced or involuntary disappearances.[44]

More generally, the General Assembly continues to adopt resolutions which articulate and reinforce key rule of law principles applicable to countering terrorism,[45] and to negotiate and adopt anti-terrorism conventions. Despite all of these positive developments and contributions, there is more that the General Assembly could do in pursuance of its key global law-making and standard-setting role, both by examining particularly concerning practices in the specific context of counter-terrorism, as well as by bringing greater precision to the interpretation and application of pivotal concepts such as 'prevention' and 'preventive'. (See further section 5 below). Certainly, it has a broad competence under Articles 10, 11(1), and 14 UN Charter to consider matters of peace and security,[46] especially those that raise human rights concerns or constitute

[43] Most recently, see UNGA Res 65/205 (21 December 2011) UN Doc A/RES/65/205.
[44] UNGA Res 57/215 (18 December 2002) UN Doc A/RES/57/215.
[45] In particular, its annual resolutions on 'Measures to eliminate international terrorism' and 'Protection of human rights and fundamental freedoms while countering terrorism'.
[46] See too art 13(1) UN Charter which states that: 'The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging

denials of the right of self-determination. Although the Security Council has the potential to act likewise on some of these issues, it is often debarred from doing so in practice due to the exercise (of threat thereof) of the veto by one or more members of the P5, in particular where such a resolution may be contrary to their national interests. Certainly, there is no shortage of sources to inform its approaches on these substantive issues, including the jurisprudence and General Comments of UN treaty bodies as well as its independent experts and Special Rapporteurs. A plethora of treaty and customary international law principles also exist at the national, regional, and international levels, forming another important body of norms and standards that it could inform the General Assembly's approaches.

Furthermore, in addition to the General Assembly's ability to clarify and develop key concepts and norms, as the one global law-making body, it is uniquely placed to add a further level of legitimacy to its outputs not least where universal or near universal consensus can be achieved. This is essential, as previous attempts by the UN High Level Panel Report in 2004[47] and UN Secretary-General's 'In Larger Freedom Report' in 2005[48] to define the concept of terrorism illustrate. These attempts, which were not the product of wide consensus among states, were robustly rejected by the Organization of Islamic Cooperation (then the Organization of the Islamic Conference) and the Non-Aligned Movement especially,[49] including because the proposed definitions did not reflect their position that those engaged in legitimate armed self-determination struggles should be exempt from the scope of any definition of terrorist crimes.[50]

If the General Assembly in particular is to fulfil its potential here, this may well require some rethinking and rebalancing of the General Assembly's function on terrorism related matters, including in terms of its institutional architecture and processes to facilitate a greater law-making role.

Recommendations:

- It is suggested that the current reform agenda offers an important opportunity to reassess the UN's law-making role in the interpretation, application, and development of both formally binding and non-binding terrorism related norms and standards.
- It is important that both substantive human rights norms, and their corresponding fundamental procedural processes and safeguards, become further embedded, and where

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the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

[47] Report of the UN Secretary-General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2004) UN Doc A/59/565, paras 157-64.

[48] In Larger Freedom Report (n 15) para 91.

[49] 'Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996' Ninth session (28 March-1 April 2005) UN Doc A/60/37, Annex II B, 25 paras 12-13 (Ad Hoc Committee Report 2005).

[50] Ad Hoc Committee Report 2005 (n 49) para 13.

appropriate also developed, within the law-making and more general activities of the Security Council. This is necessary to fulfil its responsibilities under Article 24 UN Charter, which according to paragraph 2 must be discharged in accordance with the Purposes and Principles of the UN Charter.

- When undertaking law-making activities, the Security Council should improve its current related processes by consulting more widely within the wider UN Membership as a matter of routine, thereby becoming more transparent, in order to ensure greater acceptance and legitimacy of its outputs. Ultimately, unless these thresholds are crossed, it is less likely that the necessary political will and/or resources will be made available by states to implement these outputs regardless of their importance.
- While it is also important to further strengthen available judicial and non-judicial review mechanisms of Security Council actions, ultimately the most legitimate and significant method of strengthening rule of law compliance would be for the Security Council to itself demonstrate the necessary levels of political will to embark upon an internally rather than externally driven agenda of reform.
- The General Assembly should be strongly encouraged to make greater use of its competence to consider matters of peace and security relevant to counter-terrorism as it is permitted to do under Articles 10, 11(1), and 14 UN Charter. This is especially important for the General Assembly to undertake, because its norms benefit from an added layer of international legitimacy (compared with, for example, comparable outputs of the Security Council), in particular where they reflect universal or near universal consensus.
- The General Assembly should be strongly encouraged to adopt a resolution which takes a wider approach to the concept of the rule of law and its underpinning norms and standards as outlined in the previous section.
- The General Assembly should be strongly encouraged to consider and clarify the meaning, parameters, associated norms and standards, etc of key concepts underpinning counter-terrorist responses, including those of 'prevention' and 'preventive'.

5. PREVENTIVE APPROACHES AND RULE OF LAW COMPLIANCE[51]

A key concept underpinning the UN Secretary-General's identified priorities is that of prevention, not least because, as he notes, 'prevention is better – and cheaper – than cure…. It is

[51] See further KLH Samuel, 'The Rule of Law Framework and its Lacunae: Normative, Interpretative, and/or Policy Created?'; K Weston, 'Counter-Terrorism Policing and the Rule of Law: The Best of Friends'; G Staberock, 'Intelligence and Counter-Terrorism: Towards a Human Rights and Accountability Framework?'; and TR Mockaitis, C Tucker Jr, and A Invictus, 'The Military and the Role of Law in Counter-Terrorism', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

time to prioritize prevention across the board'.[52] He further notes that the UN 'will also adopt a preventive approach to human rights. The era of impunity is dead. We have entered a new age of accountability'.[53]

Certainly, for counter-terrorism to be effective, it needs to have a strong preventive element – the ultimate aim being to stop an attack long before it is launched. Despite the pivotal role and significance of this concept, however, it too suffers from having no agreed scope or meaning. Consequently, as some recent state practices reveal, in its current undefined form the concept is vulnerable to politicization, misuse, and being stretched to breaking point. It is therefore crucial that pursuance of the Secretary-General's goals relating to prevention is underpinned by a strong focus on determining the concept's scope and substantive meaning – during times of peace and armed conflict - which results in greater coherence, certainty, and legitimacy for preventive approaches. Any failure to do so, risks allowing aspects of the rule of law framework in practice to continue along their current course of being weakened through inconsistent and sometimes highly questionable state practices rather than seizing the opportunity to strengthen its norms and compliance with them.

An attempt is made below (Section 5.1) to identify what rule of law compliant preventive approaches might look like by examining a range of recent state practices considered by the project which states have sought to bring under the umbrella of prevention, including by highlighting some related aspects of rule of law concern, constraint, and/or where further discussion and development are needed, which are by no means exhaustive. Certain preventive measures may be lawful and legitimate on the condition that there are adequate levels of executive constraint and safeguards in place which ensure that such measures occur within the existing international rule of law framework as previously described. One might also argue, not least under human rights law, that one significant element of prevention is the responsibility upon executives to ensure that human rights abuses do not occur in the course of their counter-terrorist responses.

In terms of the underpinning rule of law principles for preventive approaches, the starting point is that criminal justice approaches should be the norm for counter-terrorist responses, with military approaches remaining exceptional, which is endorsed by the UN Global Counter-Terrorism Strategy: '….the United Nations system's important role in strengthening the international legal architecture by promoting the rule of law, respect for human rights, and effective criminal justice systems, which constitute the fundamental basis of our common fight against terrorism'.[54] Indeed, effective preventive measures within a criminal justice approach could largely avoid the necessity for military approaches. Therefore, the principal body of guiding principles for determining preventive approaches should be drawn from international human rights and domestic/international criminal law, as well as the UN Charter (including in a collective security context) and international refugee law where relevant. Other principles of

[52] UN Secretary-General's Five-Year Agenda (n 2).
[53] UN Secretary-General's Five-Year Agenda (n 2).
[54] UN Global Counter-Terrorism Strategy, Action Plan: Pillar IV, para 5.

general international law previously mentioned - for example, state responsibility, due diligence, legality, necessity, proportionality, and non-discrimination - remain applicable also. This does not mean that preventive approaches may not lawfully occur during armed conflict; rather that they should exceptionally rather than routinely be underpinned by international humanitarian law.

Every effort should be made to resist claims regarding the existence or emergence of a 'new paradigm' which seeks to blur the existing paradigms of criminal justice and military approaches and their applicable norms, not least to resist the creation of potential impunity gaps for states which would be contrary to the goal of strengthening the international rule of law framework within which counter-terrorist responses should occur. As previously noted, it is recognized that the current legal framework is not perfect and that tensions exist within it as it seeks to respond to and accommodate types of threats and scenarios not envisaged at the time that particular bodies of international law were developed, illustrated by the existence of transnational conflicts between state and non-state terrorist actors on the territory of a third party state. Nevertheless, in the absence of the adoption of a dedicated treaty instrument (which is currently unlikely) and/or the development of clear customary international law norms, the rule of law requires states to respond to terrorism within the structures of the two existing, internationally recognized, paradigms governing international and non-international armed conflicts.

5.1. Preventive Approaches

5.1.1. *Non-Forcible and Forcible Responses under the UN Charter*[55]

The UN Charter has a strong preventive element, including under Chapter VII which permits both non-forcible (Article 41) and forcible (Article 42) preventive measures in response to threats to or breaches of the peace. Until more recently, non-forcible measures generally took the form of sanctions imposed against the regimes of states, which were designed to be preventive in the sense of ending serious conduct violating significant rule of law norms such as fundamental human rights.[56] Since the late 1990s, these may also take the form of financial sanctions imposed against individual or non-state terrorist actors, notably although not exclusively under the sanctions regime created by Security Council Resolution 1267.[57] Another more recent trend, since the 9/11 terrorist attacks, has been that the Security Council is willing to invoke its Chapter VII powers for criminal justice purposes when terrorism poses a significant threat to

[55] See further ND White, 'The United Nations and Counter-Terrorism: Multilateral and Executive Law-Making', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

[56] For example, UNSC Res 748 (31 March 1992) UN Doc S/RES/748 imposed sanctions against Libya following the Lockerbie bombings in 1988.

[57] UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267. See too European Union's Council Implementing Regulation (EU) No 843/2011, 23 August 2011, OJ L218/1 concerning restrictive measures in view of the situation in Syria.

international peace and security. This was true for Security Council Resolution 1373[58] (and subsequently also Security Council Resolution 1566[59]) which is preventive in the sense that it aims to prevent/impede future terrorist attacks through hindering terrorist financing and strengthening the multi-national legal framework (in particular the sectoral conventions) in which transnational cooperative efforts should occur.

