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The Role of Intelligence in the Fight Against International Terrorism: Legal Profiles

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“L’uomo guerriero in tempo di pace combatte se stesso.”

[cit. G. F.]

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ABSTRACT

In seguito all'attentato dell'11 settembre agli Stati Uniti, la comunità internazionale ha adottato nuove misure contro il terrorismo, che è stato riconosciuto come una minaccia alla pace e alla sicurezza internazionale.

Numerose sono le risoluzioni adottate in seno alle Nazioni Unite, le quali impongono agli stati membri di condannare e perseguire penalmente qualunque atto terroristico che intenda causare la morte o ferire gravemente la popolazione civile con l'obiettivo di instillare terrore tra i civili, o di obbligare un governo o un'organizzazione internazionale a compiere o ad astenersi dal compiere qualunque atto. Tali affermazioni sono ciò che più si avvicina a una definizione di terrorismo, in quanto la giurisprudenza internazionale è ancora divisa tra opinioni molto contrastanti.

Il crimine di terrorismo è diverso dagli altri crimini ordinari almeno in tre caratteristiche. La prima riguarda l'obiettivo che si prefigge il terrorista. Infatti, a differenza dei criminali ordinari, i quali concentrano il loro interesse su un obiettivo specifico, i terroristi hanno obiettivi dettati da motivazioni a lungo termine, che vanno oltre il semplice attacco. Proprio per questa motivazione, il terrorista inizia fin da piccolo a sviluppare le sue abilità, in un'escalation che parte dalla lapidazione e arriva al dirottamento di aerei e attacchi suicidi.

Una seconda caratteristica che differenzia il terrorista dal criminale ordinario è la presenza di un certo numero di persone che partecipano all'attacco. Contrariamente ai criminali ordinari che cercano di non pubblicizzare le loro attività criminali e di ridurre al minimo il numero dei partecipanti, i terroristi attivano un vero e proprio centro di reclutamento e di addestramento alla loro attività. Inoltre, reclamano gli attacchi terroristici andati a buon fine attraverso il web e altri mezzi di comunicazione, per far sapere al mondo chi ha compiuto tali atti e per quale motivo.

Una terza caratteristica, altrettanto interessante, è rappresentata dalle vittime. Anche in questo caso la differenza tra criminali ordinari e terroristi è abissale. Per quanto riguarda le vittime, i criminali ordinari in genere si focalizzano su specifici target, mentre i terroristi non sono interessati a chi uccidono, ma piuttosto a come reagiranno i veri bersagli dell'attentato, che in genere sono capi di stato o altri personaggi importanti. In questo caso è possibile affermare che le vittime degli attentati terroristici non sono il vero interesse dei terroristi. Sono piuttosto un pretesto per far cadere un sistema più grande, come ad esempio una nazione.

L'obiettivo principale del terrorismo è creare insicurezza, paura e paranoia. Le minacce di terrorismo hanno il potere di terrorizzare la popolazione, di far crollare le azioni in borsa, e di creare pregiudizi e odio verso specifiche etnie e popolazioni.

La difficoltà di definire il crimine di terrorismo risiede nel fatto che gli stati della comunità internazionale hanno opinioni che arrivano ad essere anche diametralmente opposte. Ad esempio, gli stati del terzo mondo e quelli in via di sviluppo, che più di altri hanno conosciuto le sofferenze della dominazione coloniale, non considerano i movimenti di liberazione nazionale e gli attentati contro il governo coloniale come forme di terrorismo, in quanto tali movimenti mirano alla liberazione del paese dall'oppressore.

Al contrario, gli stati occidentali ritengono in modo abbastanza omogeneo che i movimenti di liberazione nazionale debbano essere severamente condannati e puniti, in quanto vi sono metodi di risoluzione più democratici.

Data una tale premessa, è chiaro che una soluzione alla definizione di terrorismo risulta difficile da ottenere. Tuttavia, a livello internazionale e regionale sono state adottate varie misure che mirano a contrastare il terrorismo, misure sia reattive che preventive. Le prime sono costituite principalmente dalla ricerca, l'arresto, la detenzione e la condanna o assoluzione dei sospettati del crimine di terrorismo. Generalmente, tali misure sono portate a termine dalla polizia in collaborazione con servizi di intelligence e di informazione. Fanno parte delle misure reattive anche le cosiddette "*targeted-killings*" e le "extraordinary renditions."

Per quanto riguarda le misure preventive, esse sono definite attraverso convenzioni e risoluzioni del consiglio di sicurezza, tra cui si ricordano la risoluzione 1267 (1999), 1333 (2000), 1373 (2001), 1540 e 1566 (2004), 1904 (2009); dell'assemblea generale, che ricorda spesso la necessità di conciliare le misure antiterrorismo con il rispetto dei diritti umani, e che con la risoluzione 60/288 (2006) ha adottato una strategia di lotta contro il terrorismo; del consiglio d'Europa e della sua assemblea parlamentare; o attraverso le posizioni comuni in materia di sicurezza e politica estera del consiglio dell'Unione europea, di cui le più interessanti, in quanto attuate in seguito alla risoluzione 1373, sono la posizione comune 930/2001 e la 931/2001; o ancora le raccomandazioni pubblicate da organizzazioni internazionali accreditate, come il Gruppo di Azione Finanziaria sull'antiriciclaggio. Sono considerate misure preventive le procedure di *listing* e *delisting* di persone sospettate di essere coinvolte in atti terroristici o di partecipare ad organizzazioni e gruppi terroristici, e le misure che mirano a prevenire il finanziamento al terrorismo attraverso controlli alle banche e il congelamento dei capitali di proprietà dei sospettati.

The Role of Intelligence in the Fight Against International Terrorism: Legal Profiles

Tuttavia, è importante riconoscere che entrambe le misure, reattive e preventive, vengono attuate in collaborazione con altre organizzazioni che, originariamente, erano state istituite per motivazioni diverse e con obiettivi diversi. In particolare, dato il recente sviluppo degli attentati terroristici, è necessario che gli stati creino nuovi modi per individuare ed eliminare le minacce di terrorismo e le basi operative delle organizzazioni terroristiche.

Il terrorismo è stato spesso associato ai servizi segreti, nonché alla cosiddetta "intelligence". Ciò è coerente con la volontà degli stati della comunità internazionale che, bisognosi di maggiore sicurezza, chiedono aiuto ai servizi di intelligence per contrastare il terrorismo internazionale.

Cos'è un servizio di intelligence? E che ruolo ha nella lotta al terrorismo? Sono queste le domande a cui si cerca di dare una risposta. L'obiettivo è capire quale sia il contributo che le agenzie segrete danno alle autorità governative per contrastare e, possibilmente, prevenire il fenomeno del terrorismo.

Il servizio di intelligence può essere definito come un'organizzazione che si occupa di raccogliere informazioni, sia segrete che non, riguardanti una minaccia all'interno del territorio di uno stato.

Originariamente, i servizi di intelligence avevano funzioni di supporto alle operazioni militari, ed il concetto della spia e dell'agente segreto risale addirittura alle origini della civiltà. In particolare, era un ruolo molto presente nell'antica Grecia e nell'antica Roma, e si è poi mantenuto nel tempo al servizio di re e imperatori, che temevano di essere destituiti da un colpo di stato.

Nel periodo dell'industrializzazione, con l'aumento della popolazione nelle aree urbane, l'intelligence veniva utilizzata per tenere sotto controllo le classi popolari più eversive, in modo da sopprimere i moti di rivolta sul nascere.

Il periodo di massimo splendore dei servizi di intelligence si è avuto durante la guerra fredda. In quel periodo tali servizi si sono specializzati nella raccolta di informazioni segrete per fini militari, attività di cui un ramo dell'intelligence si occupa ancora.

Ad oggi, le agenzie di intelligence più conosciute e, sicuramente più all'avanguardia, sono americane, e le più comuni sono la Central Intelligence Agency (CIA), la National Security Agency (NSA), il Federal Bureau of Investigation (FBI), e anche il meno conosciuto US Army Intelligence Command (USAINTC).

Si possono identificare tre categorie principali di agenzie di intelligence. La prima è l'ufficio di intelligence interno, che possiede poteri limitati e la cui azione è regolamentata

da una carta o statuto. La sua funzione principale è la raccolta di informazioni sui processi penali riguardanti crimini di sicurezza. Una seconda categoria è rappresentata dalla polizia politica, decisamente più autonoma dell'ufficio di intelligence interno. I suoi poteri derivano da una delega da parte dell'esecutivo ed è più coinvolta nelle relazioni con gruppi di potere. Le sue funzioni variano dalla raccolta di informazioni su crimini specifici alla raccolta di informazioni più generali. A differenza della prima categoria, è in grado di condurre operazioni aggressive nei confronti di avversari politici.

La terza ed ultima categoria è rappresentata dallo stato di sicurezza indipendente, che è totalmente libero da controlli esterni. Può essere associato a uno stato di sicurezza all'interno dello stato vero e proprio. È possibile che gli obiettivi degli ufficiali non coincidano con quelli della classe politica dirigente; inoltre, la politica di gestione dello stato di sicurezza e i suoi fondi sono mantenuti nel più stretto riserbo. Tra le sue funzioni principali vi è quella di attuare operazioni di controspionaggio mirate alla disgregazione di gruppi specifici.

Quando operano all'interno di uno stato, i servizi di intelligence spesso collaborano con la polizia nazionale e locale. Questo fatto, apparentemente normale e anzi apprezzato, in realtà ha un potenziale effetto distruttore sull'autorità e soprattutto sulla legittimità delle operazioni che i due servizi si trovano ad attuare. In altre parole, il rischio che si pone nel momento in cui il servizio di intelligence si confonde con quello di polizia è che non vengano rispettati i diritti fondamentali della persona, in questo caso del sospettato o accusato di terrorismo, ed è possibile che l'autorità della polizia venga minata dal metodo operativo utilizzato dal servizio di intelligence.

È chiaro che la polizia ha bisogno delle abilità dei servizi di intelligence per operare in modo efficace sul territorio, ma è altrettanto chiaro che le due autorità non devono essere confuse. Le attività della polizia sono completamente dedicate alle questioni criminali, poiché il suo compito fondamentale è quello di raccogliere informazioni al fine di catturare e consegnare alla giustizia i criminali.

Per quanto riguarda l'intelligence, le sue funzioni riguardano solo parzialmente la cattura di criminali per consegnarli alla giustizia; infatti, il suo compito è raccogliere informazioni e sottoporle a valutazioni. Il fatto che i servizi di intelligence selezionino persone specifiche da cui ottenere informazioni dipende dal bisogno percepito dell'informazione stessa. Generalmente l'intelligence si occupa di ottenere informazioni di tipo più politico che criminale.

The Role of Intelligence in the Fight Against International Terrorism: Legal Profiles

La questione principale che si pone la legge, a questo punto, è se controllare oppure no l'attività dell'intelligence, come del resto teoricamente fa con l'operato della polizia, fatto che limiterebbe il raggio di azione e l'indipendenza dei servizi di intelligence.

In termini generali, si può affermare che l'attività dell'intelligence è difficile da controllare, in quanto anche all'interno delle agenzie i controlli sull'operato degli analisti e degli agenti è molto vago e generalizzato. Si pensi che le operazioni vengono controllate dai supervisor dell'agenzia generalmente in forma scritta, attraverso la lettura di comunicati e rapporti stesi da analisti che potrebbero manipolare il testo per soddisfare le aspettative sull'operazione condotta.

Purtroppo l'attività di tale organizzazione non viene controllata, se non parzialmente, per esempio attraverso la lettura di rapporti e relazioni riguardanti le operazioni portate a termine, documenti che spesso vengono manipolati prima di essere redatti nella loro forma finale.

Il mandato principale di un servizio di intelligence è quello di raccogliere informazioni al fine di prendere delle decisioni sulle operazioni da condurre. Dunque, l'attività delle agenzie è fortemente legata al controllo dell'informazione. Tale controllo si può definire come il processo attraverso cui l'agenzia si assicura che certe persone abbiano o non abbiano accesso a specifiche informazioni in specifiche situazioni.

L'intelligence si divide in diversi rami, a seconda delle minacce di cui si occupa. In particolare, se ne possono individuare cinque tipi: una prima è legata al ramo militare, il più comune all'interno delle agenzie di intelligence, e quello a cui si collega il bisogno di sicurezza degli stati. La minaccia militare può provenire sia dall'esterno sia dall'interno, ne sono un esempio le attività paramilitari.

Una seconda tipologia è rappresentata dalla minaccia politica, generalmente connessa a fattori interni ed ideologici. A questa seconda tipologia si lega una terza minaccia, di tipo sociale, difficile da distinguere da quella politica.

Una quarta minaccia è di tipo economico, e riguarda il mercato. Tuttavia, sembra un po' contraddittorio considerare il mercato una minaccia, poiché il fondamento dell'economia di mercato sono proprio l'incertezza, la competizione e il rischio. Un esempio di minaccia economica potrebbe essere l'approvvigionamento di materiale strategico, che si ricollega alle minacce di tipo militare. Una quinta e ultima minaccia è rappresentata dal cambiamento climatico e ambientale, questione che va risolta con misure collettive a livello internazionale.

Le agenzie di intelligence si dividono anche in interne ed esterne, in base al tipo di minaccia di cui si occupano. Generalmente, i servizi di sicurezza hanno compiti di protezione da minacce interne allo stato; invece, i servizi di intelligence esterni hanno compiti legati alla protezione da minacce provenienti dall'estero.

La collaborazione delle agenzie di intelligence è un requisito fondamentale per la lotta al terrorismo. Per creare una strategia efficace contro il terrorismo internazionale è necessario utilizzare anche le abilità dei servizi di intelligence, abilità che derivano da una chiara cognizione degli obiettivi e da un accordo comune sulle funzioni di tali servizi. In altre parole, è necessario stabilire i limiti e il ruolo dei servizi di intelligence, in modo da poterli controllare senza però limitarne l'operato.

Le funzioni delle agenzie di intelligence nella lotta al terrorismo sono molteplici: per esempio, identificano gli individui coinvolti e il loro livello di coinvolgimento negli atti di terrorismo; o creano dei database che migliorano la procedura decisionale. Possono organizzare attività di controspionaggio o azioni sottocopertura; oppure stabilire le vie di approvvigionamento e le "safe houses" dove vengono portati i sospettati per gli interrogatori.

Tuttavia, le misure antiterrorismo dei servizi di intelligence non sempre vengono attuate secondo le disposizioni dettate dal diritto, sia interno sia internazionale. Questo è principalmente dovuto al fatto che nel collaborare con le forze dell'ordine, le agenzie di intelligence si sono gradualmente sostituite alla polizia nel far rispettare la legge, ed, essendo poco controllate dallo stato per cui operano, non risultano responsabili per gli atti che commettono, indipendentemente dalla legalità degli atti stessi. In realtà, è proprio questo il motivo per cui gli stati hanno esteso progressivamente il potere e le funzioni dei servizi di intelligence, i quali, originariamente predisposti alla semplice raccolta di informazioni, ora sono autorizzati a catturare, arrestare, detenere e interrogare i sospettati. Inoltre, le informazioni che ottengono sotto tortura durante gli interrogatori sono spesso utilizzate per accusare il sospettato, o addirittura vengono addotte come prove della sua colpevolezza, violando il diritto dell'imputato a non accusare se stesso.

È importante ricordare che spesso, data la segretezza dei metodi utilizzati dall'intelligence nella raccolta di informazioni, non viene data la possibilità all'imputato di conoscere tali informazioni sulla sua persona, poiché è priorità dell'agenzia non rivelare le proprie fonti, dovendo essa proteggere i propri agenti.

Si pone quindi in essere la questione del rispetto dei diritti umani. La tendenza degli stati ad estendere i poteri delle agenzie di intelligence nella lotta al terrorismo produce dei riflessi non indifferenti sull'esigenza, espressa in modo chiaro dalle convenzioni e dalle

risoluzioni delle Nazioni Unite, di conformità del comportamento degli stati membri alle disposizioni sui diritti umani.

È vero che gli stati si rivolgono alle agenzie di intelligence per realizzare misure antiterroristiche più efficaci e immediate, in quanto percepiscono un forte bisogno di sicurezza nazionale contro il terrorismo. Purtroppo però, avendo gli stati parti adottato delle convenzioni internazionali per la protezione dei diritti umani, essi devono anche agire nel rispetto di tali diritti e delle garanzie processuali fondamentali che vengono assicurate a tutti gli individui, anche in situazioni di emergenza, quali quelle poste dal terrorismo internazionale.

Una violazione di diritti umani inderogabili anche in situazioni di emergenza, quali sono il divieto di tortura e di trattamento disumano, il diritto alla vita (a cui è possibile derogare solo in caso di guerra, e in tal caso verrebbe applicato il diritto umanitario) e il diritto ad un equo processo, comporta uno sbilanciamento tra le necessità di maggiore sicurezza nazionale e il rispetto delle disposizioni sui diritti umani delle maggiori convenzioni internazionali e regionali.

Un siffatto ragionamento è valido anche per le agenzie di intelligence, le quali, benché siano difficili da controllare nel loro operato, devono essere ritenute responsabili per le azioni che commettono, a maggior ragione quando si tratta di violazione dei diritti umani. Alcune delle misure utilizzate dalle agenzie di intelligence sono state autorizzate dagli stati nonostante fossero palesemente illecite e violassero i diritti umani fondamentali. Ne sono un esempio le violazioni perpetrate nelle prigioni di Guantanamo e di Abu Ghraib, dove i detenuti versano in condizioni terribili.

Un'altra questione, che ha coinvolto anche il consiglio d'Europa, il quale a sua volta ha istituito una commissione di inchiesta, è quella delle "extraordinary renditions." Infatti, dopo gli attacchi agli Stati Uniti del 2001, sono state attuate da parte della CIA in collaborazione con alcuni paesi europei, delle consegne speciali di sospettati di terrorismo in tutta Europa. Con il rapporto del 2005 di Human Rights Watch, alcuni stati europei sono stati accusati di aver appoggiato la cattura e il trasferimento di alcuni sospettati di terrorismo dal territorio europeo a centri di detenzione e smistamento in Medio Oriente, dove i sospettati venivano sottoposti a pressanti interrogatori e ad abusi di ogni tipo. Alcuni sono stati rilasciati senza essere stati informati del capo di accusa; inoltre, non è stata fornita loro alcuna motivazione sul loro sequestro.

La lotta al terrorismo deve essere condotta nel rispetto dei diritti fondamentali dell'uomo, e a tale disposizione devono adeguarsi anche le agenzie di intelligence. Servizi

di intelligence e forze dell'ordine devono collaborare per contrastare il terrorismo su basi legittime, e devono essere responsabili per le azioni che commettono. È necessario stabilire un sistema legislativo chiaro, che definisca il mandato delle agenzie di intelligence e i poteri che sono in loro possesso. Solo in questo modo è possibile combattere il terrorismo internazionale in modo efficace e nel rispetto dei diritti umani.

INTRODUCTION

Transnational terrorism has always been present in the world, but it is only after September 9/11 that the international community has started to worry about it, forcing every single country to face this apparently new threat. No State is exempted from dealing with it. Many conventions have been adopted by the General Assembly of the United Nations, and literature is still trying to find a definition of the term, because of its political implications.

Since the latest terrorist attacks, international organizations and the Western States have mobilized in order to guarantee high levels of security, sometimes at the expense of human rights protection. It is believed that some States, in contrasting terrorism, take measures that violate fundamental human rights law, humanitarian law and international law.

Since the last few decades, the international community has been contrasting terrorism through a pyramidal system: the United Nations and the Security Council from an international perspective, the European Union from a regional one and, eventually, national States from a domestic point of view.⁽¹⁾ The Security Council has the priority over national legislation.

The political nature of the threat has forced States to cooperate. New investigative methods and instruments of intelligence have been introduced in order to exchange information. Some of these new techniques do not infringe any individual's basic right; however, some others can violate human rights and highly menace the balance between the need for security of a State and human rights compliance.

In the immediate aftermath of a terrorist attack, the population is so shocked that it allows the national government to take the necessary measures to counter the attack, consequently leaving room for lower human rights protection to the advantage of national security.

However, a State has an obligation to comply with human rights law, and to grant basic human rights protection, as stated by various international and regional

⁽¹⁾ C. DI STASIO, *La lotta multilivello al terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali*, Milano, Giuffrè Editore, 2010, p.4.

conventions⁽²⁾, even when a situation of extreme emergency may induce to react in a too aggressive manner.

The following dissertation aims at analysing the role of intelligence as a tool to fight against international terrorism. In particular, the compliance of intelligence agencies with human rights provisions is of utmost importance. Several measures undertaken by governments to counter terrorism are misused or even abused, with serious consequences for the rights infringed. Various international organizations and committees⁽³⁾ have prepared drafts and documents which tried to discover the truth behind the veil of “classified information”, and many international nongovernmental organizations have also made reports on human rights violations, blaming secret detention facilities where terrorist suspects were abused and humiliated.⁽⁴⁾

It is important to understand that national security and human rights protection are not alternatives and do not mutually exclude each other. They are instead complementary. As affirmed by the High Commissioner for human rights in his report, an effective counterterrorism strategy should place the protection of human rights as its focal point. If States pursue lower standards of human rights protection, there can be a higher risk of undermining their counterterrorism strategies.⁽⁵⁾

⁽²⁾ See as an example the *International Covenant for the protection of Civil and Political Rights* (ICCPR), adopted by General Assembly resolution 2200A (XXI) on 16 December 1966 and entered into force on 23 March 1976, Article 4, available at <http://www2.ohchr.org/english/law/ccpr.htm>; the *European Convention for the Protection of Human Rights* (ECHR), amended by Protocol No. 11 (ETS No. 155) and Protocol No. 14 (CETS No. 194) from the date of its entry into force on 1 June 2010, Article 15, available at <http://conventions.coe.int/treaty/en/treaties/html/005-1-bis.htm>; the *International Convention for the Suppression of the Financing of Terrorism*, adopted on 10 January 2000, Article 17, available at <http://www.un.org/terrorism/sc-res.shtml>; other instruments such as Security Council resolution 1373 (2001), paragraph 3(f); and General Assembly resolutions 59/195, 66/105, 66/171, 66/L.53, all available at <http://www.untreaty.un.org>.

⁽³⁾ In particular, reference to UNITED NATIONS COMMISSION ON HUMAN RIGHTS, *Report of the UN High Commissioner for human rights and follow-up to the world conference on human rights*, submitted pursuant to General Assembly resolution 48/141, 27 February 2002, E/CN.4/2002/18, available at <http://www.unhchr.ch>; UNITED NATIONS COMMISSION ON HUMAN RIGHTS, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, of Special Rapporteur Martin Scheinin, 28 December 2005, E/CN.4/2006/98, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement>; EUROPEAN PARLIAMENT, Temporary Commission on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, *Draft Interim Report on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners*, Rapporteur Giovanni Claudio Fava, 24 April 2006, available at <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=530929#tab-0>.

⁽⁴⁾ Reference to AMNESTY INTERNATIONAL USA Report on torture 2004, *Human dignity denied. Torture and Accountability in the “war on terror”*, based on Amnesty International’s 12-point Program for the Prevention of Torture by Agents of State, available at <http://www.mafhoum.com/press7/213S28.htm>; and AMNESTY INTERNATIONAL, *Partners in Crime: Europe’s role in US renditions*, 14 June 2006, available at <http://www.statewatch.org/news/2006/jul/ai-partners-in-crime.pdf>.

⁽⁵⁾ UNITED NATIONS COMMISSION ON HUMAN RIGHTS, *Report of the UN High Commissioner for human rights and follow-up to the world conference on human rights*, submitted pursuant to General Assembly

The Role of Intelligence in the Fight Against International Terrorism: Legal Profiles

The first chapter of this work will provide a theoretical analysis of the term “terrorism”, together with a discussion on the lack of a complete definition of the term. Then, there will be a further analysis of the meaning of “intelligence” and of how it serves the counterterrorism purpose. The issue of human rights compliance will be also matter of discussion in the first chapter.

The second chapter will introduce the principal measures to counter international terrorism both at an international level, the United Nations’ activity is the case, and at a regional level, in particular the European Union common positions and regulations. This step is necessary to understand the importance of international and regional conventions as origins of human rights obligations for the international community. At this stage, it will be worth noting that the international community does not agree on a common view to fight terrorism. Some States are more human rights-oriented while implementing counterterrorism measures. Others, instead, are more concerned with national security issues, thus they may easily infringe human rights provisions in implementing counterterrorism measures, often with the help of private agencies working for the government. Some others hide the elimination of political oppositions and other troublesome individuals behind the excuse of antiterrorism measures. This chapter will include the major conventions and resolutions dealing with the implementation of counterterrorism measures.

Since the advance in technology, terrorists are now able to locate and exploit financial assets in order to plan and organize attacks. It is therefore necessary that States move towards new forms of intelligence and technology developments in order to resist cyber attacks and other forms of terrorist activity.

The third chapter of this analysis will deal with methods of investigation through intelligence, and will discuss whether their implementation violates human rights law. Also the sanctions’ regime adopted at an international and regional level will be treated.

The fourth and final chapter will treat some relevant cases of intelligence abuse of power, with the aid of international organizations’ reports on human rights violations by intelligence agents on suspects of international terrorism. There will be some final considerations about the effects of the counterterrorism measures and of their implementation in the national legislations.

resolution 48/141, 27 February 2002, E/CN.4/2002/18, reference to paras.5 and 7 of the introduction, available at <http://www.unhchr.ch>.

It is of utmost importance that the international community adopts a common definition of terrorism in broad terms, in order to be better prepared to fight against it. It is also necessary that States adopt a rights-based approach to counterterrorism strategies with the objective of balancing human rights provisions and national security issues. There is a strong need for human rights norms to be effectively applied in reality. Terrorism cannot be eradicated only by reacting to its consequences and manifestations, but rather by addressing its causes.⁽⁶⁾

⁽⁶⁾ UN COMMISSION ON HUMAN RIGHTS, *supra* note (5), para.28.

I. TERRORISM: AN ENDLESS DISPUTE ON DEFINITION.

OVERVIEW: 1. The nature and definition of terrorism in international law. – 1.1. Elements to define the term: the ideological nature of terrorism. – 1.2. The political and social motivations: focus on secession, insurgency and regional retribution. – 1.3. The religious motivation: focus on the “global jihad”. – 2. Terrorism as a threat to international peace and security. – 3. Attempts to define terrorism. – 4. International and regional conventions relating to terrorism. – 4.1. The conventions adopted within the United Nations. – 4.2. Regional conventions and protocols. – 5. A comprehensive definition of terrorism must take into consideration human rights provisions. – 5.1. The International Covenant on Civil and Political Rights and the European Convention on Human Rights. – 6. Introduction to Intelligence.

1. The nature and definition of terrorism in international law.

International terrorism may be considered one of the most insidious challenges for States and international organizations, and a serious threat to international peace and security.

The international community still encounters some difficulty in defining the term and in implementing the strategies developed in order to eradicate it, since terrorists have become more technologically advanced. In fact, they are now able to exploit new technologies, which are provided by States and organizations that finance terror for political and economic purposes.

From a historical point of view, transnational terrorism has become a real threat since September 9/11 terrorist attacks. Before this event and those of the attacks in Madrid on March 2004 and in London in summer 2005, nobody was completely aware of what terrorism was about.

The first time in history when the word ‘terror’ appears is after the French Revolution of 1789, with Robespierre’s La Terreur. People were beheaded for educational purposes, to educate to values and loyalty. However, it is only at the end of the XX century that international terrorism takes such a violent and widespread shape.

Terrorism has been a worrying issue for the international community since the 1960s. The end of the Cold War put a full stop to the dichotomy between the USSR and the Allied Western countries, paving the way for the United States to become “the

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dominant world power capable of imposing a new order of peace”.⁽⁷⁾ Nonetheless, the fragmentation and dismemberment of some States produced new internal disorders, causing tensions and riots.

In the Middle Eastern area in particular, religious fundamentalism has exacerbated violence and hatred, moving from inter-state to intra-state forms of war. Terrorist groups entered self-determination fights with the excuse of fighting for freedom and independence, but easily moved towards purer forms of terror.⁽⁸⁾ This pure terror involves political and religious purposes, with the aim of producing a widespread feeling of fear and uncertainty in a targeted State. Self-determination fights are more concerned with the process of decolonization, at work in many Third World countries. In this case, the groups acting against the government usually take advantage of some typical techniques of terrorist groups and often they are helped by them.

There is still a strong polarization between Western States, supporting a total condemnation of terrorism, including liberation wars, and Eastern States, including Arab, Asian and most of Third World countries, which support a separation of liberation movements from pure terrorism, which they condemn. Also literature is still divided on the issue: one side of the doctrine believes the international community does not need a comprehensive convention on terrorism, it rather supports a stronger web of international arrangements. The other side of the doctrine still asserts the need for an agreed general convention on terrorism.⁽⁹⁾

In the international community various conventions and resolutions deal with terrorist acts, for example the *International Convention for the Suppression of the Financing of Terrorism*, which specifically addresses assets freezing and financial transactions limitations⁽¹⁰⁾; or the *International Convention for the Suppression of Terrorist Bombings*⁽¹¹⁾, which addresses the specific issue of terrorist suicide bombings; or the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, which aims at preventing and punishing violence

⁽⁷⁾ P.A. FERNÁNDEZ-SÁNCHEZ, *International Legal Dimension of Terrorism*, Leiden, Martinus Nijhoff Publishers, 2009, p.9.

⁽⁸⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (7). Terrorist cells often take advantage of States' struggle for independence in order to instill hatred and anger. However, it is true that many revolutionary movements have used techniques which are typical of terrorist groups, such as suicide bombings and indiscriminate attacks.

⁽⁹⁾ J. N. MAOGOTO, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*, Aldershot, Ashgate, 2005, p.56.

⁽¹⁰⁾ *International Convention for the Suppression of the Financing of Terrorism*, adopted on 10 January 2000, available at <http://www.un.org/terrorism/sc-res.shtml>.

⁽¹¹⁾ *International Convention for the Suppression of Terrorist Bombings*, 15 December 1998, S. Treaty Doc. n. 106-6, 37, I.L.M. 249, available at <http://www.untreaty.un.org>.

against diplomats and individuals working for the international system; or the *International Convention against the Taking of Hostages*, or the *Convention on the Physical Protection of Nuclear Material*.⁽¹²⁾ These are only some of the various conventions that are part of the United Nations documents, without taking into consideration the huge number of resolutions both of the Security Council and of the General Assembly. Some examples can be Security Council resolution 1267 (1999), which establishes a Committee whose task is to monitor States' implementation of counterterrorism measures; resolution 1333 (2000), which establishes the "Consolidated List" where people suspected to be involved in terrorist activity are designated; resolution 1373 (2001), which establishes the Counter Terrorism Committee (CTC); resolution 1904 (2009), which defines the measures to be taken against terrorists, the listing and delisting procedure in relation to resolution 1333 (2000).⁽¹³⁾

Nevertheless, the conventions and resolutions above cited, but also other instruments addressing terrorism, are very specific in considering the matter.

An act of terror is a criminal offence that implies the indiscriminate use of violence in order to cause damage to persons and to private and public property with the objective of producing a sense of terror separating the victim from the purpose of the act.⁽¹⁴⁾ According to Common Position 931/2001/CFSP of the European Council of 27 December 2001 related to the application of specific measures in the fight against international terrorism, article 1(3) defines an *act of terror* as:⁽¹⁵⁾

An intentional act committed with the objective of intimidating a State's population; or unduly forcing a State or an international organization to do or abstain from doing whatsoever act; or seriously destabilizing or destroying the fundamental political, constitutional, social or economic structures of a State or international organization.

⁽¹²⁾ *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, 14 December 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; *International Convention against the Taking of Hostages*, 17 December 1979, T.I.A.S. n. 11081, 1316 U.N.T.S. 205; *Convention on the Physical Protection of Nuclear Material*, 3 March 1980, T.I.A.S. n. 11080, 1456, U.N.T.S. 101, all available at <http://www.untreaty.un.org>.

⁽¹³⁾ S/RES/1267/1999, adopted on 15 October 1999; S/RES/1333/2000, adopted on 9 December 2000; S/RES/1373/2001, adopted on 28 September 2001; S/RES/1904/2009, adopted on 17 December 2009. They are all available at <http://www.untreaty.un.org>.

⁽¹⁴⁾ C. DI STASIO, *La lotta multilivello al terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali*, Milano, Giuffrè Editore, 2010, p.28.

⁽¹⁵⁾ G.U.C.E., L. 344/93, 27 December 2001, Common Position 931/2001/CFSP, art.1, par.3.

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A common definition of terrorism is useful in order to better determine the applicable counterterrorism measures. Some governments have hidden the dismantlement of national political factions behind the excuse of measures against terrorists: both Russia and Egypt have been accused of using counterterrorism measures to hide the elimination of political oppositions.⁽¹⁶⁾ Israel asserted that Palestinians were terrorists from al-Qaeda, and the Maldives convicted a politician of terrorism offences and brought him to imprisonment for ten years for peacefully protesting against rights violations by the government.⁽¹⁷⁾ Many others have implemented counterterrorism measures seriously violating human rights obligations.

This has happened because, without a complete definition of the term, States interpret the exceptions to some rights as necessary, especially in emergency situations or wartime, violating the most basic and fundamental human rights, for which there is no exception, in any case. The central rights subjected to no derogation are: the prohibition of torture and of inhuman or degrading treatments (art.3); the prohibition of slavery and forced labor (art.4); and the principle of no punishment without law (art.7), all present in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁽¹⁸⁾

The fight against terrorism has become a sort of excuse to violate human rights during military activities. It is responsibility of the international community to maintain a proper balance between the respect for human rights and the security needs of States.

1.1. Elements to define the term: the ideological nature of terrorism.

The international community has not found a common definition of the term “terrorism”; literature is openly divided on the specific acts to be included in the term:⁽¹⁹⁾

⁽¹⁶⁾ DI STASIO, *supra* note (14), p.31. Ref. to note (57).

⁽¹⁷⁾ B. SAUL, *Defining Terrorism in International Law*, Oxford, Oxford University Press, 2006, p.50.

⁽¹⁸⁾ *European Convention for the protection of human rights* (ECHR), amended by Protocol No. 11 (ETS No. 155) and Protocol No. 14 (CETS No. 194) from the date of its entry into force on 1 June 2010. It can be consulted on <http://conventions.coe.int/treaty/en/treaties/html/005-1-bis.htm>.

⁽¹⁹⁾ *International Convention for the Suppression of the Financing of Terrorism*, *supra* note (10). See also MAOGOTO, note (9).

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[A huge] obstacle [to cooperation among States in the fight against international terrorism] is the lack of international consensus as to an acceptable definition of terrorism...due to the politically charged nature of terrorist activity, and...whether definitions of terrorism can or should encompass national liberation movements.

As said above, the principal difficulty in defining terrorism is the political and ideological nature of the term. Since ideology derives from a personal, subjective interpretation of reality, the international community reasonably foresees the impossibility of the undertaking, as countries have often divergent ideologies.

The Third World countries and the then communist countries refused to condemn all kind of violence, because they thought that fighting for the right cause, the use of violence in liberation movements was an example, should have been welcomed as a high political purpose. The fight for freedom was, to their eyes, a political struggle against oppressive regimes rather than a humanitarian question, as it was for the Western countries. This means that defining an act of terror always implies a political analysis of the act itself: “one man’s terrorist is another man’s freedom fighter.”⁽²⁰⁾

According to popular perception, terrorism refers to a wrong and evil act, seen as illegal. It is believed to have both a violent and not-so violent nature, which may occur in peace and wartime.⁽²¹⁾ It is exactly this surprising aspect, the fact that a terrorist act may occur whenever it may be, that creates a sense of insecurity and widespread fear.

Going deeper in the matter, it can be easily noticed that an act of terrorism is often formed by various criminal acts which are already defined in domestic and international law. For example, suicide bombing, which is a common type of terrorist attack, involves the unlawful possession of explosive material, willful destruction of property and willful injury of persons. All these are already defined crimes. However, it is not possible to make the same considerations when terrorist acts involve crimes like the financing of terrorist organizations, where a definition of terrorist organization is necessary.⁽²²⁾ Furthermore, if there are different definitions of these crimes, mutual assistance among States is almost impossible.

⁽²⁰⁾ DI STASIO, *supra* note (14), p.28. Ref. to note (46).

⁽²¹⁾ A. CONTE, *Human Rights in the Prevention and Punishment of Terrorism*, Heidelberg, Springer, 2010, chapter 2, p.7.

⁽²²⁾ CONTE, *supra* note (21), pp.8-9.

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There are three core elements which distinguish terrorist crimes from ordinary crimes: focus, participants and victims.⁽²³⁾ At first sight, it seems that these three elements are common to warfare and ordinary crimes; however, what effectively distinguishes terrorist acts is that all three elements are present in a terrorist act simultaneously.

First of all, contrary from ordinary crime which is focused on a specific objective, terrorist crimes have continuous focuses, due to long-term motivations; they develop their abilities through an escalation of acts starting with stones throwing and ending with planes hijacking and suicide bombings.

The second element, then, again is different from ordinary crimes. Ordinary criminals do not want their acts to be publicly claimed, and they usually limit participants to as few people as possible. Terrorist organizations are of course secret to such an extent that planned operations and cells remain unknown, but they publicly claim attacks and try to recruit as many followers as possible.

Finally, victims are exactly the opposite if compared to ordinary crimes. Terrorist attacks are often indiscriminate, aiming at injuring indiscriminate targets, because they are not their central focus. Ordinary crimes usually have a specific target.

Of the three elements above mentioned, the last one has been the most alarming in recent years. The objective of terrorists is not to kill as many people as possible. Their tactics are aimed at creating a sense of fear and insecurity among the civil population and public authorities.⁽²⁴⁾ They often target individuals or places with a symbolic value, or crowded places, involving innocent victims. However, their aim is not to kill them, but rather to send a message to the government or specific persons, who are the real focus of terrorists.

Neither the aim nor the modus operandi of terrorists are to be considered requirements able to provide a reliable evaluation of international terrorist crimes.⁽²⁵⁾ In order to give a proper evaluation of terrorism as an international crime, it is necessary to consider the legal aspect a terrorist act undermines and the evaluation of inadmissibility of the infringement of this juridical aspect by States.

The first aspect is referred to the human rights violated by the terrorist crime, and they are, for example, the rights to life and of physical integrity, protected at an international level. However, the international community perceives the death of civil

⁽²³⁾ CONTE, *supra* note (21), pp.9-10.

⁽²⁴⁾ M. DI FILIPPO, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, in *EJIL* (2008), vol.19 no.3, p.542.

⁽²⁵⁾ DI FILIPPO, *supra* note (24), pp.543-545.

population differently from the death of diplomats and State agents in general. This is because State agents embody the State, they have a symbolic value, and they are usually the central focus of terrorist attacks, because they represent what terrorists want to reverse: the security and integrity of a State.

From another perspective, civilians are not ready to face serious attacks, and they are extraneous to the reasons for which terrorists are so violent. They are only casualties. This is even more frustrating for the international community, because terrorists appear not to be sensible to the essence of a human being. They devalue and destroy life.

The international community also makes reference to the set of international rules that are related to the exercise of violence. Combatants are forbidden to kill civilians during armed conflicts, where the use of force is allowed. During peacetime the use of force is forbidden and to be considered exceptional and temporary.

Following this reasoning, terrorist crimes receive a special treatment under criminal law, because they are based on the objective of spreading panic and insecurity among civil population, leaving in the shadows the true motive of their actions, which is mainly political or a miscellany of various ideals.

The explanation behind the criminalization of terrorists' behavior and not of their ideals lies in the universal value of human life appreciated by the international community. When the civilian population of an affected State is hit in a massive, indiscriminate way, then it is possible to speak of terrorist activity, because the generalized feeling is that of fear and panic. If the perception that a specific organized group carries out terrorist attacks is added, the sense of fear and insecurity is even amplified.

The theoretical approach followed by part of the doctrine, considering both the rights infringed and the evaluation of the acts that the international community makes, originates two classes of "specially violent"⁽²⁶⁾ crimes: one is referred to violent actions undermining civilian's right to life, physical integrity, and freedom, which are condemned by the international community; the other one refers to violent crimes against State agents' rights towards which the community has not a common view of condemnation, because of the symbolic value of the persons involved.

In this case, it is possible to affirm that the former type of violent crimes is often connected to the intention of spreading a sense of terror and insecurity among the civil population; the latter, instead, has a political end, because of the targets it chooses.⁽²⁷⁾

⁽²⁶⁾ DI FILIPPO, *supra* note (24), p.546.

⁽²⁷⁾ DI FILIPPO, *supra* note (24), pp.546-547.

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Thus, the core element which usually defines terrorist acts is ideology.⁽²⁸⁾ In particular, there are strong political and religious motivations behind terrorists' behavior. The principal motivation of a terrorist act is connected to a higher cause. Of course, an individual who perpetrates acts of terrorism may *per se* be motivated by anger or revenge in carrying out the specific act, according to his personal background. But if a whole organization is taken into consideration, it can be noticed that terrorists follow an external cause in carrying out their crimes.

The ideological motivation of a terrorist act can be divided into two focuses: one is political and social, whose practical forms are secession, insurgency and regional retribution; the other one is mainly religious, and it involves the "global jihad."

1.2. The political and social motivations: focus on secession, insurgency and regional retribution.

The central issue when considering the political purpose of a terrorist act is to distinguish it from an act of self-determination. In States where a dictatorship or a strict regime is in place, often responsible for human rights violations, can national liberation movements use terrorist tactics in order to free the country from the dictatorial regime? Are they justified because they try to become free from the political power? When does an act of self-determination becomes an act of terrorism?

The doctrine is still discussing the issue, but it is far from reaching a definite conclusion. This because the boundaries of one term blur into the other. Secession is a political motive behind a terrorist attack, but it is also a motive that lies in the struggle for self-determination.

During the second half of the XX century, there was a certain sympathy for "freedom fighters", because they fought for a high cause: freedom and independence. Therefore, when considered by the international community, especially by those States that were directly affected by the need for independence in their development, freedom fighters' tactics were judged with less severity. The main cause of this warm judgment lied in the firm conviction that their extreme acts were often due to a real risk of suffering ill-

⁽²⁸⁾ CONTE, *supra* note (21), pp.10-17.

treatment if not successful. However, nowadays, national liberation movements are far from being exempted from any restrictions in terms of terrorist tactics to obtain independence.⁽²⁹⁾

In the first resolutions of the United Nations addressing the issue of terrorism, the General Assembly maintained firm the right to self-determination and independence of peoples under colonial, racist or other forms of domination, and reaffirmed the legitimacy of the struggle of national liberation movements in accordance with the principles of the Charter of the UN and other international instruments.⁽³⁰⁾

All people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁽³¹⁾

As far as insurgency and regional retribution are concerned, it is necessary to recognize that they have in common with secession the fact that they are important political motives which could lead a group to carry out violent acts of terrorism.

They are usually in place when there is an occupation of a territory by foreign military. They are achieved by acts within the occupied territory or towards the foreign military forces outside the occupied territory.

Insurgency and regional retribution have been alleged as the central motives lying in terrorist acts perpetrated against the American forces which invaded Afghanistan and Iraq in 2003. Examples of the violent reaction of part of the population can be found in a manifesto by Salem Almakhi aired on Aljazeera in 2002 which warned Christians and the members of the alliance against al-Qaeda; or also in the attacks to the United Nations headquarters in Baghdad in 2003.⁽³²⁾

⁽²⁹⁾ DI FILIPPO, *supra* note (24), pp.548-549.

⁽³⁰⁾ CONTE, *supra* note (21), p.12. Reference to UN Doc A/RES/27/3034 (1972), available at <http://www.untreaty.un.org>.