Additionally, under Chapter VII, preventive measures in response to threats to or breaches of the peace may be permissible. Care, however, must be taken not to cross the line from lawful preventive to unlawful interventionalist and/or pre-emptive responses that would be contrary to the UN Charter. Certainly, one important matter on which the General Assembly could assist in bringing further clarity is the threshold at which any use of force in self-defence to respond to terrorist threats crosses the line from preventive to pre-emption. This would be a continuation of its role of developing the rules governing the use of force, contained in seminal resolutions such as the Declaration on Friendly Relations 1970[60] and the Definition of Aggression 1974.[61]

Contraints:

The idea of prevention is embodied in the concept of 'threat to the peace', one of the three 'triggers' for Chapter VII action, located in Article 39 UN Charter. Historically, this was seen as a threat or a breach of the peace or act of aggression, but the concept has been validly widened by subsequent practice by the Security Council to cover the threat of terrorism, as its non-forcible action against Libya in 1992,[62] Sudan in 1996,[63] Afghanistan in 1999,[64] and more generally after 2001, testify. There are debates about whether such resolutions override potentially conflicting human rights obligations of states (for example, the right to due process or freedom of movement), though the Security Council itself has clearly stated that targeted measures should be implemented by states in a way that is consistent with their international legal obligations.[65]

The imposition of sanctions against a state, even if they are intended to be 'targeted' or 'smart' in nature, generally have a significant impact upon the country and population of the state concerned. This is illustrated by the serious effects of mandatory sanctions against Iraq[66] and Haiti,[67] imposed in the 1990s, on the economic rights of the general population (for example, the

[58] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
[59] UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566.
[60] UNGA Res 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/2625 (XXV).
[61] UNGA Res 3314 (XXIX) 'Definition of Aggression' (14 December 1974) UN Doc A/RES/3314(XXIX).
[62] UNSC Res 748 (31 March 1992) UN Doc S/RES/748.
[63] UNSC Res 1044 (31 January 1996) UN Doc S/RES/1044; and UNSC Res 1054 (26 April 1996) UN Doc S/RES/1054.
[64] UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267. More recently, see too UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989.
[65] UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456 para 6.
[66] UNSC Res 661 (6 August 1990) UN Doc S/RES/661.
[67] UNSC Res 841 (16 June 1993) UN Doc S/RES/841.

right to health, education, and work), and the enrichment by means of black markets of the elite within those states, which led to a move away from collective punishment towards targeting those individuals primarily responsible. In this way, modifications to the forms of sanctions have reflected human rights concerns.

Nevertheless, the imposition of financial sanctions against individuals, which can significantly impact their lives, can also raise important human rights concerns. Consequently, one of the primary concerns of courts reviewing such measures has been to afford those affected appropriate levels of due process. The courts are not unwilling to grant political institutions a margin of discretion, given the significance of the security concerns involved, so long as a fair balance is struck between the requirements of the rule of law and security considerations. If some minimum guarantees are not respected, notably the obligation to provide reasons for listing, and the right of the individual concerned to be heard, the balance struck will not be fair. In particular, although the sanctions regime is non-judicial in nature, due to its criminal and punitive characteristics in practice, combined with the fact that they extend beyond temporary administrative measures, there is nevertheless support for the proposition that the review process more closely reflect the fundamental guarantees and principles of the rights to a fair trial (for example, as expressed in Article 14 International Covenant on Civil and Political Rights 1966 to which most UN Member States are States Parties) – not only because such principles are non-derogable in the context of judicial proceedings, but also as a safeguard to the Security Council's significant powers (under Articles 25 and 103 UN Charter in particular). Advancements have been made in this regard with respect to the establishment of the Office of Ombudsperson for the 1267 sanctions regime created by Security Council Resolution 1904,[68] although a number of due process concerns remain. (See further Section 6.3.2 below).

5.1.2. *Anti-Terrorism Legislation*[69]

The development, implementation, and enforcement of cohesive, robust, and rule of law compliant anti-terrorist legislative systems at the national, regional, and international levels, which facilitate rather than hinder bilateral to multilateral cooperation, form some of the most important and effective preventive elements of criminal justice approaches. In particular, they seek to prevent the commission of future terrorist acts, for example by hindering terrorist financing, or by incepting terrorist activities prior to the commission of any attack. With respect to the latter, important legislative developments here have included extending modes of criminal liability (whether described as inchoate, ancillary, or preparatory offences) under domestic law

[68] UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904.

[69] KLH Samuel, 'The Rule of Law Framework and its Lacunae: Normative, Interpretative, and/or Policy Created?'; B Saul, 'Criminality and Terrorism'; J Pejic, 'Armed Conflict and Terrorism: There is a (Big) Difference'; I Kane, 'Reconciling the Protection of Human Rights and the Fight against Terrorism in Africa'; M Ewi and A du Plessis, 'Criminal Justice Responses to Terrorism in Africa: The Role of the African Union and Sub-Regional Organizations'; M Coninsx, 'Strengthening Interstate Cooperation: The Eurojust Experience'; and N El Khoury, 'Implementing Human Rights and Rule of Law Aspects of the UN Global Counter-Terrorism Strategy: The UNODC/TPB Experience', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

which allow the criminal law to deal with terrorist attempts, conspiracies, aiding and abetting of terrorism, etc. Furthermore, such legislation is intended to have a more preventive effect in terms of sending out a clear deterrent message to potential terrorists that potential impunity gaps are narrowing and that they will be dealt with robustly if apprehended on the basis of terrorist crimes.

In situations of armed conflict, acts which might be considered terrorist during peacetime are covered by international humanitarian law as well as international and/or domestic criminal law (which may be anti-terrorist or general in nature) depending on the nature of the conflict. All persons who are not combatants are designated as civilians. Direct participation by civilians in hostilities – often referred to in such terms as 'unlawful' or 'unprivileged' combatancy or belligerency because they are not lawful combatants within the meaning of international humanitarian law - is not a war crime as such (unless carried out perfidiously), because it is an inevitable fact of armed conflict. It is, however, sanctioned in a variety of ways by both international and domestic law. The substantive rules on the conduct of hostilities prohibiting attacks against civilians or civilian objects apply equally to international and non-international armed conflicts. There is, however, a crucial legal difference between the two types of conflicts. Under international humanitarian law, there is no 'combatant' or 'POW' status in non-international armed conflict. Instead, states' domestic law prohibits and penalizes violence perpetrated by private persons or groups, including all acts of violence that would be committed in the course of an armed conflict. This represents a potential gap in international legal provision, which could lead to states' abusing this by designating the armed groups opposing them, and their supporters, as terrorists. The gap, however, is filled by the provisions of human rights law, which even in times of emergency protect the fundamental rights of the population, including those suspected of terrorism.

Constraints:

One important constraint remains the absence of a universal definition of terrorism, not least for the purpose of developing consistent and coherent approaches to anti-terrorist legislation. For example, at present, different understandings of and approaches to inchoate, ancillary, and preparatory offences exist. It is important to ensure that where these offences are connected to any criminal definition of terrorism that they are carefully drafted so that conduct is only criminalized when it has a sufficiently proximate or causal connection to actual or eventual commission of terrorist acts, including by ensuring that the fault elements of offences are sufficiently restrictive.

Similarly, when criminalizing terrorist acts, it is imperative that states still observe fundamental human rights principles, including that of legality (*nullum crimen, nulla poena sine lege*). This requires that any acts described by the law as criminal offences must be strictly defined, without doubt or ambiguity, and may not be applied retroactively. Therefore, legal definitions that are vague, nebulous, or unspecific, or that make it possible to criminalize acts that are legitimate and/or permitted in the eyes of international law, are contrary to this rudimentary rule of law

principle. Closely related to this, it is essential that these laws are also publicly promulgated in order to be considered fair and rule of law compliant.

Although criminal law is capable of being adapted to new situations, including in a counter-terrorist context, great care must be taken that public policy and political imperatives do not put so much strain upon it that the very rule of law benefits of criminal law – not least certainty, coherence, and legitimacy - are eroded or even lost.

In addition to the substantive content of criminal justice systems, it is essential that states ensure that their existing criminal procedures are adequate for the prosecution of terrorism related cases, because these constitute one of the main safeguards of the rule of law and offer legal protection to the rights of any alleged offenders. As terrorism is a crime, terrorist offenders should be dealt with as criminals, and hence be subject to the normal rules and procedures of due process that apply to other criminal offences.

It is essential that all terrorism related proceedings directly or indirectly linked to issues of criminality meet the requisite levels of due process, including the minimum standards of a fair criminal trial guaranteed under international human rights law in the case of criminal prosecutions. To avoid double punishment, alternatives to criminal justice (such as control orders) should not be imposed upon a person in respect of the same conduct for which a person has already been convicted and discharged their criminal and moral responsibility through serving a sentence.

5.1.3. *Administrative Detention/Internment*[70]

This involves the deprivation of liberty for purposes similar to those the criminal law is aimed at achieving (other than punishment), but without a judicial process that presumes innocence and only convicts people on the basis of evidence 'beyond reasonable doubt'. This approach is primarily used to remove a perceived threat from society and/or to obtain information without the discipline of a criminal trial process.

During peacetime, the governing law is usually that of international human rights, in particular those principles governing arbitrary detention (Article 9 International Covenant on Civil and Political Rights 1966), and the liberty and security of a person (Article 10 International Covenant on Civil and Political Rights 1966). In terms of the permissibility of administrative detention, under Article 9 the current position is not entirely clear in the absence of a formal derogation from it under Article 4 International Covenant on Civil and Political Rights 1966. Where this derogation is made, such a system has not been authoritatively held to violate this principle where the derogation is valid and it remains proportionate. Nevertheless, significant rule of law

[70] See further D Turns, 'Classification, Administration, and Treatment of Battlefield Detainees'; S Casale, 'Treatment in Detention'; and NS Rodley, 'Detention as a Response to Terrorism', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

concerns exist regarding any systems of peacetime administrative detention, not least their potential for human rights abuses.

Administrative internment is also permissible during armed conflict situations until such time as hostilities cease. The applicable law here is international humanitarian law, in particular its regimes governing prisoners of war and civilians under Geneva Conventions 1949 III and IV respectively.[71] The latter is likely to be the most relevant for persons engaged in transnational terrorist activities: although it does not technically apply outside of a situation of international armed conflict, important analogies may be drawn and principles identified which may be evidence of more widely applicable customary international law norms.

Constraints:

The legal safeguards applying to persons held under the criminal law should apply *mutatis mutandis* to persons held in connection with terrorism. The presumption should be in favour of retention of the legal safeguards and norms in respect of all persons detained, with any exception being necessary for and proportionate to the risk posed in individual cases.

Any system of administrative detention should apply equally to nationals and non-nationals in order not to violate rule of law principles governing equality and non-discrimination.

Where any system of administrative detention is used, it is essential that adequate mechanisms are in place to prevent its abuse and to avoid mistakes, which should conform closely to most aspects of Article 14 International Covenant on Civil and Political Rights 1966 requirements on fair trial and related due process. This includes the basic requirements of fair treatment and due process required for determining the legal status of a detainee and their subsequent treatment during situations of armed conflict, governed by Article 75 Additional Protocol I 1977 (international armed conflicts), and Common Article 3 Geneva Conventions 1949 and Article 6 Additional Protocol II 1977 (non-international armed conflict).

One of the principal methods of safeguarding against abuses remains ensuring the necessity and proportionality of administrative detention measures through periodic reviews of those detained: the longer the period of detention, the higher the burden of proof regarding the need for continued detention. This is of great importance in the context of transnational terrorism where any administrative internment may potentially be indefinite and protracted due to uncertainty as to when the source of the perceived threat has been sufficiently countered to require the release of those detained. In any event, where serious psychological damage is plausibly being caused by the detention, there may be a requirement to find an alternative, including release.

Closely related to the fact of detention is the treatment of detained persons. One of the core governing principles here is that every state must respect the absolute prohibition against torture

[71] Convention relative to the Treatment of Prisoners of War (Geneva Convention III), and Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (both adopted 12 August 1949, entered into force 21 October 1950).

and other cruel, inhuman, or degrading treatment or punishment,[72] in respect of all persons coming under its control, which includes those persons held in detention on its authority or with its acquiescence, during both times of peace and armed conflict. It is suggested that the term 'cruel, inhuman or degrading treatment or punishment' should be interpreted here in a manner which extends the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time. It is essential that effective mechanisms are in place to reduce current levels of impunity where detainees are mistreated. Additionally, it is imperative that detainees are only held in registered detention facilities, including safeguarding against their possible disappearance.

Where a person is detained administratively for a protracted period, evidence elicited by virtue of the fact, processes, or conditions of detention should not be admissible. There should be a cut-off point beyond which no criminal prosecution can be considered safe.

One of the constraints on the use of administrative internment during an armed conflict is that it must end when the conflict relied upon to justify such internment ends. Some of the current rule of law difficulties here may be attributed to unhelpful political rhetoric, notably previous references to a 'War on Terror' and now the 'War against al Qaeda'. These infer global campaigns against non-state actors without clear geographical or temporal boundaries, which are not limited to approaches during situations of armed conflict, but equally incorporate peacetime criminal justice responses, and which introduce uncertainty not least in terms of blurring criminal justice and military approaches. To ensure rule of law compliance, administrative detention should only occur where it has a clear end, such as the end of an armed conflict, to avoid indefinite detention of (suspected) terrorists.

5.1.4. *Military Courts and Commissions*[73]

Often administrative deprivations of liberty are accompanied by some special form of judicial process. In peacetime, an important example is reliance upon special immigration procedures (see expulsions *et al* below), whereas reliance upon military courts and commissions often accompany military approaches to counter-terrorism or situations of national public emergency falling short of an armed conflict. Their use is often motivated by a perceived need to establish more expeditious procedures and robust punishment as a tool of terrorism prevention, once again to send out a strong deterrent message to others. In particular, there has been a tendency by some in the post 9/11 context to treat terrorism and counter-terrorism as a form of transnational armed conflict, which enhances the appeal of military courts.

[72] See, for example, art 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987); art 7 ICCPR.

[73] C Kannady, P Masciola, and M Paradis, 'The 'Push-Pull' of the Law of War: The Rule of Law and Military Commissions'; and C Martin, 'The Role of Military Courts in a Counter-Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

Constraints:

In an accountable state, governed by the rule of law, any criminal military jurisdiction must have a restricted and exceptional scope which is limited to proceedings concerned with the protection of military values and objectives, and to dealing with persons who are in the active service of the armed forces. Otherwise, there will be a violation of the right to natural justice which is a pre-condition of the right to a fair trial. The point of departure, therefore, is that although international human rights bodies have not explicitly found that the military trial of civilians *per se* violates international human rights law, any reliance upon such systems is generally frowned upon and not accepted unless there are exceptional reasons justifying their creation and the necessary safeguards are in place. Significantly, international practice reveals that in recent times no international human rights body has found an instance in which the military trial of civilians was justified.

Respect for fundamental fair trial rights is also required in the context of an armed conflict given the protections provided under international humanitarian law principles. Generally, suspected terrorists must be treated as civilians for the purposes of their trial, which must therefore be governed by international human rights law and practices. The exception is where the acts with which such persons are charged occurred in the context of an armed conflict and their actions involved direct participation in the hostilities, in which case any criminal proceedings should be governed by international humanitarian law.

In the very exceptional circumstances in which the military trials of civilians may be justified – which must be assessed on a case by case basis - states must afford the accused the full due process protections enshrined in international human rights law. This includes the entitlement of the accused to receive the minimum disclosure of evidence necessary to maintain equality of arms in the proceedings, as well as other fundamental rights and standards enshrined in the right to fair trial under international human rights and humanitarian law.

As recent jurisprudence has highlighted, whether the intention is to try persons by a military court or commission, such persons retain the fundamental right of *habeas corpus*, namely to have prompt access to the courts to know the grounds being relied upon by the executive to justify their deprivation of liberty.

5.1.5. *Intelligence/Evidence Gathering*[74]

Primary methods of prevention include the gathering of intelligence, by the intelligence services, to intercept and prevent future terrorist attacks; and the gathering of evidence, by law enforcement agencies, to prosecute suspected terrorists in the criminal justice system to prevent the perpetration of further terrorist activities by those apprehended in addition to sending out a

[74] See K Weston, 'Counter-Terrorism Policing and the Rule of Law: The Best of Friends'; G Staberock, 'Intelligence and Counter-Terrorism: Towards a Human Rights and Accountability Framework?'; S Casale, 'Treatment in Detention'; and R Pregent, 'Torture, Interrogation, Counter-Terrorism, and the Rule of Law', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

strong deterrent message to others. Although their respective objectives differ, nevertheless there are a number of rule of law constraints which apply to both.

During any questioning or interrogating of (suspected) terrorists, it is essential that violence, oppression, or threats are not used to gain admissions from suspects; rather that they are presented with overwhelming evidence, gained from forensic examination, and an explanation is sought. Such practices are never legally, legitimately, or morally defensible, even when responding to significant and legitimate security imperatives. Well established prohibitions against unlawful coercive techniques exist under both international human rights and humanitarian law, in addition to existing national standards and regulations. In particular, the requirements of human rights law – especially the prohibition against torture and other forms of ill treatment, including under the Convention against Torture 1984 and Article 7 International Covenant on Civil and Political Rights 1966 - remain the baseline for assessing the legality of any interrogations, even during times of armed conflict.[75]

The primary objective of all questioning should be to obtain accurate and reliable information in order to discover the truth in a rule of law compliant manner. All officers involved in interviewing and interrogating suspects should be trained to elicit information in conformity with human rights precepts, including its requirements of necessity, proportionality, and non-discrimination. It is only through these means that any intelligence obtained is likely to be more reliable, and that terrorists will be 'safely' convicted and their sentences confirmed should they subsequently appeal against conviction. Not only is the utilization of coercive interrogation techniques self-defeating, but voluntary evidence is also the most useful in terms of its reliability as well as admissibility in criminal proceedings, with any evidence tainted by the suspect's mistreatment likely to be excluded. Furthermore, in terms of the overall effectiveness of both domestic and multi-national counter-terrorist efforts, these may be undermined by any suggestion of unlawful coercive practices, and indeed put strain on important partnerships.

With respect to other intelligence and evidence gathering techniques, for example reliance upon intercept mechanisms, national approaches and related legislative constraints vary. What is important is that such practices are consistent with international human rights standards, not least regarding the qualified right to privacy and that claims of security imperatives are not abused. Another practice which has been controversial is that of terrorist profiling, namely reliance upon 'a set of physical, psychological or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect'.[76] Commonly selected factors include race, religion, and nationality. Profiles can be either *descriptive*, that is, designed to identify those likely to have committed a particular

[75] See especially Common art 3 to the Geneva Conventions; art 17 Geneva Convention III; art 7 Geneva Convention IV; art 75 Additional Protocol I (adopted 8 June 1977, entered into force 7 December 1978); and art 4 Additional Protocol I (adopted 8 June 1977, entered into force 7 December 1978).

[76] EU Council recommendation 28 November 2002 on the development of terrorist profiles, Annex A 'Best Practice', available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/en/EJN280.pdf> accessed 27 March 2012.

criminal act; or they may be *predictive*, that is, designed to identify those who may be involved in some future, or as-yet-undiscovered, crime.

Constraints:

One important source of tension here concerns the relationship between intelligence and law enforcement agencies. Particular rule of law concerns arise here where there is a blurring of the roles between these agencies in criminal justice approaches with the consequence that they are no longer the primary domain of law enforcement agencies, but rather become more preventive in nature with greater involvement of intelligence agencies. For example, while intelligence plays a vital role in enabling governments to develop security policies that prevent terrorist attacks, it is not the function of the intelligence services to enforce such policies and related anti-terrorist legislation, such as arresting, detaining, or questioning terrorist suspects which are law enforcement functions, not least because they are generally not adequately trained for such tasks or sufficiently concerned with criminal justice processes. Consequently, such increased roles of intelligence agencies can not only result in human rights abuses, but they can also impede other aspects of prevention such as by contaminating evidence which subsequently cannot be relied upon during criminal proceedings to bring a suspected terrorist to justice. To the extent that intelligence agencies are given any coercive powers, they must be conversant and comply with the same standards as law enforcement agencies.

In maintaining clear boundaries between the mutually reinforcing yet distinctive roles of intelligence and law enforcement agencies, it is crucially important to develop effective mechanisms for inter-agency cooperation, both at the national and international levels; indeed, a clear division of functions necessitates this if counter-terrorist responses are to be truly coherent and effective. One way in which this may be achieved is through the embedding of liaison officers from each agency within the other, to better comprehend their respective approaches, objectives, and contraints.

Sufficient levels of independence and interdependence are required between law enforcement, intelligence, and prosecutorial bodies, not least to provide the necessary checks and balances to ensure rule of law compliance.

It is essential that all intra- and inter-agency intelligence gathering methods adhere to both substantive and procedural rule of law norms and standards throughout their activities, including: operating within the contraints of national and international privacy laws and standards; adequately handling and safeguarding sensitive and/or personal data; and not otherwise obtaining intelligence or evidence through unlawful means.

One key challenge here, whether in national or international contexts, is ensuring that confessions are voluntary not least because each state applies its own criminal law and criminal procedural code to terrorism investigations. Although there is wide agreement that confessions must be ‘voluntary’ in nature, beyond the fundamental prohibition against torture and specified forms of ill treatment, there is no single, uniform, human rights based standard for the

interrogations of terrorist suspects to ensure that statements are voluntarily given, in part attributable to cultural differences. Certainly, in the absence of universal agreement here, it is imperative that no agencies act beyond their national constraints regarding voluntary confessions, even when seeking to counter or respond to serious terrorism related threats and acts.

In addition to rejecting coercive interrogation as a matter of principle, a further challenge remains ensuring that states take affirmative steps to ensure that this principle is incorporated into their law enforcement and military cultures. It must be built into institutional doctrine, repeatedly trained at every level, and periodically inspected by oversight authorities.

An important source of tension regarding terrorist profiling is that intelligence and law enforcement resources are not unlimited, yet such approaches are potentially discriminatory, and the effectiveness of such measures is also highly questionable.

5.1.6. *Targeted Killing*[77]

The taking of a person's life should never be undertaken lightly. It may be permissible for governments to neutralize what may be a very real threat to the lives of their own citizens and territory, especially where the persons concerned are in the territory of another country that is either unwilling to constrain their activities, or incapable of doing so. Any use of lethal force, however, will be subject to strict criteria, including as a measure of absolute last resort to prevent future terrorist attacks.