⁽³¹⁾ *International Covenant for the protection of Civil and Political Rights* (ICCPR), adopted by General Assembly resolution 2200 (XXI) of 16 December 1966 and entered into force on 23 March 1976. Reference to article 1(1). It is available at <http://www2.ohchr.org/english/law/ccpr.htm>. For more information about the discussion on the right to self-determination and the issue of national liberation movements, see Report of the Sub-Commission Special Rapporteur on terrorism and human rights, Specific Human Rights Issues: New priorities, in particular terrorism and counterterrorism, UN Doc E/CN.4/Sub.2/2004/40 (2004); and UN Doc E/CN.4/Sub.2/1997/28 (1997) at <http://www.unhchr.ch>.

⁽³²⁾ CONTE, *supra* note (21), pp.13-14. Reference to note (27). Salem Almakhi, "Mending the Hearts of the Believers". He is said to be one of Usama bin Laden's supporters and admirers and he is said to have strong relations with al-Qaeda's operations.

1.3. The religious motivation: focus on the “global jihad.”

Religion holds a special position among the motivations of terrorists. As an example, the afterlife rewards of a suicide bomber (Shahid) were:⁽³³⁾

When the Shahid meets Allah, he will be forgiven from the first drop of blood. He is saved from the grave. He sees his place in heaven. He is saved from the great horror. He is given 72 dark-eyed women. And he is champion of the right for 70 members of his family. A crown is placed on his head, with a precious gem. That is better than anything that exists in this world.

The statement itself is clear when affirming that Allah does not perceive the murder of innocent people as a crime. This means that terrorists evaluate their conduct according to their ideology, the unlawfulness of the act being absolutely irrelevant.

Terrorism has always been considered as a phenomenon perpetrated by radical Muslims; however this prejudice is far from reality. Terrorists can be of every nationality and faith. In the United Kingdom, for example, there is the Irish independent movement (IRA); in Spain the Euskadi movement to free the Basque region (ETA); in Italy there were the anarchical Red Brigades. Following this reasoning, terrorism is not only matter of radical Muslim, even though recent years have shown that terrorists pursuing Muslim faith are a large percentage.

The terrorist aspect lies in a radical interpretation of the already radical school of Hanbali, from which al-Qaeda and Bin Laden’s supporters come. Al-Qaeda’s aim is to spread the Muslim faith and destroy the supporters of modernity. Modernity is perceived as an evil force which prevents the community of Islamic believers from recollecting in a prosperous region without State borders. It claims that the duty to eliminate Western modernity and in particular the Americans and its allies derives from a religious ruling (fatwa) directly coming from Allah.⁽³⁴⁾

⁽³³⁾ CONTE, *supra* note (21), p.11. Reference to note (13). This statement was uncovered by intelligence agencies and aired on Israeli television in 2005. It was delivered by Dr. Ismaeli Radwan, Sheik of the Ajlin Mosque in the Gaza Strip, and it is part of a work called “Paradise”.

⁽³⁴⁾ As stated in the World Islamic Front Statement of 1998 entitled “Jihad against Jews and Crusaders”. Reference to note (21), pp.15-16, at note (38).

Therefore, the minority radical school of Hanbali is somehow responsible for the fundamentalist interpretation of Qur'an. In particular, this school has been strongly encouraged by the government of Saudi Arabia, which has ruled that judges discount the testimony of people who are not practicing Muslim faith according to the school of Hanbali.⁽³⁵⁾

2. Terrorism as a threat to international peace and security.

Terrorist crime is founded on three core elements: the serious violation of essential rights, like the right to life, to physical integrity, to personal freedom, of civil population; the intention to spread terror and insecurity through indiscriminate, violent mass attacks; and the presence of a terrorist organization able to plan and carry out violent actions.⁽³⁶⁾

The two main classes of international crimes are crimes against humanity and war crimes. International terrorism may be included in the latter group, if it is considered that war crimes involve alternatively the use or the threat to use force against innocent people or the use or the threat to use force in an indiscriminate and cruel manner during an armed conflict.⁽³⁷⁾

However, the Rome Statute⁽³⁸⁾, which established the International Criminal Court, has made no reference to international terrorism and has not included it within war crimes. Furthermore, war crimes necessarily refer to international humanitarian law and warfare, whereas terrorism can occur both in war and peace time. Thus, only one of the three characteristics of terrorism can be included in the class of war crimes.

Therefore, it would be useful to take into consideration the possibility to include terrorism among the crimes against humanity. In this case, this class of crimes allows for a more liberal interpretation of the term. Crimes against humanity can occur in peace time, they involve systematic and widespread violations of civilians' basic rights (through cruel and inhuman attacks), and are perpetrated by organized groups or networks. However, terrorism must include the intention of the perpetrators to instill fear and

⁽³⁵⁾ More information on Hanbali school of interpretation of the Qur'an at <http://www.globalsecurity.org/military/intro/islam-hanbali.htm>.

⁽³⁶⁾ DI FILIPPO, *supra* note (24), p.561.

⁽³⁷⁾ DI FILIPPO, *supra* note (24), pp.564-565.

⁽³⁸⁾ *Rome Statute of the International Criminal Court* (ICC), adopted on 17 July 1998, available at <http://www.untreaty.un.org/cod/icc/statute/rome.htm>.

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insecurity among civil population, the so called *mens rea*, because the main objective of a terrorist attack is to spread terror and a generalized sense of fear and insecurity, it is not to kill people *per se*.

In addition, legal literature is still discussing whether crimes against humanity perpetrated by organized private groups may be associated with state-like actors, which embody a *de facto* territorial authority.⁽³⁹⁾

The threat to international peace and security was first mentioned in article 39 of the United Nations Charter, which has stated that the Security Council is the competent organ in determining the existence of an act of aggression, a threat to international peace and security or a breach of peace. Further, the Security Council has the duty to make recommendations and undertake coercive measures under Chapter VII thereof.⁽⁴⁰⁾

The threat to international peace and security in the UN Charter is described as an extremely broad term, which could be liberally interpreted. It becomes specific only when the Security Council's powers are in place.

Initially, in its first resolution in 1985, the Security Council labeled the suicide attempts in the airports of Rome and Vienna of the same year as "manifestations of international terrorism [...], offences of grave concern"⁽⁴¹⁾ to the community, causing serious consequences for human rights. The acts of terrorism were condemned *per se*.

After September 9/11, the Security Council has invoked a threat to international peace and security because the acts of terrorism perpetrated were referred to state-like actors highly involved in the promotion of those acts. Hence, whenever an act of terrorism occurred, the international community concentrated its attention on the State involved. For example, the 1988 destruction of Pan-Am flight over Lockerbie was perceived as an act against peace and security perpetrated by Libyan authorities, and the State itself was condemned, not the act of terrorism.⁽⁴²⁾

Security Council resolutions adopted post September 9/11⁽⁴³⁾ defined the threat to international peace and security caused by terrorist acts as general and permanent.⁽⁴⁴⁾ "General" refers to any act of terrorism, in broad terms. "Permanent" refers to the fact that

⁽³⁹⁾ DI FILIPPO, *supra* note (24), p.566.

⁽⁴⁰⁾ *Charter of the United Nations*, adopted on 26 June 1945, Chapter VII, article 39. Available at <http://www.un.org>.

⁽⁴¹⁾ S/RES/579/1985, adopted on 18 December 1985, available at <http://www.untreaty.un.org>. See also R. GILES-CARNERO, in P. A. FERNÁNDEZ-SÁNCHEZ, *International Legal Dimension of Terrorism*, Leiden, Martinus Nijhoff Publishers, 2009, p.59.

⁽⁴²⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (41) p.60.

⁽⁴³⁾ S/RES/1368/2001 and S/RES/1373/2001, available at <http://www.untreaty.un.org>.

⁽⁴⁴⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (41), pp.61-66.

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an act of terrorism has various forms in practical realization; it is referred to any type of terrorism (it may be cyber terrorism, or nuclear terrorism, or also suicide bombings).

The generic definition of a threat to international peace and security aims at establishing a broad authorization to adopt general and permanent countermeasures. This reasoning allows the Security Council to make assertions on hypothetical future events, which are not specifically defined in the moment of describing the threat to peace and security.

Nevertheless, this broad description of an act of terrorism as a threat to international peace and security, provides States with the discretionary power of deciding on any specific violent act as a threat to peace, hence an act of terrorism. It is a dangerous power, because States may decide to consider an act against peace and security as an act which is not terrorism at all. This conundrum could be easily resolved by establishing a definition of terrorism in general terms. States have no criteria of reference to identify specific acts as terrorists, they do it arbitrarily.⁽⁴⁵⁾

States are bound to Security Council resolutions, many of whom impose counterterrorism measures to be taken against a threat to international peace and security. For example, resolution 1373 (2001) requires member States to control funds of persons and groups suspected of terrorist activity, and imposes international cooperation on criminal investigations and other police matters to prevent future attacks. Resolution 1540 (2004) requires member States to prevent non-state actors from acquiring weapons of mass destruction.⁽⁴⁶⁾

The objective of the Security Council is to extend its quasi-legislative powers; indeed, its resolutions are coercive and pre-eminent in respect of all other instruments. The Security Council believes there is a need to fight against new threats, such as terrorism, which has become more violent and cruel. This need is necessarily accompanied by new competencies that go beyond States' powers to negotiate. Of course, this attitude is not envisaged by the Charter of the United Nations. In other words, the Security Council has the power to extend its competencies; and there seems to be a general consensus among States. However, this issue is still open to debate.

The absence of a definition of terrorism is a serious concern for the international community. States are forced to identify acts of terrorism on a case-by-case basis, looking at what specific terrorist act is condemned by Security Council resolutions.

⁽⁴⁵⁾ B. SAUL, *Definition of "Terrorism" in International Law*, Oxford, Oxford University Press, 2006.

⁽⁴⁶⁾ S/RES/1373/2001, adopted on 28 September 2001, and S/RES/1540/2004, adopted on 28 April 2004. They are both available at <http://www.untreaty.un.org>.

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Security Council resolutions take into consideration acts of terrorism perpetrated by both State and non-state actors. The latter group is always linked to a specific State, though.

Member States are expressly allowed to give their own definition of terrorism; of course, this creates confusion and serious problems for the implementation of cooperation measures among States, which are binding.⁽⁴⁷⁾ Thereby, States have an opportunity to abuse the definition in order to prosecute political opponents and violate human rights provisions.

The Security Council tried to prevent this behavior with resolution 1566 (2004), which gives some elements for a definition of the term. In particular, terrorism is viewed as a set of criminal acts against the population, which take the form of serious injuries or attacks, committed with *mens rea* (the voluntary spread of terror and fear), with the objective of intimidate civilians or compel the authorities or other public entities to do or abstain from doing any act. These criminal acts are condemned and prosecuted according to the international conventions and protocols relating to terrorism. The above definition represents a non-binding reference.

However, this resolution has had some important critics. First, it is not fully operational, because the Security Council has already stated in 1985 that terrorism is considered as a threat to international peace and security. Second, the States' power to give a personal definition of terrorism is still in place. And finally, the definition given by resolution 1566 (2004) is not coherent with the specific definitions in other international instruments, therefore it may contradict them and create even more confusion.⁽⁴⁸⁾

The lack of a definition of terrorism is even more annoying if one takes into account that thereby the threat to international peace and security concept becomes more ambiguous, and creates divergent definitions within the international community. These divergent definitions may allow States to legally infringe human rights law in the name of international peace and security protection.⁽⁴⁹⁾

Another question raised by the lack of a definition concerns the difference between international acts of terrorism and internal acts of terrorism. Resolution 1368 (2001)⁽⁵⁰⁾ has affirmed that any act of terrorism is considered a threat to international peace and security. At first sight, the definition seems to take into consideration only acts of terrorism

⁽⁴⁷⁾ S/RES/1373/2001, *supra* note (46). See also note (42), p.67.

⁽⁴⁸⁾ S/RES/1566/2004, adopted on 8 October 2004, para.3. It can be consulted on <http://www.untreaty.un.org>.

⁽⁴⁹⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (41), pp.68-69.

⁽⁵⁰⁾ S/RES/1368/2001, *supra* note (43).

at an international level. However, the Security Council later modified the definition so as to include the domestic nature of some acts of terrorism (usually those whose motivation is political and social, like secession or regional retribution).

Thus, terrorism is classified as a general and permanent threat to peace and security, including both international and internal acts thereof.⁽⁵¹⁾

3. Attempts to define terrorism.

The United Nations Terrorism Prevention Branch has described terrorism as a unique form of violent crime, involving both warfare and peacetime, with ideological and religious motivations.⁽⁵²⁾

[...] terrorist organizations are usually small, making detection and infiltration difficult. Although the goals of terrorists are sometimes shared by wider constituencies, their methods are generally abhorred.

This statement, as many others in international conventions and resolutions on terrorism, does not define what a terrorist organization is, or what the term “terrorism” means, but rather it gives some references about the main characteristics of a terrorist organization: terrorists organize in small cells, difficult if not impossible to infiltrate. The ideology on which they base their activities is widely accepted and recognized, even though the manner through which they carry out their acts is widely rejected. As said in previous paragraphs, the religious extremist aspect is typical of the Hanbali school of interpretation, to which only a small part of the population adheres.⁽⁵³⁾

The United Nations Office on Drugs and Crimes tried to define terrorism as:⁽⁵⁴⁾

An anxiety-inspiring method of repeated violent action, employed by a (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby [...the victims] are not the main targets. The

⁽⁵¹⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (41), p.70.

⁽⁵²⁾ United Nations Office on Drugs and Crimes (UNODC), “UN Action Against Terrorism”, available at <http://www.odccp.org/terrorism.html>.

⁽⁵³⁾ See *supra* para.1.3. of this dissertation.

⁽⁵⁴⁾ CONTE, *supra* note (21), p.21.

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immediate human victims are chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and [convey a message]. [...] to manipulate the main target (audience), turning it into a target of terror, of demands, or of attention, depending on what the intimidation, coercion, or propaganda is primarily sought.

From the point of view of the Council of Europe, the Parliamentary Assembly has defined the violent crime of terrorism as:⁽⁵⁵⁾

Any offence committed by individuals or groups [...] to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a [feeling] of terror among official authorities, certain individuals or groups in society, or the general public.

In the above-mentioned description it is easy to identify the three elements characterizing terrorism: focus, participants and victims.

Nevertheless, when considering the elements that describe the crime of terrorism, it is important to focus on the analysis on the part of the international community. Legal literature has pointed out a twofold analysis of the term: one is subjective and the other is objective.⁽⁵⁶⁾ The former is typical of several Arab States, like Syria, Libya and Iran, which have claimed to consider relevant the purpose of terrorist activity, leaving aside the so called “freedom fighters”, those who struggle for self-determination. The latter is typical of the majority of States, which do not take into consideration the purpose of the action when trying to define the crime of terrorism.

This dichotomy between States’ interpretation is due to the different development of every single State. In particular, Arab countries have daily problems with the issue of national liberation movements, as other colonial countries do, because of foreign forces’ occupation of their territory. Western States have had a completely different historical development, hence they are less concerned with the purposes of national liberation movements.

⁽⁵⁵⁾ Recommendation 1426 (1999) of the Parliamentary Assembly of the Council of Europe, “*European Democracies Facing up to Terrorism*”, adopted on 23 September 1999. See also note (54).

⁽⁵⁶⁾ CONTE, *supra* note (21), pp.22-23.

Also the UN supports the objective approach advanced by Western countries. In particular, Security Council resolution 1373 (2001) states that “[...] claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.”⁽⁵⁷⁾

The lack of a comprehensive definition of the term does not depend upon a technical issue; on the contrary, the central problem lies in divergent opinions of government authorities. In other words, there is not a common definition of terrorism because of political disagreement.⁽⁵⁸⁾

The definitions given by States has reflected differences only in semantics, but not in substance. In addition, several States have set a mere list of elements, without clearly specify them. This ambiguity creates doubts and the opportunity for an abuse of power, in particular through the infringement of human rights provisions.

According to an author, the international community has reached an agreement on the wrongfulness of terrorism. He describes the elements that define this crime as conjunctive and non alternative. First, terrorism involves serious violence, which in most cases implies the infringement of human rights. Hence, a definition of terrorism should consider the prohibition of serious violence intended to cause bodily injuries or even death, because it violates the rights to life and security of person. The prohibition should be extended also to infrastructures and facilities where their destruction is intended to endanger civilians.

A further step towards a clear definition may include a listing of acts which are considered serious violence, for example murder, or physical assault. The enumeration may be attached to regional agreements or specific terrorism treaties to be more effective.

A second element of wrongfulness is connected to motivations and purposes of a terrorist act. A terrorist act has the objective of *seriously* intimidating a population; or of *unduly* compelling a government or other entity to do or abstain from doing any act.

However, terrorist motivations may be political or religious, but also private or public. In other words, a terrorist may want to obtain a result for himself or for the “wealth” of his group. In this case, it is necessary to distinguish those practical acts involving private purposes, like blackmail, extortion, personal profit, from those broadly referred to political independence, secession, or religion, which are public.

⁽⁵⁷⁾ SC/RES/1373/2001, para.3(g).

⁽⁵⁸⁾ SAUL, *supra* note (47), pp.57-66.

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A further element is the threat to peace and security. Terrorism, as said before, is considered a threat to international peace and security. It has been noticed that this expression seems not to include national terrorism, within a State's boundaries. The international aspect is relevant if it is taken into consideration that terrorism implies cross-border organization or effects. It may involve more than one country, and it may also infringe foreign communities or interests.

International conventions such as the *1979 Hostage Convention*, or the *Terrorist Bombings Convention of 1997*, or even the *Convention for the Suppression of the Financing of Terrorism of 1999*⁽⁵⁹⁾, do not apply if the crime is committed within a single State, or the offender and the victims are nationals of that State, or the perpetrator of the offence is found in the territory of the State affected. It is necessary to include a definition in which both the international and the internal feature of terrorism are clearly stated.

A final element to be described is the intention of a terrorist to instill terror and insecurity among a population. Bare intimidation or coercion are not as strong as the term terror. It is important to include this element in the definition of a crime of terrorism, because, besides the central objectives and motives, a terrorist shows the intention to create a feeling of extreme fear, accompanied by serious psychological consequences. It is necessary to remember that acts which are not intended to create serious risks to civilians, like protests and dissent, are to be considered an abuse of the freedom to expression, whereas they do not represent acts of terrorism.⁽⁶⁰⁾

To sum up, an act of terrorism can be defined as:⁽⁶¹⁾

- 1) Any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including by acts against property;
- 2) where committed outside an armed conflict;
- 3) for political, ideological, religious or ethnic purpose; and
- 4) where intended to create extreme fear in a person, group or the general public, and:
 - a) seriously intimidate a population or part of it, or
 - b) unduly compel a government or an international organization to do or abstain from doing any act.

⁽⁵⁹⁾ They are all available online at <http://www.untreaty.un.org>.

⁽⁶⁰⁾ The elements which describe an act of terrorism can be consulted on pp.59-65 of B. Saul's work. Reference to note (45).

⁽⁶¹⁾ SAUL, *supra* note (45), pp.65-66.

5) Advocacy, protest, dissent or industrial action which is not intended to cause death, serious bodily harm, or serious risk to public health or safety does not constitute a terrorist act.

4. International and regional conventions relating to terrorism.

The international community has adopted various conventions on terrorism-related matters, although a comprehensive definition of the term is still lacking.

The international conventions on terrorism have been developed “de manière empirique et réactive, au gré des tendances fortes du terrorisme.”⁽⁶²⁾ They apply only to States parties and are of limited application because of the specific subject matter of each convention.

The regional conventions and protocols relating to terrorism are binding only upon States parties and they usually trace the obligations imposed by international treaties. If a State is party to both regional and international conventions, it must be aware that the international ones are pre-eminent in respect of the regional ones.

4.1. The conventions adopted within the United Nations.

There are thirteen conventions and protocols⁽⁶³⁾, of which eleven are multilateral conventions and two are protocols, adopted by the United Nations. Their subject matter

⁽⁶²⁾ J. C. MARTIN, *Les Règles Internationales relatives à la Lutte contre le Terrorisme*, Bruxelles, Bruylant, 2006, p.103. The quotation means that the international conventions and protocols have been adopted on the basis of practical experience with terrorist attacks.

⁽⁶³⁾ *Convention on Offences and Certain Others Acts Committed on Board Aircraft*, 14 September 1963, 20 U.S.T.2941, 704 U.N.T.S. 219; *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 22 U.S.T.1641, 860 U.N.T.S. 105; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 24 U.S.T. 546565, 974 U.N.T.S. 178; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, 14 December 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; *International Convention against the Taking of Hostages*, 17 December 1979, T.I.A.S. n. 11081, 1316 U.N.T.S. 205; *Convention on the Physical Protection of Nuclear Material*, 3 March 1980, T.I.A.S. n. 11080, 1456, U.N.T.S. 101; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (attached to the Montreal Convention), 24 February 1988, S. Treaty Doc. n. 100-19, 1589 U.N.T.S., 474; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, S. Treaty Doc. n. 101-1, 27 I.L.M. 668; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms*

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refers to specific aspects of terrorist acts, for example on board aircraft, in public places like airports, or on maritime platforms. They can also involve assets freezing and financial transactions limitations, or the taking of hostages.⁽⁶⁴⁾

As for the content, international conventions can be divided into repressive and preventive. Repressive conventions force States to criminalize specific acts of terror and find a common base in the principle *aut dedere aut judicare*, meaning that States are forced to try or to extradite the suspects or agents of a criminal act. Instead, preventive conventions aim at preventing terrorist attacks, by negating access to financial assets and material supply.⁽⁶⁵⁾

The *International Convention for the Suppression of Acts of Nuclear Terrorism* is among the most recent conventions, and it was adopted on 13 April 2005 by the United Nations. In 2010 the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* and the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* were adopted.⁽⁶⁶⁾ However, a treaty with the potential to impact a wider audience and a wider subject matter is the *International Convention for the Suppression of the Financing of Terrorism*⁽⁶⁷⁾, adopted by the UN General Assembly in 1999.

The convention makes reference to Security Council resolution 1373 (2001), which is binding upon all member States. It is a very important document because it provides States with a definition of an “act of terrorism”. In particular it states that:⁽⁶⁸⁾

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or

Located on the Continent Shelf, 10 March 1988, 27 I.L.M. 685; *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, U.S. Treaty Doc. n. 103-8, 2122 U.N.T.S. 359; *International Convention for the Suppression of Terrorist Bombings*, 15 December 1998, S. Treaty Doc. n. 106-6, 37, I.L.M. 249; *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, S. Treaty Doc. n.106-49, G.A. Res. 54/109, U.N. GAOR, 54th Sess., Supp. n. 49, U.N. Doc. A/54/49; *International Convention on the Suppression of Acts of Nuclear Terrorism*, UN General Assembly Resolution 59/290, 13 April 2005. All these conventions can be consulted on <http://www.untreaty.un.org>.

⁽⁶⁴⁾ CONTE, *supra* note (21), p.24.

⁽⁶⁵⁾ DI STASIO, *supra* note (14), p.33-35. A first attempt to conclude a treaty on terrorism was made in 1937, with the *Geneva Convention on the prevention and repression of terrorism*. It never entered into force, because the Convention was signed by twenty four States and ratified only by India in 1941.

⁽⁶⁶⁾ *International Convention on the Suppression of Acts of Nuclear Terrorism*, UN General Assembly Resolution 59/290, 13 April 2005, and entered into force on 7 July 2007. The *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (Beijing Convention) and the *Protocol Supplementary to the Convention for the Suppression of the Financing of Terrorism* (Beijing Protocol), signed on 10 September 2010 and deposited at the International Civil Aviation Organization (ICAO), have not entered into force yet. They are available at <http://www.untreaty.un.org>, and <http://www.icao.int>.

⁽⁶⁷⁾ See *supra* note (63).

⁽⁶⁸⁾ *International Convention for the Suppression of the Financing of Terrorism*, art.2, para.1.

collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- b) any other act intended to cause death or seriously bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.

The Convention does not only provide the definition of an act of terrorism, but under article 8 it provides States with the measures they have to take in order to prevent terrorists from accessing funds and financial assets to plan, organize and commit their attacks. Indeed, States shall take the appropriate measures in order to identify, detect and freeze or seize any fund.⁽⁶⁹⁾ The importance of this convention lies in the fact that it tries to eradicate terrorism by imposing repressive and preventive measures, which literally stop terrorist financing.

4.2. Regional conventions and protocols.

At a regional level, the number of conventions and protocols is enormous; it is worth considering that regional organizations cover the whole international community.

It will be sufficient to mention some of the most important regional conventions and protocols. Within the Organization of the African Union (OAU), the *Convention on the Prevention and Combating of Terrorism* has been adopted in 1999, and amended by *Protocol to the OAU Convention on the Prevention and Combating of Terrorism* in 2004. Within the League of Arab States, the *Convention on the Suppression of Terrorism* has been adopted in 1998. The Council of Europe adopted the *European Convention on the Suppression of Terrorism* in 1971, and a Protocol amending the Convention in 2003. It also issued a declaration on 12 September 2001, immediately after 9/11 events, which is the *Declaration of the Committee of Ministers on the Fight against International*

⁽⁶⁹⁾ See *supra* note (68), article 8.

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Terrorism. The Council of Europe adopted the *Convention on the Prevention of Terrorism* in 2005.⁽⁷⁰⁾

The amount of documents issued by the organs of the European Union is huge and it is beyond the scope of this dissertation to deal with all of them. The most interesting ones, referred to counterterrorism measures, are two Common Positions, which implemented Security Council resolution 1373 (2001): Common Position 2001/930/CFSP⁽⁷¹⁾, dealing with the fight against terrorism, and Common Position 2001/931/CFSP⁽⁷²⁾, on the implementation of specific counterterrorism measures, both adopted by the Council of the European Union on 27 December 2001.

In particular, in Common Position 2001/931/CFSP, article 1 defines an act of terror by means of determining the crime *de equo*, i.e. focusing on the purpose of the agent that commits or threatens to commit the act of terrorism. It relies on the intimidating aspect of the act of terror, the intention to create a sense of widespread fear and insecurity.

As said before, the fact that a specific definition of terrorism is left to States' discretion, allows them to interpret the term in a broad sense, which can lead to a condemnation of any act supposed to intimidate, even those that are not mentioned by article 1 of the Position.

The European definition of terrorism given by Common Position 2001/931/CFSP has not fulfilled the prerequisite of legitimacy, thereby creating "fear that both urban

⁽⁷⁰⁾ *Organization of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance*, adopted by the Organization of American States (OAS) in Washington D.C. on 2 February 1971; *European Convention on the Suppression of Terrorism*, adopted by the Council of Europe (CoE) in 1971, and amended by *Protocol to the European Convention on the Suppression of Terrorism* in 2003; *South East Asian Association for Regional Co-operation Regional Convention on Suppression of Terrorism*, adopted by the South East Asian Association for Regional Co-operation (SAARC) in Strasbourg on 27 January 1977, and amended by *Protocol to the South East ASIAN Association for Regional Co-operation Convention on Suppression of Terrorism* on 6 January 2004; *Arab Convention on the Suppression of Terrorism*, adopted by the League of Arab States in Cairo on 22 April 1998; *Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism*, adopted by the Commonwealth of Independent States in Minsk on 4 June 1999; *Convention of the Organization of the Islamic Conference on Combating International Terrorism*, adopted by the Organization of the Islamic Conference (OIC) at Ouagadougou on 1 July 1999; *Organization of the African Union Convention on the Prevention and Combating of Terrorism*, adopted by the Organization of the African Union (OAU) at Algiers on 14 July 1999, amended by *Protocol to the African Union Convention on the Prevention and Combating of Terrorism* in 2004; *Declaration of the Committee of Ministers on the Fight against International Terrorism*, adopted by the Council of Europe on 12 September 2001; *Shanghai Cooperation Organization Convention on Combating Terrorism, Separatism and Extremism*, adopted by the Shanghai Cooperation Organization (SCO) in 2001; *Council of Europe Convention on the Prevention of Terrorism*, adopted by the Council of Europe in 2005; *Association of South East Asian Nations Convention on Counter Terrorism*, adopted by the Association of South East Asian Nations (ASEAN) in 2007. All these conventions are available online at http://www.unodc.org/tldb/en/regional_instruments.html.

⁽⁷¹⁾ G.U.C.E., L. 344/90, 27 December 2001.

⁽⁷²⁾ G.U.C.E., L. 344/93, 27 December 2001.

violence and no global manifestations could be considered acts of terrorism.”⁽⁷³⁾ A broader interpretation of the dispositions can cause possible abuse of power, which violates the fundamental human rights of the persons involved.

5. A comprehensive definition of terrorism must take into consideration human rights provisions.

So far, neither international nor regional conventions or protocols have been able to solve the central question: a comprehensive general definition of terrorism. International instruments on terrorism refer to specific aspects of terrorist events, on the basis of experience.

The Security Council and the General Assembly have rejected a subjective interpretation of the term, which would otherwise justify national liberation movements fighting for self-determination; they have rather accepted that terrorist acts are to be condemned and prosecuted regardless of the motivations of their perpetrators.⁽⁷⁴⁾

However, international conventions on terrorism are helpful when used as a “trigger” in determining what conduct should be identified as terrorist.

Security Council resolution 1566 (2004) provides member States with a useful non-binding guideline on what is to be considered a terrorist conduct to condemn and prosecute:⁽⁷⁵⁾

- 1) Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; and
- 2) irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a Government or an international organization to do or abstain from doing any act; and

⁽⁷³⁾ DI STASIO, *supra* note (14), pp.60-61.

⁽⁷⁴⁾ CONTE, *supra* note (21), p.27.

⁽⁷⁵⁾ S/RES/1566/2004, para.3, online at <http://www.untreaty.un.org>.

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3) such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

The third point is the one expressing the trigger offence. This means that not only a state or non state actor is prohibited from carrying out acts under paragraph 1), but also those specific acts condemned by international conventions and protocols on terrorism-related issues. Of course, these three points must be considered as cumulative, they cannot be identified alternatively. The trigger offence (paragraph 3) must be accompanied with the intention to cause death or bodily injury and for the purpose of provoking a widespread feeling of terror and insecurity, or of compelling state and non state actors to do or abstain from doing any act.⁽⁷⁶⁾

Security Council resolution 1373 (2001) makes reference to an additional aspect of terrorism since it can be connected to transnational organized crime, and to other issues relating to illicit drugs, money-laundering, illegal arms trafficking, illegal movement of potentially deadly materials.⁽⁷⁷⁾

International terrorism and its countermeasures can be extremely dangerous for human rights. Terrorism is an open attack against human rights; States' countermeasures, when used improperly, often infringe human rights obligations, even though they should not.

Human rights provisions are very useful in providing the limits within which States can act to contrast terrorism; however, they represent also a problem for those States mainly concerned with national security issues.

Human rights law is necessary to prevent and contrast the rise of terrorist ideas. This because terrorism usually prospers in environments where human rights are violated, or subjected to very low standards of protection. Of course, terrorism itself is a violation of human rights, since terrorists intend to cause death or serious bodily injury, which is a clear violation of the most important right, the right to life.⁽⁷⁸⁾

Often, terrorists are of humble origins, usually unemployed, they have general low levels of schooling, and they meet in the neighborhood mosques to follow classes on

⁽⁷⁶⁾ COMMISSION ON HUMAN RIGHTS, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Promotion and Protection of Human Rights*, E/CN.4/2006/98, 28 December 2005, paras.37-38. Available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement>.

⁽⁷⁷⁾ S/RES/1373/2001, *supra* note (46), para.4.

⁽⁷⁸⁾ C. M. DÍAZ-BARRADO, in P. A. FERNÁNDEZ-SÁNCHEZ, *International Legal Dimension of Terrorism*, Leiden, Martinus Nijhoff Publishers, 2009, p.33.

Jihad. It is easy for fundamentalist organizations to manipulate them and incite them to hatred and violence.⁽⁷⁹⁾

With the adoption of resolution 1456 (2003), States parties are now required to ensure that any measure taken to contrast terrorism comply with all their obligations under international law, with specific reference to human rights, refugee and humanitarian law.⁽⁸⁰⁾

The sphere of human rights obligations covers the protection of different types of rights, such as civil, cultural, economic, political, social and the right to development. Human rights can be divided into three generation rights: first generation rights involve civil and political rights and include the right to a fair trial and the freedom of expression. Second generation rights involve economic, social and cultural rights, and include the rights to education and employment. Third generation rights, finally, involve the area of development and emergency assistance.⁽⁸¹⁾

Human rights are universal, inter-dependent and indivisible. They belong to all human beings. All modern human rights refer to the *International Declaration of Human Rights* and to other subject-specific human rights treaties.⁽⁸²⁾ The Declaration is not a treaty, but it makes reference to five specific documents: the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) with its two Optional Protocols, and the *International Covenant on Economic, Social and Cultural Rights*.⁽⁸³⁾ However, human rights obligations are not limited to these. There are other human rights-related conventions and treaties which can be added to the above-mentioned. They are both international and regional, for example the *European Convention for the Protection of Human Rights* (ECHR), which is a regional convention adopted by the Council of Europe.

Furthermore, other human rights obligations have derived from customary international law. Many of the rights mentioned in the ICCPR are of this nature. Certain rights are also part of the *jus cogens*, (peremptory norms of customary international law to

⁽⁷⁹⁾ *Ibid.*, note (78), see also Y. EL BOUHAIRI, in FERNÁNDEZ-SÁNCHEZ, p.44.

⁽⁸⁰⁾ S/RES/1456/2003, para.6.

⁽⁸¹⁾ CONTE, *supra* note (21), chapter 9, p.259. The categorisation of human rights was produced in 1979 by Karel Vasak, then head of the UN Educational Scientific and Cultural Organization (UNESCO).

⁽⁸²⁾ Office of the High Commissioner for Human Rights, *The Core International Human Rights Instruments and their Monitoring Bodies*, available at <http://www2.ohchr.org/english/law/index.htm#core>.

⁽⁸³⁾ *Universal Declaration on Human Rights*, GA/RES/3/217/1948, online at <http://www.untreaty.un.org>; *International Covenant on Economic, Social and Cultural Rights*, adopted on 16 December 1966; *International Covenant on Civil and Political Rights*, adopted on 16 December 1966; *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted on 16 December 1966; and *Second Optional Protocol to the International Covenant on Civil and Political Rights*, adopted on 15 December 1989. They are all available online at <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

which all States are subjected), from which a State is prohibited to derogate, whatever the circumstances may be. The prohibition of torture, slavery, genocide, racial discrimination, crimes against humanity, the principle of non-discrimination and the right to self-determination are widely accepted as peremptory norms of customary international law.⁽⁸⁴⁾

5.1. The International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Human rights law and the rule of law impose certain requirements that help in countering the consequences of a lack of a definition of terrorism. With reference to the protection of a person's basic rights, the *International Covenant on Civil and Political Rights* affirms that:⁽⁸⁵⁾

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Article 15 of the ICCPR states that a criminal act must be prohibited and prosecuted by law; to do so it is necessary that the law is adequately accessible to individuals in order to understand when the conduct is prohibited; and that the law is sufficiently precise so that an individual can regulate his conduct. It imposes also that States respect the principle of non-discrimination and equality before the law.⁽⁸⁶⁾

⁽⁸⁴⁾ CONTE, *supra* note (83), pp.260-261.

⁽⁸⁵⁾ *International Covenant on Civil and Political Rights* (ICCPR), adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, article 15. Available at <http://www2.ohchr.org/english/law/ccpr.htm>. 162 States are parties to the Covenant, and eight further States are signatories only.

⁽⁸⁶⁾ COMMISSION ON HUMAN RIGHTS, *supra* note (76), paras.45-46.

A State party to the ICCPR and to the *European Convention on Human Rights*⁽⁸⁷⁾ owes the protection of the rights mentioned in such instruments to individuals within its territory and subject to its jurisdiction. In this case, the term “individuals” does not refer to artificial legal persons, like organizations, corporations or foundations, nor does it refer to a collective nature of individuals. Rather, it refers to the rights of the individual.⁽⁸⁸⁾

It may happen that an individual who is not situated within the territory of a State party is subjected to ICCPR and ECHR provisions, but only in cases where the said individual is a national citizen of that State.

A State party to both the conventions has a vertical and horizontal responsibility: the former refers to the relation between the organs of a State and its citizen, since a State has the obligation to respect its citizen’s human rights. The latter refers to the responsibility of States to ensure that the rights of its citizens are not violated by other private citizens, as stated by article 1 ECHR and article 2(1) ICCPR. An example is a State’s obligation to protect the right to privacy (article 17 ICCPR) and the right not to be tortured (article 7 thereof), which are often violated by agents of the State and by other private citizens. Similarly, the ECHR has stated the prohibition of torture (article 3) and the protection of family life and privacy of a State’s citizens (article 8).

There is some difference between the two conventions as far as the obligation to adopt them within national legislation is concerned. The ECHR has stated that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.⁽⁸⁹⁾

The ICCPR has been more specific in affirming such obligation:⁽⁹⁰⁾

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

⁽⁸⁷⁾ *European Convention on Human Rights*, amended by Protocol No. 11 (ETS No. 155) and Protocol No. 14 (CETS No. 194) from the date of its entry into force on 1 June 2010, available at <http://conventions.coe.int/treaty/en/treaties/html/005-1-bis.htm>. The ECHR has 47 States parties, included the United Kingdom.

⁽⁸⁸⁾ CONTE, *supra* note (83), pp.263 and following.

⁽⁸⁹⁾ ECHR, *supra* note (87), article 1.

⁽⁹⁰⁾ ICCPR, *supra* note (85), article 2(2).

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The provision of the ICCPR is definitely clearer in expressing the obligation of the States parties to incorporate the covenant within their national legislation.

Both the conventions provide for the same rights to be protected, even though there are some slight differences. For example, the ECHR does not expressly prohibit propaganda for war, as does the ICCPR under article 20(2), nor does the ECHR expressly protect minorities. However, with reference to this latter right, the ECHR guarantees the enjoyment of rights and freedoms without discrimination on national or social origin, or association with a national minority, under article 14. Furthermore, it is unique to the ECHR the protection of the right to education (article 2 of the First Protocol).

As far as the death penalty is considered, it is prohibited by both the conventions. In particular, Second Protocol to the ICCPR requires States not to execute anyone within their territories, and to abolish the death penalty. It has made reservation during warfare, when an individual is convicted for the most serious crime of a military nature.⁽⁹¹⁾ The ECHR prohibits the death penalty and expressly provides for an exception during times of war.⁽⁹²⁾

Reservations and derogations are allowed under both conventions. In particular, both the ECHR and the ICCPR allow States parties to temporarily suspend the application of certain rights during a state of emergency which threatens the life of the nation. Article 15(2) ECHR provides for derogations from all the rights mentioned, with the exception of article 2 (right to life – which can be derogated from only if death results from lawful acts of war), articles 3 and 4(1) (prohibition of torture and of slavery and forced labor), and article 7 (no punishment without law).

The ICCPR provides under article 4 for the derogation of certain rights in time of emergency which threatens the life of a nation, with the exception of articles 6, 7, 8((1)and(2) (the right to life, the prohibition of torture and inhuman treatment, the prohibition of slavery), articles 11, 15, 16 and 18.

The ICCPR has established the Human Rights Committee (HRC) under article 28, whose main task is to monitor the compliance of States parties' behavior with the Covenant provisions. The HRC is the only competent body to make authoritative interpretations of the ICCPR. It has four supervisory functions: it considers periodic reports by States parties, in order to develop a constructive dialogue with them; it makes General Comments; it manages the inter-state complaints procedure (optional),

⁽⁹¹⁾ ICCPR, *supra* note (85), Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1 and article 2(1).

⁽⁹²⁾ ECHR, *supra* note (87), Additional Protocol 6 to the ECHR, article 1 and article 2.

depending on States parties' reciprocal acceptance of the right to complain by States; and it manages the individual communication procedure, which is available to individuals only if the State affected has become party to the First Protocol to the ICCPR.

On the other hand, the ECHR has established the European Court of Human Rights (ECtHR) as its judicial body, under article 19. The ECtHR has jurisdiction on all matters of interpretation and application of the ECHR and its Protocols, in particular on matters of inter-state cases; individual applications; and requests of the Committee of Ministers for advisory opinions.

Both the ICCPR and the ECHR provides for remedies in case of violations of their rights by States parties. In particular, the ECHR states under article 13, in identical terms as the ICCPR does under articles 2(3)(a):⁽⁹³⁾

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The ECtHR provides effective remedies depending on the violation: pecuniary loss, when the individual has suffered a financial loss as a consequence of the right's violation; non-pecuniary loss, if the victim has suffered physical or mental injury; and costs and expenses.

The ICCPR does not provide the HRC with the competency to award remedies. However, when a State is found in breach of its obligations, the HRC is required to: modify its domestic law; commute a criminal sentence or release a detained person; return a victim's passport; allow for the review of a victim's conviction; undertake investigations into the disappearance or death of a victim; provide restitution or compensation.⁽⁹⁴⁾

⁽⁹³⁾ ECHR, *supra* note (87), article 13.

⁽⁹⁴⁾ CONTE, *supra* note (81), pp.276-277.

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OVERVIEW: 1. Introduction to Intelligence. – 2. Intelligence and Terrorism. – 2.1. A definition of National Security. – 2.2. From Subversion to Terrorism. Examples from the CANZAB (Canada, Australia, New Zealand, America, Britain network of counter-intelligence organizations of the 1960s). – 3. A definition of Intelligence: domestic intelligence services and foreign intelligence services. – 4. The Intelligence Process: intelligence agencies should not have enforcement powers. – 4.1. Planning and Direction. – 4.2. Collection and Processing. – 4.3. Production and Analysis. – 4.4. Dissemination and Countering. – 5. The extended powers of intelligence agencies. – 5.1. The risk of abuse. – 5.2. Surveillance and information collection. – 5.3. Arrest, detention and interrogation. – 6. Intelligence cooperation and relationship with law enforcement authorities: extraordinary renditions, lack of accountability and human rights compliance. – 6.1. Extraordinary renditions. – 6.2. The lack of accountability and human rights compliance. – 7. Recommendations of the Panel on Terrorism, Counter-Terrorism and Human Rights. – 8. Intelligence and human rights. – 9. Intelligence programs and systems. – 9.1. HUMINT. – 9.2. SIGINT. – 9.3. MASINT and IMINT. – 9.4. OSINT.

1. Introduction to Intelligence.

Terrorism is a serious threat which involves personal, organizational, and societal levels, and whose consequences are foreseeable in the economic, psychological, political and social field.⁽⁹⁵⁾

A recent report from the National Research Council⁽⁹⁶⁾ has stated that the core challenge of terrorism is defined by three central elements: terrorism, terrorist and terrorized. Terrorism is connected with information collection, knowledge creation and dissemination.

The challenge lies in the fact that it is necessary to maximize the information collected in order to analyze terrorist threats and vulnerabilities. This is difficult to achieve because of a lack of counterterrorism databases able to integrate the various sources from which data are obtained and to make them available to researchers. Another difficulty lies in the need to find new means to predict and discover those who help terrorists from the

⁽⁹⁵⁾ ARTIFICIAL INTELLIGENCE LAB, Eller College of Management, University of Arizona, *Terrorism Knowledge Discovery Project: A Knowledge Discovery Approach to Addressing the Threats of Terrorism*, Research team: Edna Reid, Jialun Qin, Wingyan Chung, Jennifer Xu, Yilu Zhou, Rob Schumaker, Marc Sageman, and Hsinchun Chen, September 2004, p.2. Available online at http://ai-vm-s08-rs1-1.ailab.eller.arizona.edu/people/edna/AI%20Lab_terrorism%20Knowledge%20Discovery%20SI%20_apr04.pdf.