Under a law enforcement, criminal justice regime, the governing law is that of international human rights. While there remains some doubt about the application of specific human rights conventions to extra-territorial action taken by states parties, the growing tendency would seem to be that states may not do things abroad that would be unlawful at home. For example, under the International Covenant on Civil and Political Rights 1966 (and customary international law) the state is prohibited from any arbitrary deprivation of life; and under the European Convention on Human Rights 1950 it is prohibited from intentionally taking the life of a person, unless use of lethal force is absolutely necessary in defence of persons against unlawful violence. The conventional view is that any pre-meditated use of lethal force can never be non-arbitrary or absolutely necessary. The hidden assumption here is that outside the hostilities of an armed conflict, unless the threat to life of others is imminent, there will always be other means to frustrate the threat that have to be considered and preferred to use of lethal force. Consequently, the position would appear to be that lethal force may exceptionally be used by law enforcement officials when trying to effect an arrest subject to the strict criteria already mentioned.

Resort to the armed conflict regime to justify use of lethal force against suspected terrorists does not lie in the discretion of the state. Rather application of this regime is dependent on the existence of an ongoing armed conflict and the vulnerability to attack of the suspected terrorists

[77] D Kretzmer, 'Use of Lethal Force against Suspected Terrorists', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

either as privileged or *de facto* combatants, members of armed groups who fulfil a continuous combat function in a non-international armed conflict, or civilians who at the time are taking a direct part in hostilities. An armed conflict can only exist with a defined and organized entity – either a state or an organized armed group. There cannot be an armed conflict with 'terror' or 'terrorists'. Even when a person belongs to a category of persons who may be targeted in an armed conflict, lethal force should not be used unless there is a military necessity to do so. The principle of proportionality regarding expected harm to civilians must be respected also.

Constraints:

A foundational principle of international law, reflected in Article 2 UN Charter, is the sovereignty of states and the presumption that this should not be interfered with. This territorial integrity of the host state is not violated when express or implied consent is given by the host state to use force, but may also be overcome if terrorist acts are attributable to the host state. In addition, there is support for the use of lethal force in circumstances when a host state is unwilling or incapable of preventing terrorist attacks being launched from its territory against targets in other states.

Any intentional use of force outside of the framework of an armed conflict must be regarded as a highly exceptional action that must meet the demands of absolute necessity to protect the rights of others against unlawful violence. In order to ensure that such use of force was both exceptional and absolutely necessary an investigation by an outside, independent body must be carried out in each case.

A significant issue, as yet not fully resolved, remains ensuring adequate levels of accountability for any decision to use lethal force under either regime, not least because the state authorities concerned often act clandestinely and deny their occurrence. In the absence of true accountability, there is no way of examining whether any decision to use lethal force was based on a reasonable assessment that, in the absence of any other available measures, was absolutely necessary.

***Recommendation*:**

- The General Assembly has played a normative role in the development of rules governing when lethal force can be used, for example by endorsing the 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' adopted by the UN General Assembly in 1990.[78] It should, in conjunction with the ICRC, provide clarity on the issue of targeted killings, confining them to situations of armed conflict. It could also, by developing the aforementioned resolution, provide the normative framework of when

[78] UNGA Res 45/121 (14 December 1990) UN Doc A/RES/45/121. See also Code of Conduct for Law Enforcement Officials, UNGA Res 34/169 (17 December 1979) UN Doc A/RES/34/168.

law enforcement officials can lethally use force when carrying out counter-terrorist operations.

5.1.7. *Extradition, Deportation, Expulsion, and Return*[79]

One of the preferred methods of prevention for many states is to physically remove from their territory those persons posing terrorist threats through their physical expulsion. One consequence of this is that asylum and refugee law has sometimes been used as a preventive instrument of governments to deny asylum to and expel from its territory those they determine to be 'terrorists'. Technically, expulsion is possible even under the Convention relating to the Status of Refugees 1951[80] (Refugee Convention 1951), the protections of which are not absolute where certain conditions are met. In particular, Article 33(2) Refugee Convention 1951, which is designed to protect the national security interests of the country of refuge, explicitly allows states to expel refugees deemed to be a threat to the community or national security of their host country. It must, however, be applied in a proportionate manner. This means that there must be a causal link between the refugee and the danger posed; it must be demonstrated that the danger is sufficiently serious and likely to be realized; that the removal is a proportionate response to the perceived danger; that removal will alleviate or even eliminate the danger; and that such mechanism is used as a last resort where no other possibilities of alleviating the danger exist. In addition, claimants may be excluded from refugee protection under Article 1F, under which the Refugee Convention 1951 does not apply where there are serious reasons for considering that a person may have committed crimes against peace, war crimes, crimes against humanity, serious non-political crimes, or acts contrary to the principles and purposes of the United Nations. The rationale behind Article 1F Refugee Convention is to exclude those whose acts are so grave that they are undeserving of international protection as refugees. Clearly, suspected terrorists could potential fall under either or both categories.

Constraints:

In terms of their potential utility as an instrument of counter-terrorism, this is believed by many to be highly questionable. Typically any such expulsions merely enable those who have been found to be committed to perpetrating terrorism to join, or rejoin, terrorist networks and terrorist training schools which operate overseas, thereby placing these individuals in situations where they can work more effectively to plan or perpetrate terrorist acts. Consequently, serious consideration must be given by states as to whether they might not be better served in security

[79] See further AM Salinas de Frías, 'States' Obligations under International Refugee Law and Counter-Terrorism Responses'; C Wouters, 'Reconciling National Security and *Non-Refoulement*: Exceptions, Exclusion, and Diplomatic Assurances'; N Mole, 'Restricted Immigration Procedures in National Security Cases and the Rule of Law: An Uncomfortable Relationship'; and E Myjer, 'Human Rights and the Fight against Terrorism: Some Comments on the Case Law of the European Court of Human Rights', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).
[80] Adopted 28 July 1951, entered into force 22 April 1954.

terms through more effective national intelligence gathering efforts, which result in evidence that may be relied upon in bringing criminal prosecutions and, if appropriate, imprisonment.

The most significant constraint here is the principle of *non-refoulement*. Even when a person may be denied refugee status under Articles 1F and 33(2) Refugee Convention 1951, he or she cannot be removed from the host state's territory (whether by extradition, deportation, expulsion, or return) to a country where his or her life or freedoms would be threatened. In addition to being specified in Article 33 Refugee Convention 1951, the guarantees of *non-refoulement* are reflected in and have been developed under various regional and international human rights instruments. Although most of the instruments do not contain express provisions prohibiting *refoulement* - Article 3 Convention against Torture 1984 is an exception - jurisprudence interpreting the International Covenant on Civil and Political Rights 1966, European Convention on Human Rights 1950, and the American Convention on Human Rights 1969 has developed prohibition of *refoulement* norms under the general prohibition of torture. These prohibitions against *refoulement* are absolute, and exist as a norm of customary international law with *jus cogens* status and *erga omnes* obligations on the international community. Consequently, even in times of public emergency or armed conflict a state cannot derogate from these prohibitions. Nor may states prioritize or balance national security interests over or against the individual right to be protected from *refoulement* if the risk of torture or ill treatment after removal exists, even when the person concerned has committed or is suspected of having committed serious criminal offences and/or poses a threat to the national security of the state or its people.

The use of the immigration system as an instrument of prevention raises other significant rule of law concerns. One important issue is whether fair trial guarantees which apply to the determination of a criminal charge, a civil right or obligation, should apply to such expulsion proceedings. The notion of 'a criminal charge' is not confined to the formal initiation of criminal proceedings, but includes any official action which carries the implication that an individual has committed a criminal offence, and which substantially affects the situation of the suspect. Since acts of terrorism are criminal offences, and expulsion (and/or detention) clearly substantially affects an individual's situation, it is arguable that fair trial guarantees should apply to expulsion proceedings even though no formal criminal charges are being brought. This includes adequate due process, for example, for asylum-seekers to properly challenge a government's decision to expel him or her.

Another significant procedural concern here has been recourse to what can effectively constitute secret trials, relying on secret evidence on grounds of national security. Any use of secret and restricted procedures to deprive people of their citizenship may not only send disconcerting messages to the members of settled ethnic minority communities, but may run an enhanced risk that wrong decisions will be taken, sometimes with irreparable consequences for the affected individuals. Certainly, the European Court of Human Rights has been concerned here with ensuring both the procedural as well as substantive aspects of due process, including those of guaranteed under Article 6 (fair trial) and Article 13 (right to an effective remedy) European Convention on Human Rights 1950.

The other important constraint referred to here relates to whether or not returning states may adequately meet their international legal obligations and overcome the obstacles posed by *non-refoulement* through seeking diplomatic assurances from the receiving state guaranteeing his or her safety. The effectiveness of diplomatic assurances to reduce the risk of a returned individual being subjected to ill treatment or serious harm depends on the ability of the receiving state to reduce the risk to a negligible level and effectively guarantee the person's safety. While the use of diplomatic assurances is not expressly prohibited, including under international human rights and refugee law treaties, various supervisory bodies to human rights instruments – in particular, the UN Human Rights Committee, UN Committee against Torture, and the European Court of Human Rights - have expressed serious reluctance to accept diplomatic assurances in asylum cases. Indeed, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment is of the opinion that requesting and obtaining assurances as a precondition for the transfer of people should be ruled out altogether.[81]

There are a number of reasons for such reservations. First, such assurances are often sought, made, and implemented outside of a clear and formal legal framework, leaving their exact status, binding character, and effectiveness uncertain. Closely related to this is the fact that such assurances are based on good faith rather than law, which is especially concerning in this context. Another is that a receiving state may not be capable of controlling its agents and therefore guaranteeing that a risk of proscribed ill treatment is reduced to a negligible level. Indeed, this is likely in a weak state where the very risk of ill treatment has been identified in the first place, with such countries often suffering from poor human rights records not least systematic practices of torture or the perpetration of other grave human rights violations by state officials especially. Furthermore, instead of negating the risk, requesting assurances by identifying the individual concerned to his or her country of origin may well increase it. It certainly raises issues of privacy and confidentiality. A final principal concern noted here is that any decision to rely upon diplomatic assurances normally by-passes the individual in question, who plays no role in requesting, assessing, accepting, or refusing such assurances; nor does the individual generally have any say as to whether he or she wishes to return voluntarily and subject himself or herself to the associated risks of ill treatment, rather than for example face the prospect of indefinite administrative detention.

It may be possible to obtain diplomatic assurances that respond to significant rule of law concerns associated with expulsions *et al* in such circumstances – or at least make them less objectionable - subject to meeting rigorous criteria, for example by putting in place measures that reduce the risk of any ill treatment or serious harm to a negligible level which effectively guarantees the person's safety. In practice, however, it is believed extremely difficult, if not

[81] See, for example, 'Reports of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly' of: (23 August 2004) UN Doc A/59/324, para 30 (van Boven); and (30 August 2005) UN Doc A/60/316, para 46 (Nowak). See too M Nowak, 'Report of the Special Rapporteur on the question of torture' (23 December 2005) E/CN.4/2006/6, para 32: 'diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement'.

impossible, for any state to give such unequivocal guarantees about a returnee's safety and treatment.

***Recommendations*:**

- It would be a very positive step if the General Assembly were to strongly encourage states, as far as it is possible, to regulate these and other refugee and immigration matters through different legal instruments that correspond with the recommendations of the UN High Commissioner for Refugees.
- The General Assembly is strongly encouraged to adopt a resolution that clearly calls upon states to ratify human rights treaties enshrining the *non-refoulement* principle where they have not done so already. Such a resolution should further underline the customary nature of the principle of *non-refoulement* and, therefore, its binding force on states as a matter of *erga omnes* obligation at least with respect to the risk of torture, ill-treatment or punishment, enforced disappearances, and extrajudicial execution.
- Similarly, the General Assembly should put pressure on states to introduce and/or improve existing procedures in order to ensure the open and transparent scrutiny of any claimed risks of prohibited ill-treatment. This should include granting the individual concerned the possibility of challenging his or her expulsion before a court that ensures that they are afforded all basic procedural guarantees, including delaying such expulsion where necessary until any challenges and related investigations have been fully and properly concluded, even when cases are founded upon security imperatives.

5.1.8. *Violent Mobilization*[82]

One of the most effective preventive approaches is to avoid violent mobilization by non-state actors against the state in the first place. Any blurring of the distinction between terrorism and counter-terrorism, including through any engagement in extra-legal responses to terrorism, generally fuels the problem rather than extinguishes it. Empirical evidence suggests, for example, that torturing one can result in the radicalization of one hundred, not least because a government's use of indiscriminate repression seems to assist the flow of recruits to, and communal support or toleration for, terrorist groups. While 'radicalization' of itself is not necessary problematic, it may form the stepping stone to violent mobilization against the state by its own citizens which clearly is problematic. Therefore, in terms of identifying and addressing (potential) root causes of terrorism, it is suggested that egregious and indiscriminate harsh overt repression by the state under the guise of tackling terrorism is likely to have counter-productive effects overall, not least in terms of triggering violent mobilization against the state by its own citizens.

[82] See further C Campbell, 'Beyond Radicalization: Towards an Integrated Anti-Violence Rule of Law Strategy', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

Given that a developed insurgency is famously difficult to defeat, the primary aim of counter-terrorism therefore must be to avoid its initial eruption (most obviously by addressing grievances). But once protest mobilization has taken place it is critical to avoid the kind of acts which can trigger 'backlash', not least the killing of protestors or mistreatment of prisoners. In general, strategies that maximize rule of law adherence seem to pose the least risk of escalating conflict in the early stages. Empirical data gathered - where states have engaged in violence rather than responding to that of others - demonstrates that state action is often key to conflict escalation, and central to 'backlash' effects, requiring 'anti-violence' rather than 'anti-terrorist' strategies. Such practices and their consequences challenge some current counter-terrorist approaches and discourse, not least in relation to the role of law itself which should not be limited to a norm-system, but should also be regarded as a system of communication in terms of messaging and framing during conflict. When insurgency has already taken root, the only feasible strategy is likely to be some dialogue with the group leading to a settlement (with inevitable compromises), with the end goal of using law to bring the adversary into a better way of doing politics, and to bring the state into operating a model of human security compatible with it. It would, of course, be much better to insist on rule of based responses from the outset and to avoid (or at least reduce) the likelihood of violent mobilization against the state.

Ultimately, when the actions of states founded upon the rule of law no longer reflect their declared values, this serves to destroy the distinction between these states and those ready to embrace or acquiesce in terrorism. Consequently, any attempts to rationalize violations of the law on the grounds of meeting security imperatives (whether or not legitimate ones) constitute a most corrosive danger to national security. Simply put, counter-terrorist responses that are not rule of law based, whatever their perceived short-term benefits, not only lack legality and legitimacy, but they are ultimately counter-productive in policy and operational terms and difficult to distinguish from terrorism itself.

Recommendations:

- The General Assembly should make it clear that trying to identify and tackle the roots and causes of terrorism is not condoning terrorism, but rather is a more profound method of halting its spread, and hopefully reducing its significance in international relations. Utilizing its competence in development and self-determination matters, the General Assembly should consider sponsoring more studies into the relationship between development and terrorism, and between the non-fulfilment of self-determination and terrorism.
- The General Assembly could also instigate more general assessments regarding the counter-terrorist measures being undertaken by the UN and its Member States, including any negative impact upon civil, political, economic, cultural, etc human rights.

6. STRENGTHENING THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: INCREASING ACCOUNTABILITY AND CLOSING IMPUNITY GAPS

Both with respect to the possible preventive measures just considered, and for the purpose of strengthening the rule of law in practice more generally from the national to the international levels, it is imperative that every effort is made to increase and strengthen accountability mechanisms – both judicial and non-judicial – in order to improve compliance with international standards and norms through the closing of corresponding impunity gaps. Although judicial mechanisms play a pivotal role here, they are often incomplete and insufficient on their own to reduce current levels of impunity (whether that of non-state terrorist, state, or institutional actors) and to ensure adequate redress for victims. This is especially true of any security related matter where a victim of either terrorist attacks or security imperatives typically faces additional hurdles, not least in terms of accessing the relevant documents to establish a *prima facia* case. Consequently, other mechanisms are important here also, such as non-judicial oversight mechanisms (for example, parliamentary, or the creation of an ombudsperson) and the availability of remedies outside of national jurisdictions, including transnational justice alternatives and human rights supervisory mechanisms.

The categories considered here are: non-state actors and governmental officials perpetrating serious international crimes; state and institutional actors committing rule of law violations in the course of their counter-terrorist responses; and the victims of both terrorist crimes and executive rule of law violations. Each category is considered in turn, focusing on those substantive and procedural matters considered during the course of the project which are believed to be of particular relevance to the UN reform agenda. In doing so, it is recognized that the UN has its own unique tensions here. One of the tensions possibly pulling against the rule of law - focusing here on increasing accountability levels and closing impunity gaps in practice - is the understandable desire to take preventive action on the part of states and organizations in order to stop terrorists before they commit atrocities, including a flexible preventive paradigm for such responses.

6.1. Non-State Actors and Governmental Officials Committing Serious International Crimes[83]

Anti-terrorist and international criminal legislation is normally enforced at the national level in the form of prosecutions for crimes within the domestic courts. Sometimes, however, governments may be unable or unwilling to bring such prosecutions – indeed their own officials, who may have been acting under executive directives, may be the potential subjects of such prosecutions. This is particularly problematic when the matters complained of fall into the

[83] F Perpiñá-Robert, 'Counter-Terrorism Policy-Making from the Perspective of a Diplomat'; and R Rastan and O Bekou, 'Terrorism and Counter-Terrorist Responses: The Role of International Criminal Jurisdictions', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

category of serious international crimes, which usually involve the perpetration of significant human rights violations. Clearly, it is important to ensure that the perpetrators of such crimes are brought to justice to act as a strong deterrent to others and to ensure justice for their victims. Sometimes too, the achievement of justice for serious crimes through judicial processes is an integral part of post-conflict peace building efforts.[84]

Consequently, there is a body of jurisprudence being developed by *inter alia* the *ad hoc* tribunals and International Criminal Court that is closing these potentially significant impunity gaps for non-state actors and governmental officials by seeking to bring their 'terrorist' activities within the scope of their existing jurisdiction, in particular as either crimes against humanity (committed during times of peace or armed conflict) or as war crimes. (See too Section 6.1 below). It is, however, recognized that each of these crimes has a high threshold to cross in terms of establishing the necessary legal elements and, as such, do not represent full substitutes for express jurisdiction for a court to examine terrorism related offences or for functioning national criminal justice systems that both have and effectively enforce their anti-terrorist laws. Indeed, the current capacity of international courts and tribunals is limited to only a small number of cases, although with the possibility of expansion commensurate with the availability of the necessary resources.

Capturing such conduct under the rubric of international criminal law, where this is possible, carries with it a number of benefits, such as the utilization of an existing legal framework without recourse to defining a separate international crime. Moreover, it captures the criminal conduct of both non-state and state actors equally, whether the alleged terrorist acts of the former or violations committed by state actors in response to them. Placing such conduct within an international jurisdiction may also trigger obligations of relevant states to provide international cooperation and judicial assistance. This may take the form of a Security Council resolution adopted under Chapter VII UN Charter imposing such obligations on all UN Member States, or through treaty obligations arising from the acceptance of international jurisdiction by particular states.

Recommendation:

- Even without the development of the Rome Statute 1998 to explicitly extend jurisdiction to terrorism *per se*, both the Prosecutor and the International Criminal Court are strongly encouraged to investigate serious terrorist offences as potential violations of the current crimes, in particular crimes against humanity and war crimes.

[84] For example, the creation of the international Criminal Tribunal for the Former Yugoslavia under UNSC Res 808 (22 February 1993) UN Doc S/RES/808.

6.2. States

The primary implementer and enforcer of international rule of law norms (which includes UN Charter principles) remains the state. It is a fundamental tenet of government that the state is, and must be held, accountable for the actions of all of its agents, including contractors carrying out state functions. This holds *a fortiori* for those working in connection with national security issues, in particular when the state and those persons acting officially for the state assume additional powers over persons within the state's territory or falling within its effective control. Additionally, the notion of positive obligations, requiring that the state adopt reasonable measures to prevent serious violations of international law and to investigate, prosecute, punish, and provide reparation when serious human rights abuses arise, is well recognized by international courts and bodies as arising under all general human rights treaties. The obligation arises whether the wrongful act is committed by private or foreign state actors.

The accompanying requirement for clear lines of accountability of police, military, and intelligence communities, and consequently in international law (in particular international human rights and humanitarian law), is a strong argument for discouraging states from contracting out of a number of governmental functions exercised in the course of counter-terrorism, such as combat, arrest, detention, interrogation, and intelligence gathering which have been at the centre of recent controversies and human rights abuses. It is crucial from a rule of law perspective to ensure that any systems of accountability are effective, adequate, and unhindered, not least to strengthen public confidence that fundamental values, as well as legal and ethical standards, are not being abused under the guise of security imperatives.

6.2.1. *Judicial Control*[85]

National, regional, and international courts play pivotal roles in ensuring adequate levels of governmental accountability for their rule of law obligations under both domestic and international law, reducing impunity gaps where violations of such obligations occur during (claimed) counter-terrorist responses, and ensuring the availability of appropriate forms and levels of redress for any victims of rule of law violations. Due to the increasing phenomenon of transnational terrorism, where national and international obligations may overlap, there is a need for existing judicial mechanisms to become increasingly 'joined up' to narrow existing impunity gaps.

A particular source of tension here, including between the executive and the judiciary, has been whether executive security imperatives should be balanced *against*, or accommodated *within* the scope of, the existing rule of law framework considered earlier, with executives generally seeking the former approach. A related tension has been a concerted effort by the courts to

[85] See further E Myjer, 'Human Rights and the Fight against Terrorism: Some Comments on the Case Law of the European Court of Human Rights'; and S García Ramírez, 'The Inter-American Court of Human Rights' Perspective on Terrorism', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

reduce those matters which have traditionally been regarded as non-justiciable (military approaches, defence and foreign policy decisions), in particular where related executive action has given rise to significant rule of law concerns, not least in the context of multi-national counter-terrorist operations.