⁽⁹⁶⁾ See *supra* note (95), at note (12). NATIONAL RESEARCH COUNCIL, *Making the Nation Safer: the Role of Science and Technology in Countering Terrorism*, Washington, D.C., 2002, 339.

planning to the achieving of their purposes, since it is well known that terrorists are helped by individuals alien to criminal acts, mainly financial supporters, difficult to detect.

The major challenge lies on information access management, since it is difficult to identify where to start the search, what type of information is necessary and available, and where to find it. "Thus, advanced techniques to support intelligent information searching and techniques to analyze and map terrorism knowledge domains are urgently needed."⁽⁹⁷⁾

Terrorist is the second category mentioned by the National Research Council, and it is connected with the definition of the dynamic evolution of terrorists. In particular, it makes reference to how to foresee terrorists' activities, groups and threats.

The last category is connected to the victims of terrorists, the terrorized. It involves how to give systematic access to system-level thinking about terrorism research to educators, students and the general public, in order to make them prepared to contrast terrorist attacks efficiently.

Intelligence is commonly believed to be important for the efficacy of a counterterrorism strategy. Spies and covert agents have always been fascinating for the mystery they carried with them. They date back to the ancient Greece and Rome, when kings and emperors, in order to maintain their power, sent spies everywhere to foresee possible "coup d'état".

At the beginning of the XX century, and during the First and Second World War, intelligence has developed rapidly and has become an important support to military operations. It reached its highest climax during the Cold War, when covert agents infiltrated in both sides of the iron curtain.

With the spreading of terrorism at the beginning of the XXI century, intelligence has overcome new frontiers. It is not only a tool which supports military operations, but also a means to gather information and evaluate the real risk that terrorism poses. Thereby, intelligence has become highly involved in civil matters.

The most common intelligence services are those established in the United States, such as the Central Intelligence Agency (CIA); or the National Security Agency (NSA); or the Federal Bureau of Investigation (FBI); or the US Army Intelligence Command and the Home Front (USAINTC). Of course, every State has its own intelligence agency, with specific tasks.

There can be more than one agency per State, since the tasks of an intelligence service are various, and they range from domestic issues up to foreign/international

⁽⁹⁷⁾ *Cit. ibid.*

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issues. The need for more than one agency against terrorism is due to the fact that terrorism has both a domestic and international nature.⁽⁹⁸⁾

The basic mandate of intelligence services is to defend the parent State against threats to its integrity and autonomy, i.e. against its ability to exercise power.⁽⁹⁹⁾

Power analysis is divided into three dimensions.⁽¹⁰⁰⁾ The first is the pluralist, which believes that only those observable powers can be considered in the analysis. The second dimension is the elitist, which believes that some groups are able to prevent any observable decision being made at all, making them not reach the political agenda. The third dimension of analysis refers to the ability to exercise power without the people knowing it. This third dimension is strongly related to the attitude of intelligence services, because secrecy is a fundamental condition for them to operate.

The relation between intelligence and power is particularly interesting in the work of M. Foucault, who “is concerned with the micro-techniques of power which normalise the population through central procedures of surveillance.”⁽¹⁰¹⁾ According to Foucault, security is a principle of politics separated from law but which can combine with it. Security has become the central element of modern government.

The State of the Middle Ages exercised “discretionary terror” in order to deter deviances in the population. In the second half of the XVIII century, scientific and religious opinions and innovations tried to reform this procedure within the government, but the State found other, more efficient ways to apprehend deviants. This was also the period of industrialization, which brought urbanisation and higher difficulty in controlling the population. The only possibility to control dangerous subversive classes was to increase surveillance. The basic form of surveillance took the form of information collection and accumulation, and it involved countering operations used as forms of supervision.⁽¹⁰²⁾

⁽⁹⁸⁾ K.G. ROBERTSON, *Intelligence, Terrorism and Civil Liberties*, in *Conflict Quarterly*, n.7.2, 1987, pp.47-48. Online at <http://www.journals.hil.unb.ca>. For more information on the history and theory of Intelligence, R. S. CLINE, *The CIA under Reagan, Bush, and Casey: the evolution of the agency from Roosevelt to Reagan*, Rev. ed. Washington, Acropolis Books, 1981; D. H. DEARTH, *Strategic Intelligence: theory and application*, Carlisle Barracks, US Army War College, 1991; M. I. HAUDEL, *War, Strategy, and Intelligence*, Totowa, Cass, 1989.

⁽⁹⁹⁾ P. GILL, *Security Intelligence and the Liberal Democratic State*, London, Frank Cass, (1994), Ed.2004, p.55.

⁽¹⁰⁰⁾ See *supra* note (99), pp.56-57. The three dimensions of power analysis come from S. LUKES, *Power: A Radical View*, reference to note (34).

⁽¹⁰¹⁾ GILL, *supra* note (99), pp.58-59. Reference to note (40) and (41).

⁽¹⁰²⁾ GILL, *supra* note (99), p.60.

The Role of Intelligence in the Fight Against International Terrorism: Legal Profiles

An attempt to classify intelligence agencies was made by Keller⁽¹⁰³⁾, who identified three categories. The first is the bureau of domestic intelligence, which has limited powers derived from a charter. Its most important function is information collection on the criminal prosecution of security offences.

The second category of intelligence agencies is the political police, which is more autonomous in carrying out its operations. Its power derives from delegations of executive power and it is more responsive than the first one to the groups in power. Its task is to gather information on specific offences, but it is not limited to it, since it can collect information on other issues. Furthermore, in opposition to the first category, it conducts aggressive countering operations against political opponents.

The third and last category is the independent security state, which lacks of all external controls. It is like a security state within the State. The goals of its officials may not coincide with those of the political class, and its funding and policies are kept secret. Its tasks certainly involve covert counterintelligence operations, such as the disruption of targeted groups.

A further important element of intelligence agencies is their relationship with law. The relationship between security agencies and police is close to such extent that they are often confused. De Sola Pool⁽¹⁰⁴⁾ affirms that “the police need intelligence” in order to operate effectively. However, they are conceptually different. The police mandate is completely involved in criminal matters, since its task is to gather information in order to apprehend and prosecute criminal offenders. On the other hand, intelligence is concerned only partly with criminal prosecution, because its task is to gather and evaluate information. Hence, its targeting of people depends on the perceived need for information.

The central question posed by law is that, while on the one side it aims at controlling security agencies in their activities, becoming a potential check for abuses, on the other it may fail in limiting intelligence agencies’ activities. This because intelligence tasks are concerned more with political crimes than with specific criminal offences. Political crimes are distinguished from other crimes because of their explicit political feature, their ambiguity and their permissiveness as far as human rights are considered.

Often, security intelligence mandates incorporate ambiguous terms, such as “subversion”, which is far more dangerous to citizens’ rights, because the agencies can be

⁽¹⁰³⁾ W.W. KELLER, *The Liberals and J. Edgar Hoover: Rise and Fall of a Domestic Intelligence State*, Princeton, Princeton University Press, 1989, pp.13-16, in GILL, note (99), at note (52), pp.60-61.

⁽¹⁰⁴⁾ I. DE SOLA POOL, *Approaches to Intelligence and Social Science*, in R. L. Pfaltzgraff, Jr. et al, *Intelligence Policy and National Security*, Basingstoke, Macmillan, 1981, p.39, in GILL, note (99), p.63.

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legally authorized to use whatever means they have to gather the necessary information. Thereby, security intelligence are legally authorized to breach law by the law itself, because it is alleged to protect the interests of the State, i.e. its *raison d'État*.⁽¹⁰⁵⁾

Another important element to describe security intelligence is information. The core task of security intelligence is to gather information, and to evaluate a possible threat.

Information collection is necessary for the decision-making of an organization, because it may improve the activity of the organization itself.

Security intelligence organizations often collect more information than necessary, but it seems that it is never enough. They appear to be constantly complaining about "inadequacies in information."⁽¹⁰⁶⁾

This failure in information processing and the overload of the system are often caused by human or organizational limitations, leading to the collection of wrong information, which is often useless in the decision-making process. This usually happens when information collection and decision-making are separate procedures. Furthermore, information gathering is often carried out without exactly knowing what information security services are searching for. Finally, the information collected may be subjected to "strategic misrepresentation", which usually compromises its value and causes contrasts within the organization.

Intelligence agencies are rarely supervised in their activity. In particular, the officials who receive reports of the operations carried out, often limit their review to a bare reading of papers, which can be manipulated in order to fulfil the official's expectations on the operation.

The central mandate of intelligence agencies is to gather information in order to make decisions on the operations to carry out. Thus, they are mainly concerned with information control. Wilsnack defines information control as the procedure through which an organization makes sure that certain people will or will not have access to certain information in specific situations. He also identifies four procedures for information control.⁽¹⁰⁷⁾ The first is espionage, which obtains information from people who want to keep it secret. A second procedure is secrecy, which involves information keeping from other people knowing it. It is the reverse of espionage.

⁽¹⁰⁵⁾ GILL, *supra* note (99), pp.64-65.

⁽¹⁰⁶⁾ GILL, *supra* note (99), pp.48-49.

⁽¹⁰⁷⁾ R. W. WILSNACK, *Information Control: A Conceptual Framework for Sociological Analysis*, *Urban Life*, 8(4), 1980, pp.467-499, in GILL, note (99), at note (8), pp.50-53.

There can be legitimate motivations behind secrecy, both in States' policing and in the individual sphere. In the case of States, administrative secrecy is often due to security matters, for example the implementation of criminal investigations, or to the fact that a State often holds sensitive information about individuals. With reference to the individual sphere, secrecy is often due to the maintenance of self-integrity and identity.

A third procedure is persuasion, which makes sure that other people receive and believe information the agency wants them to have. Often it is related to deception, which is in place when the person or entity that provided information does not believe it but wants the receiver to believe it. Of course this is risky, because it creates a web of mistrust and disinformation which can lead to a deterioration of a State's credibility. The fourth and last procedure is evaluation, connected to deception. It is the reverse of persuasion and it aims at making sure the receiver learns more from the information received than from other people.

Usually, information control generates an escalation of counterintelligence measures, because information control on the part of one State invites other governments and agencies to counteract, by means of countermeasures against espionage and deception.⁽¹⁰⁸⁾

2. Intelligence and Terrorism.

Terrorism has often been used by security intelligence to justify an increase in political surveillance and a restraint of political opposition. This view is highly accepted by Frank Donner of the American Civil Liberties Union, who sees terrorism as the new "conspiracy theory". He believes that there should be a limitation on investigations and surveillance activities.⁽¹⁰⁹⁾

The most problematic features of terrorism, those which create contrast in legal literature, are: the secrecy of terrorist cells; the real risk of death or serious injury connected with indiscriminate violence toward innocent targets; the ideological motivation,

⁽¹⁰⁸⁾ GILL, *supra* note (99), pp.54-55.

⁽¹⁰⁹⁾ ROBERTSON, *supra* note (98), p.43.

connected with political purposes and high use of publicity to communicate terrorist aims.⁽¹¹⁰⁾

Because of some unique characteristics, terrorism must be considered differently from other ordinary types of crime:

[Terrorism] is the only form of illegal or harmful act that is politically motivated, makes demands which are only indirectly connected with the immediate crime, has the objective of instilling fear without a necessary relationship to the achievement of immediate goals, uses weapons and techniques that may be sophisticated, brutal and unusual, and may involve the participation of States.⁽¹¹¹⁾

In order to identify a crime as political, i.e. against a State, a generally accepted position considers irrelevant the true motives of the perpetrator, because it rather focuses on the perception of the threat on part of the State affected. Thus, the definition of a political crime depends on the reaction of the State involved.

Other positions affirm more generally that every terrorist crime is to be considered a crime against the State, because every offence has the inner objective of destabilizing the constituted order.

A helpful method to identify a political crime is a twofold analysis: on the one side it can be useful to determine all those crimes specifically related to certain social behaviors perpetrated by the collectivity (demonstrations, protests or terrorism, for example); on the other side it is useful to identify the reasons why States label certain crimes as political. These two types of analysis are not exclusive, and they create two important questions.

The first approach, which focuses on the social aspects that give birth to criminal acts, can be interpreted as a legal form of dissent (demonstrations and protests in particular), because the community has the freedom to express its own opinion. Furthermore, the repressive actions taken by the State can be considered immoral or ineffective in these situations.

The second approach, which makes a historical analysis of the State's perception of a crime and the consequent identification with a political nature of the crime itself, can lead the State to consider the threat as unreal, a form of moral panic. Thereby, the political crime is perceived as an excuse to extend intelligence surveillance and

⁽¹¹⁰⁾ *Ibid.*

⁽¹¹¹⁾ ROBERTSON, *supra* note (98), p.44.

information collection powers, in order to protect politicians, intelligence officers, civil servants and military interests. In other words, it is perceived as a conspiracy to protect the State's interests.

Both the approaches, however, are based on the idea that there are no real threats to the public order, and that terrorism and mugging are both caused by social tensions and need the same response.⁽¹¹²⁾ Of course, it is a matter of fact that terrorism is not an ordinary crime, even though the origins of the phenomenon can be traced back to social tensions.

Intelligence is considered a fundamental tool to fight international terrorism; it is the central element of an effective counterterrorism strategy. Intelligence can be useful against terrorism in various ways: for example, it identifies the persons involved and their level of involvement; or it builds a data-base which helps in the procedure of decision-making; it identifies the groups of individuals and the properties most at risk; or it organizes counter attacks, for example, covert actions; it establishes the supply routes, safe houses where to place suspects for interrogation, weapons and funds; or it spreads black propaganda; it disrupts terrorist groups; or it influences the placement of military and technological resources; it intercepts the persons involved or threatens them of interception; it manages information, by sending it to other allies or to dissuade hostile powers; it exchanges information with other intelligence agencies or services; or it assists in the management of crisis situations.

Of course, intelligence can perform its tasks only if it has clear objectives and agreed organization of its functions. Furthermore, it cannot achieve efficient results if it is subjected to interference from the political or administrative sphere. "Good intelligence requires clear tasks, agreed methods, common perceptions and a degree of autonomy."⁽¹¹³⁾

2.1. A definition of National Security.

⁽¹¹²⁾ ROBERTSON, *supra* note (98), pp.44-45.

⁽¹¹³⁾ ROBERTSON, *supra* note (98), pp.48-49.

A definition of Intelligence can be the following:⁽¹¹⁴⁾

...the effort by a government, or a private individual or body, devoted to: the collection, analysis, production, dissemination and use of information which relates to any other government, political group, party, military force, movement or other association which is believed to relate to the group's or government's security.

However, this definition does not specify the term security, which, until the 1970s, remained a vague and ambiguous concept. An interesting, but also "ideal" definition of security is given by another author, who affirms that security is both the individual and collective feeling of freedom from external threats, which can be physical, psychological or sociological. Such threats may jeopardize essential rights, like life, freedom, self-identity. In other words, security is freedom from uncertainty, which is something that does not exist in reality.⁽¹¹⁵⁾

A complete freedom from uncertainty does not exist because an individual is not able to obtain security for himself. All depends on the collective ability to enhance personal security. Furthermore, if the collectivity, intended as the State, is able to achieve complete security, then the State itself will be a massive threat to the security of its citizens. Thus, national security, which is freedom from uncertainty given by a State, is mainly seen from a negative perspective, as a threat.

There can be five main threats: military, political, societal, economic, and ecological.⁽¹¹⁶⁾ The first is the central question of national security. Indeed, a State is mainly concerned with security from military threats. Furthermore, the citizens of a State can be menaced not only by external, but also by internal threats (military forces within the State, i.e. paramilitary activity).

The second threat is concerned with domestic security issues, within the State, rather than with external factors. The political threat tells much about the ideology of a State. The third threat is difficult to distinguish from the political. Usually societal threats refer to attacks against national identities and cultures.

⁽¹¹⁴⁾ R. GODSON, *What is Intelligence?*, in K. G. ROBERTSON, *British and American Approaches to Intelligence*, London, Macmillan Press, 1986, ROBERTSON, *supra* note (98), p.47, reference to note (12).

⁽¹¹⁵⁾ J. A. TAPIA-VALDES, *A Typology of National Security Policies*, Yale Journal of World Public Order, 9(10), 1982, p.11, in GILL, *supra* note (99), p.92.

⁽¹¹⁶⁾ B. BUZAN, *People, States and Fear*, Hemel Hempstead, Harvester Wheatsheaf, Second edition, 1991, pp.112-141, in GILL, *supra* note (99), pp.94-96, at note (15).

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The fourth, economic threat, is contradictory, if it is considered that market economy relies on uncertainty, competition and risk; if they did not exist, market economy would not have reasons to be in place. An attempt to protect market economy would mean to distort market operations. However, economic threats may also involve the supply of strategic materials (reference to the military threat); or an impact on domestic stability; or the power of a State within the international political system. The fifth threat is ecological, and it can be tackled only through a collective action.

It is important to distinguish foreign and domestic threats, because political surveillance is often conducted with the excuse of searching for covert foreign activity within a State's borders. Military threats are usually concerned with security from foreign threats, while political, societal, and economic threats involve issues of domestic security.

These five categories can be related to matters of national security on the basis of their intensity, which includes the specificity of the threat, the position in space and time, the probability of a threat to happen, the nature of its consequences, and the perception of a threat on the basis of previous experience.⁽¹¹⁷⁾

In the United Kingdom the term "national security" has often been used in the investigation of citizens' activities as a pretext to go beyond permissible legal limits. The Secretary of State

...may issue warrants on grounds of national security if he considers that the information to be acquired under the warrant is necessary in the interest of *national security* either because of terrorist, espionage or major subversive activity, or in support of the *Government's defense and foreign policies*.⁽¹¹⁸⁾

Under the 1989 Security Service Act, the Security Service has seen its powers extended, since it now protects against sabotage, espionage, subversion, and terrorism. In general terms, it has the mandate to protect national security and safeguard the UK from external threats.⁽¹¹⁹⁾

In the United States, the term has not been clearly defined; it rather has the aim of granting extensive discretionary authority to the President in deciding what measures to

⁽¹¹⁷⁾ GILL, *supra* note (99), p.97.

⁽¹¹⁸⁾ Home Office, *The Interception of Communications in the United Kingdom*, Cmnd 9438, London, HMSO, February 1985, p.9, in GILL, *supra* note (99), p.99, at note (25).

⁽¹¹⁹⁾ GILL, *supra* note (99), pp.98-100.

take against threats to national security. National security has been often used to conceal the government's illegal countermeasures.⁽¹²⁰⁾

In Canada, the 1984 Security Intelligence Service Act gives a definition of a threat to national security, affirming that it includes espionage or sabotage against Canada or its national interest; foreign influenced activities within or relating to Canada, which are deceptive or clandestine or involve a threat to any person, carried out with the intent to damage national interests; activities within or relating to Canada in support of the threat to use, or the use of, violent acts against persons or property for political purpose within Canada or a foreign State; and activities involving covert unlawful acts aimed at undermining or destroying the constitutionally established government of Canada. A threat to national security does not include lawful protest or dissent, unless they involve the acts above-mentioned. The Canadian Government focuses its efforts on five issues relating to national security: public safety, the integrity of the democratic process, the security protection of classified information and government installations, economic security, and international peace and stability.⁽¹²¹⁾

2.2. From Subversion to Terrorism. Examples from the CANZAB (Canada, Australia, New Zealand, America, Britain network of counter-intelligence organizations of the 1960s).

In the area of national security the concept of subversion has been abused throughout the XX century, until it merged with the concept of terrorism.

The problem with the term "subversion" is that it may be confused with legitimate dissent, which is absolutely legal and it represents the freedom of expression. However, the national governments of the second half of the XX century feared the activities of a typical subversive party: the Communist Party. The threat came from the Soviet Union, which was urging the revolution in other countries, and tried to export its ideology. The Communist Party was a potential threat to national security and had to be constantly checked by security agencies. Subversion was, at that time, mainly concerned with

⁽¹²⁰⁾ GILL, *supra* note (99), pp.100-104.

⁽¹²¹⁾ GILL, *supra* note (99), pp.104-107. Reference to the Canadian Security Intelligence Service Act, 1984, s.38(a), and s.2, note (44).

political oppositions on both sides; left and right wings extremism was considered highly subversive.

A good example of intelligence services operations in subversive situations is Canada, which authorized the Royal Canadian Mounted Police (RCMP) to intervene with intrusive techniques of intelligence-gathering in the case of subversive activities in 1973, with the Official Secrets Act. A second authorization was given two years later with the first Cabinet Directive on "The Role, Tasks and Methods of the RCMP Security Service".⁽¹²²⁾

The Canada Security Intelligence Service (CSIS), which is responsible for subversion and terrorism-related counter-activities, was subject to a review in 1987 by the Security Intelligence Review Committee (SIRC), which investigated the activities of CSIS's counter-subversion branch and of intelligence agencies' activities in general. The SIRC found that the CSIS overestimated the role and influence of alleged subversive groups. In particular, it concluded that individuals were targeted because they had relations with such groups, mainly of political opposition. The SIRC resolved to close the counter-subversive branch and to split its tasks between counterintelligence and counterterrorism, whose main activities concerned foreign manipulation and political violence.⁽¹²³⁾

Another interesting case is that of Australia. Similar to what happened in Canada, in Australia the Anglo-American intelligence was urging the national government to take important measures against the Communist Party, because there were rumors that Soviet spies had infiltrated in the Department of External Affairs. In particular, it was said that the Australian Labor Party (ALP) had relationships with communists.

The Australian Intelligence Organization (ASIO) decided to investigate the matter, but it was subsequently subjected to investigations by the national government, because there were doubts on information provided by the intelligence agency to the ministers. In mid-1974 the Prime Minister decided to investigate not only ASIO, but also the other

⁽¹²²⁾ GILL, *supra* note (99), pp.107-108, at note (50). For more information on subversion, R. J. SPJUT, *Defining Subversion*, British Journal of Law and Society, 6(2), Winter 1979, p.254.

⁽¹²³⁾ GILL, *supra* note (99), pp.109-110. The Royal Canadian Mounted Police (RCMP) was established in the XIX century and lasted until 1984. It was an organization of domestic security intelligence. In 1984 the Canadian Security Intelligence Service Act established the Canada Security Intelligence Service (CSIS), separated from the RCMP, with tasks relating to operations of counterintelligence, counterterrorism and counter-subversion. For more information, Special Committee of the Senate on the Canadian Security Intelligence Service, *Delicate Balance: a Security Intelligence Service in a Democratic Society*, Ottawa, Minister of Supply and Services, 1983; SIRC, *Annual Report 1986-87*, Ottawa, Minister of Supply and Services, 1987, pp.34-40; P. GILL, *Defining Subversion: The Canadian Experience Since 1977*, Public Law, Winter 1989, pp.617-636; the text of the CSIS Act is available online at <http://www.csis-scrs.gc.ca/pblctns/ct/cssct/-eng.asp>.

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national intelligence agencies, such as the Australian Secret Intelligence Service (ASIS), the Joint Intelligence Organization (JIO), and the Defense Signals Directorate (DSD).

ASIO resulted to be a dangerous agency, because of its low morality and tendency to investigate subversion beyond the limits required to obtain intelligence information. The agency's tasks were redefined by the ASIO Act of 1979, which determined ASIO's mandate: its tasks included investigations into espionage, sabotage, subversion, foreign intervention and terrorism-related measures. In order to gather information the agency had to ask for a ministerial warrant, and the Director General of ASIO became subject to ministerial directions. The ASIO Act of 1979 was amended in 1986, following a substitution of the term "subversion" with "politically motivated violence", which clearly includes terrorism-related issues.⁽¹²⁴⁾

As far as the United States are concerned, the Federal Bureau of Investigation (FBI) obtained information on the basis of mail-opening, wiretapping, electronic surveillance, break-ins and other countering programs labeled COINTELPROs, about alleged subversive groups such as the Communist Party, civil-rights and pacifist movements, and the extremist group of the Ku Klux Klan. It had the power to investigate almost every single activity of active opponents of the political power, with no limitations.

The FBI is supposed of having frequently abused its powers, since it is alleged that it made use of preventive intelligence investigations and assisted civil disorders that were nothing more than the right of people to express their opinion. Conversely, it was said that the FBI would have better results if it focused its investigations on terrorism and foreign intelligence activity, and that it should limit investigative intelligence to terrorism and espionage-related matters, in compliance with a fundamental condition: there should be reasonable suspicion and evidence of an individual to commit a specific act violating a federal statute pertaining to national security.⁽¹²⁵⁾

⁽¹²⁴⁾ GILL, *supra* note (99), pp.112-115. Under section 3 of the ASIO Amendment Act of 1986, "politically motivated violence" means:

a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere;

b) acts that (1) involve or are intended to involve violence (whether by the persons who carry on those acts or by other persons); and (2) are directed to overthrowing or destroying the government or the constitutional system of government of the Commonwealth or of a State.

⁽¹²⁵⁾ GILL, *supra* note (99), pp.116-118. Reference to the Church Committee Final Report, Book II, *Intelligence Activities and the Rights of Americans*, Washington D.C., US Government Printing Office, 1976, p.319; and to the Church Committee Final Report, Book III, *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans*, Washington D.C., US Government Printing Office, pp.921-982.

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Eventually, the case of the United Kingdom should be examined. In 1952, a directive issued by the Home Secretary stated that the mandate of the Security Service is to defend the United Kingdom as a whole from external and internal threats, which may derive from espionage or sabotage attempts, or from subversive actions directed within or without the country.

In the directive a clear definition of subversion is lacking, even though it is easy to understand that a subversive action is an act intended to overthrow a government by unlawful means.

In 1989, the Security Service Act defined the function of the Security Service as that of protecting national security against threats from espionage, terrorism and sabotage, from foreign influenced activities and from actions intended to overthrow parliamentary democracy by political, industrial or violent means. Of course, this definition includes not only sabotage, espionage and terrorism, but also other lawful means of expressing dissent, like strikes or protests. The UK interpretation of “subversion” does not consider violence or unlawfulness as the term’s main characteristic.⁽¹²⁶⁾

The area of the CANZAB (Canada, Australia, New Zealand, America, Britain network of counter-intelligence organizations) above-examined clearly shows a shift from specific subversive intention within national governments to a more general “politically motivated violence”, which involves foreign influenced acts, such as terrorism.

After the reviews initiated by the governments of Canada, Australia, the United States and the United Kingdom, intelligence agencies concentrated more upon terrorism. Some authors argue that this shift has been caused by the advent of new subversive/terrorist groups on the international arena, such as the Palestine Liberation Organization (PLO), the Red Brigades (Italy), the Provisional Irish Republican Army (PIRA) in Northern Ireland. However, several authors agree in considering the shift from subversion to terrorism as a pretext used by intelligence agencies to maintain counter-subversion strategies intact.⁽¹²⁷⁾

The difference between subversion and terrorism lies in the targets of the counter action carried out by intelligence agencies. Subversive individuals and groups were usually involved in political dissent, and the countering activity was limited to disruption.

⁽¹²⁶⁾ GILL, *supra* note (99), pp.119-122. For more information, F. KITSON, *Low Intensity Operations: Subversion, Insurgency, Peacekeeping*, London, Faber and Faber, 1971, p.3; the Security Service Act of 1989 is available at <http://www.archive.official-documents.co.uk/document/cm47/4779/4779.htm>.

⁽¹²⁷⁾ GILL, *supra* note (99), p.123.

Terrorism, instead, involves terrorist acts and counterterrorism reactions, in a reciprocal relationship. In addition, the type of communication of terrorism is unique; the targets of political violence are civilians, victims of indiscriminate violence, and the governments, the international organizations, or the individuals to which terrorist demands are directed. In other words, terrorism is a form of political communication.⁽¹²⁸⁾

3. A definition of Intelligence: domestic intelligence services and foreign intelligence services.

As said in the previous paragraphs, intelligence should be defined as a unique phenomenon. In particular, attention should be paid to some important elements.⁽¹²⁹⁾

First, in order to define intelligence, it is necessary to examine what it is used for. Intelligence protects from threats: without threats intelligence services would be useless. When governments are threatened, or there is a possibility of a threat to occur, then they put in place secret plans and search for secret information, in order to protect national security. A threat can be hypothetical or real, and cause serious harm.

A second element to consider is secrecy, which is referred to the type of information that intelligence agencies collect. Thanks to secret information a government may be able to eliminate a threat or at least reduce its impact on the population. At this stage, spies and covert agents are key elements in the sphere of information collection.

An intelligence service must transform the information collected into knowledge by means of evaluation. In other words, information must be given significance, context, pattern; it must be connected with other information; it must be evaluated in its reliability.

A further element to examine is collection. Information must be collected before it is transformed and evaluated. It is important to collect useful information, even though the majority of information gathered by intelligence agencies is not useful, and often non reliable.

However, in order to collect the right information, agents and analysts need to know precisely what information is necessary from their users. It often happens that users deliberately create uncertainty and give vague ideas of what kind of information they

⁽¹²⁸⁾ GILL, *supra* note (99), p.125.

⁽¹²⁹⁾ ROBERTSON, *supra* note (98), pp.46-48.

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want. Thereby, they avoid responsibility in case something goes wrong, and generally blame collectors for having gathered the wrong information or too little of it. Nevertheless, collectors have an interest in the vagueness of the information provided by users, because this allow them to move in a more flexible manner.

To sum up, an intelligence agency is an organization whose task is to collect secret information, by secret means, in order to evaluate it and transform it into knowledge of a threat intended to cause serious harm to a nation State.

Intelligence agencies can be domestic or foreign. This division is determined by the fact that governments do not want to concentrate all intelligence powers in one single and centralized agency; nor they want to treat citizens and aliens equally. Domestic and foreign intelligence agencies do not have the same purposes, nor they use the same techniques, even though they are very similar.

A fourth element which is necessary to understand the difference between domestic and foreign intelligence agencies is the purpose. Intelligence services' purpose is to collect information in order to eliminate or highly reduce a threat, internal in case of domestic intelligence and external to a State or territory in case of foreign intelligence.

Common to both intelligence services are the interception of communications, the use of "bug" devices, and the use of human agents. Instead, spy satellites and intelligence gathering from radar signals are specific tasks of foreign intelligence services. Also infiltration is common to both the agencies, but, in the case of domestic intelligence it is perceived as negative. This because infiltrators within a State's affairs have the purpose of stealing information and deceive other members of the domestic intelligence, and are often called informers, "stool-pigeons" and agents provocateurs. This negative perspective is often connected to the fact that infiltration in domestic situations is used against a State's own citizens, which is of dubious morality.

On the other hand, foreign intelligence evaluates infiltration highly positively, because it is seen on the part of those who enter the secrets of other domestic intelligence agencies. Indeed, foreign intelligence calls infiltrators "placing agents" or "human source."⁽¹³⁰⁾

A final element, which is often missing within security services, is analysis. Several governments lack an organ or committee whose task should be to check and evaluate security agencies' activities. Usually, senior officials check reports and written documents on the operations carried out by the agency. However, it is well known that collectors and

⁽¹³⁰⁾ ROBERTSON, *supra* note (98), p.48.

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analysts often manipulate documents in order to make them coincide with the senior official's expectations.

The lack of a mechanism of analysis on the part of security agencies is due to the fact that domestic intelligence does not often involve military, diplomatic corps and clandestine means of information gathering, which is very common in foreign intelligence agencies. Domestic agencies also do not need inter-agency cooperation, and this does not lead them to establish special review organs.

Intelligence can be defined as the product resulting from the collection, evaluation, analysis and interpretation of information, which is obtained through different sources.⁽¹³¹⁾ In some cases, the information collected is disseminated immediately after the collection, because of operational necessity. Usually this type of intelligence is fragmented and used to help in current operations. It is generally inaccurate and needs further analysis. In some other cases, the information obtained is a finished product, more certain and well developed. Usually, this type of intelligence is developed in reports, by means of analysis and review process. The exploitation of various sources helps avoid wrong conclusions and deceptive information gathering.

Besides the division between domestic and foreign intelligence, the process itself can be divided into strategic and operational intelligence. The former is concerned with policy-making and long term decisions. This type of intelligence usually needs information from other public sectors, for example from military and economic affairs, politics and technology. It usually results in intelligence studies and estimates.

The latter is more concerned with current events and short term decisions. It usually organizes current operations and is the most common, since most intelligence activities act as a support to operational intelligence.

⁽¹³¹⁾ OPERATIONS SECURITY, *Intelligence threat Handbook*, The Interagency POSEC Support Staff, April 1996, revised in May 1996, Section 2, "Intelligence collection activities and disciplines", online at <http://www.fas.org/irp/nsa/iOSS/threat96/index.html>. The Operations Security (OPSEC) was established in 1988 under the provisions of National Security Decision Directive 298, The National Operations Security Program. OPSEC was developed to promote operational effectiveness in order to protect classified material. Its aim is to control information and actions of an organization whose activities and intentions may be controlled and exploited by other entities. The OPSEC process starts with the examination of the information processed by an organization, in order to understand whether a third entity is able to obtain classified material from unclassified sources. After having identified critical information, the OPSEC analyzes the collection capabilities of the third entity, and then analyzes the threats this entity may pose and its vulnerabilities. A further step is to assess the risks; and finally, the OPSEC assists in selecting and adopting appropriate countermeasures. These may include for example the modification of administrative and operational routines; and covert and deceptive activities. The OPSEC works for the United States, thus it analyses threats and risks on the basis of US adversaries.

4. The Intelligence Process: intelligence agencies should not have enforcement powers.

The intelligence process is divided into five central activities: planning and direction; collection; processing of information; production and analysis; dissemination and countering.⁽¹³²⁾

In the UK the Security Service Act of 1989 established the mandate of the Security Service, which has the function to protect national security and economic well-being from external threats. By means of this statement, it is important to examine whether the intelligence service functions as a simple information collector (typical of a domestic intelligence bureau), or has other powers, related to counteraction (typical of a political police). In the case of UK Security Service, it has the power to react to a threat, and does not only gather information.

In the case of Australia, instead, the ASIO Act of 1979 specified that the Australian Security Intelligence Organization is not supposed to carry out countermeasures. Instead, it has other functions, for example, it can obtain and evaluate intelligence information connected to security issues; or communicate security intelligence and advise political authorities. ASIO has not enforcement powers because it is not a police force, even though its tasks remain ambiguous.

Also in Canada the Security Intelligence Service (CSIS) has not enforcement powers, since it can only collect, analyze and evaluate information (and to the extent that is strictly necessary).⁽¹³³⁾ The CSIS Act also accepted that the Security Intelligence Service has the power to disclose information if it is done in compliance with the purpose of its functions.

A different situation is that of the FBI, in the US. Indeed, the Federal Bureau of Investigation has both federal police powers and domestic intelligence security powers. In this case the central problem is the fact that the FBI should act in compliance with law enforcement rules and human rights respect.

However, the FBI should be prohibited from several actions: for example, dissemination of information to the White House or any other federal official or entity for

⁽¹³²⁾ GILL, *supra* note (99), pp.135-171.

⁽¹³³⁾ CSIS Act 1984, *supra* note (123).

improper purpose; or interference with lawful association or publication which expresses dissent; or harassment of individuals by means of overt investigations and surveillance for intimidation purposes.⁽¹³⁴⁾

4.1. Planning and Direction.

The first two parts of the intelligence process are planning and direction. They summarize the entire effort of the intelligence activity, from the identification of targets to the decision-making process.⁽¹³⁵⁾ The process involves the targeting of an individual or group as subversive or terrorist (in any case there is an identification of the subject as a threat to national security).⁽¹³⁶⁾

Planning and direction are both present within domestic and foreign intelligence. However, in the case of the UK, the foreign intelligence mandate, is much more formalized than that of domestic intelligence, with reference to the intelligence process.

The process of planning and direction consists of identifying intelligence requirements, prioritizing, and validating them. Subsequently, the requirements are translated into collection plans. Then, requests for information collection are issued, information is produced, analyzed and disseminated to final users. At this stage, the intelligence tasks required are: collection capabilities, susceptibility of targeted activity to different types of collection activity, and availability of collection assets.⁽¹³⁷⁾

In a targeting procedure the individuals subject to targets are often selected *per se*, because of their simply having participated to a group which has been considered “subversive” or dangerous at a certain time. This is often called “targeting-by-category”, because individuals are targeted by reasons of membership in a particular targeted group. This procedure is very common in domestic security intelligence agencies, and it is highly resistant to external efforts at change.⁽¹³⁸⁾

In the Us the new guidelines of 1976 established further controls on the targeting procedure, which permitted the FBI to initiate preliminary investigations into groups and

⁽¹³⁴⁾ CHURCH COMMITTEE, FINAL REPORT, BOOK III, *supra* note (125), p.316.

⁽¹³⁵⁾ OPSEC, *supra* note (131).

⁽¹³⁶⁾ GILL, *supra* note (99), p.140.

⁽¹³⁷⁾ OPSEC, *supra* note (131).

⁽¹³⁸⁾ GILL, *supra* note (99), p.146. In the UK the Security Service Act of 1989 has legalised the practice of *per se* targeting.

individuals, provided there was sufficient evidence that they have breached the law for political purposes. The FBI was authorized to examine its databases and files, public sources, existing information provided by informants, and physical surveillance of suspects.⁽¹³⁹⁾

The targeting of individuals and groups causes serious concerns about, for example, the impossibility of predicting an actual threat to national security. It is the covert nature of an individual's behavior that shows if he is a potential threat to national security. However, this means that the more serious the threat, the harder to detect.⁽¹⁴⁰⁾

4.2. Collection and Processing.

A second step of the intelligence process is collection, which involves information gathering, and it is directly connected to a third step, which is the processing of that information. Intelligence collection develops guidelines in order to ensure the optimal exploitation of intelligence resources. The collectors are given specific tasks to collect information. These tasks are redundant and they aim at reducing the margin of loss or failure in the collecting process. Thus, if a collection asset has not been able to collect enough, or the right, information, tasking redundancy would duplicate the number of assets in order to answer the collection need. Thereby, the availability of different collection assets allows the gathering of various types of information, which can be used to confirm or contradict potential assessments.⁽¹⁴¹⁾ Once collected, information is correlated and sent to processing and producing steps.

Most of the information gathered by intelligence agencies comes from open sources, i.e. public documents and sites, available to whoever wants to consult them. Open sources include press reports, petitions, political groups' publications, meetings.

In Canada information gathering is limited by five principles: first, criminal law should not be infringed, unless reasons of national security impose a change in law; second, the investigative methods should be proportionate to the threat and to the

⁽¹³⁹⁾ GILL, *supra* note (101), p.148. For more information on FBI reform, J. T. ELLIFF, *The Reform of FBI Intelligence Operations*, Princeton, Princeton University Press, 1979, pp.196-198, note (40) in GILL, p.148.

⁽¹⁴⁰⁾ J. P. BRODEUR, *On Evaluating Threats to the National Security of Canada and to the Civil Rights of Canadians*, paper for SIRC seminar, October 1985, pp.7-9, in GILL, note (99), p.149, at note (45).

⁽¹⁴¹⁾ OPSEC, *supra* note (131).

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potential for it to occur. A third principle involves the balance between gathering techniques and human rights compliance; a fourth affirms that an intrusive technique should be used only on approval of a higher authority. Finally, less intrusive techniques should be preferred instead of more intrusive ones.⁽¹⁴²⁾

Other sources of information collection are covert sources, even though it is estimated that less than 10 per cent of information collected comes from secret intelligence sources. These are usually gathered for short term operations, and confirm or discredit information coming from other, easily available sources.⁽¹⁴³⁾

In order to collect information intelligence agencies use informers, a human resource whose task is to collect information undercover. The presence, or even the suspicion, of informers can be highly disruptive. However, this type of information collectors are subject to high risks, not only those concerning the mission itself, but also those connected to human rights respect.

The informer can be of three different types: the volunteer, usually an ordinary citizen or somebody who does it for personal gain; the undeveloped casual informer, for example a taxi driver, or a telephone company employee, also called "confidential source"; and finally, the developed casual informer, with active information collection tasks, and usually paid for the information provided.

A serious risk that intelligence agencies have to face when using informers is the fact that information may be deceptive or non reliable. Furthermore, the informer may behave as an *agent provocateur*, whose main objective is to deceive the organization for which he is working, making it believe that he has defected from a former organization.

The General Accounting Office (GAO) of the US Congress found that in 85 per cent of domestic intelligence cases the FBI used paid and directed sources, i.e. informers.⁽¹⁴⁴⁾

Finally, other forms of information gathering are surreptitious entries, break-ins and interceptions. The first and second are often used to obtain documents or to install bugs for electronic surveillance purposes. A covert form of entrance onto private property is the surreptitious entry, usually by means of a telephone engineer whose task is to install electronic devices which check the activity inside the property. If a surreptitious entry is not possible, then intelligence agencies use break-ins, which are overt operations.

⁽¹⁴²⁾ GILL, *supra* note (99), p.151.

⁽¹⁴³⁾ GILL, *supra* note (99), pp.152-169.

⁽¹⁴⁴⁾ CHURCH COMMITTEE, FINAL REPORT, BOOK III, *supra* note (125), p.228, in GILL, note (99), p.155, at note (66).

A third technique of information gathering is interception, both of telephones and mail. The latter has two different forms: the mail-cover, where all information on the outside of the envelope is recorded; and the mail-opening, where the whole content of the mail to a target address is recorded. The interception of telephones and mail is the only one which involves domestic intelligence agencies' cooperation, since it has already been said that domestic intelligence agencies usually do not need cooperation among each other.⁽¹⁴⁵⁾

A third step of the intelligence procedure is processing, which is directly connected to information collection. It involves the conversion of collected information into a suitable form for knowledge production. Incoming information is transformed into readable formats, which are subsequently used by intelligence analysts to produce intelligence.

The processing of collected information includes translation and transcription of intercepted information; video and photographs processing; and correlation of the information collected by technical intelligence platforms.⁽¹⁴⁶⁾

4.3. Production and Analysis.

After information has been collected, it is processed in order to produce intelligence. This is the fourth step, and it involves the "process of analyzing, evaluating, interpreting and integrating raw information into finished intelligence products."⁽¹⁴⁷⁾

The finished intelligence product must be focused on the user's needs in order to be effective. It should be as much accurate and objective as possible, in order to avoid misinterpretations.

During the process of production and analysis, the analyst must eliminate the redundant and inapplicable parts of information, and correlate it with other already analyzed information. The final product must comply with the user's needs and requirements.

Literature is still arguing whether analysts should be involved in the process of policy-making or isolated from it. On the one hand, if analysts are involved in the

⁽¹⁴⁵⁾ GILL, *supra* note (99), p.169.

⁽¹⁴⁶⁾ OPSEC, *supra* note (131).

⁽¹⁴⁷⁾ *Ibid.*

decision process, they will be aware of what the central problems are, but they will also provide the policy-makers with the information they want to hear. On the other hand, if analysts are isolated from the process of decision-making, they will be more independent in the interpretation of information, but they will not be aware of the policy problems and their product may be useless or even ignored.⁽¹⁴⁸⁾

4.4. Dissemination and Countering.

The two final steps of the intelligence process are dissemination and countering. When the analyst has produced the final information, he forwards it to the consumer in a proper manner, to let him read and understand it. Information can be provided in various formats, for example verbal or written reports, images, intelligence databases. Final information can be disseminated by means both of physical exchanges of data and communication networks.⁽¹⁴⁹⁾

Usually military data are less widespread than general economic information, and it may happen that final information is disseminated from one intelligence agency to the other; but it can also remain within the same agency. CIA may forward information to other agencies, for example to the FBI, or it may exchange it with other departments of the same agency.⁽¹⁵⁰⁾

An important question when the dissemination process is considered is that each intelligence agency has and wants to protect its own sources of information. For example, at trial intelligence agencies do not reveal their sources if the information on the defendant has been obtained from a covert source, because they want to protect the integrity of their informers.

Dissemination can involve an active exchange of the information produced, or a simple storage of it in the organizational memory.⁽¹⁵¹⁾

Countering involves the decision-making process and the implementation of the countermeasures adopted. Surveillance can be considered both a technique used to collect information and a technique of countering.

⁽¹⁴⁸⁾ GILL, *supra* note (99), p.181.

⁽¹⁴⁹⁾ OPSEC, *supra* note (131).

⁽¹⁵⁰⁾ GILL, *supra* note (99), p.182.

⁽¹⁵¹⁾ *Ibid.* pp.184-188.

“Between 1956 and 1971 the FBI carried out a series of counterintelligence programs (COINTELPRO) which [...] were explicitly intended to deter citizens from joining groups...”⁽¹⁵²⁾

Countering measures include but are not limited to: the technique of the “snitch jacket” (creating the impression that leaders were informants); the arrest of people on marijuana charges; anonymous letters about “subversive” groups to the media; encouragement of gang warfare by means of reducing funds; and deception.

Usually, intelligence agencies do not have countering authority, because their only task is to collect information. However, in the case of the FBI for example, it may happen that national governments give them extended powers of “protecting” or “safeguarding” national security, especially in emergency situations.⁽¹⁵³⁾

5. The extended powers of intelligence agencies.

In the past decade, national governments have extended the powers of intelligence agencies to various legal and administrative proceedings, and have increased international cooperation and information sharing among countries.⁽¹⁵⁴⁾

However, since the XX century, intelligence has been highly criticized, because of the methods it uses to apprehend terrorists and other criminals. Often, it is accused of

⁽¹⁵²⁾ GILL, *supra* note (99), p.192.

⁽¹⁵³⁾ *Ibid*, pp.200-201.

⁽¹⁵⁴⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *Assessing Damage, Urging Action*, Geneva, International Commission of Jurists, 2009, p.67. The Eminent Jurists' Panel on Terrorism, Counter-Terrorism and Human Rights was created on the initiative of the International Commission of Jurists in August 2004, as a result of the Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (the declaration sets out 11 principles that States should respect when countering terrorism). It is composed of eight jurists of different nationality. The Panel's mandate is to make recommendations and considerations on the nature of human rights threats and on the impact on them of counterterrorism measures. Its work is coordinated by the Commission of Jurists in Geneva. The judges meet three times in plenary. The Panel's tasks are to listen to the experiences on counterterrorism measures of the countries asked to send reports to the Panel itself. Such listening takes the form of “hearings”, and can take place in different parts of the world. The Panel also seek reports on the part of NGOs and other experts and lawyers, and it engages in discussion with the International Commission of Jurists. Finally, the Panel produces final detailed reports and makes recommendations on the basis of the hearings and discussions that took place. The hearings can be national or sub-regional: the former involves countries such as Australia, Canada, Colombia, Indonesia, Pakistan, the Philippines, the Russian Federation, Thailand, the United Kingdom and the United States. The latter involves the European Union, East, North and South Africa, South Asia and the Middle East. More information on the Eminent Jurists' Panel is available online at <http://ejp.icj.org>.

violating basic human rights by physically and psychologically torturing suspects, or by taking possession of private documents.

The real matter when considering intelligence is the potential for abuse of powers. Actually, States extended intelligence agencies' powers, and authorized them to investigate almost every single activity. Hence, the risk to go beyond the limits of the protection of privacy rights and individuals' life has increased at a fast pace.

The main duty of national governments, in particular when countering terrorism, is to protect the people under their jurisdiction. However, it is true that to give power to intelligence agencies will legally discharge them from any responsibility, with a high risk that these agencies do not care about people's protection, considering themselves as unaccountable bodies.⁽¹⁵⁵⁾ Hence, States must ensure that appropriate safeguards are in place in order to avoid a potential abuse of powers.

5.1. The risk of abuse.

There are three main concerns with reference to the risk of abuse of powers⁽¹⁵⁶⁾: the first is the fact that intelligence activity generally remains secret. Information collected through intelligence sources should be secret to protect the agent involved in the activity. National governments do not ask for transparency in terms of reports on detailed activities, but they rather want to know who makes decisions, who is the individual responsible for the whole activity of the agency.

A second important risk of abuse comes from the increase of power granted by a national government. It gives more strength in terms of surveillance and law enforcement. Thereby, intelligence agencies have powers of arrest, detention and interrogation. It is worth noting that the executive often transfers these powers from law enforcement systems to intelligence agencies because of their lack of accountability to other organs of the State.

A third risk of abuse arises when cooperation among intelligence agencies increases. Since countries have different standards of human rights protection and their

⁽¹⁵⁵⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.68.

⁽¹⁵⁶⁾ *Ibid.*

executive often does not operate following a generally agreed system of control procedures, intelligence agencies are not subject to specific controls and, consequently, act according to their own interests, thanks particularly to the broad power they are granted. Of course this happens also because their activity is secret and they are difficult to account.

However, the organs of the United Nations have been encouraging the exchange of information and higher cooperation among police and intelligence agencies, always affirming the importance of human rights protection.⁽¹⁵⁷⁾

A significant question is posed when intelligence activities clash with the principle of *due process*. Since intelligence information is based on secret sources, some States have derogated from legal and administrative procedures by authorizing intelligence agencies to maintain a secret profile. Hence, not all information is revealed at trial, and the defendant is limited in his right to ask for clarification on the charges against him.⁽¹⁵⁸⁾

Due process is related also to the lawyer's ability of challenging the charges against an individual. It has been said that, since lawyers tend to rebut to the accuses, intelligence agencies limit their participation to interrogations, whereas they are accepted in questionings by law enforcement authorities.⁽¹⁵⁹⁾

The main areas of intelligence activities that were interested by an extension of powers on the part of national governments are surveillance, information collection, arrest, detention, and interrogation.⁽¹⁶⁰⁾ The first two can be grouped together, since they are strictly connected one to the other. The other three also can be analyzed together.

5.2. Surveillance and information collection.

⁽¹⁵⁷⁾ As an example see A/RES/59/195 (2005), adopted on 22 March 2005 by the General Assembly, para.7. See also A/RES/64/297 (2010), adopted by the General Assembly on 13 October 2010, paras.4, 5 and 7. Online at <http://www.un.org/terrorism/sc-res.shtml>.

⁽¹⁵⁸⁾ See, for example, the case of *Mansour Ahani v. Canada*, Communication No.1051/2002, UN Doc. CCPR/C/80/D/1051/2002 (2004), online at <http://www1.umn.edu/humanrts/undocs/html/1051-2002.html>; and *Wassink v. The Netherlands*, Application No.12535/86, Judgement on 27 September 1990, available online at <http://sim.law.uu.nl/sim/caselaw/Hof.nsf/d0cd2c2c444d8d94c12567c2002de990/133687e6c9798c01c1256640004c1d47?OpenDocument>.

⁽¹⁵⁹⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.79.

⁽¹⁶⁰⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.69.

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After 9/11 the safeguards introduced to contain the power of surveillance of intelligence agencies have been highly reduced; conversely, surveillance was extended, following a steady decrease of the involvement of judicial powers.

In 1978, the US Administration amended the Foreign Intelligence Surveillance Act (FISA), which authorized the surveillance of individuals and entities outside the US, in order to spy governments. During the 1970s, it was discovered that the NSA was monitoring US citizens for political reasons. This is the reason that led to an amendment of the act.⁽¹⁶¹⁾

Since the World Trade Center events, the Bush Administration created in 2001 a new program immediately implemented by the National Security Agency (NSA): the Terrorist Surveillance Program (TSP). At first, the TSP was successfully kept secret. But in December 2005 the media discovered the secret activity of the NSA.⁽¹⁶²⁾

The TSP is a warrantless system because it authorizes the surveillance of suspected members of terrorist organizations without warrant, on the condition that at least one element of the communication is outside the US borders. The Panel on Terrorism, Counter-Terrorism and Human Rights was informed that the TSP limited the prisoners of Guantanamo Bay in their right to talk to their defense lawyers.⁽¹⁶³⁾

Nevertheless, it is not only the US that has authorized the extension of surveillance and information collection powers. Indeed, other countries were reported of having adopted similar acts, for example Egypt, the Russian Federation, Bangladesh and also Sweden.⁽¹⁶⁴⁾

Information collection and sharing is important in order to fight terrorism, since it helps governments find the suspects they are searching for. Of course, this happens at the expense of the right to privacy, because nobody knows where information goes, who reads it and what it may be done with it. Instead, data may go to different intelligence

⁽¹⁶¹⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (159). The FISA was created in 1952 and was supposed to spy foreign governments, since the 1960s-1970s are years of turbulence. It is worth to consider that this is the period of the Cold War and both the US and the Soviet Union are trying to discover each others secrets about nuclear energy and other military hardware. Thus, this is a period in which the two blocks take advantage of the huge and sometimes illegal methods of intelligence agencies.

⁽¹⁶²⁾ *Ibid.*

⁽¹⁶³⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.70.

⁽¹⁶⁴⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (160).

agencies that may use them with different purposes in respect of those for which they have been collected.⁽¹⁶⁵⁾

Several persons gave their private life to intelligence agencies for the purpose of information gathering without even knowing it. This is why it is important, following the Panel's reasoning, to share private information with appropriate safeguards that guarantee the correct use of such information. Indeed, the need for that specific information should be documented and properly used only when a question of national security is in place.

As far as the activity of intelligence agencies in the European Union is concerned, it is worth noting that data gathering and sharing is implemented within the Third Pillar of "Justice and Home Affairs". This situation is even worse than the United States' if it is considered that European States act independently in applying the rules of the Third Pillar. European governments' decisions in that area are not subject to judicial controls (only by the European Court of Justice) and they do not require the approval of the European Union Parliament. Hence, it is easier to violate the right to privacy, the obligation of limiting these actions to specific circumstances, and the principle of non-discrimination. Actually, in many cases, the individuals monitored are Islamist males from Middle Eastern countries, a typical example of discrimination elements. The Panel was also informed that European governments have reduced the safeguards circumscribing intelligence activity and have turned their attention to "data-mining" investigations.⁽¹⁶⁶⁾

In addition, several rights violations are related to the misuse of the information collected. Hence, the European Court of Human Rights (ECtHR) requires that appropriate safeguards are in place in order to protect individuals from information abuse or data processing by unauthorized persons.

Another important question about surveillance mechanisms and covert operations is that persons generally never know that they have been monitored or wiretapped. A violation of the right of an individual is difficult to detect. Theoretically, the persons involved should be informed of having been monitored, but only as the surveillance

⁽¹⁶⁵⁾ *Ibid.*, p.83; see also case-study of Maher Arar, chapter IV of this dissertation. For more information <http://ccrjustice.org/arar>.

⁽¹⁶⁶⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.72. Reference to note (162). Data-mining can be defined as a specific type of doubtless investigation of groups of individuals through the use of databases, pattern analysis software and the creation of a "terrorist profile". It means that the government does not require the agency to report its activity. The terrorist profile often violates the principle of non-discrimination. For more specific information about data-mining tools, <http://ftp.rta.nato.int/public//PubFullText/RTO/MP/RTO-MP-IST-063-14.pdf>.

activity ends. The only activity allowed without notifying it to the individual affected is covert surveillance, authorized only in specific cases.⁽¹⁶⁷⁾

5.3. Arrest, detention and interrogation.

Arrest, detention and interrogation can be grouped together, since they are part of the investigative procedure and are relevant for data gathering.

When intelligence agencies carry out the functions of arrest, detention and interrogation, they actually operate as substitutes of law enforcement authorities. In ordinary proceedings, these authorities are responsible for apprehending an individual and interrogating him with the aim of bringing him before a court.

In the case of terrorist suspects, intelligence works with national authorities by providing classified information and carrying out interrogations. The two systems operate at close, even though they should remain separate.

After 9/11 intelligence tasks have broadened and, if not used properly, they can undermine the basic rights of individuals. In particular, several States have affirmed that, given the growing importance of terrorism as a global threat, it is necessary to give intelligence agencies more power to counter it. This means that they may be authorized to arrest, hold and interrogate people that are not guilty until proved otherwise. Hence, everybody could be arrested, detained and questioned only because of having talked to a terrorist suspect without knowing it.

The power to detain people is the most questioned. Intelligence agencies should not be authorized to hold people, and while carrying out their activities, they should always comply with basic human rights standards and respect safeguards.

At least in theory, detention by intelligence agencies has the purpose of gathering more information. However, what is questioned is the fact that in order to collect information for the investigative procedure, agents often follow low human rights standards. For example, at the US Hearing of the Panel on Terrorism, Counter-Terrorism and Human Rights, the Central Intelligence Agency (CIA) was accused of several violations of human rights when carrying out interrogations, and of detention standards of

⁽¹⁶⁷⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.73.

its prisoners, standards that were lower than those of national law enforcement authorities. In particular, detainees were held outside the US borders, in secret places; they were denied access to lawyers and to the right to a remedy when proved innocent. Prisoners were also detained in inhuman conditions and tortured. All this happened for the purpose of intelligence gathering. In addition, the CIA has not accounted for this kind of activity.⁽¹⁶⁸⁾

Another example of the conflict between intelligence activity and law enforcement mechanism is given by the Australian system. The Australian Security Intelligence Organization (ASIO) is authorized to issue warrants related to persons that are not terrorist suspects but are supposed to own relevant information. During a Panel's Hearing, on the one side the Australian governments' thesis alleged that the ASIO had not a much stronger power than national authorities. On the other, affected lawyers and former intelligence agents affirmed that intelligence powers were intrusive in law enforcement mechanisms. However, Australia was accused of not granting an equivalent protection to the one required by ordinary interrogations. In particular, during interrogations, a suspect may have limited access to his lawyer to exchange confidential information and may be questioned in the absence of his counsel. Also the lawyer's intervention may be restricted to clarification on unclear questions.⁽¹⁶⁹⁾

Another example is Indonesia, where the government extended the Indonesian State Intelligence Agency (BIN) powers of arrest and detention of suspects up to 30 days. It is worth noting that these people were detained only on the basis of strong suspects that they were members of a terrorist group or involved in terrorist activities.⁽¹⁷⁰⁾

All these actions are carried out by intelligence agents that work for national agencies. Sometimes, their activity coincides with that of law enforcement authorities, but since they are not accountable for what they do, national governments extend their powers and leave behind the law enforcement system.

Nevertheless, some countries tend to blend intelligence methods with law enforcement. It is the case of Pakistan, the Northern area of Africa and the Middle East. They were all accused of torture, cruel and inhuman treatment, enforced disappearances

⁽¹⁶⁸⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.74.

⁽¹⁶⁹⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.75. In particular, see note (173) with reference to UN Committee against Torture, *Concluding observations and recommendations on Australia*, UN Doc. CAT/AUS/CO/1, 15 May 2008, para.10; and Special Rapporteur on Human Rights and Terrorism, *Australia, Study on Human Rights Compliance While Countering Terrorism*, UN Doc. A/HRC/4/26/Add.3, 14 December 2006, para.42.

⁽¹⁷⁰⁾ *Ibid.*

and detention of *incommunicado*. These and other countries have been reported to the Panel on Terrorism, Counter-terrorism and Human Rights for violations of human rights; for having rendered prisoners to other States to receive back a financial compensation; and for having detained people in secret places.

As far as Pakistan is concerned, the judicial system was accused of corresponding with the Pakistani Inter-Services Intelligence (ISI). It exchanged classified information and often bypassed judicial control. In addition, it transferred persons to other countries without trial or judicial safeguards, and did not give the necessary information for the accountability of the agency.⁽¹⁷¹⁾ Not only Pakistan, but also Morocco, Jordan and Egypt were reported of secret detention in places that were not officially considered detention facilities.

The most serious concern about secret detention is that when a centre is not officially listed as a detention facility, it is not properly inspected by the government, consequently allowing violations of human rights with nobody denouncing it.

In the States above-mentioned, the safeguards adopted do not guarantee the basic rights of suspects, and the judicial system responsible for controls on intelligence agencies is not able to ensure their respect. The Panel received reports also on many other countries where intelligence agencies do not act according to the safeguards imposed, in collaboration with the government or the judicial system.

In order to avoid the interference between intelligence agencies' powers and law enforcement mechanisms, it is necessary to keep them firmly distinct in their roles and functions.

6. Intelligence cooperation and relationship with law enforcement authorities: extraordinary renditions, lack of accountability and human rights compliance.

Intelligence agencies share information with other international agencies, helping governments in the fight against international terrorism through methods that can often be considered unfair or even illegal.

⁽¹⁷¹⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.76-77. Reference to notes (177), (178), (179).

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Usually, national security authorities need intelligence information in order to apprehend terrorists whose bases are in other countries. This means that intelligence agents have to engage in security activities with their foreign counterpart, which may have different, often lower, standards of human rights protection.

Cooperation among States is a fundamental tool to fight an international threat. States cannot avoid to exchange intelligent information through their agencies. Hence, they must establish specific safeguards and controls on the activity of such systems, in order to protect the rights of the suspects. International safeguards should be created to complement domestic measures.

Intelligence agencies have often been confused with law enforcement authorities, perhaps because their powers are not always limited to information gathering, for example the FBI, which is an intelligence agency with both information collection tasks and police powers.

An intelligence operation can be effective even without a conviction in a court of law, because its task is to gather information, not to prosecute criminals, which is a matter of police authorities. However, this will be acceptable only if there is a high consensus from the public on the seriousness of a threat. Only in this case security intelligence agencies are authorized to operate secretly. Thereby, a potential scenario could be one in which the national government examines the extent, the intensity, and the effectiveness of the countermeasures adopted to fight the threat without this involving any kind of prosecution.⁽¹⁷²⁾

Without the consensus of the public, intelligence agencies' activities will be interpreted as an aid to arrest and prosecution, and their secret measures would be part of the policy-making of national authorities. This position shows a more serious matter: the legitimacy of the preventive measures established to deter, prevent and reduce the potential harm caused by threats to national security, which are often put in place in advance of any particular crime being committed.⁽¹⁷³⁾

This change in the purpose of investigations has created a situation in which any socially uncharacteristic citizen is potentially a target for suspicion and observation. In other words, the whole society is under surveillance.⁽¹⁷⁴⁾ Surveillance during the investigation procedure starts before any degree of suspicion of an act being committed,

⁽¹⁷²⁾ ROBERTSON, *supra* note (98), p.50.

⁽¹⁷³⁾ ROBERTSON, *supra* note (98), p.51

⁽¹⁷⁴⁾ *Ibid.* Reference to D. CAMPBELL, *Society under Surveillance*, in P. HAIN, *Policing the Police*, Vol.2, London, John Calder, 1980, p.65.

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leading to check and suspect on individuals innocent of criminal involvement until otherwise proven.⁽¹⁷⁵⁾

An important issue to consider when relating intelligence activities to policy-making is the relationship which exists between them. It is interesting to notice that national governments have adopted different methods. For example, the FBI has both powers of intelligence security and law enforcement, while the CIA's tasks are limited to information-gathering. In the UK the Security Service has no law enforcement powers and has to rely on the police forces to carry out this function.⁽¹⁷⁶⁾

Law enforcement and intelligence powers should remain separate, because otherwise there would be a higher potential for an abuse of power which can become a justification for massive and indiscriminate collection, infiltration and surveillance of criminal acts no matter how political they can be.

Intelligence objectives are much more extended and general, while law enforcement has a central role in apprehending and convicting criminals, which is a very specific task.

Intelligence activity must have a clear conception of threats, and it has to receive high support from public forces. However, while the police is independent from the political class and directly accountable to the law, security services collect information on potential threats to national security on the basis of political decisions.

A further important element concerns the methods used by intelligence services. The question arises when such methods involve illegitimate measures, used not only to collect information on terrorists and other international criminals, but also to apprehend and convict ordinary criminals. In this case civil liberties will be infringed, even though human rights conventions will help contrast potential abuse of powers. A major protection against this abuse is reached when courts resolve not to accept evidence obtained by means of unlawful activities.

Both intelligence activity and human rights can be maintained, provided the distinction between law enforcement and security intelligence remains in place, and provided the courts maintain the distinction between admissible and inadmissible evidence at trial.⁽¹⁷⁷⁾

⁽¹⁷⁵⁾ ROBERTSON, *supra* note (98), p.52. Reference to note (21). P. HEWITT, *Privacy – The Information Gatherers*, London, NCCL, 1980, p.65.

⁽¹⁷⁶⁾ ROBERTSON, *supra* note (98), pp.52-53.

⁽¹⁷⁷⁾ ROBERTSON, *supra* note (98), pp.53-54.

6.1. Extraordinary renditions.

Renditions and extraordinary renditions have not a specific legal definition, but they are used with reference to the process by which agents abduct and transfer terrorist suspects from one country to an other, with or without the cooperation of the latter government, in order to interrogate and detain them.

Renditions may easily imply violations of the principle of due process, which is the right of a suspect to know what the charge against him is and what information the agency has about him, and they do not follow the ordinary legal procedures used in cases of extradition, deportation, expulsion and removal of an individual from a State.⁽¹⁷⁸⁾

Before 9/11, renditions had the purpose of initiating criminal proceedings. Now they have become a means to gather information about terrorist cells, with an important focus on detention and interrogation. Of course, at this stage there is not a criminal proceeding, and there are no charges against the suspect.

The US has been accused on several occasions after 2001 of having rendered people to countries where there are low human rights protection standards. However, the US Government's response has been a reaffirmation of the need to fight terrorism through extraordinary renditions and of the compliance of its measures with international law. In particular, former Secretary of State, Condoleezza Rice, alleged that a State's consent to renditions, as it is the case of the US, makes them legal and in compliance with international law. She added that these measures were adopted because local administrations were not able to detain or prosecute individuals, and ordinary extraditions would have not been a good alternative.⁽¹⁷⁹⁾ Former Secretary of State justified the US behavior affirming that the choice of a State to cooperate in renditions complies with international law and is consistent with the State's obligation to protect its citizens.

However, extraordinary renditions do not comply with international law; on the contrary, they violate several human rights. In particular, extraordinary renditions are concerned with arbitrary arrest, enforced disappearance, forcible abduction, detention and transfer, subjection to cruel, inhuman and degrading treatment. Usually, the individuals transferred are placed in secret centers of detention, unknown to official

⁽¹⁷⁸⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.80.

⁽¹⁷⁹⁾ *Ibid.* For more information on extraordinary renditions see chapter IV of this dissertation.

authorities. Families are not informed and nobody knows where they are. Enforced disappearances can be defined as follows:

...the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁽¹⁸⁰⁾

Usually, incommunicado detention for an indefinite period of time is not considered as an enforced disappearance, provided the family is informed and the official authorities acknowledge that the individual is detained (and where he is detained). In the case where both the family and the authorities do not know where the person is, then it is possible to talk about enforced disappearance. This falls under the so called crimes against humanity, and violates human rights law and international law.

6.2. The lack of accountability and human rights compliance.

In the last decade, national governments have extended intelligence agencies' powers, authorizing them to apprehend, detain and question terrorist suspects. Thereby, they shifted accountability from law enforcement authorities to private agencies that lack of such an obligation.

This makes States non responsible, increasing the sense of impunity on the part of the intelligence community. Not punishing them for their abuse of power leads to a justification of the violation of human rights law. States may be accused of encouraging the perpetration of human rights violations.

The sense of impunity is even stronger if it is considered that secrecy is growing. States are taking advantage of expressions like "public interest immunity" or "state

⁽¹⁸⁰⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.81. Reference to note (189). The excerpt is taken from article 2 of the UN *Convention for the Protection of All Persons from Enforced Disappearance*, adopted by the UN General Assembly on 20 December 2006.

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secrecy”⁽¹⁸¹⁾, used in order to foreclose remedies for individuals proven innocent. These expressions are mainly used to conceal human rights violations on the part of intelligence agencies in cooperation with national governments.

As far as the United States is concerned, it is worth noting that the US Administration has often been accused of human rights violations on the part of the CIA. The US has invoked state secrecy whenever States or individuals asked for remedies and accountability of the agency, and has alleged that the agents were acting ignorant of the law, asking for indemnity for those involved in improper interrogation and detention activities.⁽¹⁸²⁾ An example of other governments that accuse the US of improper management of extraordinary renditions may be the case of Abu Omar’s abduction.⁽¹⁸³⁾

Abu Omar was abducted in Italy in an operation organized by the CIA in collaboration with the Italian military intelligence services (SISMI). The Italian Government’s prosecution efforts have been hindered. Italy alleged that the investigations had broken state secrecy laws, because of wiretapping conversations and communications between intelligence officials about the abduction. In addition, Italy issued an order preventing witnesses from testifying at trial with the excuse of state secrecy protection. The Italian Government requested the extradition of US officials involved in the kidnapping, with no positive response from the US Government. The prosecutor proceeded anyway with the prosecution *in absentia* of more than twenty US citizens charged of the kidnapping. However, the US Administration refused to comply with any request of extradition made by the Italian Government.⁽¹⁸⁴⁾

⁽¹⁸¹⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.86.

⁽¹⁸²⁾ *Ibid.*, p.88.

⁽¹⁸³⁾ *Ibid.*, p. 86. Reference to note (200). For more information on extraordinary rendition see chapter IV of this dissertation.

⁽¹⁸⁴⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), pp.86-87. On 29 November 2012, the Italian Supreme Court passed a judgment on the complaints submitted by the Appeal Court of Milan towards M. Mancini and N. Pollari, ex chiefs of the SISMI, and towards R. Di Troia and L. Di Gregori. An appeal was submitted also by civil parts Abu Omar and his wife, and by CIA and SISMI agents. The Court makes specific reference to the limits of “state secrecy”, affirming that it can be applied only to the relationship between the CIA and SISMI, and not to the individual officers and agents acting beyond their functions, who on their part are liable for the crime of abduction under Italian domestic law. The Supreme Court concludes that the challenged judgment is rejected, whereas the civil parts’ position is partially accepted and postponed for further examination. The appeals submitted by Pollari, Di Troia and Di Gregori hold steady. The Court repealed the orders of 22 and 26 October 2010 issued by the Appeal Court of Milan. The appeals submitted by P. Pompa and L. Seno are rejected, as those submitted by the CIA agents. Mancini and G. Ciorra shall be condemned to the payment of the procedural expenses. Except for Pompa, Seno, Pollari, Di Troia and Di Gregori, all the other defendants are condemned to refund each civil part with €5.760,00. The appeal of the civil parts against Pollari, Di Troia and Di Gregori has been accepted, consequently their expenses will be settled with the final judgment. The judgment is at <http://www.diritto24.ilsole24ore.com/content/dam/law24/Gad/Sentenze/2012/Corte%20di%20cassazione%20-%20Sezione%20V%20penale%20-%20Sentenza%2029%20novembre%202012%20n.%2046340.pdf>.

The lack of accountability of intelligence agencies is strictly important to the extent of human rights compliance. Indeed, it may happen that the State receiving a terrorist suspect is engaged in torture and inhuman treatment of its detainees.

An example is the Shanghai Cooperation Organization (SCO) Charter and Agreement on the Regional Anti-Terrorism Structure (RATS), adopted in 2002 by SCO member States, whose main tasks were to provide undefined assistance in operational activities, information sharing between security services, immunity of the officials involved, and prohibition to disclose information about security services' assistance.⁽¹⁸⁵⁾

The States involved in this Agreement have been accused of intelligence extralegal activities concerning abduction and transfer of individuals to their country of origin, where they risked serious human rights violations, in evident contrast with the principle of *non-refoulement*.⁽¹⁸⁶⁾

States may be charged of complicity because they regularly receive and exchange information with intelligence systems. In addition, governments distinguish intelligence information gathered by means of torture, not used in legal proceedings, from those gathered for operational purposes concerning the prevention of a terrorist attack. They prohibit the former but authorize the latter. It may happen that States allowing the use of intelligence gathered by means of torture for operational purposes may use information in legal proceedings.

Some governments also take advantage of intelligence gathered by others, thus becoming consumers of such information and implicitly legitimizing such practices.

7. Recommendations of the Panel on Terrorism, Counter-Terrorism and Human Rights.

It may happen that the respect for human rights may be in contrast with a State's obligation to protect its populations for national security matters, in particular when fighting against international terrorism. On the one side, the intelligence system of investigations is concerned with secrecy and lack of clear, transparent information, while,

⁽¹⁸⁵⁾ *Ibid.*, p.82. For more information on the Shanghai Cooperation Organisation look at <http://www.globalsecurity.org/military/world/int/sco.htm>.

⁽¹⁸⁶⁾ Reference to the case of Maher Arar. See chapter IV of this dissertation.

on the other, human rights protection is strongly based on clear accountability and punishment of human rights violations.

The Panel on Terrorism, Counter-Terrorism and Human Rights affirms that this conundrum can be overcome through the use of good intelligence services, whose aim should be to fight terrorism in the respect of human rights. It is necessary to take advantage of mechanisms of democratic control of intelligence activity in order to ensure that law binds the agencies effectively, according to human rights standards.

In 2009, the Panel made various recommendations both at a domestic and international level.⁽¹⁸⁷⁾ At a domestic level, the Panel asked States to distinguish “*the role of intelligence and law enforcement*”: they are not exchangeable. In addition, intelligence officials cannot perform law enforcement duties such as arrest or detention. When acting in the performance of their duties, intelligence personnel must comply with human rights standards as it is stated by law. Detainees must be allowed prompt access to a lawyer and to courts.

States have also been asked to use intelligence information with due respect for human rights and not for discrimination purposes. The authorization to use such material given by a judicial power is included in intrusive surveillance powers and it must be clear when and on what basis these powers can be used.

A third recommendation to States is that they must control their intelligence agencies effectively, since they are responsible for their acts under international law. Internal and external controls, and oversight mechanisms are included. Where these mechanisms are already in existence, it is necessary that States review them periodically, in order to check whether they are truly effective in practice. Where these mechanisms do not exist, then investigations should be initiated on possible violations of human rights, and if this is the case, establish proper remedies for victims and bring perpetrators to justice. In addition, “*permanent complaints procedures*”, for example those involving the Ombudsmen or Inspector Generals, should be established in order to avoid any future violation.

A final domestic recommendation given by the Panel is that States should protect the secrecy of intelligence information and sources. Nevertheless, they must take into consideration human rights standards, thus not acting according to the culture of “state secrecy”, a practice that must be strongly condemned and punished.

⁽¹⁸⁷⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), pp.89-90.

At an international level, the Panel made three relevant recommendations: the first recalled the one concerned with the domestic control of intelligence agents. In fact, States must remember that they are responsible under international law for the acts of their intelligence personnel. States must ensure that intelligence agents comply with international human rights law and do not cooperate with other agencies in the violation of such law.

A second recommendation makes reference to the importance of not entrenching the institutional culture of “state secrecy” when a State protects the secrecy of intelligent information and sources. The Panel asked States to establish “*clear policies, regulations and procedures*” covering information exchange with foreign intelligence agencies. Indeed, States should never provide classified information to others when there is a credible risk that information is abused to violate human rights.

A final recommendation given by the Panel is related to the importance of international cooperation in the respect of human rights standards and in the control of intelligence activity. To assist States in their duties towards human rights respect, the Panel recalled the 2006 proposal of the Secretary General of the Council of Europe related to a clearer international guidance in the field of intelligence cooperation. There should be a clarification in States’ obligations under human rights law both from a theoretical and practical point of view.

8. Intelligence and human rights.

Terrorism is itself a violation of human rights, and it is precisely what terrorists sought to obtain. As said before, terrorists, in particular suicide bombers, are recruited in the poorest suburbs of Islamic cities and villages. They usually do not have a high degree of education and live in inhuman conditions.

Nevertheless, not only terrorism can infringe human rights. Also national governments, especially when they overreact to a threat, can violate their duties towards human rights.

A first step to damage human rights is increased surveillance on the part of security intelligence agencies. Such surveillance on citizens is said to “chill” their willingness to participate to associations, movements and to express their opinion. It also

damages personal privacy, and leads to an erosion of the ordinary procedures followed by police in apprehending and convicting a criminal.⁽¹⁸⁸⁾

In order to avoid an over reaction on the part of national governments, the relationship between intelligence countermeasures and human rights should be balanced. To balance human rights and government measures, policy-makers should examine the threat they face and clearly state what intelligence can do to eliminate or at least reduce the impact of such threat in the society.

To make this assessment, it is first of all necessary to establish a good system of intelligence, which must be able to analyze existing information and determine objectively what threat poses terrorism. Thereby, a good intelligence agency is capable of determining whether the threat needs the full range of countermeasures in possession of the agency, or whether the threat can be considered isolated criminal activity, which can be resolved rapidly.

The problem of “over reaction” arises at this stage, often as a consequence of the intelligence agency inability to understand the real degree of seriousness of the threat. Usually, death is the criterion adopted to make a group object of intelligence investigations.⁽¹⁸⁹⁾ Indeed, terrorist groups generally claim responsibility for certain acts which involve massive and indiscriminate deaths. At this point the interest of an intelligence agency in such group is almost automatic.

In the first moments of the investigations, intelligence agencies should decide what measures are more likely to be used to obtain effective results. Usually information-gathering involves a minimum degree of resources, unless politicians decide to publicly exaggerate the seriousness of the threat, which is often done for personal gain.

Since intelligence agencies act in compliance with policy-makers’ decisions, if politicians’ aim is harassment, then intelligence agencies carry out activities aiming at obtaining such result.

In order to overcome this difficulty, limitations and rules on intelligence activity should be in place, and also an effective system of accountability which involves the executive should be present. However, rules which limit the flexibility of intelligence activity can be damaging of their capability to achieve their scope. Indeed, intelligence agencies have broad and general tasks which cannot be restricted too heavily by law.

⁽¹⁸⁸⁾ ROBERTSON, *supra* note (98), pp.54-55.

⁽¹⁸⁹⁾ *Ibid.*, pp.55-56.

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In the United States Attorney General Levi adopted some guidelines which took a step-by-step approach to investigations. These guidelines involved triggers which would allow the opening of an investigation and the use of more intrusive techniques.⁽¹⁹⁰⁾

The other possible solution to abuse on the part of intelligence agencies is to establish a monitoring committee to check the activities carried out by security intelligence agencies. However, this solution places decisions in the hands of a restricted number of persons. The problem would be overcome if the committee has to clear operational decisions with the Attorney General or a court judge.

These two solutions, the establishment of a set of rules and of a monitoring committee, are far from being effective or adequate. A more satisfactory solution lies in defining the purpose for which information is collected.

Intelligence activity against terrorism has two distinct objectives: the first is the apprehension and arrest of a suspect of terrorism aiming at bringing him before a court. In this case only admissible information should be considered at trial. Indeed, it is the use an intelligence agency makes of information collected that can infringe human rights. The second objective is the collection of information for an identifiable purpose, i.e. a threat identified by the State.

The political aspect in determining intelligence activity is necessary, but often intelligence agencies' abuse of power is due to a lack of control by politicians, who have the task of defining what is, and what is not, a threat to national security. Therefore, it is necessary to establish political bodies able to set priorities and reviewing mechanisms.

Citizens must be assured that there is an organ of the political system that monitors the activity of intelligence agencies, by assessing whether collection, operations and analysis of information collected are producing any result. Only countermeasures which reduce a threat can be effective and fully justified.⁽¹⁹¹⁾

Citizens' suspicion towards intelligence agencies' activities has often been exaggerated by the lack of a clear definition of agencies' tasks and objectives. The responsibility has fallen over the political class, which has not been able to give proper guidance. Intelligence services are less damaging of human rights when they collect the necessary information for a specific purpose, but this implies that they have a clear idea of what is their purpose.

⁽¹⁹⁰⁾ *Ibid.*, p.56.

⁽¹⁹¹⁾ *Ibid.*, p.58.

Intelligence is not limited to obtain prosecution of criminals, but it is thought of as an aid to policy-makers, to the extent that it helps defining the seriousness, resources, foreign connections and implications of a terrorist cell, describing the available options to eliminate the threat of terrorism. However, in order to do this, the body politic has to agree on the nature and characteristics of the threat being faced, on the tasks of intelligence services, and on the proper analysis of information collected.

The public must be aware that intelligence activity aims at aiding the activity of policy-makers. Thereby, the fear that human rights can be violated is highly reduced.⁽¹⁹²⁾

9. Intelligence programs and systems.

Intelligence programs can be divided into core systems, tasking, collection, processing and dissemination systems.⁽¹⁹³⁾ The first ones include both the general architecture of intelligence systems and the application interoperability. In other words, core systems have both the theoretical ensemble which is the foundation of the interoperability of intelligence application, and the applications themselves.

The second systems, tasking, aim at direct and prioritize collection requirements. They represent the interface between producers and users of intelligence. The third is the group of collection systems, whose main task is to gather information from various sources. These systems take advantage of different organizations and services, including tactical ground-based systems, unmanned aerial vehicles (drones), and space systems.

Processing systems are tasked to receive, convert and correlate information collected by collection systems. They then translate information into operational information or finished intelligence. Dissemination systems, finally, distribute finished information to users by creating communication links, which include both physical and networks communications.

Nevertheless, there is one more group of systems, named “other”, which includes a catch-all residual category, whose exact purposes are obscure.

In 1995, the US Presidential Decision Directive 35 (PDD-35), called “Intelligence Requirements”, has established four different types of intelligence operations: 1)Support to

⁽¹⁹²⁾ *Ibid.*, pp.58-59.

⁽¹⁹³⁾ They are available at <http://www.globalsecurity.org>. They refer to the US intelligence approach.

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Military Operations (SMO), 2) Support to Policy, 3) Support to Law Enforcement, and 4) Counterintelligence (CI). The PDD-35 has also defined the degree of risk for national security from tier 0 to tier 4. Tier 0 represents the highest degree of seriousness, identifying warning and crisis management; tier 4 represents the lowest degree and develops no interest to intelligence forces.⁽¹⁹⁴⁾

Thus, intelligence activity can be both independent, i.e. related to non military purposes, and of support to military operations, by means of communication networks, information databases and new means of information collection.

Among the various disciplines used to collect intelligence, five should be examined. They are human intelligence (HUMINT), signal intelligence (SIGINT), imagery intelligence (IMINT), measurement and signatures intelligence (MASINT), and open source intelligence (OSINT).⁽¹⁹⁵⁾ Not every discipline is present within all intelligence services.

Open source intelligence is effective when information is collected in open societies, such as those of the Western countries. Information can be obtained easily from technical and professional journals, or from the web.

Usually, the majority of intelligence agencies collect information through HUMINT, because IMINT, SIGINT and MASINT are effective only depending on the degree of technological advance of the agency which uses them.

9.1. HUMINT.⁽¹⁹⁶⁾

Human sources is the most common means to collect information, and although the public consider HUMINT as clandestine activity and espionage, the majority of information collected comes from overt collectors such as diplomats and military forces.

HUMINT includes overt, sensitive, and clandestine activities and the individuals who exploit, control, supervise, or support these sources.

Overt HUMINT involves the exploit of unclassified publications or conference materials; operations in detention and interrogation centers; and debrief of legal travelers who moved to countries which were of interest for the intelligence agency.

⁽¹⁹⁴⁾ *Ibid.*

⁽¹⁹⁵⁾ OPSEC, *supra* note (131).

⁽¹⁹⁶⁾ For more information on HUMINT, J. E. THOMAS, *Human Source Intelligence*, in the Military Intelligence Community, ed. by G. W. Hoppe and B. W. Watson, Boulder, Westview Press, 1986, pp.55-70.

Covert HUMINT carries out the same activities but cannot disclose information or documents, because of sensitive information and sources involved. It includes volunteers or informants who provide information to a foreign nation, or foreign nationals who have infiltrated with a cover story (rare).

HUMINT is perhaps the most important collector system, because it provides an insight of the real intentions of criminals. It also provides documentary evidence, such as blueprints of facilities, and copies of documents. In addition, HUMINT is less expensive than other technical collection systems and does not require a significant technological production base for support.

9.2. SIGINT.⁽¹⁹⁷⁾

Signal intelligence collects signals intercepted from other important sources, including communication intelligence (COMINT), electronic intelligence (ELINT), and foreign instrumentation signals intelligence (FISINT). COMINT provides information intercepted from communication transmissions. It targets voice, video, Morse code traffic, and facsimile messages. Information from COMINT can be collected from the air waves, cable, fiber optics, or any other means of transmission.

ELINT intercepts and analyses non communication transmissions, for example radar transmissions. It is used to identify the location of an emitter, determine its characteristics and forward information to other supported systems.

FISINT intercepts telemetry from a weapon system as it is tested. It provides information such as the prototype of weapon tested, fuel usage, and staging. FISINT evaluates the performance of the weapon being tested.

SIGINT can be performed on different platforms, for example, overt ground collection sites, ships or aircrafts, and also covert locations. SIGINT intercepts information both from communication satellites and terrestrial facilities.

⁽¹⁹⁷⁾ For more information on SIGINT, D. L. CHRISTIANSON, *Signals Intelligence*, in the Military Intelligence Community, ed. by G. W. Hopple and B. W. Watson, Boulder, Westview press, 1986, pp.39-54.

9.3. MASINT and IMINT.⁽¹⁹⁸⁾

MASINT provides quantitative and qualitative analysis of information intercepted from technical sensors. The goal is to identify any distinctive feature connected to the source emitter intercepted. MASINT intercepts information to obtain finite metric parameters. MASINT includes radar intelligence (RADINT), infrared intelligence (IRINT), and nuclear intelligence (NUCINT).

IMINT intercepts and analyses images detected from electronic representations of objects, representations by optical means, or electronic display devices. Images can be derived from visual photography, radar sensors, infrared sensors, lasers, and electro-optics. IMINT is useful because properly measured imagery can provide important information on geo-location of weapons systems and targeting, and it can provide a mapping of areas of fundamental importance.

However, imagery also has important limitations, since the quality of images can be degraded by darkness and adverse weather. In addition, if the adversary discovers that a foreign intelligence agency has targeted the former by IMINT, it can conceal its activity, obscure information or provide misleading images, by means of camouflage, concealment and deception (CC&D). Thereby, the intelligence agency may draw erroneous conclusions about the capabilities of the organization observed.

9.4. OSINT.

OSINT, as said before, involves open source information collection, and it has become widespread thanks to the advent of the World Wide Web, which has lessened restrictions on privacy matters.

OSINT has proved to be extremely accurate in providing specific information on an organization's capabilities and activities. However, it has some limitations: for example, if OSINT studies technical journals, it may provide information that do not exactly represent the real activity and capability of an organization, because it may be tainted with desires or

⁽¹⁹⁸⁾ For more information, S. S. BEITLER, *Imagery Intelligence*, in the Military Intelligence Community, ed. by G. W. Hopple and B. W. Watson, Boulder, Westview Press, 1986, pp.71-86.

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theories. In addition, censorship may reduce the quantity and quality of information, often producing erroneous information.

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1. Legal tools to fight against international terrorism.

There is a widespread consensus on the political and social nature of international terrorism, and the international community has adopted legal countermeasures to eradicate such a threat.

First of all, an important means of reducing the impact of international terrorism on the Western world is to create wealth in poorer areas. Terrorism grows more rapidly in places where there is no respect for human rights, where people have nothing to lose because of a lack of the means to create wealth and economic security. Hence, the richest countries should make financial investments in health and education in the undeveloped areas of the world.⁽¹⁹⁹⁾

⁽¹⁹⁹⁾ N. QUÉNIVET, *The World after September 11: Has It Really Changed?*, in *EJIL* (2005), vol.16 no.3, p. 566. Reference to Tálas, *Fighting Terrorism as a New Type of Warfare*, in P. TÁLAS, *Responses to Terrorism Or: Is There a Route from the “Hunt-down” in Afghanistan to Sustainable Globalization?*, 2002.