Unsurprisingly, governments are reluctant litigants before courts given that their primary concern when faced with terrorist threats or attacks is the security of their citizens. Consequently, the gathering of evidence or the correct treatment of suspects may not always be as high a priority as it should be from a rule of law perspective. In terms of identifying an overall approach, the courts are fully aware of the difficulties facing executives in meeting national security imperatives, therefore allowing them a significant degree of discretion in terms of executive determinations of situations of public emergency or heightened threats to security and responses to them. Nevertheless, they remain insistent upon the existing rule of law obligations of states being upheld as the bedrock of their counter-terrorist responses; clear and unequivocal in their rejection of rule of law excesses; and robust in response to any attempts to justify deviations from fundamental rule of law norms on the grounds of special gravity. Indeed, the European Court of Human Rights perceives the upholding of human rights as being a precondition to security: there is no security without human rights, and human rights are at least in great danger without security, making them interdependent.

Although there are some discernible differences in terms of approach, as a general rule regional and other international tribunals do not apply a doctrine of state secrets, and do not defer automatically to states' own assessments of the need for restrictions on rights in the interests of national security. Instead, they adopt a more nuanced approach to respecting states' national security concerns, being concerned with the pursuit of a legitimate aim where any restrictions of, for example, due process exist; and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be pursued. Further, any limitations cannot impair the essence of fair trial rights, particularly the requirements of adversarial proceedings and equality of arms, and must incorporate adequate safeguards to protect the interests of the parties. One important example of judicial control of the legality of some counter-terrorist responses has been the upholding of the right to *habeas corpus*, considered by international law to be an indispensable procedural guarantee not least to guard against the arbitrary arrest and detention of terrorist suspects.

Despite the positive progress that has been made, there is recognition that much work still remains to be done, not least in terms of revising national definitions of terrorism; reviewing, reforming, and strengthening domestic procedural systems, especially the investigation and subsequent prosecution of terrorist offences; and, ultimately, eliminating the many different forms of human rights violations that currently occur under the guise of pursuing counter-terrorist security imperatives.

6.2.2. *Non-Judicial Mechanisms*[86]

A significant non-judicial mechanism for increasing the accountability of counter-terrorist policies and practices of executives and their agents is that of parliamentary oversight, the importance of which was highlighted in relation to the recent practice of extraordinary renditions. The added value of effective parliamentary oversight, vis-à-vis other forms of oversight, is its potential to ensure broader democratic legitimacy of policies and actions that to a certain degree need to take place outside of the public eye. It is crucial that government agencies involved in counter-terrorism are subject to a combination of effective internal and external controls (both judicial and political). In particular, it is important to ensure that the scope of such oversight extends to all relevant actors, not only intelligence agencies and specialized law enforcement or military units, but also the related actions of the police, justice, immigration, border security services, as well as contractors employed to perform such services. Such scrutiny must be independent and unhindered in order to strengthen public confidence that fundamental values, together with legal and ethical standards, are not being abused.

There is no single normative framework or model for parliamentary oversight to permit the scrutiny and increased accountability of the executive arm of government. That said, as a foundational principle, the ultimate authority and legitimacy of agencies involved in counter-terrorism should be derived from constitutional and legislative approval of their powers, operations, and expenditure by parliament. Certainly, the existence of appropriate parliamentary oversight mechanisms brings with it a number of important benefits, which include: strengthening the public legitimacy of governmental agencies as state actors; increasing the awareness and expertise on counter-terrorist policies within parliament, resulting in better informed decision-making; enhancing the critical debate on basic policy choices and making the likely scope for misunderstanding, misinformation, and partisan politics narrower; and, as a non-judicial mechanism, providing continual feedback for the relevant government services, and consequently contribute to the clarity and effectiveness of their mandate. Even where the requisite legal and/or constitutional framework is in place, to be truly effective it is essential that parliamentary oversight bodies have the necessary powers and resources to carry out their functions effectively, which in turn requires the necessary levels of genuine political will, each of which is often deficient in practice. For example, even in the context of parliamentary oversight of the counter-terrorist activities of intelligence or law enforcement agencies, national security grounds are commonly cited by the executive as the basis of non-disclosure of the key documents necessary to scrutinize their activities and related executive decision-making processes.

Parliamentary oversight as a mechanism for increased accountability is not limited to the domestic context, rather exists at the regional level also, such as where there is inter-state cooperation responding to transnational terrorist threats. Particular challenges are posed here where third party states are engaged in international cooperative efforts which have different understandings and practices of democracy and international rule of law obligations, and which

[86] J Oikarinen, 'Parliamentary Oversight of Counter-Terrorism Policies', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

are not subject to the same levels of parliamentary scrutiny and accountability. Whether or not cooperation is between Member or non-Member States of regional organizations, there is a strong argument to be made that existing national democratic oversight bodies engage in networked oversight, not only with each other, but also in cooperation with regional parliamentary bodies where these exist and have a meaningful mandate. This is essential if executive accountability gaps are to be avoided, or at least the associated risk minimized, not least in the context of national and foreign intelligence gathering activities.

Recommendation:

- The General Assembly should consider developing its line of resolutions supporting democracy and democratization to cover greater scrutiny of executive counter-terrorist actions within states. A further development of these resolutions would be to encourage UN bodies, such as the Human Rights Council and the Counter-Terrorist Executive Directorate, to scrutinize the practice of states in this regard and to report to the General Assembly.

6.3. International Organizations (United Nations)

Although historically states have been the primary actors in international law, there is increasing recognition of the obligations incumbent upon international organizations, including the UN, to uphold and act in a manner consistent with international rule of law obligations and standards. This has been evident through developing judicial and non-judicial mechanisms and approaches aimed at increasing institutional accountability.

With specific reference to the UN, as previously discussed, it is expected to act in a manner consistent with its own Charter, the underpinning principles of which are foundational to not only its approach to the rule of law, but form an integral part of the international rule of law framework as described. (See Section 3 above). UN institutional practices here are crucial if its actions are to be perceived as legitimate by its Membership and, hopefully, also positively influence their domestic practices.

The rule of law tensions between the need to take effective preventive measures to terrorist threats, many of which pose a threat to international peace and security, and the UN's role as a guardian and standard setter of international rule of law norms, have been most prominent in the context of the Security Council's responses. In particular, many questions have arisen and concerns have been voiced regarding its adherence to international human rights norms – both in the exercise of its Chapter VI non-forcible and Chapter VII forcible preventive measures – regarding its imposition of sanctions on individuals/non-state actors and states. There are two separate, but related issues: first, that the Security Council does not override the human rights obligations of Member States (unless out of necessity when faced with an overwhelming threat);

and second, that the UN (and therefore the Security Council) as an international legal person not only has a range of rights on the international stage, but also corresponding duties. Therefore, it is bound, *inter alia*, by fundamental principles of international human rights law.

6.3.1. *Judicial Control*[87]

The courts have had some limited opportunity to review the system of targeted measures against certain suspected terrorists or terrorist groups created by the Security Council's 1267 sanctions regime. In doing so, some believe that the Security Council has trespassed nevertheless on the civil and political rights of individuals.

Such mandatory sanctions, adopted under Chapter VII UN Charter, must be implemented by states. Therefore, any targeted individuals seeking redress against such measures must pursue justice through appropriate national then regional courts, as well as international human rights bodies. They have no right of action against the Security Council itself. A core rule of law tension for these courts and bodies has been how to protect national and international security – not least because there is a duty incumbent upon states to protect those residing within their territories as previously noted – while simultaneously protecting the rights of (suspected) terrorists.

In doing so, a number of principles have been articulated, which are aimed at ensuring greater accountability of such institutional measures, motivated especially by their potential to impact considerably upon basic human rights protections. More specifically, the EU Courts have confirmed that there is, in principle, 'full review' of the legality of restrictive measures. This does not imply, however, that the Courts are unwilling to grant the political institutions a margin of discretion, given the security concerns involved, as long as a fair balance is struck between the requirements of the rule of law and security considerations. If some minimum guarantees are not respected, notably the obligation to provide reasons for listing, and the right of the individual concerned to be heard, the balance struck will not be fair. The 'punitive' and quasi-criminal nature of such measures should be recognized thereby bringing them within the protections specified in Article 14 International Covenant on Civil and Political Rights 1966, at least if they extend beyond temporary administrative measures.

When determining these matters in the specific context of sanctions, it has been suggested that initial questions to ask, which are also of wider rule of law concern as states struggle to fulfil their security imperatives, include the following: does a system which enables the freezing of funds and other similar restrictive measures for an indefinite period, imposed by a political body against persons suspected, but not tried, of being associated with terrorists, without adequate guarantees concerning the right of defence and lacking any judicial or even quasi-judicial control ex post, constitute good law?; and can the brand of terrorism, which has existed for hundreds of

[87] A Rosas, 'Counter-Terrorism and the Rule of Law: Issues of Judicial Control'; TH Jillani, 'Impunity and the Emerging Patterns of International Justice'; and H Corell, 'The Role of the Lawyer in Shaping Responses to the Security Imperative', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

years, but which on the other hand still lacks a precise universal definition and thus easily lends itself to extensive applications, justify derogations from human rights and humanitarian law rules beyond the leeway these rules permit?

Although highly desirable from a rule of law perspective, it is considered very unlikely that UN sanctions regime will for the foreseeable future, if at all, include any system of judicial control. Consequently, this function will probably remain with national and European Union courts (and potentially other regional human rights systems, and non-judicial human rights bodies). They cannot but uphold their most fundamental mandate, which is to ensure the right to effective judicial protection of these significant rights. The Security Council itself has recognized that states should comply with the relevant principles of international law, including human rights law, when complying with Security Council targeted measures,[88] thus recognizing that security measures such as targeted sanctions must be kept within the rule of law.

More generally, there is much ongoing debate and discussion regarding the current scope of the jurisdiction of the International Court of Justice,[89] including whether better and increased use might be made of it to perform a number of *inter alia* review functions regarding not only the conduct of states, but also of the UN itself to ensure a more rule of law-based international system.[90] Certainly, historically much concern has been expressed regarding the lack of any direct formal review mechanisms of the Security Council's activities – only, for example, an indirect opportunity of review in the margins of any contentious proceedings before the International Court of Justice - not least due to the considerable powers that the Security Council possesses under Chapter VII UN Charter. One of the principal obstacles to reform here, including any increase in jurisdiction and powers, is that any amendment to the International Court of Justice's founding treaty is liable to be blocked by those whose actions would be most likely to come under the Court's scrutiny, namely P5 states.[91] Yet, if the Security Council, including P5 states, are serious in their expressed commitment as a principal global upholder of the rule of law, it is essential that its own systems and decision-making processes become more transparent, and that the substance of its outputs are subject to the potential of external scrutiny. Indeed, from a rule of law perspective, this can only serve to strengthen rather than undermine the legitimacy and force of its outputs.

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[88] See, for example, UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456 para 6.

[89] See too, UNGA Res 66/102 (9 December 2011) UN Doc A/RES/66/102 para 12 which: '*Invites* the International Court of Justice……to continue to comment, in their respective reports to the General Assembly, on their current roles in promoting the rule of law'.