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The international community has started to respond to terrorism through a “piecemeal approach”⁽²⁰⁰⁾, meaning that it reacted to the latest forms of terrorism, condemning specific acts of terror.

National governments adopted two different approaches to counter terrorism: one is a more liberal logic which promotes freedom and autonomy of the individual; the other is a defensive logic, which believes in a more efficient and secure State.

The central question when facing counterterrorism measures is that nowadays States have to consider not only internal but also external political factors in order to adopt the proper approach against terrorism, an approach that has become highly multidisciplinary and strongly connected to other States’ political approaches, since the international community has to consider both reactive and preventive measures.⁽²⁰¹⁾

Counterterrorist measures must comply with human rights provisions, because even though terrorism represents a serious threat to national and international security, this does not authorize States to over react and violate human rights standards.

States are actually the only parties responsible for the fight against terrorism. They have to implement international conventions and treaties within domestic law, and have the responsibility to protect their population. However, the implementation of counterterrorist instruments is largely conditioned by the good will of States. In addition, real enforcement mechanisms are still lacking.

In order to make States respect their obligations, Security Council resolution 1373 (2001)⁽²⁰²⁾ has established a Counter-Terrorism Committee (CTC), whose task is to monitor States’ compliance with their obligations under international law. However, the CTC does not have the power to monitor the conformity of States’ counterterrorist measures with human rights standards, and it has not been provided for how States not respecting resolution 1373 would be compelled to abide by its provisions.⁽²⁰³⁾

2. The UN organs.

⁽²⁰⁰⁾ *Ibid.*, p.565.

⁽²⁰¹⁾ *Ibid.*, p.568.

⁽²⁰²⁾ S/RES/1373/2001, *supra* note (46).

⁽²⁰³⁾ QUÉNIVET, *supra* note (199), p.570.

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From an international perspective, the United Nations (UN) can be considered the fundamental “centre for international cooperation in all fields.”⁽²⁰⁴⁾ The UN has the proper legitimacy that makes States Parties adopt difficult measures to fight against terrorism in an environment of peace and cooperation. This is possible because the UN has been established on important values that terrorism tries to eradicate, for example, the respect for human rights, the rule of law, tolerance and peaceful conflict resolution.

The UN organs that work to create higher cooperation between States are: the Security Council, the General Assembly, and the Secretary General, which is part of the Secretariat. They have been established by the Charter of the United Nations.⁽²⁰⁵⁾

2.1. The role of the Security Council.

Before September 9/11, the Security Council (SC) was not directly involved in terrorist fighting, and it had condemned terrorism in general terms as a threat to international peace and security, only rarely referring to particular events. After the 9/11 attacks, the SC has started to pass resolutions on specific terrorist acts.⁽²⁰⁶⁾

The Security Council is considered the “policeman” of the international order, whose goal is to protect international peace and security, under article 24 of the Charter of the UN.⁽²⁰⁷⁾

With reference to the fight against terrorism, the SC adopts resolutions acting under Chapter VII of the Charter, which gives the Security Council the power to establish the existence of a threat to peace, a violation of peace or an act of aggression. Under Chapter VII the Security Council makes recommendations or decides what measures shall be taken in order to maintain or restore international peace and security (art.39). It decides what measures to take that do not imply the use of force (art.41). And if the measures imposed by article 41 were not adequate, the Security Council may resolve to the use of force or of any other necessary means to maintain or restore international

⁽²⁰⁴⁾ P. ANDRÉS-SÁENZ-DE-SANTA-MARÍA, in FERNÁNDEZ-SÁNCHEZ, p.91.

⁽²⁰⁵⁾ CHARTER OF THE UN, *supra* note (40). The Charter is available online at <http://www.untreaty.un.org>.

⁽²⁰⁶⁾ QUÉNIVET, *supra* note (199), p.575.

⁽²⁰⁷⁾ CHARTER OF THE UN, *supra* note (40), art.24.

peace and security (art.42).⁽²⁰⁸⁾ Security Council resolutions are binding upon all member States.

The Security Council follows three lines to counter terrorism: 1) by means of international sanctions, 2) by means of general declarations, and 3) by legislative activity on terrorism-related matters.⁽²⁰⁹⁾

International sanctions involve the adoption of various resolutions on both the object and the subject of the measures. In other words, the SC adopts resolutions on both the protection of victims and the condemnation of perpetrators.

The most known system of resolutions against the perpetrators, which has adopted measures against the Taliban regime and al-Qaeda, is the group chaired by resolution 1267 (1999) and going to resolution 1526 (2004).⁽²¹⁰⁾

Resolutions are characterized by abstract headings referring to general themes. They are general and non binding upon member States, but they do not have time limited effects, they are permanent. An example is resolution 1269 (1999), which clearly express the need to reinforce international cooperation against terrorism. It also insists on the need for all States to adopt and implement national and international conventions on terrorism. In particular, States are asked to adopt all necessary measures to protect persons, prevent terrorism financing and terrorist acts, and cooperate to bring perpetrators to justice.

A second important resolution is 1377 (2001), which includes the Declaration on global efforts to combat terrorism. The Declaration affirms again the importance to fight terrorism, since it is a threat to international peace and security and is contrary to the principles of the Charter of the UN.

A third resolution is 1456 (2003), which emphasizes the importance of international cooperation and the need for effective communication among civilizations.⁽²¹¹⁾

2.1.1. Security Council resolutions on terrorism.

⁽²⁰⁸⁾ *Ibid.*, Chapter VII, artt. 39, 41, 42.

⁽²⁰⁹⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (204), p.95.

⁽²¹⁰⁾ *Ibid.* SC resolutions are available online at <http://www.untreaty.un.org>.

⁽²¹¹⁾ *Ibid.*, p.96.

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Beginning with resolution 1373 (2001) and continuing with resolutions 1540 (2004), 1535 (2004), 1566 (2004) and 1624 (2005), the Security Council has established a twofold line of actions. On the one side, these resolutions adopted norms to counter terrorism; on the other, they developed institutional measures binding upon all member States.⁽²¹²⁾

In particular, resolution 1373 (2001) requires States to comply with a specific set of norms relating to the financing of terrorism, active or passive support to terrorists, asylum, cooperation, and assistance among member States for investigation and prosecution purposes. In other words, resolution 1373 stresses the accent on the need for cooperation through measures of assistance connected to “criminal investigations or criminal proceedings relating to the financing or support of terrorist acts.”⁽²¹³⁾

However, resolution 1373 does not have a clause that forces member States to act under international humanitarian law.⁽²¹⁴⁾ It seems that States, in order to fight international terrorism, give more importance to security needs than to human rights protection. This resolution was strongly criticized for its orientation towards the needs for security, which after 9/11 represented a form of solidarity towards the United States. Indeed, the serious threats posed by al-Qaeda created a situation of extreme uncertainty, in which States could choose to negate some fundamental rights in order to better implement resolutions’ measures and to eradicate terrorism.

Resolution 1540 requires States to control weapons and prevent nuclear, and other dangerous substances, proliferation. In particular, States are required to prevent non-state actors from acquiring and using such weapons, and to adopt national rules to prevent and suppress such activity.

Resolution 1566 (2004) has already been examined in the first chapter of this dissertation, in particular with reference to a general definition of terrorism.⁽²¹⁵⁾ It is necessary to recall that the definition thereof is non binding, but only a guideline.

Resolution 1566 also established the Working Group 1566, whose main tasks are to make recommendations about the measures to which are subject specific individuals and entities, suspected of, or involved in, terrorist acts. The countermeasures examined include assets freezing, prohibition of movement within member States’ territory and negation of access to material supply.

⁽²¹²⁾ *Ibid.* All SC resolutions can be consulted online at <http://www.un.org/terrorism/sc-res.shtml>.

⁽²¹³⁾ S/RES/1373/2001, para. 2, subpara. (f).

⁽²¹⁴⁾ DI STASIO, *supra* note (14), p.106.

⁽²¹⁵⁾ See *supra* chapter I of this dissertation, note (75).

The Security Council adopted other resolutions whose aim is to implement the measures imposed by the first resolutions on terrorism; however, none of them mentions human rights standards. For example, resolution 1455 (2003)⁽²¹⁶⁾ imposes further tasks to the Committee against the Taliban and Al-Qaeda established with resolution 1267 (1999), and requests member States to submit as soon as possible the names of individuals and organizations suspected of terrorism activity in order to place them in a list which has to be adopted by all member States. It does not talk about delisting, nor it mentions human rights protection.

Kofi Annan, former Secretary-General of the UN, during a summit in Madrid in March 2005, condemned the measures that member States adopted in order to fight international terrorism, because they “infringe on human rights and fundamental freedoms.”⁽²¹⁷⁾ He stressed the importance of maintaining a proper balance between human rights protection and the need for security of member States.

Consequently, the Security Council adopted further resolutions that aimed at correcting the previous ones, imposing de-listing procedures from the lists proposed by member States and recalling the importance of human rights protection.

Resolution 1730 (2006)⁽²¹⁸⁾ establishes a de-listing procedure and requests the Secretary-General to establish a focal point to receive de-listing requests and to start the de-listing procedure, under previous consultation with the government of citizenship or residence of the individual. If the government accepts the de-listing request, the focal point submits the request to the Chairman of the Sanctions Committee, who will place it on the Committee’s agenda. Whether or not the Committee recommends de-listing, the focal point shall be informed and then itself inform the petitioner of the Committee’s decision. In the preamble of the resolution, the Security Council commits “to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.”⁽²¹⁹⁾

Particularly important is, in my opinion, resolution 1904 (2009)⁽²²⁰⁾, because in the preamble it emphasizes the need to combat by all means threats to international peace and security posed by terrorist acts, taking into account the Charter of the United Nations

⁽²¹⁶⁾ S/RES/1455/2003, adopted by the Security Council on 17 January 2003. It is available online at <http://www.un.org/terrorism/sc-res.shtml>.

⁽²¹⁷⁾ Excerpt from DI STASIO, *supra* note (14), p.107. Reference to note (15).

⁽²¹⁸⁾ S/RES/1730/2006, adopted by the Security Council on 19 December 2006. It is available online at <http://www.un.org/terrorism/sc-res.shtml>.

⁽²¹⁹⁾ *Ibid.*

⁽²²⁰⁾ S/RES/1904/2009, adopted by the Security Council on 17 December 2009. It is available online at <http://www.un.org/terrorism/sc-res.shtml>.

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and international law, with reference to applicable international human rights, refugee and humanitarian law. This assertion will be recalled many other times by the latest resolutions, in order to maintain the balance between human rights protection and security issues.

The resolution goes further in describing the measures imposed to member States: they shall freeze without delay funds and financial assets owned by Taliban or by the individuals inscribed in the lists; they shall prevent the entry or transit of the individuals listed through their territories; they shall prevent the supply, sale or transfer of arms or other military supplies to these individuals. It then describes the listing procedure and the role of the Ombudsperson in the delisting process. The focal point, established with resolution 1730 (2006), is no longer the reference point for petitioners to appoint a delisting request. However, it remains important because it is located within the member States territory.

When, with resolution 1333 (2000)⁽²²¹⁾, a “*Consolidated List*” was established, the list itself was not supposed to be reviewed, at least not too early from its creation. With resolution 1904, the Committee has the new task of conducting an annual review of the Consolidated List, with the help of the Monitoring Team, in particular of those names which have not been reviewed for three or more years, in order to ensure the list is as updated and accurate as possible and to confirm that listing remains appropriate.

The resolution also has two annexes: Annex I deals with the tasks that the Monitoring Team has to fulfill under the direction of the Committee, which are mainly those of assisting the Committee’s work, analyzing its reports and coordinating with national counterterrorism focal point in the country of visit. It shall make recommendations regarding the implementation of the measures.⁽²²²⁾

Annex II deals with the Office of the Ombudsperson and its tasks. In particular, the Ombudsman has to gather information relevant to the petitioner’s request and send it to the Monitoring Team. Then, a dialogue begins, in which the petitioner may be involved and, finally, the Committee discusses and decides for accepting or rejecting the delisting request; it informs the Ombudsman, who informs the petitioner of the decision.

⁽²²¹⁾ S/RES/1333/2000, *supra* note (13).

⁽²²²⁾ S/RES/1904/2009, *supra* note (220). Reference to Annex I.

2.1.2. The limits to the power of the Security Council.

Nowadays it is common to speak of the Security Council as a “legislator”, as an organ with a normative power. Its power is perceived as “hyper”, especially when it has to react to threats posed by terrorism. If terrorism becomes hyper-terrorism, then the Security Council has the duty to hyper-react, because Chapter VII of the Charter imposes an obligation on the Security Council to act in situations of emergency which involve a threat to international peace and security.⁽²²³⁾

However, some legal opinion argues that the Chapter only authorizes the Security Council to act in situation of emergency where international peace and security are threatened, hence not in every circumstance. On the other side, other authors accept its competence, but with caution. Further in the discussion, some others have shown doubts about the Council’s legitimacy. Indeed, the Security Council has a restricted membership and has five permanent members with powers of veto on every topic discussed by the Council. The position of the five members is highly privileged and absolutely non equal to the other members.

Another criticism to the Security Council’s normative power is that often the Council is not able to make member States comply with their obligations, but this happens because they practically have not the capacity to comply with them. For example, J. Rupérez, the Executive Director of the Counter-Terrorism Committee affirmed that:⁽²²⁴⁾

Security Council resolution 1566, which opened up a promising channel for the UN to provide a global list of terrorist individuals and organizations, and also proposed the setting-up of an international fund to provide aid to terrorist victims and their families, has come to nothing. Security Council resolution 1624... should receive reports from all UN members on their compliance... By July only 50 countries had met this commitment.

This evaluation clearly shows that, of all the reports submitted by States, both members and non, not all States can comply with the obligations imposed by the resolutions. Most of them are small countries of the African and Asian continent. In

⁽²²³⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (204), pp.97-98.

⁽²²⁴⁾ The Counter-Terrorism Committee was established by resolution 1373 (2001) and it is examined further on in this chapter. J. Rupérez was Executive Director of the Counter-Terrorism Committee in 2006. Reference to FERNÁNDEZ-SÁNCHEZ, note (204), pp.99-100, at note (34). Reference to *The UN’s Fight Against Terrorism: Five Years After 9/11*, in ARI, Real Instituto Elcano, No.83, September 2006, p.9.

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addition, the obligations of sending reports to the CTC imposed by the resolutions are often perceived as a “burden” by States.

A further motive of conflict in legal literature is the fact that Security Council measures often do not take into account the protection of human rights. A solution to the question of national security and counterterrorism measures against human rights provisions should be of a balance.

A particular interest arose from the listing procedure of the al-Qaeda/Taliban Sanctions Committee, which was accused of being obscurantist and of not respecting the suspects’ human rights. Review and appeal mechanisms were not supposed to be established, but they were needed in order to ensure fair procedures of listing and the protection of human rights.⁽²²⁵⁾

A Report of the Monitoring Team of 2005 argued that the individual listed received no notice of the listing, neither before nor after any actions taken by the Committee. There was no time limit to the listing, unless the Council decided otherwise. The Guidelines for the de-listing procedure established by the Sanctions Committee did not provide for justifications, nor did they allow an individual to appeal for de-listing, unless he did so through his country of residence or citizenship. In addition, the applicant did not have any judicial remedy, because the Security Council believed it was not necessary to establish an independent international court with jurisdiction on actions brought against individual decisions taken by the Sanctions Committee.⁽²²⁶⁾

Nevertheless, the Sanctions Committee revised the Guidelines for the Conduct of its Work in 2011, revision which included the amendment of Section 6 on listing, Section 7 on de-listing, and Section 10 on the al-Qaeda Sanctions List of individuals and entities subject to sanctions measures. The revised guidelines include the obligation for the Committee to publish the reasons for the listing of a name on its website and to provide a copy of the narrative summary of reasons for listing. In addition, an individual whose name is on the list, shall be promptly informed of being listed and of the reasons of the designation.

As far as the delisting procedure is concerned, a petitioner can submit a request for delisting either through his State of residence or citizenship or directly to the Office of the Ombudsperson. The Ombudsperson is the only responsible for providing the response of

⁽²²⁵⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (204), pp.100-101. Currently, there is a review mechanism distributed in three years. The Committee provides for an annual review of the names in the Sanctions List that have not been reviewed in three or more years.

⁽²²⁶⁾ *Ibid.*, pp.102-104.

the Committee to the petitioner for delisting, provided the Committee has already given its response to the Permanent Mission of the State affected. However, at first, member States requiring the designation could decide not to provide the Ombudsperson with confidential information on the person for whom they asked the listing procedure, in particular information collected with the help of intelligence agencies. Nevertheless, pursuing resolution 1989 (2011), the Security Council asked member States to provide all relevant information to the Ombudsperson, including any relevant confidential information where appropriate.⁽²²⁷⁾

2.2. The General Assembly.

The General Assembly has promoted most of the international conventions on terrorism. In 2005 the Assembly adopted the *Convention for the Suppression of Acts of Nuclear Terrorism*, and reached a total of 13 instruments on terrorism-related issues.⁽²²⁸⁾

The General Assembly has the right to discuss every issue or question within the purposes of the Charter of the UN (art.10). It examines the general principles of cooperation in order to maintain international peace and security (art.11); it makes recommendations in order to promote cooperation among States and the respect of human rights and fundamental freedoms (art.13).⁽²²⁹⁾ With regard to this article, the General Assembly adopts resolutions on human rights and terrorism.

Resolution 49/60 emphasizes that terrorism practices constitute a grave crime which violates the purposes and values of the United Nations. It also points out that member States are required to comply with the obligation to suppress terrorist activities and cooperate in order to prevent and eliminate terrorism.⁽²³⁰⁾

⁽²²⁷⁾ The Guidelines were revised on 30 November 2011 in compliance with paragraph 43 of Security Council resolution 1989 (2011), adopted on 17 June 2011, which directed the Sanctions Committee to review its guidelines in compliance of the provisions of the resolution thereof. The revised Guidelines are available online at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf. With reference to the role of the Ombudsperson and its relation with intelligent information, see S. DE VIDO, *Il contrasto del finanziamento al terrorismo internazionale. Profili di diritto internazionale e dell'Unione europea*, Padova, Cedam, 2012, forthcoming, p.286.

⁽²²⁸⁾ See *supra* note (226), p.93. The Convention was adopted on 13 April 2005.

⁽²²⁹⁾ CHARTER OF THE UN, *supra* note (40), Chapter IV, artt.10, 11, 13.

⁽²³⁰⁾ A/RES/49/60 (1994), adopted on 17 January 1994, online at <http://www.un.org/terrorism/sc-res.shtml>. Reference to FERNÁNDEZ-SÁNCHEZ, note (204), p.92.

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Another important instrument is resolution 51/210, which stresses the importance of cooperation among member States in order to prevent and counter terrorism. It also points out the importance of cooperation in extradition matters.⁽²³¹⁾

In resolution 59/195⁽²³²⁾, the need to combat terrorism in all its forms and by any means is strongly expressed, but countermeasures must be in accordance with international human rights standards.

Some little steps forward were made in order to make member States conscious of their obligations towards human rights provisions while fighting against international terrorism.

An important resolution adopted by the General Assembly is resolution 60/288, known as the *United Nations Global Counter-Terrorism Strategy*.⁽²³³⁾ This Strategy has been adopted on 20 September 2006 and recently reviewed on 26 June 2012. In paragraph 3(b), it affirms the need to examine, in two years, the progress made by the implementation of “the Strategy” and to consider further updates. The Annex in the Strategy is constituted by a Plan of Action divided into four pillars:⁽²³⁴⁾

- I. Measures to address the conditions conducive to the spread of terrorism – they aim at conflict prevention, judicial settlement and peaceful resolution of unresolved conflicts (para.1); they promote dialogue, tolerance in order to avoid religious discrimination (para.2); they aim at reaching development standards and eliminating political exclusion and socio-economic marginalization (paras.3, 5, 6).
- II. Measures to prevent and combat terrorism – aimed at refraining from encouraging and financing terrorist activities (para.1), following the principle “*aut dedere aut judicare*”; at reaching a high level of cooperation in denying safe havens (para.2); at ensuring apprehension and extradition of perpetrators, complying with human rights law,

⁽²³¹⁾ A/RES/51/210 (1996), adopted on 15 July 1996, online at <http://www.un.org/terrorism/sc-res.shtml>. Reference to FERNÁNDEZ-SÁNCHEZ, note (204), p.93.

⁽²³²⁾ A/RES/59/195 (2005), *supra* note (157), paras.7, 8, and 10.

⁽²³³⁾ A/RES/60/288, *The United Nations Global Counter-Terrorism Strategy*, adopted by the General Assembly on 20 September 2006. This is the first resolution that treats a Global Strategy against terrorism. Further updates were made by A/RES/62/272, adopted on 15 September 2008, and by A/RES/64/297. The last review of the Strategy was made in June 2012, with draft resolution A/66/L.53. All the resolutions can be consulted on <http://www.un.org/terrorism/sc-res.shtml>.

⁽²³⁴⁾ *Ibid.* Reference to the Annex, Plan of Action.

refugee law and humanitarian law (para.3); at intensifying international cooperation and exchange of accurate information.

- III. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard – the aim is to develop States capacity to prevent and combat terrorism.
- IV. Measures to ensure the respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism – aiming at balancing counterterrorism measures with human rights protection.

The fourth pillar mentions perhaps the focal point in the question of international terrorism. The balance between human rights standards and counterterrorism measures is fundamental in a system in which States often disregard and violate human rights provisions with the excuse of taking necessary measures in order to fight terrorism without bounds.

It is true that terrorism shall be fought with all means possible, but repaying terrorists with the same treatment is not a typical attitude of democratic civil countries with an efficient judicial system. Terrorists should be apprehended and extradited to the State of citizenship or residence, or, if there is not an extradition treaty between the States appointed, the State apprehending the terrorist shall try him, ensuring a fair trial and, most of all, the respect for human rights and fundamental freedoms (right to life, prohibition of torture and inhuman or degrading treatment, prohibition of slavery). Indeed, paragraph 4 of Pillar IV of the Strategy affirms that “any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms...”⁽²³⁵⁾

The General Assembly has adopted 45 resolutions, thanks to the fact that during its plenary sessions the number of resolutions discussed and approved ranged from one-two resolutions per session to 5 resolutions adopted in each of its last two sessions. It continues to address the issue of terrorism through the adoption of general measures to eliminate it, but always taking into account the protection of human rights.

⁽²³⁵⁾ *Ibid.*, Pillar IV, para.4 of the Annex.

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2.3. The Secretary General.

The other important organ of the UN is the Secretariat, which includes the Secretary-General and the Organization personnel. The Secretary-General represents the United Nations and makes annual reports on the activities of the Organization (art.98). He focuses the attention of the Security Council on whatever issue he believes it may threaten international peace and security (art.99).⁽²³⁶⁾

In October 2001, former Secretary-General Kofi Annan promoted the establishment of the Advisory Group on the UN and Terrorism to study the issue and make recommendations in order to fight against international terrorism.⁽²³⁷⁾

2.4. The subsidiary bodies involved in counterterrorism measures.

The Security Council, the General Assembly and the Secretary-General are not the only organs involved in terrorist fighting. There are other subsidiary groups established within the United Nations whose aim is to make recommendations or, more often, reports, in order to better respond to a terrorist threat.

The Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights are fundamental for the examination of human rights violations in relation to the fight against terrorism. These groups study the phenomenon and elaborate guidelines and general principles. Between 1999 and 2004, the Sub-Commission has produced an important global study on human rights protection and terrorism, which member States should take into account when implementing counterterrorism measures.⁽²³⁸⁾

In April 2005, the Commission appointed a Special Rapporteur with resolution 2005/80⁽²³⁹⁾, whose main task was to monitor and examine human rights violations in relation to counterterrorism measures for three years.

⁽²³⁶⁾ CHARTER OF THE UN, *supra* note (40), artt.98, 99.

⁽²³⁷⁾ DI STASIO, *supra* note (14), p.115.

⁽²³⁸⁾ DI STASIO, *supra* note (14). Reference to note (38) p.119.

⁽²³⁹⁾ E/CN.4/RES/2005/80 (2005), relating to the protection of human rights and fundamental freedoms while countering terrorism, adopted on 15 April 2005 by the Commission on Human Rights. Online at http://ap.ohchr.org/documents/sdpage_e.aspx?b=1&se=59&t=11.

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A year later, resolution 60/251⁽²⁴⁰⁾ of the General Assembly established the Human Rights Council, whose task is to promote and enforce human rights at an international level, and to make recommendations regarding issues of human rights violations while countering terrorism. The Human Rights Council took the place of the Commission on Human Rights and works in cooperation with the Special Rapporteur, whose mission has been extended to technical assistance and advice, if requested by member States, and to the exchange of information regarding human rights issues.

The Special Rapporteur could be considered a point of reference for member States in the area of terrorism in relation to human rights. Its objective is to develop higher cooperation among member States and other international organizations in order to implement the counterterrorism measures imposed by the resolutions and other international instruments.

Since the establishment of the Special Rapporteur, States have highly contributed to its tasks, by sending accurate and detailed information on specific individual cases of human rights violations. The Special Rapporteur is required to draw up periodical reports, based on the information received by member States.⁽²⁴¹⁾

A fundamental subsidiary body, established by General Assembly resolution 51/210⁽²⁴²⁾ in 1996, is the Ad-Hoc Committee, whose main task is to help in the elaboration of international conventions on terrorism.

Other important organizations are the United Nations Office on Drugs and Crime (UNODC), which helps States implement counterterrorist measures; the Committee related to the Taliban, Osama bin Laden and al-Qaeda, established with Security Council resolution 1267 (1999), whose tasks are to make reports on information received about their activity to the Security Council, to monitor the implementation of counterterrorism measures within States' domestic law and to examine derogations from paragraph 4 of the resolution; the Counter-Terrorism Committee (CTC), established with Security Council resolution 1373 (2001), whose task is to monitor States in their obligations to abide by the resolution. With resolution 1535 (2004), the General Assembly revitalized the CTC and established the Counter-Terrorism Committee Executive Directorate (the CTED) in order to help the CTC in assessing the implementation of measures imposed by resolution

⁽²⁴⁰⁾ A/RES/60/251 (2006), adopted on 3 April 2006 by the General Assembly. Online at <http://www.un.org/terrorism/sc-res.shtml>.

⁽²⁴¹⁾ DI STASIO, *supra* note (14), p.121. Reference also to COMMISSION OF HUMAN RIGHTS, note (76).

⁽²⁴²⁾ A/RES/51/210 (1996), *supra* note (230).

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1373 by supplying technical assistance and carrying out visits to member States with their consent.

2.5. The “Committee” established under resolution 1267 and the Counter-Terrorism Committee established under resolution 1373.

The measures adopted both by the Security Council and by the General Assembly are called “smart sanctions”⁽²⁴³⁾, and they aim at eliminating specific terrorist acts. In particular, with resolution 1267(1999), adopted by the Security Council on 15 October 1999, the UN “establishes a Committee of the Security Council consisting of all the members of the Council to undertake [measures] and to report on its work to the Council with its observations and recommendations.”⁽²⁴⁴⁾ The “Committee” has the following tasks:

- To seek further information about the actions of other member states and of the implementation of measures imposed by paragraph 4.⁽²⁴⁵⁾
- To consider information given by States relating to violations of paragraph 4 and to recommend appropriate counter measures.
- To make periodic reports to the Council on the impact of the measures of paragraph 4, and reports on information regarding alleged violations of the measures in paragraph 4, identifying individuals involved in these violations.
- To designate the financial assets, funds and aircraft mentioned in paragraph 4 in order to better implement the measures imposed.
- To consider the exemptions mentioned in the paragraph and to allow them in case of humanitarian need, taking into account the positions of the International Air Transport Association and the aeronautical authority of Afghanistan.
- Finally to examine States’ report about the implementation of the measures imposed by paragraph 4.⁽²⁴⁶⁾

⁽²⁴³⁾ DI STASIO, *supra* note (14), p.104.

⁽²⁴⁴⁾ S/RES/1267/1999, note (13), para.6.

⁽²⁴⁵⁾ *Ibid.*, paras.4(a) and 4(b). States shall deny permission for any aircraft to take off or land in their territory if it is owned, leased or operated by or on behalf of the Taliban as designated by the Committee, unless the particular flight has been approved in advance by the Committee on humanitarian need. They shall also freeze funds and other financial assets controlled, directly or indirectly, by the Taliban, and ensure that they are not made available by other individuals for the benefit of the Taliban, except in case of humanitarian need or under the Committee authorization.

⁽²⁴⁶⁾ *Ibid.*, subparas.(a), (b), (c), (d), (e), (f), (g).

The Committee's central function is to produce a list of individuals suspected of being involved in terrorist activity, or of participating to terrorist organizations or of financing terrorism. The financial assets and funds of the listed persons are immediately frozen and transactions highly limited.

The "Committee" established by resolution 1267 has to identify and inscribe individuals on suspects lists. The process of inscription, at first, was not transparent, and the "Committee" did not have an obligation to let those individuals know the reasons for their inscription on the list. However, a clearer process has been established after the 2011 review of the Sanctions Committee Guidelines.

Besides the "Committee" established by resolution 1267, Security Council resolution 1373 (2001) established the Counter-Terrorism Committee (CTC), which was revitalized by resolution 1535, which included an Executive Directorate.⁽²⁴⁷⁾

The main task of the Counter-Terrorism Committee is to monitor the implementation on the part of member States of resolution 1373. The Committee also asks States to report to the Committee on the steps they have followed to implement the resolution.

The CTC had no mandate to monitor the compliance of counterterrorism measures with human rights provisions when such measures were implemented by member States in compliance with resolution 1373.⁽²⁴⁸⁾ However, Security Council resolution 1624 (2005)⁽²⁴⁹⁾ conferred a human rights mandate on the CTC, giving new tasks which include reviewing the human rights conformity of measures adopted by member States. Hence, the CTC and its Executive Directorate (CTED) can now discuss issues of human rights compliance with counterterrorism measures in cooperation with the Special Rapporteur for the protection of human rights while countering terrorism.

However, the reports asked by the CTC resulted too of a technical nature, without apparent human rights implications. Most of member States have reported to be confused about the guidelines offered by the CTC. For example, some States reported that they were not able to implement the CTC's recommendations because they had to comply with human rights provisions.⁽²⁵⁰⁾

⁽²⁴⁷⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (204), p.97. For more information on the CTC, E. ROSAND, *The International Law of Terrorist Financing*, in *AJIL* (2003), vol.97 no.2, pp.315-341.

⁽²⁴⁸⁾ COMMISSION ON HUMAN RIGHTS, *supra* note (76), para.52.

⁽²⁴⁹⁾ S/RES/1624/2005, adopted on 14 September 2005, online at <http://www.un.org/terrorism/sc-res.shtml>.

⁽²⁵⁰⁾ COMMISSION ON HUMAN RIGHTS, *supra* note (76), paras.57 and 59. As an example, Paraguay and Peru demonstrated not to implement resolution 1373 because they alleged to be limited by human rights provisions.

3. The United Nations Global Counter-Terrorism Strategy.

The measures imposed by the United Nations to its member States are described in the *United Nations Global Counter-Terrorism Strategy*.⁽²⁵¹⁾

The strategy can be summarized into five important activities:

- Dissuading people from committing or supporting terrorist acts;
- Negating access to the means to carry out their attacks;
- Deterring States from supporting terrorism;
- Building State capacity to eradicate terrorism;
- Protecting human rights.⁽²⁵²⁾

In the Plan of Action of the Strategy, member States resolve to combat terrorism taking all the necessary measures, taking into account the importance of human rights protection even for the perpetrators of terrorist attacks. They also resolve to cooperate among themselves and with other subsidiary bodies apt to the fulfilling of counterterrorism tasks. The measures imposed must comply with the Charter of the United Nations, with human rights law, refugee and international humanitarian law.

3.1. Measures to address the conditions conducive to the spread of terrorism.

The first Pillar of the Strategy⁽²⁵²⁾ imposes measures aimed at avoiding those situations in which terrorism is rooted, for example, prolonged unresolved conflicts, which can be avoided through negotiation, mediation, judicial settlement, peacekeeping and peace building operations.

Another condition that favors the spread of terrorist attitude is the lack of the rule of law, accompanied by human rights violations and ethnic and religious discrimination. These situations may be avoided through the promotion of tolerance, dialogue, mutual respect for different cultures and religions.

⁽²⁵¹⁾ UN GLOBAL COUNTER-TERRORISM STRATEGY, A/RES/60/288, *supra* note (232).

⁽²⁵²⁾ DI STASIO, *supra* note (14), p.117.

⁽²⁵²⁾ A/RES/60/288, *supra* note (233).

It is easy to understand that the paramount task is to promote social development and sustained economic growth, in order to eradicate poverty and to eliminate political exclusion and socio-economic marginalization. This attitude seems in line with a thesis arguing that “without a solution to the problem of poverty in the world, there will be no solution to the problem of terrorism.”⁽²⁵³⁾

With reference to the prevention of individuals from joining terrorist groups, the doctrine gives various opinions about what actually induces the spread of terrorism. Besides the above-mentioned, another opinion asserts that a cause of terrorism is the never ending Palestinian conflict: putting an end to that conflict would reduce significantly the support of terrorist groups to Islamic countries.⁽²⁵⁴⁾ Another author, instead, is convinced that more investments in education and health in the developing countries by the rich world can prevent people from participating to terrorist activity.⁽²⁵⁵⁾

In general, legal literature agrees on the fact that the main sources of terrorist spreading are poverty, uneducated populations and political troubles, which affect mainly failed States.

The first Pillar concludes with considerations on the establishment of national systems of assistance for the victims of terrorism and their families on a voluntary basis, in order to help them live a normal life.

3.2. Measures to prevent and combat terrorism.

The second Pillar concerns preventive and repressive measures imposed to member States. In particular, all States shall undertake counterterrorism measures in accordance with the principle to extradite or to prosecute, known as “*aut dedere aut judicare*.”

States shall refrain from organizing, instigating, participating in, financing or encouraging terrorist activities. They shall deny access to their territory and deny safe havens to terrorists or to individuals or entities which support or finance terrorist acts.

⁽²⁵³⁾ BRUHA, *Neuer Internationaler Terrorismus: Völkerrecht im Wandel?*, cit. in QUÉNIVET, note (199), p.567.

⁽²⁵⁴⁾ *Ibid.*, p.566.

⁽²⁵⁵⁾ TÁLAS, *Fighting Terrorism as a New Type of Warfare*, cit. *ibid.*, p.567.

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When a State apprehends an individual suspected of, or caught while, committing a terrorist act, it shall remit the individual to the State whose jurisdiction falls over the individual for extradition and subsequent trial. However, if there is no extradition agreement between the States involved, or the State where the individual is to be transferred is suspected of violating fundamental human rights standards, or of subjecting persons to inhuman and degrading treatment, the State having the individual in custody shall bring him to justice, ensuring the respect of human rights and his right to a fair trial.

The provision set in paragraph 3, Pillar II of the Strategy, is relatively new in the system of UN resolutions. Actually, previous resolutions did not mention the respect for human rights law as a principle to take into consideration while fighting against terrorism. This represents an important step forward in the balance between counterterrorism measures and human rights protection; a balance that seems closer to reality in the fourth Pillar, which explicitly relates to the complementary character of security needs and human rights standards.

Under paragraph 7 of the second Pillar, States shall grant asylum under refugee law, but only if the asylum seeker has not engaged in whatsoever terrorist activity. Refugee law has also been treated by Security Council resolution 1373 (2001), which, in paragraph 3(f), affirmed that before granting a refugee status, a State must take appropriate measures to ensure the asylum-seeker is not involved at any stage in a terrorist act (from planning to participating).

The second Pillar imposes an intensification of cooperation among member States, in particular as for the exchange of accurate information, since terrorism is not the only activity carried out by terrorist groups. Indeed, they may be involved in drug trafficking, illicit arms trade, money-laundering and smuggling of nuclear weapons, to mention some activities connected to terrorists. With reference to money-laundering, the General Assembly encourages the implementation of the *Recommendations* made by the Financial Action Task Force (FATF), issued in February 2012.⁽²⁵⁶⁾

Persons connected to al-Qaeda and the Taliban regime are banned from traveling and are inscribed in the lists created with resolution 1267 (1999). The International Criminal Police Organization, known as INTERPOL, circulates information about these individuals and their involvement in terrorist activities.

⁽²⁵⁶⁾ A/RES/60/288, *supra* note (232), para.10, Pillar II. The FATF Recommendations represent international standards which help to fight against money laundering and the financing of terrorism. The most recent revision was made on 16 February 2012. The FATF Recommendations are available at <http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardscombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html>.

Finally, States have improved the security of travel documents and issuing identity; they have also improved the security and protection of vulnerable targets (infrastructures and public places) in order to grant civil protection.

3.3. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard.

The measures examined in the third Pillar are mainly related to capacity-building in order to enhance cooperation among member States.

The capacity-building programs deal with funds raising and technical assistance projects. In particular, the UN addresses its interest towards the private sector for contributions. States are encouraged to participate to regular informal meetings, and to support higher cooperation and involvement.

The third Pillar is mainly concerned with the implementation of the activities of subsidiary bodies, playing important roles in the fight against international terrorism. The Counter-Terrorism Committee (CTC) and the Executive Directorate (CTED) are encouraged to share more information about technical assistance at international, regional and sub-regional levels, including efficient communication with member States and organizations.

The United Nations Office on Drugs and Crime (UNODC) is requested to facilitate the implementation of international conventions and protocols regarding the suppression of terrorism. Also the International Monetary Fund (IMF) is encouraged to commit itself in the fight against money-laundering and the financing of terrorism.

The International Atomic Energy Agency (IAEA) is called to implement capacity-building in order to prevent terrorists from accessing nuclear materials and to ensure public facilities in order to be ready for possible threats. Instead, the World Health Organization (WHO) commits itself in the implementation of public health system.

Finally, the third Pillar encourages INTERPOL to cooperate with the Secretary-General in order to share best practices with the aim of preventing terrorist attacks.

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3.4. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

The fourth Pillar is perhaps the most important of the Strategy. Indeed, it affirms that human rights and effective counterterrorism measures are not conflicting goals, instead they are complementary and mutually reinforcing.

States must comply with their obligations under human rights, refugee and international humanitarian law while fighting against terrorism. They must ensure an efficient criminal justice system, in compliance with the principle “*aut dedere aut judicare.*” In other words, they must ensure the right to a fair trial to individuals who participate, plan, or commit acts of terrorism who are brought to justice, taking into consideration the respect for human rights and fundamental freedoms.

The Pillar asserts the importance of the United Nations contribution in the implementation of its legal structure within member States, through the promotion of the rule of law, the respect for human rights and the criminal justice systems of States.

The measures imposed in the fourth Pillar are related also to subsidiary bodies that work to protect human rights. In particular, the Office of the United Nations High Commissioner for Human Rights (UNHCHR) has to examine the question of protecting human rights within counterterrorism measures. It is encouraged to make recommendations and give assistance and advice to States seeking for help to implement human rights obligations in the national law-enforcement system.

Also the Special Rapporteur has an important role in the promotion and protection of human rights while fighting against terrorism. The General Assembly encourages the Special Rapporteur to cooperate with member States in giving concrete advice and functioning as a reference point for reports and clarifications.

4. The Council of Europe and the protection of human rights.

The Role of Intelligence in the Fight Against International Terrorism: Legal Profiles

The Council of Europe⁽²⁵⁷⁾ is an organization with a substantive body of conventions whose main interests are international legal cooperation and protection of human rights. In particular its Parliamentary Assembly has followed some important rules in producing its texts and treaties, both before and after 11 September 2001, which implemented the counterterrorist measures imposed by international conventions and UN resolutions making sure that such measures comply with human rights standards.⁽²⁵⁸⁾

First of all, terrorism can never be a possible solution for States. They shall not justify any terrorist activity, nor support it. It is also important to recall that terrorists shall be allowed human rights protection, even if they commit outrageous acts to other people.

Unfortunately, several governments believe that, since terrorists violate human rights by mass killings, hostage-taking and torturing, they create an exceptional situation, in which derogations from human rights are considered necessary, in order to take effective measures against the threat posed by terrorists.

The United States was probably the first government to adopt emergency counterterrorism measures that derogate from human rights standards. In Europe, also the United Kingdom asked for a derogation of some fundamental principles of the European Convention of Human Rights (ECHR).⁽²⁵⁹⁾ For example, national authorities have often carried out arrests of individuals for religious or ethnic motives. They were detained for limitless periods, without the possibility of defend themselves. They did not know what charge was brought against them and their State of residence or of citizenship did not even know they were under arrest.⁽²⁶⁰⁾

Another important point which the Parliamentary Assembly takes into account in producing its texts is the fact that counterterrorism measures are effective when they stop terrorist recruitment. In other words, States shall create development and a sense of security in those countries where they are not present.

A useful example is the Israel-Palestinian conflict, still very present in today's world.⁽²⁶¹⁾ Israel still carries out massive attacks to the Palestinian population, provoking indiscriminate and disproportionate retaliations. This causes a general sense of fear and

⁽²⁵⁷⁾ The Council of Europe (CoE) was founded on 5 May 1949, it is based in Strasbourg (France), and its mandate is to develop throughout Europe common and democratic principles, which found their basis on the European Convention on Human Rights (ECHR). For more information on the Council of Europe, see <http://hub.coe.int>.

⁽²⁵⁸⁾ P. SCHIEDER, *Anti-Terrorist Measures and Human Rights from the Perspective of the Parliamentary Assembly of the Council of Europe*, article in W. BENEDEK, *Anti-terrorist Measures and Human Rights*, Leiden, Martinus Nijhoff Publishers, 2004, p.69.

⁽²⁵⁹⁾ ECHR, *supra* note (87).

⁽²⁶⁰⁾ SCHIEDER, *supra* note (258), p.70.

⁽²⁶¹⁾ *Ibid.*

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hatred that favors terrorist recruitments, leading to a vicious circle which can never be stopped. Furthermore, whenever a State does not respect human rights, terrorists find a fertile territory to attack.

The Parliamentary Assembly also makes reference to the fact that States need to implement preventive counterterrorism measures. Repressive methods alone will never work. It is necessary to eradicate the root causes of terrorism.⁽²⁶²⁾

Legal literature believes that the root causes of terrorism are poverty, unequal distribution of wealth in the world, social marginalization and political exclusion. The problem of failed States can be another form of destabilization.⁽²⁶³⁾ Indeed, by taking advantage of the difficult situation of failed States, terrorists are able to organize and from that failed States' territory launch their attacks. Long-term preventive measures should be operations of nation-building in these States, in order to eradicate terrorist bases in their territory.

There is also another important issue which the Parliamentary Assembly of the Council of Europe should take into consideration, and it is the use of fear as a political tool to gain power during election periods. In many States, during elections, candidates instill a sense of fear of terrorist attacks in the population in order to deviate attention from the actual problems of their government and obtain more votes.⁽²⁶⁴⁾

5. European conventions and common positions on terrorism.

The first convention adopted at the European level was the *European Convention on the Suppression of Terrorism*⁽²⁶⁵⁾ of January 1977, adopted by the Council of Europe. Its main task was to impede that terrorist crimes are considered political crimes, facilitating the extradition of terrorists. Member States agree in considering that even if terrorist acts are not considered political crimes, the motivations and causes of terrorism remain of a political nature.

⁽²⁶²⁾ The root causes of terrorism are well examined in QUÉNIVET, note (199).

⁽²⁶³⁾ E.-O. CZEMPIEL, *Weltpolitik im Umbruch: Die Pax Americana, der Terrorismus und die Zukunft der internationalen Beziehungen* (2003), in QUÉNIVET, note (199), p.567.

⁽²⁶⁴⁾ SCHIEDER, *supra* note (258), p.71.

⁽²⁶⁵⁾ DI STASIO, *supra* note (14), p.45, note (98). The *European Convention on the Suppression of Terrorism* was adopted on 27 January 1977, and registered by the Secretary-General of the Council of Europe on 30 May 1979. Available at http://treaties.un.org/untc//Pages//doc/Publication/UNTS/Volume%201137/volume-1137-I-17828_English.pdf.

Besides CoE instruments, the Council of the European Union adopted other treaties⁽²⁶⁶⁾, including the *Schengen Convention* of 1990, which created a unified external border with common rules on customs controls, visas and asylum; the *Maastricht Treaty* of 1992, which created the First Pillar, on security matters, the European Community (EC) and the European Union (EU). The First Pillar is accompanied by the Common Foreign Security Policy (CFSP – Second Pillar) and the Third Pillar, known as Justice and Internal Affairs; and the *Europol Convention* of 1995.

Another important instrument which better explained the counterterrorism measures adopted is the *Amsterdam Treaty* of 1997 which, with the European Council of Tampere of 15-16 October 1999, developed all focal points on counterterrorism measures. According to the *Amsterdam Treaty*, the European Council follows four strategic lines in the fight against terrorism:

- the establishment of common investigative teams;
- the establishment of Eurojust, made of police squads that function as coordination bridges with the penal systems;
- the implementation of the principle of mutual enforcement of judicial decisions;
- the harmonization of national laws in the penal system of member States.

However, it is only in 2001 with the *Nice Treaty* that these strategic lines were implemented by the EU Council.

After 9/11, the Committee of Ministers of the Council of Europe requested the Committee for Human Rights to draw up guidelines based on human rights provisions and aiming at countering terrorism.⁽²⁶⁷⁾

These guidelines cover various issues, including the prohibition of torture; the collection and elaboration of personal information by national governments; measures interfering with privacy; arrests and detention; asylum and extradition; the right to property; derogations. Some of the guidelines impose absolute standards and measures,

⁽²⁶⁶⁾ *Ibid.*, pp.178-181.

⁽²⁶⁷⁾ M. EATON, *Human Rights Standards and Framework Conditions for Anti-Terrorist Measures. European Standards and Procedures*, in W. BENEDEK, *Anti-terrorist Measures and Human Rights*, Leiden, Martinus Nijhoff Publishers, 2004, p.27. A first group of Guidelines was issued on 11 July 2002, and it refers to human rights and the fight against terrorism. Another group of Guidelines was issued on 2 March 2005, and it refers to the protection of victims of terrorist acts. The two groups of Guidelines are available online at <http://www.echr.coe.int/NR/rdonlyres/176C046F-C0E6-423C-A039-F66D90CC6031/0/LignesDirectrices.EN.pdf>.

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for example the prohibition of torture; but others admit derogations from general principles.

The guidelines are non binding, even though they find their source in the main conventions and declarations on human rights and terrorism. Because of their non binding nature, they do not require signature or ratification.

Between December 2001 and July 2003, the European Union sent to the UN Counter-Terrorism Committee (CTC) three reports that outlined the counterterrorism measures adopted at a regional level.⁽²⁶⁸⁾

Within the European Union the main competent body in the adoption of Common Positions, coordinated policies and other instruments is the Council of the European Union. Among its tasks, there is the power to decide on international legal cooperation, through the Common Foreign and Security Policy (CFSP).⁽²⁶⁹⁾

After the 9/11 attacks, the two most interesting Common Positions adopted by the EU Council were Common Position 2001/930/CFSP⁽²⁷⁰⁾ on combating terrorism, which implemented Security Council resolution 1373 (2001), and Common Position 2001/931/CFSP⁽²⁷¹⁾, which concerned the application of specific measures to combat terrorism. The EU Council also adopted Council Regulation No.2580/2001⁽²⁷²⁾, which imposed specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

Common Position 2001/931/CFSP, under article 1(3), provides a definition of terrorism and a list of individuals and entities suspected of being involved in terrorist activity, whose funds and financial assets are frozen for an indefinite period of time.

Council Regulation No.2580/2001 aims at implementing Common Position 2001/931/CFSP by adding another list of persons and entities involved in terrorism. However, the EU Council has the power to limit financial transactions and capital movements only to third countries, not within the European Union territory. The lists provided by the common positions are additional to those of the UN already implemented by the European Union.

⁽²⁶⁸⁾ W. GEHR, *The European Union Approach to Measures against Terrorism*, in W. BENEDEK, *Anti-terrorist Measures and Human Rights*, Leiden, Martinus Nijhoff Publishers, 2004, pp.79-80. Two of the three reports were adopted on 20 December 2001 and 26 July 2003; the third report was a contribution to the Special Meeting of the Counter-Terrorism Committee of 6 March 2003.

⁽²⁶⁹⁾ For more information on the Council of the European Union, see http://europa.eu/about-eu/institutions-bodies/council-eu/index_en.htm.

⁽²⁷⁰⁾ G.U. C.E., L. 344/90, 27 December 2001.

⁽²⁷¹⁾ G.U. C.E., L. 344/93, 27 December 2001.

⁽²⁷²⁾ .U. L. 344, Regulation EC No 2580/2001, 27 December 2001. Article 2(3) of this Regulation has been implemented by Council Regulation No.542/2012 of 25 June 2012.

Another important document is Directive 2001/97/EC, which has been adopted for the purpose of controlling and detecting funds used for money-laundering and coming from illegal activities.⁽²⁷³⁾ However, the detection of funds used for money-laundering purposes has been strongly criticized, because terrorists often use false identities in order to receive the sum of money, or they deviate immigrants' remittances, which were originally supposed to go to immigrants' families in their country of origin.

5.1. The 1990 Schengen Convention implementing the Schengen Agreement.⁽²⁷⁴⁾

The *Schengen Convention* of 1990 implemented the Schengen Agreement of 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic. The Agreement gradually eliminated internal cross-border controls while reinforcing controls on external borders. Further on, other governments asked to join the Agreement.

The purpose of the Convention is to authorize freedom of movements to people within the European territory, and to abolish checks at internal borders, creating a unified area.

The Convention also requires States to "adopt a common policy on the movement of persons and...on the arrangement for visas."⁽²⁷⁵⁾ In particular, it affirms that aliens who are not in possession of valid visas, or no longer fulfill the short-stay conditions, shall be required to leave the territory, and

Where such aliens have not left voluntarily or...it may be assumed they will not do so or...departure is required for reasons of national security or public policy, they must be expelled from the territory of the Contracting Party in which they were apprehended, in accordance with the national law of that Contracting Party. If under that law expulsion is not authorized, the Contracting Party concerned may allow the persons concerned to remain within its territory.

⁽²⁷³⁾ DI STASIO, *supra* note (14), p.83.

⁽²⁷⁴⁾ The *1990 Schengen Convention* was adopted on 19 June 1990, and it implemented the Schengen Agreement of 14 June 1985. The Convention is available online at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?url=CELEX:42000A0922\(02\):en:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?url=CELEX:42000A0922(02):en:HTML)

⁽²⁷⁵⁾ *Ibid.*, art.9 of the Convention.

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The alien may be expelled to his country of origin or any other State which accepts him.⁽²⁷⁶⁾

Title III of the Convention examines the issue of policy and security, with specific reference to police cross-borders cooperation within the territory and mutual assistance in criminal matters and extradition procedures.

Title IV, instead, establishes the Schengen Information System (SIS), which concerns immigration and border controls. The SIS consists of a national section in each State Party and a technical support function. The SIS task is to access the database of national governments in order to alert border customs checks of suspicious movements of persons and property. The SIS helps national governments in maintaining public policy and security, including national security.⁽²⁷⁷⁾

5.2. The Maastricht Treaty of 1992 and the 1995 Europol Convention.⁽²⁷⁸⁾

The *Maastricht Treaty* was adopted on 7 February 1992, and it established the European Economic Community, where goods, persons, services and capital could move freely and without restrictions.

The Treaty established three important pillars: the First, concerning security issues and the European Economic Community (EEC), which became the European Community (EC) and then the European Union (EU); the Second Pillar, which concerns common foreign security positions, related to foreign issues on security, for example the implementation of UN resolutions and international conventions; and finally, the Third Pillar, which is more concerned with internal affairs and justice.

Article 4 of the Treaty affirmed that the tasks of the European Community are carried out by a European Parliament, a Council and a Commission, both assisted by an Economic and Social Committee and a Committee of Regions with advisory tasks; a

⁽²⁷⁶⁾ *Ibid.*, art.23(3) and (4) of the Convention.

⁽²⁷⁷⁾ *Ibid.*, title IV, artt.92-118.

⁽²⁷⁸⁾ The *Maastricht Treaty*, adopted on 7 February 1992, is available online at <http://www.eurotreaties.com/maastrichtec.pdf>. The *Europol Convention*, adopted on 18 July 1995, is online at http://www.unicri.it/emerging_crimes/human_trafficking/legal_framework/docs/europol_convention.pdf. The *Europol Convention* has been substituted with EU Council Decision 2009/371/JHA, of 6 April 2009, which eased future amendments.

Court of Justice; and a Court of Auditors. The Treaty also established a system of central banks and the European Central Bank (ECB), a common monetary policy and a commercial policy.

From an executive point of view, with reference to police and judicial cooperation, the *Maastricht Treaty* established the European Police Office (Europol). With the *Europol Convention* of 1995⁽²⁷⁹⁾, Europol became a legal entity that could conclude treaties and enhance cooperation among member States.

At first, Europol had limited tasks, related mainly to drug-trafficking and the eradication of organized crime. Then, it was reformed twice, in 2002 and 2003, and it was enabled to participate more actively in the investigative procedures of national units.

Europol is composed of a central system, based at the Hague, and a system of satellites situated within member States. Its main activity is to act as a collector of information and data elaboration.

Its objective is to improve the effectiveness of cooperation in preventing and combating terrorism, drug-trafficking and other serious forms of international crime. Europol aims at facilitating the exchange of information within the European Union territory; obtaining, connecting, analyzing and providing information and strategic intelligence; and aiding investigations within member States.⁽²⁸⁰⁾

In recent years, Europol has started to be used as an intelligence system, because it has access to databases which collect information on persons involved in terrorist and organized crime activity. In particular, Europol bases its work on the TECS (The Europol Computer System, art.6), which collects and diffuses information and data. In addition, the TECS works with the EIS (Europol Information System, art.7); with the Info-Exchange, a sort of intranet where national units exchange information with the central system; and the Index System (art.11), a sort of library for the consultation of information. Data collected and elaborated are contained in specific archives, the Analysis Work Files (AWF).

Europol is also tasked to elaborate terrorist profiles. This function has been strongly criticized, since to elaborate such profiles some privacy rights can be violated, and of course the issue of nationality, religion and place of birth discrimination comes into place.

⁽²⁷⁹⁾ See *supra* note (278).

⁽²⁸⁰⁾ EUROPOL CONVENTION, *supra* note (278), artt.1 to 4.

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Within the Europol system, the Counter-Terrorism Task Force, now known as the Counter Terrorist Unit, diffuses intelligence information and is active 24 hours a day.

5.3. Eurojust.

Eurojust was created by Council Decision 2002/187/GAI⁽²⁸¹⁾ in order to answer the need for a common investigative system.

Eurojust is a legal entity made of independent police officers and provides national authorities with legal assistance in criminal proceedings between at least two member States. It enables them to make fast and direct consultations in penal matters with experts from other European States. Formal collaborations are authorized also with third States. Eurojust's main task is to share, collect and transfer personal data on persons involved in terrorist activity.

Nevertheless, Eurojust is still a very young system that needs further reforms in order to become a common investigative system. In addition, Council Decision 2002/187/GAI contains no clauses in which it is stated that Eurojust activity shall comply with human rights law. Its only obligation is to draw up an annual report on its own activity.

5.4. The 1997 Amsterdam Treaty and the 2001 Nice Treaty.⁽²⁸²⁾

The *Amsterdam Treaty*, adopted on 10 November 1997, amended the Treaty on the establishment of the European Union. It eliminated all internal frontiers within the European Union, and implemented common policies in matters of security, economy and monetary cohesion.

⁽²⁸¹⁾ DI STASIO, *supra* note (14), p.200.

⁽²⁸²⁾ The *1997 Amsterdam Treaty*, adopted on 10 November 1997, and is available online at <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html>. The *Nice Treaty* of 2001, adopted on 10 March 2001, is also available online at http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf.

Title VI of the Treaty mentions provisions on police and judicial cooperation in criminal matters. Member States are required to closely cooperate among each other with the objective of preventing and combating crime and terrorism, human-trafficking and violence to children, corruption and fraud.

The Treaty asks for the cooperation of Europol and other intelligence systems in providing necessary information to help investigations.

The *Nice Treaty* was adopted on 10 March 2001, and it provides practical realization of the objectives mentioned in the *Amsterdam Treaty*. In particular, article 31 affirms that judicial cooperation in criminal matters shall include: (a) the acceleration of cooperation between judicial authorities of member States, in particular through Eurojust; (b) the facilitation of extradition; (c) closer compatibility of rules in member States; (d) the prevention of conflicts of jurisdiction; and (e) the adoption of measures which establish a minimum standard of the constituent elements of a criminal act and of penalties for terrorism and other crimes.⁽²⁸³⁾

5.5. The European Arrest Warrant.

The *Amsterdam Treaty* of 1997 also affirmed that the Third Pillar includes police and judicial cooperation.⁽²⁸⁴⁾ The Decision-Cadre 2002/585/GAI⁽²⁸⁵⁾ of 13 June 2002 shall be examined in these terms, as establishing an important tool involving closer judicial cooperation among member States: the European Arrest Warrant, which is

une décision judiciaire émise par un État membre en vue de l'arrestation et de la remise par un autre État membre d'une personne recherchée pour l'exercice de poursuites pénales ou pour l'exécution d'une peine ou d'une mesure de sûreté privatives de liberté (art.1).⁽²⁸⁶⁾

⁽²⁸³⁾ *Ibid.*, NICE TREATY, art.31(1), subparas. (a), (b), (c), (d), (e).

⁽²⁸⁴⁾ J. C. MARTIN, *Les Règles Internationales relatives à la Lutte contre le Terrorisme*, Bruxelles, Bruylant, 2006, p.175. See also AMSTERDAM TREATY, art.29.

⁽²⁸⁵⁾ G.U.C.E. L. 190, 18 July 2002. Reference to S. DE VIDO, *Il finanziamento al terrorismo internazionale nella decisione quadro sul mandato d'arresto europeo*, Milano, Giuffrè Editore, 2011, in "Il diritto dell'Unione Europea", Anno XVI, Fasc. 2-2011, pp.357-358.

⁽²⁸⁶⁾ MARTIN, *supra* note (284) p.177.

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The European Arrest Warrant can be issued either for preventive purposes, implying a deprivation of liberty for up to twelve months, or for punitive purposes, in which case the convicted can be deprived of his liberty for a minimum of four month conviction.⁽²⁸⁷⁾

An individual subject to a European Arrest Warrant is usually subject to a double incrimination, i.e. the crime committed is an offence in both the sending and the receiving State. However, terrorism does not appear among the crimes subject to double incrimination, and cannot be subject to double incrimination.⁽²⁸⁸⁾

The *1996 Convention on Extradition within Member States of the European Union* imposes that terrorist crimes are not considered of a political nature. This means that extradition is possible among member States. Within the European Union, extradition takes the form of a “système de remise entre autorités judiciaires.”⁽²⁸⁹⁾

After the 2001 resolution, the formal procedure of extradition has been substituted by the principle of mutual recognition of the criminal courts' decisions.

The central function of the European Arrest Warrant is to avoid the formal extradition procedure, too long and complex, bypassing the political phase of extradition, and involving only the judicial aspect.

The European Arrest Warrant can be divided into four important activities:

- 1) the demand for investigation;
- 2) the demand for arrest;
- 3) the demand for detention;
- 4) the demand for rendition by the judicial authority of the State issuing the arrest warrant. This fourth activity follows the ordinary formal procedure.⁽²⁹⁰⁾

The European Arrest Warrant does not apply when the issuing State grants an amnesty to the person subject to the warrant, or the person herself has already been judged for her crimes in another member State. It is based on the mutual recognition of judicial decisions among member States. In the past States could not enforce extradition procedures, unless an agreement on extradition was concluded between the Parties.

Nevertheless, the European Arrest Warrant has been strongly criticized, for it does not mention human rights standards in the procedure of investigation, apprehension,

⁽²⁸⁷⁾ DE VIDO, *supra* note (285).

⁽²⁸⁸⁾ *Ibid.* There are 32 crimes for which double incrimination is not applied. Reference to note (7) in DE VIDO, p.358.

⁽²⁸⁹⁾ MARTIN, *supra* note (284), p.176.

⁽²⁹⁰⁾ *Ibid.*

transfer and detention. It does not impose any standard to member States or their judicial authorities.

Besides the critical aspects, European Arrest Warrant dispositions cross-refer to national legislations, maintaining States' autonomy in the application of such instrument.

5.6. The European strategy.

The strategy of the Council of Europe is based on three main objectives:

- 1) to strengthen the legal action against terrorism;
- 2) to safeguard fundamental values;
- 3) to address the causes.⁽²⁹¹⁾

1) To strengthen the legal action against terrorism requires a certain degree of cooperation among member States and their judicial authorities. In particular, the Council of Europe urged member States which did not join the European Community Conventions to become Parties without reservations. In addition, it invited the observer States to become Parties of the *European Convention on the Suppression of Terrorism*. It finally established a Multidisciplinary Group on International Action Against Terrorism (GMT)⁽²⁹²⁾ in order to implement the existing instruments.

2) The safeguard of fundamental values involves the *Guidelines on Human Rights and the Fight against Terrorism*⁽²⁹³⁾ adopted by the Committee of Ministers, i.e. the protection of human rights principles while countering terrorism. In the second half of 2003 a follow-up to the guidelines took place in order to evaluate their effectiveness.

⁽²⁹¹⁾ M. EATON, *Council of Europe Measures against Terrorism*, in W. BENEDEK, *Anti-terrorist Measures and Human Rights*, Leiden, Martinus Nijhoff Publishers, 2004, p.73.

⁽²⁹²⁾ *Ibid.*, p.74. The Multidisciplinary Group on International Action Against Terrorism (GMT) had the main objective of updating the proposals of the European Convention on the Suppression of Terrorism of 1977 by amending it with a protocol drafted by the group itself. The core elements of the protocol included an update and expansion of the list of conventions mentioned in article 1 of the European Convention; the introduction of provisions refusing to extradite an individual where there is a real risk of torture or death penalty exposure; provisions on follow-up mechanisms, still under negotiation; the openness of the European Convention and its protocol to observer States and third States. Other important functions of the GMT include strengthening the activities of the Council of Europe against terrorism financing; research and study on the justification of and incitement to terrorism; and improving international law enforcement cooperation.

⁽²⁹³⁾ EATON, *supra* note (268).

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3) Addressing the causes means that the Council of Europe develops democracy and social consciousness in order to eradicate the root causes of terrorism, reducing the probability of terrorists recruitment. These developments are mainly based on higher regional cooperation and inter-culture and religious communication, greater respect of diversity and greater social justice.

The European strategy seeks short-term results by mobilizing experts in order to reinforce legal cooperation. However, it makes also long-term interventions in order to eradicate terrorism and its bases by involving social and cultural differences in constructive dialogue and cooperation.⁽²⁹⁴⁾

6. Counterterrorism measures: the use of force and preventive techniques.

Both at a regional and international level States have adopted several counterterrorism measures: some of them imply the use of force, for they are intended to repress terrorists; others imply preventive actions, such as tighter controls on financial transactions in order to prevent terrorism financing.

The former are much more connected to law enforcement activity, which includes the apprehension, on the basis of data collection, detention and conviction of individuals. The latter, instead, involve financial countermeasures, which deal with assets freezing, anti-money laundering legislation and blacklists. In particular, the adoption of financial measures can be connected to the importance that nowadays money has for terrorists in order to finance their attacks (even though they are still very cheap to prepare). Terrorist groups, indeed, have become more technology-oriented and they have moved from public to private financing.

6.1. The use of force: self-defense, targeted killing, and renditions.

⁽²⁹⁴⁾ EATON, *supra* note (291), p.78.

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The use of force is an intervention made by the authorities of a State on the territory of another State which involves the use of physical constriction, or of the army. The use of force in the fight against terrorism is directed towards private individuals accused of involvement in terrorist activity.⁽²⁹⁵⁾

Article 2(4) of the Charter of the UN affirms that member States shall abstain from the threat to use, or the use of, force in whatever situation beyond the purposes of the United Nations.⁽²⁹⁶⁾ Hence, the use of force is strictly prohibited, with the exception of alleged “self-defense” or when the Security Council has authorized so.

Self-defense was the principal justification of States for the use of force against terrorists. Indeed, States claimed the right to respond to an attack even if this was not carried out by another State. Of course, such a justification was highly contrasted by the international community.⁽²⁹⁷⁾

The use of force against terrorists is not condemned *in toto*, rather it is a feasible option to use military force to apprehend and repress terrorist activity. However, the international community asks for a collective reaction to this phenomenon, since the Charter of the UN does not authorize member States to act unilaterally.

A first important point to clear is the fact that article 2(4) of the Charter of the UN does not explicitly forbid the use of force against terrorists as such, but only in international relations between States. However, States still interpret the article as a total ban on force.

Under articles 42 and 43 of the UN Charter, the Security Council can deploy other instruments from recommendations in order to give effect to its decisions. As far as terrorists sanctions are concerned, the SC has authorized mainly non-military sanctions against them. For example, resolution 1267 has created a special anti-terrorism committee; member States have been required to freeze and seize terrorists’ financial assets and funds, and also to extradite suspects and prosecute specific terrorist acts. Since the first anti-terrorism resolution, the Security Council has never authorized the use of force against terrorists as a military sanction.⁽²⁹⁸⁾

After the 9/11 attacks, States have reacted using military force against terrorists, including the invasion of territories from which terrorists were operating. For example, in 2003 Israel responded to Palestinian bombs with the bombing of Palestinian camps in

⁽²⁹⁵⁾ MARTIN, *supra* note (284), p.264.

⁽²⁹⁶⁾ CHARTER OF THE UN, *supra* note (40), art.2(4).

⁽²⁹⁷⁾ C. J. TAMS, *The Use of Force against Terrorists*, in *EJIL* (2009), vol.20 no.2, p.367.

⁽²⁹⁸⁾ C. GRAY, *International Law and the Use of Force*, third ed.2008, pp.31-33 in TAMS, *supra* note (297), p.377. The authorization of the Security Council needs the support of all five permanent members.

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Damascus.⁽²⁹⁹⁾ In July 2006 Israel invaded Lebanon to respond to Hamas and Hezbollah's attacks.

States introduced self-defense clauses in their national strategies to contrast terrorism. A clear example is the United States, which explicitly affirmed in its 2002 National Security Strategy that the US has the right to pre-emptive self defense against *non-imminent threats*, in particular those of terrorists.⁽³⁰⁰⁾ The US position does not only consider legitimate to defend itself from external terrorist attacks, but also to defend from non-imminent attacks, a pre-emptive measure which is different from the concept of prevention. The term "pre-emptive" conveys the idea of "I attack you before you attack me, even if you have not planned to attack me yet". On the other side, the term "preventive" aims at stopping a harmful activity before it occurs, but in this case the threat is imminent, and national authorities already know it can occur.

States have used self-defense as a justification for many different situations in which they used force against non-state actors and went beyond traditional rules. States' reaction to terrorism has ranged from immediate reaction to cross-border violence up to long-term campaigns with unclear motivations and purposes (notably the US operation called "*Operation Enduring Freedom*").⁽³⁰¹⁾

A possible solution to the question of self-defense, taking into account the fact that the international community is not unwilling to consider reaction to terrorism as a subparagraph of self-defense, can be the potential for a terrorist act to show certain involvement with the host State, which seems willing to accept, sometimes even support, the activity of terrorists within its territory.⁽³⁰²⁾ However, if the concept of self-defense is extended, the risk of abuse will be higher.

6.1.1. Targeted killing.

⁽²⁹⁹⁾ *Ibid.*, pp.234-237.

⁽³⁰⁰⁾ WHITE HOUSE, *The National Security Strategy of the United States of America*, online at <http://www.whitehouse.gov/nsc/nss.pdf>. International law does not allow the pre-emptive use of force against a remote threat, but only against an imminent attack. Article 51 of the UN Charter authorises the use of force in case of imminent attacks, but in case of preventive use of force, this must be authorised by the Security Council to preserve international peace and security.

⁽³⁰¹⁾ TAMS, *supra* note (297), p.382.

⁽³⁰²⁾ *Ibid.*, p.385.

Strongly connected to the concept of self-defense is the concept of targeted killing, which implies the killing by a State of targeted active members of terrorist groups which are not under that State's jurisdiction. Targeted killing has often been subject to controversial interpretations, depending on the model through which they have been interpreted.⁽³⁰³⁾

According to the law enforcement model, targeted killings are extra-judicial executions of individuals implying an unjustified use of force. This model relies on the international human rights regime, which justifies the use of force only in strictly limited conditions. A State has an obligation to respect the rights of an individual to life and to due process. Targeted killings clearly infringe these rights. The ICCPR and the ECHR openly prohibit the arbitrary deprivation of life, ruling that the use of force shall be limited to absolutely necessary situations in which there is a need to defend persons whose lives are in danger.⁽³⁰⁴⁾

According to such a model, States must respect three important principles: 1) every individual should be presumed innocent unless otherwise proven; 2) suspects of involvement in terrorism planning or perpetrating should be arrested, detained and interrogated according to the right to due process; 3) if such individuals are guilty on credible evidence, they should have the right to a fair trial before an impartial, independent and competent court, and if convicted, they should be sentenced a punishment by law.⁽³⁰⁵⁾

A point of collision between the law enforcement model and transnational terrorism is that the former's core principle is that the perpetrator is within the victim State's jurisdiction, whereas transnational terrorism can be perpetrated also in other countries from the one in which terrorists prepare their attacks.

Another model, which seems more suitable in case of intense, protracted terror, is the armed conflict model. In this model, the ruling regime is international humanitarian law (*ius in bello*), which applies to the parties involved in the hostilities.⁽³⁰⁶⁾

⁽³⁰³⁾ D. KRETZMER, *Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?*, in *EJIL* (2005), vol.16 no.2, p.171. The interpretation of targeted killings is based on the division between international human rights law and international humanitarian law. In the former, the use of force does not consider the status of the individual as civilian or combatant, instead it takes into consideration the nature of the threat posed by an individual, and the alternative means available to eliminate the threat. In the latter, the use of force depends on the status of the individual, i.e. whether he can be considered a combatant or a civilian.

⁽³⁰⁴⁾ ICCPR, note (85), art.6(1); ECHR, note (87), artt.2(1) and 2(2).

⁽³⁰⁵⁾ KRETZMER, *supra* note (293), p.178.

⁽³⁰⁶⁾ *Ibid.*, p.186.

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In the case of the armed conflict model, terrorist attacks are interpreted as real armed attacks, to which a State can react in self-defense. If a terrorist attack is explicitly supported, or there is sufficient evidence that a State is hosting terrorists, then the victim State can impute such attack to the host State. The use of force on the part of the victim State must be proportional and necessary.⁽³⁰⁷⁾

Under this model, terrorists are considered combatants and therefore, if the victim State reacts to the attack through targeted killings, it is acting lawfully. In international humanitarian law the status of an individual is the fundamental condition which distinguishes lawful from unlawful acts.

Nevertheless, except for rare cases, terrorists are not part of the armed forces, and do not actively participate to the hostilities. In addition, the armed military model is effective when the parties to a conflict are States. When the public authorities of a State have been attacked by terrorists, there is only one part which can be considered combatant, the other is civilian. This latter scenario is relevant to the law enforcement model, where terrorists act within the territory of the victim State.⁽³⁰⁸⁾

There is one more model, which is the most suitable for targeted killings: the mixed model. The only acceptable justification for targeted killings is the need to protect potential victims of terrorist acts. The use of force can be accepted only when complying with the principles of necessity and proportionality.

In order to consider targeted killings lawful a State must subject such killings to thorough legal investigations. A core presumption is that “suspected terrorists may not be targeted when there is a real danger that civilians will be killed or wounded too.”⁽³⁰⁹⁾

6.1.2. Renditions.

Renditions represent an alternative to extradition, and can be defined as the rendering of a criminal to the State of citizenship or residence where he will be prosecuted for the crime committed. Usually, extradition requires a previous agreement

⁽³⁰⁷⁾ The principle of necessity affirms that a State can resolve to use force only if alternative means of solving the conflict have already been used or are not available. The principle of proportionality affirms that the victim State cannot exceed in the use of force needed to achieve the purpose of defending itself. *Ibid.*, pp.187-188.

⁽³⁰⁸⁾ *Ibid.*, pp.190-196.

⁽³⁰⁹⁾ *Ibid.*, pp.201-204.

between the State where the criminal was found and the receiving State. If a State does not want to extradite a criminal, it should prosecute him and bring him before a court for judgment, according to the principle “*aut dedere aut iudicare*.”⁽³¹⁰⁾

Rendition may be used by States for several reasons, including to avoid the ordinary procedure of extradition, which can be long. The practice of rendition involves the apprehension and detention of suspects in secret facilities, where they may be subjected to torture, inhuman or degrading treatment and enforced disappearance.⁽³¹¹⁾

In a legal opinion of 2005, the Venice Commission emphasized the importance of the respect of human rights provisions under ECHR, and the fact that humanitarian law is not applicable to counterterrorism measures undertaken in the global war on terror. The Commission affirmed that the extraordinary renditions carried out by the CIA with the help of some European countries are incompatible with the rights provided by the ECHR.⁽³¹²⁾

The Commission concluded that both secret detention facilities and interstate transfers infringed the right to liberty and security of person (art.5 ECHR). In addition, these activities infringed the right to life (art.2), the right not to be tortured (art.3), and the right to a fair hearing (art.6).

An interstate transfer is lawful only on four conditions: 1) when an alien is deported; 2) when a person is extradited to be subjected to trial or to serve a sentence; 3) when a person transits a State's territory; and 4) when a person is transferred to serve a sentence.⁽³¹³⁾

According to the Venice Commission, rendition refers to

...one State obtaining custody over a person suspected of involvement in serious crime, [notably terrorism], in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State. “Rendition” is thus a general term

⁽³¹⁰⁾ Within the European Union this is no longer necessary, thanks to the European Arrest Warrant.

⁽³¹¹⁾ MARTIN, *supra* note (284), p.265. See also AMNESTY INTERNATIONAL 2006, *Partners in crime: Europe's role in US renditions*, 14 June 2006, online at <http://www.statewatch.org/news/2006/jui/ai-partners-in-crime.pdf>. See also M. HAKIMI, *The Council of Europe addresses CIA Rendition and Detention Program*, in *AJIL* (2007), vol.101 no.2, pp.442-452.

⁽³¹²⁾ VENICE COMMISSION, *Opinion No. 363/2005 on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-state Transport of Prisoners*, Doc. CDL-AD(2006)009, paras.78-85 (2006), online at [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp). The Venice Commission, formally known as the European Commission for Democracy through Law, is the Council of Europe's advisory body with competence on constitutional matters, and it was established in 1990. It can be considered an internationally recognized independent legal think-tank. The Commission meets in plenary four times a year in Venice. Its members include States that are not parties to the Council of Europe, to a total of 58 members.

⁽³¹³⁾ HAKIMI, *supra* note (311), pp.445-446.

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referring more to the result – obtaining of custody over a suspected person – rather than the means. Whether a particular “rendition” is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law.⁽³¹⁴⁾

Theoretically, rendition is not an unlawful procedure, provided the individual transferred is later subjected to a legal process compatible with ECHR provisions. The renditions carried out by the CIA with the involvement of certain European governments have proven not to be only informal (not pursuant to any treaty), but also outside any legal process.⁽³¹⁵⁾

The States involved have failed in respecting and protecting human rights, action for which they are accountable. The Venice Commission provides also some measures that States can take in order to prevent unlawful renditions and subsequent liability. In particular, they must not cooperate in secret detentions or transfer of persons which are not lawful. They must not transfer persons to places where there is a real risk that such persons suffer torture or inhuman treatment. States must also refuse to allow their airspace or territory to be used for the transit of persons potentially suffering such treatment. With reference to those States where secret detentions were established, they must take necessary measures to cease secret detention, whenever they learn or have reasonable grounds to suspect that such facilities are present.⁽³¹⁶⁾

6.2. Investigation and arrest.

Investigation deals with the processing of data, thanks also to intelligence agencies which provide information from their databases. Investigation can be carried out through the mapping of terrorist groups and their supporters (pro-active mode) or through the investigation on specific individuals suspected of being involved in terrorist activity (reactive mode).⁽³¹⁷⁾

⁽³¹⁴⁾ VENICE COMMISSION, *supra* note (312), para.30.

⁽³¹⁵⁾ HAKIMI, *supra* note (311), p.446.

⁽³¹⁶⁾ *Ibid.*, pp.448-449.

⁽³¹⁷⁾ C. FIJNANT, *Legal Instruments in the Fight against International Terrorism*, The Hague, Martinus Nijhoff Publishers, 2004, p.228

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As affirmed by the European Court of Human Rights (ECtHR) in *Klass v. Germany*⁽³¹⁸⁾, secret surveillance is accepted, especially in mail, post and telecommunication, but it must be confined to exceptional circumstances, in case of threats to national security or of crime prevention. The processing of data must strictly comply with the principle of proportionality, which affirms that information should not exceed the purpose for which it has been obtained, and it should be deleted when no longer necessary.

When investigations lead to specific individuals, known to be located in specific places, and suspected of involvement in terrorist activity, then judicial authorities proceed to the apprehension and arrest of the individual. The suspect may react with violence and try to resist the arrest: in this case, police officers are authorized to use force in order to apprehend him. Of course, the use of force by police officers must comply with the principle of proportionality, meaning that the action must be proportionate to the resistance, used only in absolutely necessary circumstances and temporary, lasting only until the individual has become harmless. Also the right to life must be respected, since police officers shall not kill the suspect. If, instead, the suspect is killed, then the operation in its entirety must be examined. For example, in *McCann v. United Kingdom*⁽³¹⁹⁾, British soldiers fired lethal shots at three IRA terrorists, suspected of having placed a car bomb, during an operation in Gibraltar. The European Court decided that soldiers used more force than it was absolutely necessary.

An arrest is lawful when it is based on a reasonable suspicion. Evidence of the responsibility of the suspect must be proved by police authority. However, since national authorities often use secret intelligence services to investigate and arrest a suspect, police officers often carry out apprehensions without revealing the source of information, given the fact that they must remain unknown in order to be effective. Hence, authorities are not forced to give all information and sources, though they must produce evidence of the chargeability of the defendant in order to satisfy a court during trial.

Usually the arrest of an individual serves the purpose of confirming confidential information received by secret services during the process of investigation. If he is found guilty, authorities can bring charges against him and put him on trial. If he is not, then he must be released promptly. The time allowed for custody without charge for investigative

⁽³¹⁸⁾ *Ibid.*, note (22), ECtHR, *Klass v. Germany*, 6 September 1978, Application No.5029/71. The case can be consulted online at http://hub.coe.int/c/document_library/get_file?uuid=ec21d8f2-46a9-4c6e-8184-dffd9d3e3e6b&groupId=10227.

⁽³¹⁹⁾ *Ibid.*, p.230, and note (27), *McCann v. United Kingdom*, 27 September 1995, Application No.18984/91, available online at <http://www.echr.coe.int>.

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purposes must not exceed four days of detention, since to arrest suspects for questioning without a charge on them falls outside the provisions set forth by article 5(3) of ECHR.⁽³²⁰⁾

6.3. Detention and interrogation.

During the detention period (not exceeding four days if there is no charge against the suspect), competent authorities usually interrogate the individual. It is obvious that terrorist suspects will not easily collaborate, bringing officers to react with coercive manners, by using physical force or exerting psychological pressure in order to obtain a confession. It is then necessary to remember that inhuman or degrading treatment, torture and physical punishments are absolutely prohibited, and they are subject to no exception.⁽³²¹⁾

Usually, as provided by domestic law, a suspect should be allowed to benefit from the assistance of a lawyer, even in case the interrogation takes place in an intimidating situation where the authorities want him to confess bypassing his will. However, much of the development of an interrogation often depends on the attitude of a suspect at the initial stage of the interrogation process.

Also detention must comply with human rights standards. According to the European Court, under article 3 ECHR (prohibition of torture and inhuman treatment):

The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that...his health and well-being are adequately secured by...providing him with the requisite medical assistance.⁽³²²⁾

⁽³²⁰⁾ *Ibid.*, pp.231-233. ECHR, note (87), article 5(3).

⁽³²¹⁾ *Ibid.*, p.233. Torture and physical punishments are absolutely prohibited under article 7 ICCPR, note (85), and under article 3 ECHR, note (87). Such prohibition also applies in emergency situations, as stated by article 4(2) ICCPR and article 15(2) ECHR.

⁽³²²⁾ FIJNANT, *supra* note (317), pp.233-234. Reference to note (54) – ECtHR, *Kudla v. Poland*, 26 October 2000, Application No.30210/96, online at <http://www.echr.coe.int>.

When extraordinary security measures are necessary, there may be the need for the total social isolation of the subject. However, total social isolation has been considered a form of inhuman treatment, because it violates human rights standards.⁽³²³⁾ Accordingly, the detention of a prisoner in total isolation for 23 hours a day in a small cell with no more than ten minutes outside is considered inhuman and degrading treatment, since it completely destroys the individual.

Also not to grant a confidential contact with a lawyer represents a violation of human right, in particular, the right to a fair trial, whose exception must be accompanied by convincing motivation. General Comment No.29 of the Human Rights Committee affirmed that “safeguards related to derogation...are based on the principles of legality and the rule of law...Certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflicts.” The Committee believes that the principle of legality and the rule of law require that the fundamental elements of fair trial must be respected in a state of emergency.⁽³²⁴⁾ The presumption of innocence should always be applicable, both by the public authorities and the judiciary.⁽³²⁵⁾

The right of a detained to a counsel is one basic element of the right to a fair trial. However, exceptional circumstances can lead to the negation of such right. For example if an individual is suspected of being involved in a terrorist group, the right to have a lawyer can be negated, since terrorism poses a threat to national security and creates a situation of emergency which endangers civilians.⁽³²⁶⁾

6.4. Trial and sentence.

The trial of an individual accused of terrorist acts must be carried out with respect for basic guarantees of the right to a fair trial. The competent court before which a terrorist suspect appears must be independent and impartial.

⁽³²³⁾ ECtHR, *Öcalan v. Turkey*, 12 March 2003, Application No.46221/99, available at <http://www.echr.coe.int>.

⁽³²⁴⁾ UN HUMAN RIGHTS COMMITTEE (HRC), CCPR General Comment No.29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add11, para.16. Online at <http://www.unhcr.org/refworld/docid/453883fd1f.html>.

⁽³²⁵⁾ A. BIANCHI, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: the Quest for Legitimacy and Cohesion*, in *EJIL* (2007), vol.17 no.5, pp.905-906.

⁽³²⁶⁾ FIJNANT, *supra* note (258), p.236.

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A critical remark has been made about the composition of such court. Some States give jurisdiction to military courts for the judgment of specific crimes committed by civilians, as it is the case of terrorists. For example, the Human Rights Chamber for Bosnia and Herzegovina, when examining the legality of suspects' rendition to US authorities, noticed that, in the Military Order signed by President Bush in November 2001 creating an independent military commission competent of judging non-citizen in the war on terror, these military commissions were not completely independent from the executive. In addition, they did not respect the right to a fair trial within a reasonable period of time, the right to a public hearing and to equality of arms for the defendant. Under these premises, the Chamber concluded that it was an obligation of Bosnia and Herzegovina, before handing over the suspects, to ask for assurances by US authorities that the individuals rendered would not be subject to death penalty at the end of the trial before the Military Commission.⁽³²⁷⁾

Another criticism involves the use of "faceless judges", very common in Latin American countries. In these courts the identity and appearance of the judges were not revealed to the defendants, and the trial was held in secret places, derogating from the right of the defendants to be judged before a public court. The justification alleged was that judges needed to be protected from terrorists and their organizations.

However, the UN Human Rights Committee rejected the use of "faceless judges", because they infringe some basic procedural guarantees of the right to a fair trial.⁽³²⁸⁾

Although, at least theoretically, terrorist suspects enjoy the same procedural guarantees as other criminals, some restrictions may be in place. For example, the right to counsel or a lawyer may not be granted; or anonymous testimony may be used, in order to protect witnesses. However, any restriction must fulfill certain conditions, which imply the guarantee of a fair trial and of procedural rights.

Counterterrorism measures can easily be abused if there is not a proper control on the authorities carrying out such measures. Indeed, they can be misused against other innocent persons, for other purposes. Terrorist suspects should enjoy the presumption of innocence until otherwise proven.

In order to prevent and punish such abuses, in July 2002 the Council of Europe adopted the *Guidelines on Human Rights and the Fight against Terrorism*, which imposed human rights standards while countering terrorism:

⁽³²⁷⁾ *Ibid.*, p.237. See also M. COSTAS-TRASCASAS, in FERNÁNDEZ-SÁNCHEZ, pp.491-493.

⁽³²⁸⁾ *Ibid.*, p.238.

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.⁽³²⁹⁾

If an individual is detained with no charge against him he has the right to bring a complaint before the competent authority, and ask for a remedy.⁽³³⁰⁾

However, after the 9/11 events, States have taken counterterrorism measures which often violated human rights provisions, and did not purport any justification. For example, the US has continued to provide no judicial control over detention of foreigners at Guantanamo Bay. The detention facility is not under US legislation, and detainees are in an indefinite situation of lawlessness.⁽³³¹⁾ At Guantanamo Bay, for example, a UK citizen is detained in a “legal black-hole” in violation of the fundamental human rights principles of US and UK jurisdictions.⁽³³²⁾

Derogation from human rights obligations is allowed only in situations of public emergency that threatens the security of a nation. Of course, States are not authorized to use unlimited powers; they must give specific justifications for adopting extraordinary measures; and they must comply with the principle of proportionality.

Even if terrorists commit horrible acts, it is important to remember that they should still be treated as human beings, being granted at least fundamental human rights while detained and sentenced.

7. The prevention of terrorism financing.

⁽³²⁹⁾ CoE GUIDELINES ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM, *supra* note (267), Guideline II on the Prohibition of Arbitrariness.

⁽³³⁰⁾ FIJNANT, *supra* note (317), p.241.

⁽³³¹⁾ *Ibid.*, p.242. For more information on the situation of Guantanamo Bay, see D. M. AMANN, *Guantanamo*, in COL JTL, 2004, vol.42 n.1, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951875; and K. J. GROENBERG, J. L. DRATER (eds.), *The torture paper: the road to Abu Ghraib*, Cambridge, Cambridge University Press, 2005.

⁽³³²⁾ FIJNANT, *supra* note (317), p.243. Court of Appeal, *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, 6 November 2002, Case No.C/2002/0617A, available at <http://www.courtservice.gov.uk/Judgements.doc>.

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A fundamental cornerstone of counterterrorist financial measures resides in the belief of many States that, in the XXI century, the main activity which finances terrorist acts and their preparation is money. The sources of terrorist funding can be traced to State and private actors; and on the basis of the origin financial funds can be divided into lawful and unlawful funds. The former can be obtained through legal means, including donations, charity activity, legal forms of fund-raising, or immigrants' remittances which are deviated from their initial destination. Unlawful funds usually derive from illegal activities, such as drugs-trafficking, weapons smuggling, or money-laundering.