[90] Some of the comments and recommendations made here have been informed by A Strauss, 'Cutting the Gordian Knot: How and Why The United Nations Should Vest The International Court of Justice with Referral Jurisdiction', Widener Law School Legal Studies Research Paper Series no. 11-43 (March 2012), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959565>, accessed 27 March 2012, which argues in favour of a referral jurisdiction for the review of state actions which does not require the consent of the state(s) concerned nor a treaty amendment to the Statute of the International Court of Justice.

[91] Art 69 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) states that any sought amendments to the Statute need to follow the same procedures as any amendments to the UN Charter. Art 109 UN Charter requires the minimum support by two-third majority vote of the General Assembly and an affirmative vote of nine members of the Security Council (without any use of the P5 veto).

In terms of how this might be achieved, if the requisite levels of political will can be secured, then clearly a treaty amendment to the Statute of the International Court of Justice 1945 would be the preferred option not least as it would provide increased certainty, clarity, and transparency regarding the existence and exercise of any review powers. It would potentially also allow states to complain directly to the International Court of Justice regarding the activities of any UN organs, including the Security Council. On the basis that it is more likely than not that the requisite level of political will does not currently exist and that it is unlikely to do so for the foreseeable future, in the absence of a treaty amendment, there are two possible ways in which the Court may be able to assert jurisdiction over *inter alia* the Security Council and review its actions.

The first is political, namely by persuading the General Assembly to make better use of its existing powers under Article 96 UN Charter to request an advisory opinion from the International Court of Justice on any legal question. There is a strong argument to be made that, as a primary guardian of both the UN Charter and international rule of law matters, the General Assembly has both the necessary legal powers and the accompanying responsibility to request advisory opinions which effectively review Security Council actions that raise significant rule of law concerns - for example, the original listing processes of the 1267 sanctions regime which failed to conform with fundamental standards of fairness and due process. Indeed, because the General Assembly already adopts some strong resolutions where rule of law concerns arise in relation to the practice of states - illustrated by its routine resolutions concerning 'Human Rights and Unilateral Coercive Measures'[92] - it is difficult for it to justify not responding proactively to rule of law concerns created by the UN's own institutional practices and processes, for example, sanctions imposed against states or individuals that raise significant human right issues.

The other is to effectively create a referral jurisdiction - which does not require Security Council consent or a treaty amendment - for the General Assembly under its existing powers, by establishing some form of subsidiary organ under Article 22 UN Charter which has power to act on behalf of the General Assembly in terms of its Article 96 UN Charter powers to request an advisory opinion. Such a subsidiary organ, for example some form of commission, could receive complaints from states and possibly even individuals, regarding significant rule of law matters of wider concern beyond the grievances of the complainants.

Recommendations:

- Security Council resolutions are binding on Member States, and may override other international agreements or treaties under Article 103 UN Charter. Consequently, it is imperative that the Security Council, in passing resolutions on inter alia anti-terrorism measures, ensures and itself adheres to the fundamental guarantees and principles of human rights provided for under the UN Charter and various other international instruments and conventions, especially those of a non-derogable nature.

[92] See, for example, UNGA Res 66/102 (9 December 2011) UN Doc A/RES/66/102; and UNGA Res 65/217 (21 December 2010) UN Doc A/RES/65/217.

- States should ensure that they fulfil their obligations under Security Council resolutions in accordance with their obligations under international human rights law. In the event of a direct conflict between obligations there should be a presumption in favour of human rights obligations unless the Security Council has expressly and exceptionally overridden specific human rights temporarily for imperative reasons of peace and security.
- Consideration should be given to expanding the jurisdiction of the International Court of Justice in order to afford it the power of judicial review of UN institutional practices. Ideally, this would be achieved through a treaty amendment to the Court's founding Statute, to ensure increased clarity and transparency of the related powers and processes if the requisite levels of political will are forthcoming. Alternatively or additionally, more extensive use could be made of the General Assembly's existing powers under Article 96 UN Charter to request advisory opinions from the International Court of Justice on significant matters of rule of law concern, whether directly, or as a form of referral through a subsidiary organ of the General Assembly created under Article 22 UN Charter exercising its Article 96 UN Charter powers.
- In terms of the underpinning principles of any form of review of UN institutional activities, it is important to ensure that a right balance is struck between the two competing objectives of ensuring and maintaining international peace versus international justice, and ensuring the protection of fundamental rule of law norms including those of human rights. This should include recognition that, in exceptional circumstances, it may be justifiable for the Security Council to expressly override certain human rights as a temporary measure where a person poses an imminent threat to security. This should be seen as the extent of the overriding powers of the Security Council under Article 103 UN Charter.

6.3.2. *Non-Judicial Mechanisms*[93]

There are a number of non-judicial mechanisms that play an important role in ensuring increased rule of law compliance within the UN system, which include human rights mechanisms.

One is that the UN, as with regional organizations, appoints independent experts as special rapporteurs with mandates on specific human rights issues, for example the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Bodies or organs which are treaty-based play an important part here too, including in terms of their monitoring and jurisprudential functions, in particular the UN Committee against Torture and Human Rights Committee in the context of counter-terrorism. While their outputs are not legally binding, nevertheless they are important in terms of shaping

[93] See further K Prost, 'Fair Process and the Security Council: A Case for the Office of the Ombudsperson'; S Casale, 'Treatment in Detention'; CM Cerna, 'The Role and Legal Framework of the Inter-American Commission on Human Rights in Securing Justice for Victims'; and I Kane, 'Reconciling the Protection of Human Rights and the Fight against Terrorism in Africa', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

applicable norms – in terms of their meaning and scope – as well as informing policy debates, not least by articulating those standards that not only states should adhere to, but that the UN should reflect within its own practices also.

Recommendation:

- The Security Council and the General Assembly, as well as being sources of law and, in the case of the former, executive action aimed at terrorism, should ensure that the mechanisms and bodies it creates - such as the Counter-Terrorism Committee and the 1267 Committee - include within them a review function. This should enable both organs to scrutinize not only the implementation of Security Council decisions or General Assembly recommendations by states, but also that this is done in compliance with the human rights and other international legal duties incumbent upon Member States. This follows from the basic premise that although there is no separation of powers within the UN, each organ - when utilizing any quasi-judicial power, or when establishing bodies that exercise such powers - should ensure that it puts in place within those bodies or elsewhere in the UN system a review mechanism to check that such powers are exercised in accordance with basic human rights standards and rule of law norms more generally.

Another mechanism considered is that of the Ombudsperson created to review the Security Council's 1267 sanctions regime. A primary concern, from a rule of law perspective, has been that although the UN has claimed that inclusion on the list and their accompanying sanctions are non-criminal and preventive in nature, the regime has many hallmarks of a criminal process, and the impact upon individuals is often highly deleterious not least on a person's livelihood, employability, and reputation, yet without the accompanying safeguards of a criminal justice process. In response, the Office of the Ombudsperson was created in December 2009 by Security Council Resolution 1904 and its mandate renewed and strengthened in June 2011 in Security Council Resolution 1989.[94]

To date, the creation of the Office has brought some positive developments towards increased rule of law compliance by the Security Council's 1267 sanction regime. For example, whilst the Ombudsperson does not possess judicial or compulsory powers, the processes being put in place facilitate and encourage cooperation by states in the provision of information. If the process functions in an optimum way, this will provide a real opportunity for petitioners to 'know' the case against them, leading to a meaningful opportunity for a response to that case. Nevertheless, accessing all relevant information (especially sensitive or classified materials), for the purpose of reviewing the listing and potential delisting of individuals, remains problematic. Another positive development is the contribution of the Ombudsperson's report based on her findings which is presented to the 1267 Committee during their delisting deliberation processes. While

[94] UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 paras 20-1; UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989.

decision-making power clearly and firmly rests with the Committee, the report should better inform the process, not least due to its inclusion of the petitioner's response to the case against him or her. The new recommendatory power and associated trigger mechanism accorded to the Ombudsperson in Security Council Resolution 1989 should further enhance the fairness of the process.[95]

Despite such positive developments, a number of important concerns remain. Some of the most significant and frequently articulated ones elate to issues of procedural fairness. Although the sanctions regime is non-judicial in nature and some of its unique features are recognized, due to its significant criminal and punitive characteristics in practice, there is strong support for the proposition that the review process more closely reflect the fundamental guarantees and principles of the rights to a fair trial (for example, as expressed in Article 14 International Covenant on Civil and Political Rights 1966 to which most UN Member States are States Parties) – not only because such principles are effectively non-derogable in the context of judicial proceedings, but also as a safeguard to the Security Council's significant powers (under Articles 25 and 103 UN Charter especially).

It has been suggested that such standards are not appropriate for the unique context of the Security Council. Instead, that by focusing on the fundamental components of fairness as opposed to the mechanics by which they are delivered, the Office of the Ombudsperson should provide the necessary fair and clear process, in particular the right to be informed, the right to be heard, and the right to effective review. Not all agree, however, with such a position. While the creation of this Office is an encouraging step towards greater rule of law compliance, and is certainly significant in creating the first formal administrative review mechanism of the Security Council in the exercise of its powers, many believe that it falls short in terms of addressing all related rule of law concerns. In particular, it has been suggested that the system cannot be regarded as being truly in conformity with human rights obligations unless there is a judicial body at the end of the process which conforms fully with the fundamental principles of a fair trial in the determination of a individual's civil rights and obligations, not least in terms of a public hearing by an independent and impartial tribunal established by law, and an ability to appeal any refusal to be delisted. A further important limitation on the role and influence of the Ombudsperson is that her recommendations are neither binding nor has her post been invested with any power to remove a petitioner's name from the list, although the recent changes introduced by Security Council Resolution 1989 do go some way to mitigating these limitations.

Recommendations:

- The effectiveness of the Office of Ombudsperson to the 1267 Sanctions Committee in ensuring greater rule of law compliance by the Security Council would be further increased by affording it greater powers. In particular, it is recommended that at least

[95] UNSC Res 1989 (2011) provides that the Ombudsperson may make recommendations in the Comprehensive Report. Further, if the Ombudsperson recommends delisting, 60 days later the name will be removed from the List unless the Committee by consensus agrees to retain it or the matter is referred to the Security Council for a vote.

some of its recommendations should be binding upon the relevant parties due to the independence and impartiality of the Office combined with the need for the appearance of at least some equality of arms (via the Ombudsperson) between the Security Council and the subjects of its sanctions measures.