These funds represent a crime even if they are not used to finance terrorist activity, and for this reason they are seized or frozen anyway. Lawful funds apparently do not seem to be used for illegal purposes; therefore they are seized or frozen only if public authorities find evidence of their misuse for terrorist purposes.⁽³³³⁾

The use terrorists make of money is different from that of organized crime: the latter's objective is to take advantage of the world-wide financial system, if not, it would not have reasons to exist. Instead, terrorists consider money as a means to a morally superior end: money is used to finance attacks. The removal of the financial aid to an attack does not eradicate the attack itself or the threat of terrorism, although it can obstacle its preparation and organization.

The Security Council refers to "terrorist financing"⁽³³⁴⁾ only in resolution 1269 (1999) but only as a general statement, not in relation to the actors behind the financing. Conversely, with reference to the financial measures imposed by Security Council resolutions, it is necessary to include the freeze of assets and anti-money laundering legislation. The main components of the latter, adopted by many important international bodies, involve the control of financial transactions and the seizure of illegal or suspicious assets.⁽³³⁵⁾

At an international level, resolutions 1267 (1999) and 1373 (2001) deal with the financial seizure and freeze of suspicious assets. Instead, the European Union adopted Common Position 2001/931/CFSP and Council Regulation No.2580/2001 on financial countermeasures. Still in Europe, the Financial Action Task Force on Money Laundering (FATF), in October 2001, issued the *Eight Special Recommendations on Terrorism*

⁽³³³⁾ I. BANTEKAS, *The International Law of Terrorist Financing*, in *AJIL* (2003), vol.97 no.2, p.316.

⁽³³⁴⁾ S/RES/1269/1999, adopted on 19 October 1999, online at <http://www.un.org/terrorism/sc-res.shtml>.

⁽³³⁵⁾ M.KILCHLING, *Financial Counterterrorism Initiatives in Europe*, in C. FIJNANT, *supra* note (317).

Financing, known as the Eight Rules, focusing on money-laundering control and on seizure and freeze of financial assets.⁽³³⁶⁾

Besides its antiterrorism aim, which is to eradicate terrorism by apprehending and sentencing individuals supporting or participating to terrorist groups, anti-money laundering legislation has two investigative objectives: first, the tracing of money flows in order to collect information on the groups' movements and activity (pro-active strategy), and second, to obtain a picture of the financial background of individuals suspected of terrorism in order to freeze, seize and confiscate their assets and funds (reactive strategy).

Usually, the reactive strategy is more effective, since it is difficult to move from assets to crime, because terrorists often hide their funds behind charity organizations, or remittance flows, which are legal transfers of money.

Money-laundering control follows the line of the criminal origin of the flow of money, not the method through which money is administered. For example, Bin Laden earned his fortune through legal entrepreneurial activities, hence he could not be accused of having obtained the funds for the 11 September attacks through money-laundering. "The wealth of al-Qaeda can be estimated at around US\$ 5 billion...the budget lies between US\$ 20 and 50 million per year".⁽³³⁷⁾ Instead, other terrorist groups, like the Italian Red Brigades, procured money by killing people or through bank robberies.

7.1. State and private-financed terrorism: lawful and unlawful financing.

Security Council resolution 1269 (1999) does not explicitly refer to state-sponsored terrorism, although it implicates state actors as supporters of terrorist activity.

It has already been said that terrorist organizations are often supported by the country from where they prepare their acts. Those States victims of terrorist attacks have started their war on terror not only against the terrorist organization which claimed the responsibility of the attack, but also against the State which hosted the said organization. Al-Qaeda did not necessarily need the financial support of the Taliban government, but it depended on its acquiescence in the training of al-Qaeda forces on the Taliban territory.

⁽³³⁶⁾ FATF, *supra* note (256). As said before, the FATF issued more recent recommendations in 2012.

⁽³³⁷⁾ KILCHLING, *supra* note (335), p.194.

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The acquiescence of a hosting State has important developments for terrorist organizations, because they can engage in whatever activity they may like, notably drugs trafficking and weapons smuggling, since the State authorizes so, or at least it looks at another side.⁽³³⁸⁾

Therefore, it can be easily understood that state-financing does not only involve active participation and support of the State in terrorist activity, but also omissions and failure to adopt repressive measures. Only state actors provide shelter to terrorists, whereas financial support can come from both state and private funds.

The *1999 International Convention for the Suppression of the Financing of Terrorism* tried to act as a deterrent, providing financial countermeasures to prevent terrorist activity. It is obvious that the cut of financial support to terrorists does not prevent them from acting, but at least it changes their plans.

Since the Convention, however, the international community has not found an agreement on how to consider terrorist support on the part of state actors. In other words, should state-financing be considered in the same way as terrorist crimes, and therefore criminalized and prosecuted as if it were a terrorist offence? Can article 51 of the UN Charter be invoked in a case like this?

These questions are far from finding an answer, because the international community has divergent opinions. The US-led campaign against the Taliban, which was premised on Security Council resolutions 1368 and 1373, has worsened the problem. Of course, in this case al-Qaeda clearly had connections with the Taliban government, and the latter could equate the former.

Private-financed terrorism is not connected with shelter, but is mainly concerned with financial aid through lawful and unlawful means. When state-sponsored terrorism started to decrease, terrorists found themselves alone, without funds to perpetrate their acts. In order to solve their financial problems they turned to illegal activities. Thus, terrorists may be easily associated with organized crime, which deals with drugs trafficking and weapons smuggling. However, terrorists have different objectives from those of organized crime. The motivation behind their actions is ideological, money is not the end, as it is for organized crime, it is rather a means to reach a higher purpose.

When illicit trafficking brings money, this is recycled and then it enters the legitimate economy. This is the money-laundering procedure, which transforms "black" money into clean. This activity is difficult to detect, because the international community

⁽³³⁸⁾ BANTEKAS, *supra* note (333), p.316.

sanctions only control import and export financial transactions within the economy. Instead, illicit trafficking runs around legitimate economy. When money is recycled, it becomes legal and thus unsusceptible to financial countermeasures.⁽³³⁹⁾

Other illicit trafficking, besides drugs, includes extortion, smuggling, fraud, and robbery.⁽³⁴⁰⁾ The latter is rarely used to finance terrorism, the others are much more common. For example, in the case of smuggling, the profits enter another jurisdiction by means of a courier, enter the banking system as short-term shell companies, and disappear few months later. It often happens that dirty money is placed in bank accounts together with lawful funds, in order not to be easily detected.

An important anti-money laundering legislation has been provided by the FATF, whose proposals are very specific and useful to detect lawful funds used to finance terrorist activities and organizations. However, as clearly stated by the FATF, lawful funds are almost impossible to detect, and can be seized only upon suspicion of banks and financial institution on the nature of the transaction.⁽³⁴¹⁾

With reference to lawful means of terrorism financing, perhaps the most important is “*hawala*”, which is a form of alternative remittance through which an immigrant sends money to his family in his country of origin. “*Hawalas*” have been placed onto FBI and Security Council lists, because they can easily be misused in order to finance terrorist organizations. Other lawful means are ordinary financial transactions like wire transfers.

Lawful means of terrorism financing are impossible to detect, unless public authorities make connections between the name of a terrorist and a bank account or financial transaction. The only way to detect these lawful transactions is the practice of “know-your-customer” (KYC), which enables financial institutions to ask their customers more information, or authorize only those transactions where there is the name of the receiver, and not other ambiguous phrases.

The FBI distinguishes between “mission specific” terrorist cells and “sleeper” cells. “Mission specific” cells include people and funds which are both involved in terrorist acts. “Sleeper” cells, instead, add a legitimate component to the mission specific cells, because

⁽³³⁹⁾ *Ibid.*, pp.317-318.

⁽³⁴⁰⁾ *Ibid.*, p.319. Reference to the UK JOINT MONEY LAUNDERING STEERING GROUP (JMLSG), *Guidance Notes for the Financial Sector*, 2001, online at <http://www.jmlsg.org.uk>.

⁽³⁴¹⁾ The FATF provided three important examples of lawful and unlawful funds : the first shows that criminal groups and liberation movements usually use deposits from offshore tax havens through intermediate brokers to clean dirty money. The second example involves a woman whose husband was suspected to be involved in terrorist activities. The woman was not able to explain why her banking account registered \$7 million. The banking account was frozen. The third example shows that lawful and unlawful funds can be placed together, thereby making it impossible to detect the unlawful one. See *supra* note (256). Reference to BANTEKAS, note (333), pp.319-320.

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they involve funds and people derived from lawful employment and activities within the country from which the cell is operating.

However, as far as terrorist funding detection is concerned, the FBI established three elements which define the strategy to detect terrorist financing. The first is the transaction profile, which shows that terrorists have joint accounts that change continuously. The type of account can say much on its owner. Terrorists usually have more than one legitimate accounts, one for domestic and the other for business purposes. There are also “dormant” accounts, which are used in situations of emergency for fast cash withdrawal.

A second element is the transaction profile, which is not easy to detect. Terrorists often make simple and informal transfers of small amounts of money. They use the form of wire transfer, and, as the 11 September hijackers were, they can be students receiving money from their parents.

The third and last element is the nonfinancial profile, and it involves other information than that of the bank account. Usually it compares personal information with account transactions information, like the person’s background and activity within a certain country.⁽³⁴²⁾

Lawful funds can also derive from charity and “*zakaat*”, the latter being a tax on wealth, a form of charity typical of Islamic culture, deriving directly from its primary source, the Qur’an. Also trusts can be used as vehicles for terrorism financing. The trust has several advantages, including that of privacy, which helps conceal the identity of the parties. Trusts can take various forms, such as “blind trusts”, which do not reveal the beneficiary of the trust nor the purpose; “asset protection trusts”, which transform the settler (giving the trust) into the beneficiary, enabling him to retain the control on the trust; and finally, “flee clauses”, which enables the trust to fly to another country if an investigation is initiated.⁽³⁴³⁾

7.2. Listing: the designation of persons and groups as terrorist entities.

⁽³⁴²⁾ BANTEKAS, *supra* note (333), pp.320-321.

⁽³⁴³⁾ *Ibid.*, pp.322-323.

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The designation and listing of certain individuals and groups suspected to be involved in terrorist activity, or associated with al-Qaeda and the Taliban, can be considered the first step towards the implementation of the financial counterterrorism measures imposed by Security Council resolution 1267 (1999), 1333 (2000), and 1373 (2001).⁽³⁴⁴⁾

In 1999, Security Council resolution 1267(1999) established the al-Qaeda and Taliban Sanctions Committee, with the objective of designating individuals and entities suspected of being involved in terrorist activities in the area of the then Taliban-controlled Afghanistan. After the events of the World Trade Center in 2001, the Committee's work has broaden to any individual or entity suspected of terrorism that is inscribed in the "Consolidated List."⁽³⁴⁵⁾

UN member States have an obligation to designate those listed in the Consolidated List as terrorists. The obligation to comply with the UN Sanctions Committee's listing arises from different instruments, including:

- Article 25 of the UN Charter, requiring that "all UN member States accept and implement Security Council decisions, in accordance with the dispositions of the Charter."⁽³⁴⁶⁾
- Security Council resolution 1267 (1999), requiring that all UN member States shall.⁽³⁴⁷⁾

Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.

⁽³⁴⁴⁾ S/RES/1267/1999, note (13), para.4(b); S/RES/1333/2000, note (13), para.8(c); and S/RES/1373/2001, note (46), para.1(c).

⁽³⁴⁵⁾ CONTE, *supra* note (21), chapter 19, p.586. The "Consolidated List" has been established by Security Council resolution 1333 (1999), para.16(b).

⁽³⁴⁶⁾ CHARTER OF THE UN, *supra* note (40), art.25.

⁽³⁴⁷⁾ S/RES/1267/1999, para.4(b).

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- Security Council resolution 1333 (2000), requiring all member States to freeze funds and other financial assets of individuals associated with Osama bin Laden and the al-Qaeda organization.
- Security Council resolution 1373 (2001), requiring member States to prevent terrorist acts and freeze funds and financial assets owned by terrorist entities or used to fund a terrorist act.⁽³⁴⁸⁾

All these instruments, together with others, are complementary to article 8(2) of the *International Convention for the Suppression of the Financing of Terrorism*, which requires that States shall adopt “appropriate measures...for the forfeiture of funds used or allocated [in order to] commit offence.”

States may ask the Committee to add to or delete from the Consolidated List names of individuals and entities respectively suspected of being involved in terrorist activity, or no longer representing a threat to international peace and security.

The Consolidated List consists of two main sections related to: A) individuals associated with al-Qaeda (231 individuals); and B) entities and other groups and undertakings associated with the al-Qaeda (63 entities).⁽³⁴⁹⁾

In 2004 a Sanctions Monitoring Team was established in order to monitor the activity of the Committee. The Monitoring Team has to review the process of listing and delisting and makes recommendations to the Committee on the implementation of measures by member States.⁽³⁵⁰⁾ Since its update in 2008, the Committee is currently required to maintain a narrative summary of the reasons for the inclusion of individuals and groups in the List, with the objective of transparency and fairness of the procedure.⁽³⁵¹⁾

Besides the UN Consolidated List and its implementation in domestic legislations, regional unions such as the European Union have further instruments for the designation of individuals and entities. Common Position 2001/931/CFSP of the EU Council, for example, implements the financial counterterrorism measures imposed by Security

⁽³⁴⁸⁾ See *supra* note (344).

⁽³⁴⁹⁾ CONTE, *supra* note (345), pp.587-588. The Consolidated List is available at http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml.

⁽³⁵⁰⁾ CONTE, *supra* note (345), pp.588-589. The Sanctions Monitoring Team was established under resolution 1526 (2004) of the Security Council. Since its establishment up to 2013, the Monitoring Team has issued thirteen reports. The Monitoring Team is online at <http://www.un.org/sc/committees/1267/monitoringteam.shtml>.

⁽³⁵¹⁾ The Sanctions Committee's Guidelines are available online at http://www.un.org/sc/committees1267/pdf/1267_guidelines.pdf.

Council resolutions, even though it is more specific.⁽³⁵²⁾ Indeed, it mentions a list, implemented by Council Regulation No.2589/2001⁽³⁵³⁾, of individuals and entities suspected of being involved in terrorist groups, or of financially supporting them, whose assets and funds shall be frozen, seized or confiscated. The people and groups listed are all non-EU nationals and the restrictive financial measures are effective only on them. In order to make them effective against EU nationals, financial countermeasures must be transformed into national legislation.

However, asset and account freezing is only a preliminary measure, since, while suspects are under arrest, their funds are still property of the first owner. The subsequent procedure is to seize and confiscate the funds, but this measure can be applied only under national law integration. Indeed, “le gel ou la saisie sont des mesures de sûreté provisoires, dans l’attente d’une décision de confiscation, sanction principale.”⁽³⁵⁴⁾

The lists added to EU Council regulation implementing resolution 1267 and 1373, and the new lists produced by the regional union aim at identifying the assets to freeze or confiscate. These lists are diffused to all competent national and international authorities, especially those operating at custom controls and in airports, in order to prevent the individuals listed from escaping.

The listing procedure has been strongly criticized, since there is no possibility for the suspects to defend themselves from the inscription on the list. In particular, names are proposed by member States to the Sanctions Committee on the basis of confidential information gathered by means of secret service agencies. The Committee examines the information collected and, if satisfied with it, it inscribes the names on the list. The listed person does not know about it before being listed, since the preventive measure is to freeze his accounts and assets, in order not to let him make use of them.

When the list is published, the State of citizenship or residence informs the person of the measure undertaken. The listed person is not sentenced, since there is not a trial before the listing procedure, and there is no charge against him. However, authorities freeze his assets, as if he was guilty. There are plenty of cases in which individuals who have nothing to do with terrorist activity are mistaken for suspects because of homonymy.

The request for delisting must be submitted to the Office of the Ombudsperson, which puts the matter on the Committee’s agenda, upon request of a member of the

⁽³⁵²⁾ COMMON POSITION 2001/931/CFSP, *supra* note (271).

⁽³⁵³⁾ COUNCIL REGULATION No.2580/2001, *supra* note (272).

⁽³⁵⁴⁾ MARTIN, *supra* note (284), p.426.

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Committee. Whether the Committee resolves for the removal or not, the individual shall be informed by the State of citizenship or residence.⁽³⁵⁵⁾

Financial counterterrorism measures impose obligations also on private financial institutions and banks, which must operate controls on suspect transactions and money transfer. They are not forced to provide information on whether the transactions considered have criminal sources or what their final destination is. Their task is only to inform competent authorities of suspect money movements.

After 9/11, the amount of terrorist assets frozen is estimated to be around US\$ 125 million, and 149 countries are responsible for this funds freezing.⁽³⁵⁶⁾ Listed organizations are generally banned, whereas listed individuals are limited in their freedom of movement or in the disposal of their financial transactions.⁽³⁵⁷⁾

Since every member State implements the lists of the organizations to which is member, there is a considerable amount of overlap between national and international lists. This increases the potential for error and abuse of listing powers.

Despite the general belief that listing has not strong physical and psychological consequences, it is true that it has important implications in human rights violations. It is worth thinking about individuals and families whose names and family names resemble to those of individuals and entities listed in “watch” or “no fly” lists.⁽³⁵⁸⁾

At a domestic level, a common system of measures has been adopted by most of countries. Usually domestic listing involves financial sanctions and travel restrictions.⁽³⁵⁹⁾ A State may decide to confiscate financial assets or limit/prohibit financial transactions, and may also decide to restrict when and where an individual may travel.

The decision of listing a person is made by the executive with no judicial involvement, and it does not follow any specific criteria. This procedure has been widely criticized, because the majority of individuals and entities listed are Muslim, and this raises potential issues of discrimination. The main concern is that national governments may designate and then detain individuals and groups that simply express unpopular opinions, without being positively involved in the terrorist act itself, but, since they talk about terrorism or support terrorist ideology, it is rational to catch them, even though they have not done anything.

⁽³⁵⁵⁾ S/RES/1730/2006, note (218), and S/RES/1904/2009, note (220) for listing and delisting procedure, and Ombudsperson's role in the procedure.

⁽³⁵⁶⁾ MARTIN, *supra* note (284), p.434.

⁽³⁵⁷⁾ DI STASIO, *supra* note (14), pp.113 and following.

⁽³⁵⁸⁾ *Ibid.* Reference to the case of Mr. Mohammed. His five year old son's name matched with one listed in a “security watch list”, note (286), p.114.

⁽³⁵⁹⁾ *Ibid.*, pp.115-117.

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Usually, listed persons and groups have little if not any possibility to challenge the government who listed them. This is due to the secrecy of the appeal process, which does not permit disclosure of important materials.

In addition, the UN Sanctions Committee does not allow a listed individual to apply for delisting. The listed person has to rely on the goodwill of a State. The decision of removal from a list is made by consensus, and all five permanent members of the Security Council must agree. Every member State has veto power, but if only one of the five permanent members does not agree on delisting, the delisting process does not occur. In addition, there is no option for independent review, and once a name is on the list there is no time-limit to the listing.

Some safeguards have been established, including the obligation to notify the individual of the listing, providing some information on the charges against him and the reasons for designation. At an international level, national governments need to cooperate and give coordinated responses. It is necessary that national listing be coordinated with international listing in order not to make mistakes that may threaten the whole system of listings.

The UN is not itself party to human rights treaties, but States are so. Regional and domestic lists must comply with human rights provisions, but they also have to comply with the obligations set forth by Chapter VII of the UN Charter. It may happen that some States' lists violate the right of an individual to defense, to a fair hearing, to an effective remedy, or to freedom of association and peaceful assembly. It is obvious that there is a urgent need to reform UN and regional lists in order to make them comply with human rights provisions, since the individuals affected should be protected by strong safeguards during the judicial proceeding.

IV. CASE LAW.

OVERVIEW: 1. Human rights and national security in the fight against terrorism. – 1.1. Derogations in time of emergency. – 1.2. The respect of basic judicial guarantees in time of emergency. – 2. The practice of “targeted sanctions.” – 2.1. Designations in the Commonwealth area. – 2.2. Designations engage some basic human rights. – 3. The practice of “extraordinary renditions” and the CIA detention program. – 3.1. European States’ responsibility in CIA extraordinary renditions. – 3.2. “Diplomatic assurances”, the shift in the purpose of extraordinary renditions, and the principle of *non-refoulement*. – 3.2.1. The principle of *non-refoulement*. – 3.3. The case of Maher Arar (Canada-US-Syria network). – 4. Prisoners of Guantanamo Bay: the status of “*enemy combatants*.” – 4.1. Torture and abuses: the *Standard Minimum Rules for the Treatment of Prisoners*. – 4.2. The cases of *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Rumsfeld v. Padilla*. – 5. The treatment of terrorist suspects: breach of human rights for intelligence gathering purposes. – 5.1. Detention. – 5.2. Interrogation. – 5.2.1. Intelligence interrogation techniques from Guantanamo to Iraq. – 5.3. Barack Obama and the Executive Order on the closure of Guantanamo detention facility. – 5.4. The other sites of the “US torture chamber.” – 5.4.1. Afghanistan. – 5.4.2. Pakistan. – 5.4.3. Iraq. – 5.4.4. Jordan. – 6. Intelligence preventive measures: detention, expulsion and deportation, administrative detention and control orders. – 6.1. Detention, expulsion and deportation in the area of immigration. – 6.1.1. National security removal. – 6.1.2. Detention pending deportation. – 6.2. Administrative detention and control orders. – 6.2.1. Administrative detention does not protect the detainee. – 6.2.2. Control orders: derogation from human rights. The UK case law. – 6.2.3. Comparison between the UK and Australia. Derogating and non derogating control orders. – 7. The role of Intelligence in the strategy against terrorism. – 7.1. Intelligence cooperation between Europe and the US. – 7.2. EU regional intelligence agencies. – 7.3. The changing nature of terrorism requires new intelligence. – 7.4. Conclusions.

1. Human rights and national security in the fight against terrorism.

The secrecy surrounding information obtained by intelligence sources often limits the effectiveness of judicial proceedings, because it derogates from human rights obligations. In addition, it does not ensure safeguards for persons suspected of being involved in terrorist activities.

Courts do not want to be in a position to challenge the lawfulness of secret information on which the Security Council sanctioning system is based. Lacking the fundamental safeguards, the whole system credibility is undermined, because it seems that fighting against terrorism is much more important than protecting the individuals affected by intelligence preventive measures. Several States, indeed, justify the

systematic use of intelligence measures for reasons of national security to protect the public, but they often hide the true purpose, which is to prevent certain individuals, inevitably discriminating them, from associating, or talking about unpopular issues, like political opponents or people who peacefully protest against a tyrannous government.

States often make use of intelligence sources, and overcome the ordinary criminal justice system. The main reason for this to happen is that intelligence services are much freer than national criminal justice, and they are supposed to be non liable for their acts. Hence, they are given more power and freedom of action than the ordinary judicial system may have.

It is increasingly worrying that States have legitimized greater use of secret information as an evidence during secret hearings, which violates an individual's right to be heard and to be informed of all charges against him.⁽³⁶⁰⁾

The use of intelligence in the fight against terrorism has important reflections in terms of expenditures. For example, after September 2001, security services' budgets have grown enormously, with a subsequent increase in personnel, the assumption of women as analysts, and the opening of offices in other countries.⁽³⁶¹⁾

Intelligence preventive measures must comply with various principles, including the principles of legality, necessity, proportionality and non discrimination in order to protect the persons affected. It is necessary that some safeguards are into place to ensure an effective protection of human rights.

An important 1987 Advisory Opinion of the Inter-American Court of Human Rights declared that democratic societies cannot put in second place the rights and freedoms of individuals, nor the guarantees they should have, or the rule of law that inspired such rights. Rights and freedoms, guarantees applicable and rule of law can be considered the ends of a triangle, where the highest angle is the rule of law, which inspires the other two angles on the basis, rights and freedoms, and guarantees applicable. However, all three are very important one to the other, because even in time of war, or of emergency, judicial guarantees arising from the rule of law must not be infringed. Human rights can be derogated in such situations, provided that basic human rights, from which no derogation is authorized, are ensured. However, this is not the case of the rule of law, which must be respected always.⁽³⁶²⁾

⁽³⁶⁰⁾ EMINENT JURISTS PANEL, *supra* note (154), p.118.

⁽³⁶¹⁾ C. WALKER, in FERNÁNDEZ-SÁNCHEZ, pp.149-150. See also GILL, note (99), pp.226-235.

⁽³⁶²⁾ *Ibid.*, p.469. Reference to note (1).

Many measures taken by national governments have often curtailed certain rights of alleged terrorists to challenge the charges against them, or to receive a fair trial. These measures include indefinite detention, often with no charge against the detainee; the establishment of special military courts to try civilians; the misuse or even the abuse of certain laws on immigration to avoid judicial guarantees; the use of “targeted sanctions” by the Security Council without process against the defendant; and the practice of extraordinary renditions.⁽³⁶³⁾

States must respect human rights provisions and ensure basic judicial guarantees to the persons suspected of being involved in terrorist activity. The suspension of certain rights must be temporary and occur only when a state of emergency threatens national security. Otherwise, when the threat is only apparent or remote, no derogation should be in place.

Immediately after a terrorist attack has occurred, civilians are willing to sacrifice some of their rights for national security, in order to let their government respond to the attack promptly and efficiently. This practice is not under discussion, since it is a normal reaction. What is being questioned is that this practice should not become an ordinary manner of resolving terrorism-related issues. Unfortunately, this is a widespread practice among democratic countries, because it is a common perception that terrorism has to be fought with aggressive exceptional measures, which automatically involve an infringement of human rights and judicial guarantees. This happens because many States tend to consider human rights provisions as an obstacle to counterterrorism policies, whereas it is important to recognize that human rights and counterterrorism measures are complementary and not mutually exclusive.⁽³⁶⁴⁾

1.1. Derogations in time of emergency.

Derogation from human rights provisions can occur only in time of war or emergency threatening the life of a nation, which are considered exceptional circumstances. Of course, not all human rights can be derogated from by national governments in time of emergency. Fundamental rights such as the right to life, to a fair

⁽³⁶³⁾ *Ibid.*, p.470.

⁽³⁶⁴⁾ *Ibid.*, pp.471-472.

trial, the prohibition of torture, and of inhuman or degrading treatment, cannot be infringed in whatever circumstance.⁽³⁶⁵⁾

Any derogation from other human rights must be officially declared by the national government that carries out such derogation, who must notify the nature and reasons of the derogation to the Secretary-General of the United Nations. Derogation in time of emergency must be time-limited, since it involves a temporary situation, and it must be proportionate to the extent required by the exigencies of the situation itself.

In addition, any derogation from human rights must be subjected to regular revision and to the principle of non discrimination, which shall always be respected. The principle of legality requires that judicial guarantees be respected even in time of emergency, thereby ensuring the right to a fair trial. The principles of necessity and proportionality imply that the measures taken during a time of emergency are appropriate and the least intrusive to achieve the objective.⁽³⁶⁶⁾ Proportionality requires that derogating measures be limited to those strictly required by the exigencies of the situation, and it refers to the adequacy of extraordinary measures to overcome the situation of extreme danger, in order to re-establish the public order.

The UN Human Rights Committee has repeatedly affirmed that member States shall comply with article 9 ICCPR, which is the right to liberty and security of the person, instead of extending the powers of arrest and detention. In particular, the period of custody of an alleged criminal before being brought before a court must be a maximum of “few days”; and national authorities must ensure the right to counsel and to a fair trial to the detainee.

Member States are prohibited from torturing alleged criminals, neither to obtain information, nor to punish the individual. Torture and inhuman or degrading treatment are prohibited both in the ICCPR and in the ECHR.⁽³⁶⁷⁾

National governments have justified the use of exceptional counterterrorism measures with matters of national security. According to the Siracusa principles, “national security”:⁽³⁶⁸⁾

⁽³⁶⁵⁾ ECHR, art.15(1), (2), note (89); and ICCPR, art.4(1), (2), note (85).

⁽³⁶⁶⁾ COMMISSION ON HUMAN RIGHTS, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, Report of the High Commissioner submitted pursuant to General Assembly resolution 48/141, E/CN.4/2002/18, of 27 February 2002, paras.11, 12, 13. It is available online at <http://www.unhchr.ch>.

⁽³⁶⁷⁾ *Ibid.*, paras.14, 15, 16.

⁽³⁶⁸⁾ COMMISSION ON HUMAN RIGHTS, *Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4, of 28 September 1984, part I (B), principles 29-32. Available online at <http://www.unhcr.org/refworld/docid/4672bc122.html>.

...may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation, its territorial integrity or political independence against force or threat of force.

...cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

...cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

The systematic violation of human rights undermines national security and may jeopardize international peace and security. A State responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

It clearly results from these four principles that national security cannot be misused for repressive purposes against targeted persons or groups. The only acceptable justification is an imminent threat which endangers a nation or civilians.

Nowadays, however, national governments have accepted terrorism as a permanent phenomenon, and the measures they adopted temporarily are now being used *de iure* or *de facto* permanently to suspend human rights obligations. This creates a paradox, because what was considered a temporary “extraordinary” measure has become the rule.⁽³⁶⁹⁾

Issues of national security also occur when a war has been initiated. However, in this case too is not always possible to derogate from human rights and judicial guarantees, with particular reference to terrorism. Several States, including the United States, have declared a war on terrorism, thereby considering themselves actually engaged in a real war. Terrorism can be categorized as an armed conflict, where humanitarian law is applicable, only when it is directly involved in the hostilities; in other words, when terrorists actively participate to the conflict by means of their attacks.⁽³⁷⁰⁾

⁽³⁶⁹⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (327), p.477.

⁽³⁷⁰⁾ *Ibid.* It is worth noting that an important difference exists between terrorism and the concept of armed conflict. The former is a form of political violence with political purposes. The latter requires two important conditions: 1) an armed confrontation must exist, in the sense of hostilities between two States or where one, or both, of the two parties is a relatively organized armed group; and 2) the hostilities must reach a certain level of intensity.

Often the States declaring a “war on terror” aim at reaching a permanent situation of emergency, where human rights can be derogated from by national authorities for issues of national security. Thereby, terrorists are no longer considered civilians, but rather combatants, and for this reason they can be judged by military or martial courts, created *ad hoc*, whose decisions do not completely conform to human rights standards.⁽³⁷¹⁾

1.2. The respect of basic judicial guarantees in time of emergency.

As affirmed by the Human Rights Committee in its General Comment No.29, “the principle of legality and the rule of law require that fundamental conditions of fair trial must be respected during a state of emergency.”⁽³⁷²⁾

Judicial guarantees can be derogated from in time of emergency, as affirmed in General Comment No.29, paragraph 14. State Parties can adjust some procedural guarantees, but they must comply with article 2(3) ICCPR, which provides an effective remedy to defendants. Alleged criminals must be protected by basic judicial guarantees, including the writs of *habeas corpus*, the right to a fair trial, and also effective judicial review in the case of administrative detention.⁽³⁷³⁾

With reference to the right to a fair trial, certain elements can be derogated from, for example the right to a public trial, or the right of a defendant to examine witnesses, or the right to a hearing within a reasonable time. Other components of the right to a fair trial, conversely, cannot be derogated from, whatever the situation may be. They include the right to be heard by a competent, impartial and independent court; the presumption of innocence; the right to be promptly informed of the criminal charge against the individual; the right to adequate time and facilities to prepare a defense; the right to counsel; the right not to incriminate oneself, neither under coercion; the right to attendance of witnesses; the right to appeal and to an effective remedy; the non-retroactivity principle.

⁽³⁷¹⁾ *Ibid.*, p.478.

⁽³⁷²⁾ HUMAN RIGHTS COMMITTEE, General Comment No.29, *supra* note (324), para.16.

⁽³⁷³⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (327), pp.483-484. *Habeas corpus* has the function of protecting a person’s life and physical integrity; it prevents an individual from disappearing, and from torture or inhuman or degrading treatment.

These rights can be grouped within the right of due process, and they all aim at protecting the right to life and security of a person.⁽³⁷⁴⁾

Other principles which can be considered general principles of criminal law are the *non-bis-in-idem* principle, the *nullum crimen sine lege* and *nulla poena sine lege* principles.⁽³⁷⁵⁾ These latter principles require that the offence for which sanctions are provided be clearly defined by law. National authorities cannot incriminate an individual if the offence of which he is accused is not provided for by law.⁽³⁷⁶⁾

The provisions in article 14 ICCPR can be considered core elements of human rights protection, which safeguards the rule of law. States must always respect such provisions, both in time of emergency and in time of war, because international humanitarian law protects basic judicial guarantees also during an armed conflict.

The Human Rights Committee, in General Comment No.29, notes that in case of a public emergency, certain elements of the right to a fair trial can be derogated, but limitations on such right must not go beyond what is strictly required to overcome the danger, and they cannot include restrictions on basic judicial guarantees for which no suspension is allowed.

Even though article 14 ICCPR cannot be derogated from, according to the Human Rights Committee, any reservations to the right to a fair trial would be incompatible with the objective of the ICCPR.⁽³⁷⁷⁾

An interesting example of the non compliance with article 14 ICCPR, and of the subsequent violation of basic judicial guarantees is the situation of detainees in the detention facility of Guantanamo Bay, Cuba.

The UN Commission on Human Rights has often showed serious concerns on the actual situation of detainees in Guantanamo, because criminals, or suspects waiting for judgment, are detained in inhuman conditions: they are not given neither the right to counsel, nor the right to be heard promptly by an independent, impartial and competent court; or the right to challenge the charge against them, the right to be promptly informed of the charge against them; or the right to be presumed innocent until otherwise proven. To worsen the situation, there is no independent review mechanism of the decisions issued by the only competent body, the US Supreme Court. Individuals are subject to the worst treatment, in clear violation of basic human rights provisions, such as the prohibition

⁽³⁷⁴⁾ ICCPR, art.14, note (85).

⁽³⁷⁵⁾ *Ibid.*, p.485.

⁽³⁷⁶⁾ BIANCHI, *supra* note (325), p.907.

⁽³⁷⁷⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (327), pp.486-487.

of torture and of inhuman or degrading treatment, and the right to freedom and security of the person.⁽³⁷⁸⁾

There is still discussion on the nature of detainees in Guantanamo. They look like being in a sort of limbo; they are not civilians, but rather combatants, and this is the reason why they are tried by military or martial courts, an example of which are the military courts established by the US Military Order. In addition, Guantanamo facility is located on Cuban soil, which was bought by the US Government. However, the Americans allege to have no jurisdiction on that area, nor has it the Cuban Government.⁽³⁷⁹⁾

2. The practice of “targeted sanctions.”

In countering terrorism national governments have taken measures that often go beyond the respect of basic human rights provisions. They have been, and are still, helped by security intelligence agencies, whose activity, as said previously, is difficult to account, because of the secret halo surrounding their operations.

Terrorism is a rather dangerous phenomenon that needs to be fought with strong national legislations. National legislations, on their part, must be based on high standards of human rights in order to be effective. Consequently, counterterrorism measures must be based on the respect for human rights provisions to effectively counter such a threat. Otherwise, national governments would fight against terrorism creating more terrorism. In other words, since terrorism is rooted in human rights violation, any violation of the said rights on the part of States would feed more terrorism, instead of eliminating it.

Therefore, it is essential that basic judicial guarantees and human rights from which no derogation is possible, are protected even when a threat to a nation is posed by terrorism.⁽³⁸⁰⁾

As far as “targeted sanctions” are concerned, it is important to recall the practice of blacklists, i.e. those lists adopted by the UN Security Council whose listed individuals and groups (or regimes, notably the Taliban) are subjected to asset freeze or seizure, travel

⁽³⁷⁸⁾ *Ibid.*, p.488. See also M. RATNER, E. RAY, *Prigionieri di Guantanamo. Quello che il mondo deve sapere*, Bologna, Nuovi Mondi Media, 2005.

⁽³⁷⁹⁾ RATNER, RAY, *supra* note (378).

⁽³⁸⁰⁾ FERNÁNDEZ-SÁNCHEZ, note (378).

ban, arms embargo, and restrictions on financial transactions. These can be called “targeted sanctions” because they aim at hitting specific persons and groups.

Such sanctions often violate certain human rights and judicial guarantees, in particular the right to be promptly informed of the inclusion on the blacklist, which is usually not granted. The Security Council justified such violation by alleging that the sanctions lists impose preventive measures, which should prevent any of the individual listed from making use of his assets and funds. The Security Council also affirmed that the presumption of innocence is not precluded by the listing, since the individuals listed have no charge against them; there is only reasonable suspicion, usually based on intelligence information, which is not disclosed.⁽³⁸¹⁾

An interesting example of targeted sanctions’ violation of certain basic judicial guarantees are two cases judged by the Court of First Instance: *Ahmed Ali Yusuf and Al Barakaat International Foundation and Yassin Abdullah Kadi v. Council of European Union and Commission of the European Communities*, of 21 September 2005.⁽³⁸²⁾ In particular, Ahmed Ali Yusuf, a Swede of Arab origin, found he was included in a blacklist of the UN Security Council Sanctions Committee. He contested the European Council implementation of UN resolution 1267, which imposed asset freeze of all individuals and groups listed. The Court of First Instance rejected the applicant’s allegation, affirming that the European Council was competent to implement such resolution in accordance with international law.

Despite the fact that there shall be a possibility to review the lawfulness of European Council norms, in accordance with the principle of legality, the situation is different when UN Security Council, or one of its Committees, imposes binding resolutions. The Court of First Instance denied to be competent to judge on such matters, since it only had jurisdiction to review UN norms in relation to *ius cogens*.

With reference to the violations of rights alleged by the applicant, which included the protection of property and the right to an effective remedy, the Court of First Instance refused any competency to judge on the matter, since said rights did not have *ius cogens* status. The Court concluded that there were no grounds for annulling the European Council implementation of UN resolution.

⁽³⁸¹⁾ *Ibid.*, p.489.

⁽³⁸²⁾ *Ibid.* Judgements of the Court of First Instance, *Ahmed Ali Yusuf and Al Barakaat International Foundation and Yassin Abdullah Kadi v. Council of European Union and Commission of the European Communities*, 21 September 2005, Case T-306/01 and Case T-315/01, note (72). Case T-306/01 is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0306:EN:HTML> Case T-315/01 is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0315:EN:HTML>.

This example shows that the targeted sanctions procedure of listing does not fit into the traditional system of due process. However, even though there can be some adjustments or exceptions, the Security Council should guarantee certain basic components of the right to due process, such as the right to be informed promptly of the measures adopted, the right to be heard within reasonable time, the right to counsel, and the right to an effective remedy.⁽³⁸³⁾

Nevertheless, the listing procedure remains a deficient targeted sanctions system, because even though listed individuals should be granted certain basic judicial guarantees, this is true only theoretically, because in practice it never happens.

Listed individuals know of the inclusion on the lists only after having been listed, and may not be informed of the reasons for listing for secrecy motives; often, they are not granted the right to an effective remedy, neither in case they decide to appeal for cancellation, nor when proven innocent. In addition, the appeal for cancellation must be filed to the State of citizenship or residency, where the evaluation of the matter is made within an intergovernmental procedure, since the State examining the appeal, if believes so, contacts the State which asked for inclusion in order to ask for cancellation to the Sanctions Committee. With resolution 1989 (2011) the Security Council introduced the Office of the Ombudsperson, which receives the requests for delisting filed by listed individuals. This procedure was established to make the delisting system more transparent.⁽³⁸⁴⁾

As far as the case of *Yusuf and Kadi* is concerned, the applicants applied to the European Court of Justice (ECJ), which changed completely the decision made by the Court of First Instance.⁽³⁸⁵⁾ In particular, the ECJ annulled⁽³⁸⁵⁾ the sentence of the Court of First Instance, whose effects were maintained for three months. The ECJ found a violation of the right to cross-examination, to an effective remedy, and the right to property. The ECJ also found that the judges of the Community were competent on the judgment of lawfulness of UN Security Council resolutions, because the principle of

⁽³⁸³⁾ *Ibid.*, p.490.

⁽³⁸⁴⁾ G. DE AMICIS, A. BALSAMO, *Terrorismo Internazionale, Congelamento dei Beni, Tutela dei Diritti Fondamentali nell'Interpretazione della Corte di Giustizia del 3 settembre 2008*, in *Cass. Pen.* 2009, vol.49, fasc. 1, p.403. See also DE VIDO, *supra* note (227).

⁽³⁸⁵⁾ *Ibid.* The European Court of Justice approved the applicants' allegations on 23 January 2008, rejecting the conclusion of the Court of First Instance of 21 September 2005. The Court of First Instance of the European Communities responded, in a judgment of 30 September 2010, that it would have reviewed meticulously the Regulation that imposed the freezing of Mr. Kadi's assets. It also declared its previous judgment repealed because adopted in violation of certain basic rights which had to be granted to the applicant. More information at <http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1735>.

legality is a constitutional guarantee that must be respected in accordance with the concept of autonomy and independence of the European Union.

The ECJ concluded that UN principles governing international law do not exclude the possibility of a control on the lawfulness of European common positions in compliance with human rights law. UN instruments cannot jeopardize the constitutional principles governing the treaties of the European Community, because one of the requirements for such treaties to be lawful is their respect of fundamental rights and freedoms.⁽³⁸⁶⁾

With reference to the facts here examined, the ECJ affirmed that the applicants should have been informed of the reasons for the inclusion on the sanctions lists, in order to let them exercise their right of cross-examination of the allegation, and to file appeals to the Court on the lawfulness of the procedure. However, an effective review and appeal mechanism have not been considered by the UN Sanctions Committee, fact that involves a violation of the right to a due process and to an effective remedy. Furthermore, the freezing of assets and funds of the applicants have had the effect of infringing their right to property.⁽³⁸⁷⁾

2.1. Designations in the Commonwealth area.

At a domestic level, every country has adopted international obligations on listing procedures in its own national legislation.

Australia, Canada, New Zealand and the United Kingdom, in particular, have the capacity to designate individuals and groups outside of the UN Consolidated List.⁽³⁸⁸⁾ Australia, for example, implemented international obligations so that, when the Sanctions Committee designates a name, that person or group is automatically proscribed under Australian law and added to the Australian List.

Being on the UN Consolidated List does not represent criminal offence, at least theoretically. However, it is true that certain acts connected to designated entities are criminalized. In particular, if third parties deal with assets of listed individuals, or make funds available to them, they may be imprisoned for up to ten years, under Australian law.

⁽³⁸⁶⁾ *Ibid.*, pp.404-406.

⁽³⁸⁷⁾ *Ibid.*, pp.408-412.

⁽³⁸⁸⁾ CONTE, *supra* note (345), pp.590 and following on the Commonwealth countries' designation procedures.

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There is not criminal offence for individuals that deal with assets in good faith and without negligence. In addition, persons wrongly proscribed must be compensated.

The Australian listing procedure involves the Minister of Foreign Affairs and Trade, to whom an individual can apply after his name has been listed, in order to remove it from the list.

A different situation occurs when a terrorist organization is listed. As said before, it does not constitute criminal offence to be designated on the UN Consolidated List; conversely, the issue becomes complicate if the entity listed is a terrorist organization as defined by the Criminal Code Act 2005.⁽³⁸⁹⁾ In this case, it does constitute criminal offence to be a member of, or associated with, a terrorist organization as defined in the Criminal Code Act 2005. The punishment may be up to 25 years imprisonment.

The critical point is that an entity can be listed extremely easily, without a criminal standard of proof, rather on an ordinary basis, and the inclusion on the list can be followed by severe criminal penalties. Designations in Australia may last up to two years, and can be renewed.