- Increased clarity and certainty are required regarding the exact nature of the international standards and principles, in particular those of international human rights law, that currently influence the Ombudsperson's review process and 1267 Sanction Committee's determinations.
- Every effort should be made to accord those persons listed adequate levels of due process, specifically those articulated within Article 14 International Covenant on Civil and Political Rights 1966 unless there are persuasive reasons as to why this should not be the case, and to clarify current areas of ambiguity such as the exact standard to which the petitioner has to prove their case in order to be delisted.
- Targeted individuals' freedom of movement should only be restricted temporarily, and should be reviewed if an extended restriction is necessitated by imperative reasons of security.
- Efforts should be made to reduce the impact of targeted sanctions on members of the listed individual's family, by ensuring that their basic needs are met, and that their rights to health and education are not violated.
- From a rule of law perspective, now that the Office of Ombudsperson has established processes and procedures for reviewing sanctions imposed under the 1267 sanctions regime, it would seem logical to expand this mechanism to existing and future forms of sanctions against individuals. Indeed, now that the precedent has been established for one source of sanctions, the subjects of other sanctions regimes have legitimate grounds for complaint in the absence of a corresponding mechanism, not least in terms of partiality and inconsistency of approach by the UN. Furthermore, this should not be limited to the instance of individuals, but should extend to states subjected to general sanctions (for example, due to their support for terrorism) for which mechanisms should also be in place to allow them to formally challenge any decisions to impose sanctions against them, and for such complaints (including ones of rule of law concern) to be independently reviewed. This would not only improve the legitimacy of sanctions regimes, but it should lead to a greater understanding of the role of states in supporting terrorism.
- To establish an Office similar to the Ombudsperson to the 1267 sanctions regime (or the World Bank Inspection Panel) for any individual, group, or government who alleges that their international rights have been violated by a sanctions regime imposed by the UN. The rights covered should include core economic rights, such as the right to health; core civil rights, such as the right to free movement; and core collective rights, such as the right to self-determination.

6.4. Reparation for Victims

Adequate access to justice for victims - both those of terrorist attacks and those of governmental counter-terrorist responses – is an inherent element of any rule of law based counter-terrorist responses. Therefore, this should form a central focus and objective of efforts to increase accountability and reduce impunity gaps as just examined with respect to individual/non-state, state, and institutional actors. This may take a number of different forms, including restitution, reparations, compensation, and other forms of remedies. Although references to the need for adequate levels of justice are often present within rule of law discourse, in practice it is often not achieved fully, if at all, due to a number of factors, some of which are considered here.

6.4.1. *Victims of Terrorist Attacks*[96]

A significant current weakness is the absence of any coherent or comprehensive international legal framework that specifically governs issues relating to victims of terrorist crimes. This could be attributable, at least in part, to the fact that states are still unable to agree upon an internationally accepted definition of terrorism, which in turn makes it very difficult to define a 'victim of terrorism' for the purposes of reparations at the international level. That said, there is no shortage of existing norms which could be drawn upon in shaping such an international framework.

At the domestic level, some national systems already have well developed legislation and mechanisms for compensating the victims of terrorist attacks. In fact, certainly within the European region, current state practice in many countries suggests the emergence of a regional rule on the provision of victims' redress in case of violent crimes, even if not specifically for terrorist incidents, which is reflected in a number of European instruments together with other norms from which an international framework could draw key principles and procedures. Furthermore, a number of international principles already exist for the reparation of victims of both ordinary and serious crimes, which could similarly inform an international framework. There have also been some encouraging recent developments, which have included provisions within Article 79 Rome Statute 1998 regarding the redress of and participation by victims.

Much could still be achieved in the way of positive developments if the international community were to focus on the adoption of general principles and guidelines to encourage states to adopt domestic schemes for the compensation of terrorist crimes, and on reparation standards that countries should observe in their respective laws relating to terrorism. The need for such principles is pressing. In particular, domestic compensation schemes for victims of terrorism suffer from a number of common problems which could be addressed by an international framework, including: restrictions over questions of *locus standi*, or the right of victims to institute proceedings against the state for compensation; state compensation schemes that are not

[96] See further I Bottigliero, 'Realizing the Right to Redress for Victims of Terrorist Attacks', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012). See too UN Office on Drugs and Crime, 'The Criminal Justice Response to Support Victims of Acts of Terrorism' (UN Office on Drugs and Crime, Vienna 2011).

based on an enforceable right of victims to receive compensation; state compensation schemes that are generally established on an *ad hoc* and *ex post facto* basis; and state compensation schemes that generally cover only monetary aspects of redress.

Recommendation:

- To at least some extent, the absence of a coherent international framework appears to be explicable more in terms of poor political will rather than normative *lacunae.* Therefore, every effort should be made to draw from the body of existing norms to develop an international rule of law framework for the reparation of victims of terrorist crimes building on the influential normative resolutions adopted by the General Assembly, in particular the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law',[97] and the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'.[98] Ideally, this should take the form of an international treaty.

6.4.2. *Victims of Counter-Terrorist Responses*[99]

In terms of the applicable international legal framework, there is a number of governing human rights norms. More generally, Article 2(3)(a) International Covenant on Civil and Political Rights 1966 states that there is an obligation upon States Parties 'to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'. In addition, provision is made for reparations to be made available in respect of particular violations, whether in the context of a more general human rights treaty, or in subject-matter specific conventions.[100]

Redress is not limited to financial compensation, but rather may include criminal sanctions also for those responsible for the violations. Similarly, under an armed conflict regime, international criminal responsibility may be involved, not only pursuant to a war crime (not least as grave breaches of the Geneva Conventions), but also under the international criminal law rubric of crimes against humanity. For example, Article 7(1)(e) Rome Statute 1998 states that 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law' constitute a crime against humanity; similarly, Article 7(1)(i) explicitly

[97] UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147.
[98] UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34.
[99] See further H Duffy and SA Kostas, 'Extraordinary Rendition': A Challenge for the Rule of Law', in AM Salinas de Frías, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).
[100] See, for example, art 14 Convention against Torture 1984; art 2 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010). Both require that adequate compensation be given to victims of torture and enforced disappearances respectively.

recognizes enforced disappearance (which may extend to such practices as extraordinary renditions) as a crime against humanity. While the threshold problem is the contextual requirement of the alleged violation being part of a systematic attack against a civilian population, which will generally be hard to cross, the articulation of such state practices in terms of constituting crimes against humanity militates against any interpretation of international human rights or humanitarian law that would seek to excuse such practices as lawful.

Nevertheless, although civil and criminal law provisions exist aimed at securing justice and reparations for victims of *inter alia* human rights violations committed in pursuit of claimed security imperatives, these are not always achievable in practice due to the reluctance by many governments on security grounds to disclose the evidence necessary to bring a successful criminal or civil action. Furthermore, states have sought to argue and/or exploit potential *lacunae* in order to avoid liability here, for example relating to the extra-territorial nature of their practices, and seeking to rely on the *lex specialis* of international humanitarian law in an attempt to preclude scrutiny of their actions by *inter alia* human rights bodies. In response, the courts have often taken an approach which seeks to balance the needs of the victim with the public interest in protecting security as previously noted (Section 6.2.1), and to close such gaps where possible, for example by interpreting the extra-territorial reach of human rights obligations widely rather than restrictively.[101] In particular, in recognition of the significant legal obstacles that any victims (or their families) of security imperatives generally need to overcome to bring a claim against the state, human rights courts especially have developed certain legal presumptions to assist litigants. For example, where a *prima facie* case can be made against the state in such circumstances, the onus is likely to shift from the claimant to the state to demonstrate the steps it took to protect the rights of persons subject to their jurisdiction and to take adequate steps to investigate any allegations of abuse. Despite such positive developments, very few cases are properly investigated and even fewer are brought before the courts to enable victims to properly exercise their right to remedy and reparation.

There is a pressing need to better understand and clarify the applicable legal framework, including that governing the responsibility of states for human rights violations. More specifically, under Article 31 International Law Commission's Articles on Responsibility of States, where state actors are responsible for the commission of internationally wrongful acts, they are under an obligation to make full reparation for the resultant injury, whether the damage is material or moral in nature. Another issue of state responsibility that is gaining currency in the wake of litigation, enquiries, etc concerning extraordinary rendition is the nature of aiding and assisting in the commission of human rights violations. Certainly, the increased attention by a broad range of state and non-state actors, public enquiries, and judicial proceedings, is serving to clarify legal standards concerning intelligence relationships and international cooperation more broadly. Similarly, another topical issue in terms of standard setting relates to the non-binding Montreux Document on Private Military and Security Companies, which recognizes that states

[101] More recently, see the cases of *Al-Skeini and others v United Kingdom (*Application No 55721/07) European Court of Human Rights 7 July 2011, and *Al-Jedda v United Kingdom* (Application No 27021/08) European Court of Human Rights 7 July 2011.

which employ private security companies have a responsibility to provide victims of human rights violations committed by such companies with effective remedies, including compensation.[102]

Recommendation:

- The General Assembly should expand its law-making outputs on reparations to develop those aspects that might potentially cover the victims of misapplied counter-terrorism. The existing resolutions do potentially cover both victims of terrorism and of counter-terrorism, including in the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2005), and the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (1985). The adoption, however, of a resolution covering reparations for victims of both terrorism and counter-terrorism would be a welcome addition, indicating a concern that disproportionate and misapplied counter-terrorism is not only counter-productive but impacts on the rights of innocent people.

7. CONCLUDING REMARKS

The current UN reform agenda and the priorities identified by the UN Secretary-General present a timely and important opportunity to reassess, strengthen, and develop the UN's pivotal role in shaping international responses to terrorism and counter-terrorism. In particular, as the principal international guardian of the rule of law, the UN has an essential function here in terms of ensuring that such responses are rule of law led, both those of UN Member States as well as its own institutions.

Therefore, it is essential that key opportunities presented by this reform agenda are not missed. A primary argument underpinning this report is that the agenda should not be limited solely or principally to a review of and amendments to institutional and procedural aspects of the UN's counter-terrorism architecture, but rather that equal and parallel attention must be given to its substantive elements. Both are important and inherently related – measures to strengthen one limb will not achieve their full potential and reach without corresponding efforts being afforded to the other. To this end, the current report has sought to inform the substantive aspect of the reform process by identifying associated norms, parameters, areas of constraint and concern, which give meaning to pivotal concepts – such as the international rule of law and its framework

[102] 'Montreux Document on Private Military and Security Companies' (Swiss Government and ICRC, 2008) (Montreux Document), <http://www.icrc.org/eng/resources/documents/misc/ montreux-document-170908.htm> accessed 15 March 2012: Statement number 4; and Recommendation number 72 (under 'good practices' section).

for counter-terrorist responses, and prevention - for which there are no universally agreed definitions.

A recurring and related theme has been the UN's not yet fully realized potential – especially through the law-making and standard setting activities of the General Assembly and Security Council - to bring greater coherence, clarity, and certainty to both national and international counter-terrorist responses. While there have been some welcome developments, there is much more that could be done in terms of progressing substantive norms. However, if these and other activities are to be underpinned by the requisite levels of political will for them to be effective, there is a pressing need for the UN to honestly and comprehensively review and reform itself in order to become a model adherent to rule of law norms. This is true not only in terms of the substantive content of its outputs, but also its processes and procedures, including those that are necessary to protect basic rights such as those of due process.

Historically, executives – whether at the governmental or intergovernmental levels – have tended to regard the rule of law with suspicion, often considering it to impose onerous obligations and to hinder them in responding effectively to *inter alia* legitimate security imperatives. There can be no better time than the present, not least within the context of the UN reform agenda, to encourage and progress a paradigm shift in such thinking which recognizes the many benefits that rule of law compliance can bring, in particular in terms of increased legality, legitimacy, and certainty. In turn, these can only serve to enhance and strengthen governmental and intergovernmental counter-terrorist responses and, ultimately, the rule of law itself.