In Canada, the Governor in Council is authorized to establish a list of persons and entities, if he believes that there is a real possibility that the entity has carried out or participated to a terrorist activity, or the entity is knowingly acting on behalf of or in association with a terrorist organization. The Governor in Council makes reference to the 2002 Regulations Establishing a List of Entities, comprised of two regulations: one is the list of entities, and the other provides for the entry into force of the Regulations.⁽³⁹⁰⁾

In order to be delisted, an entity has different possibilities. A first one is to wait for the review made by the Minister of Public Safety and Emergency Preparedness, which occurs every two years. The Minister makes recommendations to the Governor in Council. A second possibility is to apply in writing to the Minister to be delisted. If the Minister does not make any recommendation within sixty days from the application date, then the Minister may have reasonable grounds not to delist the entity. Judicial review can be applied for if there has been a material change after the first application. A further possibility is the so called “fast-track” application to the Minister, who will give his response within fifteen days.

⁽³⁸⁹⁾ Under Criminal Code Act 2005 (Australia), a terrorist organization is “an organization that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (non necessity of the act of terrorism); or an organization that is specified to be so by the terrorist organization regulations (listed in the Criminal Code Regulations 2002). *Ibid.*, pp.590-591.

⁽³⁹⁰⁾ *Ibid.*, p.592. The List of Entities is available online at <http://www.justice.gc.ca>.

In Canada, when a name is listed, assets freezing takes place. However, an exception must be considered. The Minister can authorize a specific activity or transaction otherwise prohibited; the authorization is subject to any terms and conditions alleged by the Minister (section 83.09 of the Criminal Code Act 2005). Designations under Canadian law are valid indefinitely, but they are subject to review.

New Zealand's Terrorism Suppression Act 2002 (TSA) sets out a detailed designation procedure, which may be related to domestic lists, specific of the country, or may be a result of the Committee's Consolidated List, since New Zealand has adopted the Sanctions Committee's List of designated entities automatically in its domestic law.⁽³⁹¹⁾

Under the TSA 2002, there can be interim designations and final designations. The main difference between the two types of designation is the standard of belief. An interim designation requires the Prime Minister to have a good cause to suspect in order to be made. A final designation, instead, requires that the Prime Minister believes on reasonable grounds that an individual/entity is involved in terrorist activity.

There is no necessity that one of the two types of designation comes before the other. An entity may be designated on a final basis even though it has never been designated on an interim basis. However, when an entity is designated on a final basis but it has already been subject of an interim designation, then the interim designation is revoked.

The TSA amendment in 2007 allowed to distinguish between domestic designations and UN designations, made according to the Sanctions Committee's List.

A further important difference between interim and final designations is the class of designation applied. When a designation is made on a basis of reasonable suspicion or belief that the entity has knowingly carried out the terrorist act, then the entity can be designated as a terrorist entity. However, the entity can be designated as an associated entity if there is reasonable suspicion or belief that it has facilitated or participated to the execution of a terrorist act, or is acting at the direction of a terrorist entity. When the Prime Minister makes a designation, he may rely on any information he considers relevant for

⁽³⁹¹⁾ *Ibid.*, pp. 594 and following. Under TSA 2002, section 55, property can be forfeited by the Attorney-General if the designation has been extended beyond the three-year period and it has been noticed that the prohibition against dealing with the property is not sufficient. If, instead, the designation has not been extended beyond the normal three years and the simple prohibition against dealing with property is believed to be enough, then property can be frozen. Hence, an individual cannot make use of it, but property cannot be forfeited by the Crown unless the three years has passed.

the case. Some information, usually obtained through intelligence sources, is normally not disclosed if the head of the agency certifies so.

The expiry of designations depends on the type of designation. Interim designations expire after thirty days, unless earlier revoked or replaced by final designations. A final designation can last for a longer period of three years, and there are three means by which it can be renewed or reviewed. The first is similar to the interim designation procedure. If both designations become subject of a judicial proceeding, they can continue to operate beyond the time-limit. A second means to renew or revoke a designation depends on the Prime Minister's initiative, who can decide to initiate internal reviews. A third means depends directly on the individual affected or on a third person, allowed to bring any judicial review before a court, alleging that the entity is no longer involved in the conduct that established the designation, or that the designation must be revoked for the entity does not satisfy the requirements for the designation to be made.

2.2. Designations engage some basic human rights.

The designation of persons and groups as terrorist entities impact on the right to peaceful assembly and freedom of association, on the rights to natural justice and fair hearing. Other rights involved are the right to dispose of one's property and the right to privacy.

The rights to association and peaceful assembly are considered integral to human dignity, even though they are not precisely defined within international instruments. For example, the ICCPR treats these rights in broad and simple terms:⁽³⁹²⁾

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

It can be easily noticed that the article is extremely broad and does not take into account all the shades of the term. Indeed, is it possible to interpret the term freedom of association here on a religious or political basis? Or is it only intended for commercial and work purposes? Unfortunately, the jurisprudence of the Human Rights Committee is

⁽³⁹²⁾ ICCPR, *supra* note (85), art.22.

useless, because the most common complaints are referred to work matters, strike actions and political issues. The same reasoning can be made for article 11 of the ECHR, which exactly confirms the broad definition.⁽³⁹³⁾

The term “freedom of association” has not an absolute value, because it is subject to restrictions prescribed by law. The whole (democratic) society has the right to freely associate but in the respect of the others, of national security and of public order (ordre public). Also the right to peaceful assembly is subject some restrictions prescribed by law.

With reference to listing procedures, these rights may be limited for issues of national security and protection of the public, because there may be a terrorist threat endangering the life of a nation.⁽³⁹⁴⁾

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism asserted that Governments must be clear in defining the aim of the limitations of certain rights. If the true purpose is different from that of fighting against terrorism, then there may be a higher risk of undermining national security and international peace.

A Government shall not justify a limitation of certain rights only with the objective of eliminating political opponents or of using repressive practices against its population. It must prove that the limitations follow a good faith belief in effectively dealing with the threat. In order to prevent abuses a Government shall establish effective safeguards, because the designation of individuals and entities may have the aim of preventing membership in all Islamic organizations rather than preventing only those individuals that fall under the requirements for a designation to be made.⁽³⁹⁵⁾

Another group of rights engaged by designations is the right to natural justice and fair hearing. They both involve the equality of arms and the right to be judged by a competent, independent and impartial tribunal.

Several States have complained that the Sanctions Committee does not provide sufficient safeguards against abuse of listing and delisting powers. An example is the statement of the Danish Ambassador to the UN, Margrethe Løj⁽³⁹⁶⁾, who claimed that the procedures of the Sanctions Committee do not comply with the principles of due process.

⁽³⁹³⁾ ECHR, *supra* note (87), art.11.

⁽³⁹⁴⁾ CONTE, *supra* note (345), pp.601-602.

⁽³⁹⁵⁾ *Ibid.*, pp.603-604. For more information on the Special Rapporteur report, see the report on the listing of individuals and entities (n.41) paras.11, 20, 27 and 29.

⁽³⁹⁶⁾ *Ibid.*, p.604. Reference to note (53). Margrethe Løj was ambassador of the Danish Delegation to the UN from 2001 to 2007.

She added that her country would not assist the Committee's activity by providing it with names of individuals or entities to be listed.

Still, the Security Council has to go a long way before it ensures clear and fair procedures of listing and delisting. There is not an independent review mechanism at an international level, hence it is necessary that individuals have access to judicial review at a domestic level of any implementing measure.

A minimum level of safeguards to grant the right to a fair hearing must include the right to be informed of the measures taken; the right to be heard within a reasonable period by the court; the right to have access to counsel; the right to challenge the charges by applying for review; and the right to an effective remedy.⁽³⁹⁷⁾

An example of non compliance with the right to a fair hearing is New Zealand's law. In this case, both interim and final designations do not comply with the rights above-mentioned, because under the Terrorism Suppression Act 2002 an individual subjected to designations can apply for review only through a written form. The right to natural justice apparently does not include a right to be heard before the court making the decision (sections 20 and 22 of the TSA).

Furthermore, section 26 of the TSA does not require that notice of designation includes motivations for the inclusion on the lists. In particular, section 29 asserts that the designation order cannot be invalidated just because an individual was not given notice of the reasons. This does not happen to the UN Sanctions Committee, because the Committee is required to maintain a narrative summary of the reasons for all decisions.

In New Zealand the right of an individual to be informed of the reasons why he has been listed is not prescribed by law; however, it is considered as a public responsibility to do so, because it helps the tribunals to focus on the main question. It also helps the individual affected, because it allows him to determine whether there are grounds for appeal or judicial review.⁽³⁹⁸⁾

3. The practice of "extraordinary renditions" and the CIA detention program.

⁽³⁹⁷⁾ *Ibid.*, pp.605-606. See also the Report of the Special Rapporteur on the right to a fair hearing, (n.41) paras.16 and 26.

⁽³⁹⁸⁾ *Ibid.*, pp.606-607.

“Extraordinary renditions” refer to an extra-judicial practice of the US, implemented in the “war on terror” after September 2001. Such practice consists of the abduction and transfer of persons to other States for the purpose of interrogation. Extraordinary renditions do not always involve terrorist suspects.

As said before, the practice of rendition *per se* is not unlawful, provided the individual transferred is then subjected to a legal proceeding. However, this rarely happens. In general terms, extraordinary renditions represent an evident violation of the right to a fair trial, because individuals have no access to the judicial system of the sending State to oppose their transfer. Hence, individuals may be sent to places, usually their country of origin, where there is a real risk they suffer torture and inhuman or degrading treatment in order to obtain information.

The purpose of such practices is to avoid legal constraints in order to obtain valuable intelligence information. Since these practices remain secret, they can be plausibly negated.⁽³⁹⁹⁾

Extraordinary renditions are a part of the so-called “war on terror” of the United States, which involves low protection of human rights and strong use of unlawful measures. The US pays more attention to “nice words” than to facts: kidnapping becomes extraordinary rendition, and torture and inhuman treatment becomes coercive interrogation. Thereby, public opinion remains calm and the international community acts as though nothing has happened.⁽⁴⁰⁰⁾

The US has progressively created a web of disappearances, secret detentions, unlawful transfers, on the legal basis of the *Authorization for Use of Military Force* (AUMF), asserting that

The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts

⁽³⁹⁹⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (327), pp.490-491. Rendition is different from the concept of “extradition”, because the latter is lawful and it derives from the principle *aut dedere aut iudicare*, which clearly explains that those states not willing to extradite criminals or suspects have an obligation to prosecute them under national law. Extradition consists of the apprehension of individuals on a State’s soil to be transferred to another State where they will be subjected to a legal proceeding. Extradition is not always possible, for example when the State requesting for extradition is known to use illegal methods of interrogation, such as torture or inhuman treatment of detainees, or sentence individuals with the death penalty. See FIJNANT, *supra* note (317), pp.246-247.

⁽⁴⁰⁰⁾ *Ibid.*, pp.113-114.

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of international terrorism against the United States by such nations, organizations or persons.⁽⁴⁰¹⁾

The practice of extraordinary renditions has often been carried out with the cooperation of European States, either active or passive. Such cooperation, being secret, has breached various treaty obligations and has taken different forms, such as:

- 1) the secret detention of a person on European soil for an indefinite period, and without granting basic human rights and procedural guarantees (notably habeas corpus); or
- 2) the capture and handing of a person over to the U.S. knowing that said person would be unlawfully transferred to a secret detention facility administered by US forces; or
- 3) the authorization of unlawful transfers of detainees on civilian aircrafts carrying out rendition operations, through European airspace and territory; or
- 4) the provision of intelligence information to the U.S., knowing that such material would be used directly to carry out renditions or to hold persons in secret detention facilities; or
- 5) the active participation in the interrogations of persons captured and subjected to rendition operations; or
- 6) the use of information gathered by means of torture and other abuses during interrogations; or
- 7) the availability of European airports and territories to facilitate extraordinary renditions; or
- 8) the availability of European airports and platforms to refuel aircrafts used to carry out rendition operations.⁽⁴⁰²⁾

⁽⁴⁰¹⁾ *Ibid.*, p.114, note (5). Authorization for Use of Military Force (AUMF), Commander in Chief Clause, Article II Constitution.13/11/2001, *Military Order on the Detention Treatment and Trial of Certain Non-Citizens in the War against Terrorism*. Such an order breached every principle of the basic right to a fair trial, including no specific charges against the defendant, no right to be heard before an independent, impartial and competent court, no right of appeal to challenge the decisions of the court. See also *Lakhdar Boumediene et al. v. Bush, President of the United States, et al.*, argued on 5 December, 2007 and decided on 12 June, 2008, Application No.06-1195 available online at <http://www.supremecourtus.gov>.

⁽⁴⁰²⁾ *Ibid.*, pp.115-116, note (7). The active and passive acts carried out by European countries are listed in COUNCIL OF EUROPE, *Alleged Secret Detention and Unlawful Inter-State Transfer of Detainee Involving Council of Europe Member State*, Resolution 1507 (2006). See also EUROPEAN PARLIAMENT, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, *Draft Interim Report on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners*, Rapporteur: G. C. Fava, available online at <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=530929#tab-0> See also HAKIMI, *supra* note (311).

European countries have an international responsibility to protect basic human rights and ensure judicial guarantees of habeas corpus and of due process. Extraordinary renditions, indeed, infringe the prohibition of torture and of inhuman or degrading treatment; they do not respect the right to a fair trial and to protection of the physical person by means of habeas actions. Furthermore, they do not comply with the principle of *non-refoulement*, which requires that persons are not transferred to their country of origin, or to a place, where there is a real risk that such persons will suffer torture, inhuman treatment or be subjected to the death penalty. In addition, extraordinary renditions attempt to avoid *ius cogens* norms by using the “balanced approach” of diplomatic assurances, which require that a receiving State ensures that the person transferred will not suffer any form of torture or abuse.

3.1. European States’ responsibility in CIA extraordinary renditions.

In November 2005, the Washington Post published an article containing the first Human Rights Watch report “on the existence of secret detention centers in certain democratic countries in Central and Eastern Europe, and flights chartered by the CIA to transfer persons suspected of terrorism aside from the legality of the detention centers.”⁽⁴⁰³⁾

The Council of Europe immediately reacted by appointing a rapporteur to investigate at the level of the Parliamentary Assembly, which established a Temporary Committee, and at the level of the Secretary-General to invite Member States to provide an explanation of the facts. In addition, the rapporteur asked the Venice Commission to prepare a legal opinion on extraordinary renditions and on member States’ international obligations.⁽⁴⁰⁴⁾

The report of the rapporteur on 12 June 2006 concluded that the CIA had created a spider’s web of unlawful kidnapping and transfer of persons which could not be carried

⁽⁴⁰³⁾ *Ibid.*, p.117, note (13).

⁽⁴⁰⁴⁾ HAKIMI, *supra* note (311), p.442. For more information on extraordinary renditions, see R. ALBARIÑO, *La responsabilidad de los Estados europeos en los vuelos secretos de la CIA. Especial referencia a España*, Revista de Derecho Comunitario Europeo, no.24, 2006, pp.541-570, available online at <http://www.cepc.gob.es/publicaciones/revistas/revistaselectronicas>; see also D. WEISSBRODT, A. BERGQUIST, *Extraordinary Rendition: A Human Rights Analysis*, Harvard Human Rights Journal, vol.19, 2006, pp.123-160, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924146.

out without a certain amount of cooperation on the part of European countries. To support such a thesis, the rapporteur mentioned nine cases, involving seventeen individuals, in which terrorist suspects may have been captured far from any armed conflict (thus they could not be considered Prisoners Of War – POW), and unlawfully transferred to secret detention facilities, where they were subjected to torture and other forms of abuse.⁽⁴⁰⁵⁾

The rapporteur also named the European countries which cooperated with CIA in carrying out or facilitating extraordinary renditions. In particular, those responsible for extraordinary renditions were Sweden, the United Kingdom, Italy, Macedonia, Germany and Turkey. Those responsible for active and passive cooperation were Poland and Romania, where secret detention facilities were established. Finally, the European States serving as starting and stopover platforms were Germany, Turkey, Spain, Cyprus, and Ireland, the United Kingdom, Portugal, Greece, Italy. The most common destinations were Saudi Arabia, Egypt, Morocco, Jordan, Syria, Afghanistan, and Yemen. Against all these States there are proofs that torture was used during interrogations.⁽⁴⁰⁶⁾

The European Parliament asserted that European States were liable of human rights violations under the *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, under the ICCPR, and under the *Chicago*

⁽⁴⁰⁵⁾ *Ibid.*, pp.443-444.

⁽⁴⁰⁶⁾ N. ARENAS-HIDALGO, in FERNÁNDEZ-SÁNCHEZ, pp.116-117, notes (7) and (11). See AMNESTY INTERNATIONAL 2006, *supra* note (311). The report published by Amnesty International in 2006 focused on six cases of rendition, involving seven European states and thirteen victims. All involve persons being captured and transferred abroad, without due process, to secret detention places where they suffered torture and other inhuman treatment. The report highlights the role of European states and shows how their active and passive participation to renditions infringed international and domestic obligations. The six cases were:

- 1) Mustafa Ait Idir, Belkacem Bensayah, Hadj Boudellaa, Saber Lahmer, Lakhdar Boumediene and Mohamed Nechle, arrested by Bosnia-Herzegovina in January 2002, are Bosnian citizens of Algerian origin. They were handed to US forces which flew them to Guantanamo Bay. They are still there.
- 2) Muhammad Haydar Zammar, from Germany, was detained in December 2001 while travelling in Morocco, held there without charge, and then transferred to Syria.
- 3) Abu Omar, of Egyptian nationality, was granted asylum in Italy. He was abducted in Milan in February 2003 by the CIA with the help of Italian police forces. He was transferred to Germany, and then to Egypt, where he has allegedly been tortured. He is believed still to be held in Egypt without charge.
- 4) Khaled el-Masri, a German national of Lebanese origin, was abducted in December 2003 while seeking to enter Macedonia. He was detained there without charge and subjected to ill-treatment. Then he was handed to US officials and transferred to Afghanistan. When the US authorities realized they had made a mistake, he was driven to the Albanian border and then back to Germany.
- 5) Ahmed Agiza and Mohammed El Zari, Egyptian nationals seeking asylum in Sweden, were detained in December 2001 in Sweden and then transferred to Egypt, where they were held incommunicado and allegedly tortured. In 2004 Agiza was sentenced to 25 years of imprisonment, without possibility of appeal. He saw his sentence reduced to 15 years, and he is detained in Egypt. El Zari was released in 2003 without ever having been charged.
- 6) Bisher Al-Rawi and Jamil El-Banna, of Iraqi and Jordanian origin respectively, flew from the UK to Gambia in November 2002 for business. In Gambia they were arrested and handed to US authorities. In 2003 they were transferred to Afghanistan and denied fair trial or habeas corpus. Then, they were transferred to Guantanamo Bay, where they are still held.

Convention on International Civil Aviation.⁽⁴⁰⁷⁾ In addition, it affirmed that the rules governing the activities of secret services are inadequate and need stricter and more effective control on the compliance of such activities with international human rights provisions.⁽⁴⁰⁸⁾

As said in the report of Amnesty International in 2006, renditions are illegal because they bypass due process and involve serious human rights violations. In particular, the seventeen victims of extraordinary renditions in Europe committed by the CIA have been abducted and detained unlawfully in secret detention facilities, often incommunicado; several of them have been refused access to counsel, and to an effective remedy, including an opportunity to challenge the charges against them, if there were any. They have also been allegedly subjected to torture and ill-treatment to gather information on terrorist cells and activities.

Any State helping another State to violate international law is internationally responsible if the former does so “with knowledge of the circumstances” of the violation.⁽⁴⁰⁹⁾ European States are responsible for having violated the principle of *non-refoulement*. To facilitate the abduction on foreign soil and provide essential facilities by authorizing other States to intervene and move on a State territory can be considered liability for complicity. Violation of human rights deriving from a case of extraordinary rendition must be illegal in both the States involved in order to be effectively unlawful.⁽⁴¹⁰⁾

The complicity offence arises even though the base on a European State’s territory is a US base, because ECHR requires that Member States take diplomatic, economic, judicial or other measures in their power to secure the rights guaranteed by the Convention to people within their territory, even in the absence of effective control over a part of that territory.⁽⁴¹¹⁾

Amnesty International report is supported by a judgment provided by the European Court on the case of *Khaled el-Masri v the Former Yugoslav Republic of Macedonia*.⁽⁴¹²⁾

⁽⁴⁰⁷⁾ EUROPEAN PARLIAMENT DRAFT INTERIM REPORT, *supra* note (402), paragraph E. The *Convention on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* was adopted by the UN General Assembly on 10 December 1984; and the *Chicago Convention on International Civil Aviation* was adopted on 7 December 1944. They are both available online at <http://www.untreaty.un.org>. ICCPR, *supra* note (85).

⁽⁴⁰⁸⁾ *Ibid.*, para.3.

⁽⁴⁰⁹⁾ AMNESTY INTERNATIONAL 2006, *supra* note (311), p.4. Reference to the INTERNATIONAL LAW COMMISSION, Articles on Responsibility of States for Internationally Wrongful Acts, article 16, UN General Assembly resolution 56/83 of 12 December 2001, available online at <http://www.un.org>.

⁽⁴¹⁰⁾ INTERNATIONAL LAW COMMISSION, *supra* note (409), art.16.

⁽⁴¹¹⁾ AMNESTY INTERNATIONAL 2006, *supra* note (409).

⁽⁴¹²⁾ ECtHR, *Khaled el-Masri v. the Former Yugoslav Republic of Macedonia*, 13 December 2012, Application No.39630/09, available online at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001->

El-Masri, a German citizen of Lebanese origin, alleged he had been subjected to a secret rendition procedure operated by Macedonian agents, who had apprehended, held incommunicado and ill-treated him in Skopje. He then had been transferred to a secret detention facility in Afghanistan where he was subjected to torture for more than four months by CIA agents. In May 2004 he returned to Germany, after having been released in Albania. The European Court concluded that there is a *prima facie* evidence in favor of the applicant's version of events. Furthermore, it confirmed that the respondent Government had never initiated an effective official investigation on the allegations of ill-treatment (violation of article 3 ECHR) purported by the applicant. The ECtHR also confirmed that the respondent State had violated article 5, 8 and 13 of ECHR; and also confirmed that El-Masri was subjected to "enforced disappearance."

Several inquiries were initiated into allegations of secret rendition operations in Europe by CIA agents in cooperation with certain European countries. Among them, the 2006 Marty report confirmed that renditions took place and that the individuals apprehended had been transferred to secret detention facilities.⁽⁴¹³⁾

3.2. "Diplomatic assurances", the shift in the purpose of extraordinary renditions, and the principle of *non-refoulement*.

Several European countries argued that they had required "diplomatic assurances" that the persons transferred to a receiving country would not be tortured or subjected to ill-treatment. For example, Sweden alleged it had required diplomatic assurance that Egypt would not subject Ahmed Agiza to torture or other human rights violations. However, such assurances do not completely satisfy the principle of *non-refoulement*. The reasoning behind such a thesis lies in the fact that if a diplomatic assurance is needed, then it means that the potential for a risk of torture or ill-treatment is too great to

[115621#{"itemid":\["001-115621"\]}](#). When directly asked whether the Macedonian Government had known where El-Masri was transferred after the detention period in Macedonia, the Minister of Interior answered that they were "...not able to tell...exactly what happened to [Mr. El-Masri] after he was released because it is not in [their] interest; after the person leaves the border crossing, [they are] not in a position to know how he travelled further."

⁽⁴¹³⁾ *Ibid*, part C. The Marty inquiry identified Skopje as "one-off pick-up point", which represents a sort of platform from which detainees are picked up for rendition or unlawful transfer.

let the transfer occur. States are responsible even if they require diplomatic assurances.⁽⁴¹⁴⁾

Extraordinary renditions can be considered a hybrid form of human rights violation, which includes arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial, independent and competent courts. Extraordinary renditions represent an attempt to avoid international condemnation of torture and other forms of abuse and ill-treatment as interrogation techniques. National authorities argue that extraordinary rendition is just an informal and benign alternative to extradition.⁽⁴¹⁵⁾

The objective of extraordinary renditions is to interrogate suspects for intelligence information gathering purposes. In order to obtain such information, agents have to use non conventional coercive techniques, which usually imply the use of torture and other forms of abuse.

The practice of extraordinary renditions is generally connected to the United States. Under the Clinton Administration such a practice was put under strict controls, which included an arrest warrant in the hands of the receiving country for the person transferred; the approval of each extraordinary rendition operation by senior government officials after strict administrative scrutiny; the notification to the local government; and the assurance given to the CIA by the receiving country that the individual transferred would not suffer ill-treatment.⁽⁴¹⁶⁾

However, under the G. W. Bush Administration, specifically after 9/11 attacks, the CIA was granted extended powers and flexibility with reference to extraordinary renditions. The change in administrations has brought also a change in the objective or renditions. Currently the purpose of extraordinary renditions is not to bring the suspect to trial, but it is rather to obtain intelligence information without considering human rights obligations and judicial guarantees of fair trial and due process. This clearly shows a shift from rendition to justice to rendition to torture.⁽⁴¹⁷⁾

As affirmed in *Hamdi, et al. v. D. Rumsfeld, Secretary of Defense, et al. of 28 June 2004*, individuals subjected to preventative detention have not access to counsel unless they are charged with a specific war crime. In other words, suspects who may possess

⁽⁴¹⁴⁾ *Ibid.*, p.5. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, 24 May 2005, Decision CAT/C/34/D/233/2003. Another emblematic case of the failure of diplomatic assurances is the case of Maher Arar, mentioned further on in this chapter.

⁽⁴¹⁵⁾ WEISSBRODT, and BERGQUIST, *supra* note (404), pp.127-128.

⁽⁴¹⁶⁾ *Ibid.*, pp.124-125.

⁽⁴¹⁷⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (406), p.120.

valuable intelligence information have no access to a lawyer during interrogation, because otherwise they would not tell what they know to agents. This occurs only if the detainee has paramount intelligence value.⁽⁴¹⁸⁾

On 6 September 2006, President Bush acknowledged the existence of CIA secret detention centers, and justified them by arguing that the most important source of information on terrorist activity and bases is the terrorists themselves. In order to effectively obtain information on their activity, they had to be moved to secret places, where experts and agents could interrogate and, when necessary, prosecute them for their acts. US national security depends on the collection of such information.⁽⁴¹⁹⁾

In order to prevent extraordinary renditions, States must ensure stricter controls over civil air transport; establish more effective controls over the activity of secret intelligence agencies; offer more effective protection to individuals against human rights violations on the part of States; and create greater democratic control on counterterrorism measures to ensure that fundamental rights and judicial guarantees protection will never be compromised.⁽⁴²⁰⁾

3.2.1. The principle of *non-refoulement*.

A State is prohibited from sending an individual to a country where there is a credible risk that he might be subjected to serious human rights violations. This prohibition includes the deportation, extradition, expulsion and transfer of people to countries at risk. If a State violates such a prohibition, then it violates the principle of *non-refoulement*.

The principle of *non-refoulement* finds its origins in refugee law, where the 1951 *United Nations Convention relating to the Status of Refugees* affirmed that every contracting State is prohibited from expelling or returning a refugee to a territory or frontier

⁽⁴¹⁸⁾ *Hamdi, et al. v. D. Rumsfeld, Secretary of Defense, et al.*, 28 June 2004, Application No.03-6696, Appearance of 28 April 2004, available online at <http://www.supremecourtus.gov>.

⁽⁴¹⁹⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (406), p.121. The statement of President Bush is available online at <http://www.whitehouse.gov/news/releases/2006/09>.

⁽⁴²⁰⁾ *Ibid.*, pp.126-130.

where there is a real risk that he is subjected to discrimination or human rights violations on the basis of race, religion, nationality, political opinion.⁽⁴²¹⁾

The *non-refoulement* principle is seriously at risk in such contexts where national governments resolve to use deportation and expulsion as their counterterrorist strategies. In these cases, the principle represents an impediment, and some States (notably Middle Eastern countries) simply choose to ignore their duties, even more so when they are not bounded by bilateral or multilateral treaties. Furthermore, some other countries argue that, since the purpose of a State is to protect its population as a whole, there should be a balance between the need to protect the community from a terrorist threat and the duty to protect an individual from a real risk of human rights violations.

However, it is worth recalling the importance of the principle of *non-refoulement* not only because of bilateral or multilateral agreements among countries, but all the more because it is part of international human rights law and customary law, the latter binding all States of the international community.

A case that well illustrates the conundrum of the principle of *non-refoulement* is the case of *Saadi vs. Italy*⁽⁴²²⁾. Nassim Saadi is a Tunisian national who alleged that a decision to deport him to Tunisia upon authorization of the Italian Government would have exposed him to the risk of being subjected to ill-treatment, in violation of article 3 ECHR. The applicant asked the Court of Milan to suspend or annul the decision to deport him to Tunisia. The Court accepted the request and decided to reopen the case, alleging that under Tunisian law, in case of a judgment *in absentia* of the accused, the person convicted had the right to have the proceedings reopened. Since the applicant asserted he entered Italy through France, a new deportation order was issued, which named France as the receiving country. Then, the applicant was released because new information evidenced that he could not be deported to France. The applicant was released and forbidden to leave Italian territory.

Before the ECtHR, the United Kingdom intervened in support of Italy, claiming that the principle allows for some balancing measures. The UK claimed that the principle of *non-refoulement* has caused serious difficulties for the Contracting States, because it

⁽⁴²¹⁾ The *UN Convention relating to the Status of Refugees*, art.33, is available online at <http://www.untreaties.un.org>.

⁽⁴²²⁾ ECtHR, *Saadi v. Italy*, 28 February 2008, Application No.37201/06. The case is available online at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276#{"itemid":\["001-85276"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276#{). EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.102, at note (243).

prevents them from enforcing expulsion measures.⁽⁴²³⁾ The UK also affirmed that under the 1951 Convention on refugees an entitlement to asylum was not authorized where there was a risk for national security or where the asylum seeker had been involved in acts contrary to the principles of the UN.

If a foreign national represents an imminent terrorist threat, there should be a balancing of competing rights, because the State involved has the obligation to protect the community from terrorism. The UK goes further, arguing that if it is true that the respondent State has to adduce evidence of a threat to national security, it is even more important that stronger evidence is adduced that the applicant would risk ill-treatment in the receiving State. The applicant has to prove that it was “more likely than not” that he would be at risk of torture.⁽⁴²⁴⁾ It seems that the supporting States affirm that sometimes the deportation of an individual to a country where there is a serious risk of torture might be justified because of terrorism-related matters. In any case, it is a responsibility of the applicant to prove evidence that he would face a serious risk of ill-treatment. Of course, where such evidence is adduced, the respondent Government has to dispel any doubts about it.⁽⁴²⁵⁾

The ECtHR rejected the claims adduced by the UK, asserting that the assessment of a threat to national security is independent from the assessment of a feasible risk of ill-treatment upon deportation. The two evaluations shall be made independently one from the other. The Court also concluded that there was an infringement of article 3 ECHR. Conversely, it rejected the applicant’s allegation of a violation of article 6 (right to a fair trial) and article 8 ECHR (right to family and private life), and of article 1 of Protocol No.7 to the ECHR, as not relevant, since it did not doubt that the Government would comply with the Court’s judgment, consequently not deporting the applicant to Tunisia.

The principle of *non-refoulement* is an obligation integral to the prohibition of torture, which is absolute and admits no exceptions. Incommunicado detention, kidnapping and extraordinary renditions represent a clear violation of articles 3 and 4 ECHR, which impose the prohibition of torture, of inhuman treatment and of slavery or forced labor.⁽⁴²⁶⁾

International law prohibits torture, and all the States parties to ICCPR and ECHR are prohibited from deporting individuals to countries where they may risk the death

⁽⁴²³⁾ *Ibid.*, Merits, part (b)2.

⁽⁴²⁴⁾ *Ibid.*, para.122.

⁽⁴²⁵⁾ *Ibid.*, para.129.

⁽⁴²⁶⁾ FERNÁNDEZ-SÁNCHEZ, *supra* note (406), p.123, note (30). See also ECHR, note (87), artt.3 and 4.

penalty. In *Saadi v. Italy*, the European Court of Human Rights rejected Italy and its supporter's claim, affirming that the principle of *non-refoulement* is absolute and there can be no derogation from that rule.

Besides, some States have argued that the impediment of the principle may be resolved by requiring "diplomatic assurances" from a receiving State that an individual will not face any feasible risk of human rights violations. Several States have relied on diplomatic assurances, whose feature ranges from simple contacts up to Memoranda Understanding between the countries involved. Italy, Canada, the Netherlands, the US, the UK, Jordan and many others have all relied on diplomatic assurances.

Nevertheless, the use of "diplomatic assurances" does not eliminate possible violations of human rights. In *Saadi v. Italy*, the ECtHR did not fully accept diplomatic assurances, because it found sufficient evidence of torture in Tunisian detention facilities that made such instruments irrelevant and unreliable. In addition, the UN High Commissioner for Human Rights, the UN Special Rapporteur on Torture and other regional and international organs have all rejected the use of "diplomatic assurances", because they noticed that they are used in contexts where neither the sending nor the receiving State are interested in monitoring the compliance with the diplomatic assurance requirement. In addition, if there is a breach of the assurance, the individual directly involved has no remedy.⁽⁴²⁷⁾

3.3. The case of Maher Arar (Canada-US-Syria network).

Besides the case of the extraordinary rendition of Mr. Agiza from Sweden to Egypt, another interesting case is *Maher Arar v. Ashcroft et al.*⁽⁴²⁸⁾ Maher Arar is a telecommunications engineer with double citizenship. He lives in Canada but originally comes from Syria.

While he was on vacation with his family in Tunisia in September 2002, Arar received an email from his employer, who asked him to come back to Ottawa, in Canada.

⁽⁴²⁷⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), pp.104-105.

⁽⁴²⁸⁾ *Ibid.*, pp.83-85. *Maher Arar v. Ashcroft et al.*, argued on 9 November 2007 and decided on 30 June 2008 Case No.06-4216-cv. See also C. FORCESE, *The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror'*, in *EJIL* (2006), vol.17 no.2, pp.372-373. *Agiza v. Sweden*, *supra* note (414).

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Arar then flew to Zurich and boarded a flight to Montreal which made a transfer stop at J. F. Kennedy airport in New York City. Entering the US customs office, he showed his valid Canadian passport and was immediately retained by US authorities and arrested. He had been the subject of a US Government “lookout”, and therefore was detained and interrogated without counsel by several US Government officials for almost two weeks. US authorities alleged that he had links with terrorist organizations, specifically with al-Qaeda, and asked him whether he volunteered to be sent to Syria. He denied everything and alleged that he risked torture and ill-treatment if sent to Syria; he insisted to be sent to Canada or Switzerland (from where his flight had departed).

In October 2002, the US Immigration Director, S. Blackman, determined, on the basis of a mixture of classified and unclassified information, that Arar was a member of al-Qaeda, and for that reason inadmissible to the United States. He then signed an order of removal of Arar from the US to Syria. That same day, Arar was permitted to make a phone call, and decided to contact his family relatives. On their part they contacted the Office for Canadian Consular Affairs, which told them it did not receive any formal notification of Arar’s detention.

An official from the Canadian Consulate in New York visited Arar and told him he could not be sent to Syria because of his Canadian citizenship. US officials asked him to fill in a formal document declaring where he wished to be removed. He chose Canada.

The next day, he was allegedly taken in chains and shackles to a room where he was told he would be sent to Syria.

Despite the fact that he could be subjected to torture, he was removed to Syria via Jordan. In Jordan he was allegedly beaten by Jordanian officials apparently acting as transfer agents for US officials. He then was sent to Syria, where he was detained and tortured for one year. He reported to have been repeatedly subjected to physical and psychological torture, including with cables and electrical cords. He argued that during interrogations Syrian officials asked similar questions to those asked by FBI agents.

On 21 October 2002, Syrian authorities confirmed to the Canadian Embassy in Damascus that Arar was in their custody. US authorities allegedly did not acknowledge to Canada that Arar was in Syria. Arar was eventually released by Syrian authorities on 3 October 2003, because they did not find any connection with al-Qaeda.⁽⁴²⁹⁾

In February 2004, the Canadian Government established a commission to investigate the actions of Canadian officials in relation to Maher Arar’s detention in the

⁽⁴²⁹⁾ FORCESE, *ibid.*

US, removal to and detention in Syria. The commission concluded that Canadian authorities had requested US authorities to create lookouts for Arar and his wife; described Arar to US officials as an “Islamic Extremist” suspected of having links with the al-Qaeda terrorist movement; and provided American authorities with intelligence information on Arar, in particular information collected by the Royal Canadian Mounted Police (RCMP).

In January 2007, Maher Arar, with whom the Canadian Government had entered a settlement agreement, received a financial compensation of 11.5 million Canadian dollars in exchange for withdrawing a lawsuit against the Canadian Government.

Arar had filed a civil action, in December 2006, against the then US Immigration Director Blackman and against other officials of the FBI, who, alleged Arar, mistreated him while in their custody in the US, and removed him to Syria with knowledge of the fact that he risked torture and ill-treatment. They infringed the principle of *non-refoulement* and proceeded to the extraordinary rendition of Arar to Syrian authorities, which were known to use interrogation techniques involving torture.⁽⁴³⁰⁾ Arar was convinced that Syrian authorities were acting upon dispositions of the American Government, which, on its part, followed information supplied by Canada.

In April 2007, Arar submitted a reply to the Second Circuit Court of Appeals, but the defendants asked the Court of Appeals not to allow Arar’s case to proceed. In November 2007 the appeal was argued before the Second Circuit Court of Appeals. In June 2008, it was found that Arar’s claims would interfere with national security and foreign policy. The judges who rejected such a thesis argued that the decision adopted by the majority of judges would give federal officials the authorization to commit a violation of constitutional rights without punishment.⁽⁴³¹⁾

In November 2009, the Second Circuit Court of Appeals dismissed Arar’s case. The Court refused any means of redress, supported by the allegations of “state secrecy” on the part of US Government officials. However, in February 2010, Arar petitioned the Supreme Court for *certiorari* review of the Second Circuit Court of Appeals’ decision to dismiss the case. In June 2010, the Supreme Court denied Arar’s petition for *certiorari*.

The case of Maher Arar represents an example of human rights violation by intelligence agencies in cooperation with national law enforcement authorities, and their impunity because of national security matters. US and Syrian authorities have allegedly

⁽⁴³⁰⁾ *Arar v. Ashcroft*, pp.1-5.

⁽⁴³¹⁾ See <http://ccrjustice.org/arar#files>.

violated Maher Arar's right to self-defense, and to be promptly informed of the charges against him. He was denied access to counsel. US authorities used the unlawful practice of extraordinary renditions; they violated the right to liberty and security of the person, and infringed the principle of *non-refoulement*. Syrian authorities were responsible for the violation of the prohibition of torture, of inhuman or degrading treatment, and did not ensure basic judicial guarantees of due process.⁽⁴³²⁾

The only positive fact is that the Canadian Government recognized the fault and established a Commission of Inquiry which examined the circumstances of the case and made recommendations on future errors.

The main issue, however, raised by the case of Maher Arar is that official authorities were acting in cooperation with intelligence agencies. This clearly represents a case of complicity in the violation of human rights law and safeguards in the fight against terrorism.

4. Prisoners of Guantanamo Bay: the status of “*enemy combatants*.”

After the 11 September attacks, the US Department of Justice (DoJ) has proceeded to the arrest of about a thousand people suspected of involvement in the terrorist attacks of 2001. However, only little more than a half has been charged and sentenced, most of them for infringement of immigration law. Many of the detainees did not have charges against them and were retained for a long period. The majority of terrorist suspects had been subjected to preventative detention.⁽⁴³³⁾

⁽⁴³²⁾ SIRACUSA PRINCIPLES, *supra* note (368). Principle 70 affirms that “the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency, and respect for them is essential in order to ensure the enjoyment of non-derogable rights and to provide an effective remedy against their violation.” Subparagraphs from (a) to (i) list the fundamental rights that cannot be denied, some of them are particularly relevant for the case of Maher Arar:

(a) All arrests and detention and the place of detention shall be recorded, if possible centrally, and made available to the public without delay;

(b) No person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge;

(c) No person shall be held in isolation without communication with his family, friend or lawyer for longer than a few days, e.g. three to seven days;

(e) Any person charged with an offence shall be entitled to a fair trial by a competent, independent and impartial court established by law.

⁽⁴³³⁾ AMNESTY INTERNATIONAL, *United States of America: Amnesty International's concerns regarding post September 11 detentions in the USA*, p.1, available online at <http://www.amnesty.org>; see also DI STASIO, *supra* note (14), pp.506-507.

Under US law, there are two groups of detainees: one is formed by those in detention centers on US territory. They are subjected to the normative power of the DoJ Minister, and they can ask for investigations on the lawfulness of their detention. In particular, section 9 of the US Constitution provides for the possibility of obtaining a writ of *habeas corpus*, which imposes an obligation on the administrative authority to bring before a court the factual elements and the provisions prescribed by law justifying the denial of the right to liberty of a detainee.⁽⁴³⁴⁾

The second group is formed by those persons which are still detained in Guantanamo Bay detention center, in Cuba.⁽⁴³⁵⁾ Such a territory has been granted to the US with a lease agreement in 1903. The US recognizes Cuban jurisdiction on the territory, and Cuba on its part resigned its jurisdiction for the duration of the lease. Consequently, the jurisdiction over Guantanamo detainees remains controversial, because nobody knows how to label detainees in the Cuban detention center.⁽⁴³⁶⁾

Immediately after the attacks of 11 September 2001, a US-led military coalition went to the then Taliban-led Afghanistan, in order to fight down the Taliban regime, which provided safe haven to Osama bin Laden and its al-Qaeda group of terrorists. The US military forces caught thousands of terrorist operatives and Taliban fighters. Many of them were held in Afghanistan detention centers, while others were transferred to Guantanamo Bay. In such a place detainees were denied all basic human rights, including no access to family, to the press or the media, or to legal counsel, and no strangers, except from experts and military agents could enter and exit the detention facility. Detainees were subjected to repeated and stressful interrogations, they were tortured and suffered ill-treatment. Their identities had to be kept secret.⁽⁴³⁷⁾

By late 2003 the number of prisoners in Guantanamo was of 660 detainees, most of which were men, but a handful of them were young boys of thirteen years old.

⁽⁴³⁴⁾ DI STASIO, *supra* note (14), p.507.

⁽⁴³⁵⁾ M. A. DRUMBL, *Victimhood in our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, in N Car LR, 2002, vol.81, part 1, pp.1-114. It is available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=286637; see also D. M. AMANN, *Guantanamo*, in COL JTL, 2004, vol.42, n.1, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951875.

⁽⁴³⁶⁾ The agreement resulted from the aid given by the US to Cuba during the 1898 war for the independence from Spain. In 1902 Cuban Constitution provided for the "*Emendament Platt*". For the US to protect Cuban population and grant its security, Cuban Government had to sell or lease certain territories to the US, which would be authorized to place its naval bases. Among such territories there is Guantanamo, leased by the US for two thousand dollars in gold coins. See also RATNER and RAY, *supra* note (387), pp.149-154.

"*Emendament Platt*" is available in RATNER and RAY, pp.155-157.

⁽⁴³⁷⁾ AMANN, *supra* note (435), p.267.

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In November 2001, President Bush declared a state of emergency for national security, which implied an extraordinary treatment of any noncitizen alleged to have links with al-Qaeda and involved in acts of terrorism which could threaten the US.⁽⁴³⁸⁾

In the presidential order, Bush required the Secretary of Defense to detain “*enemy aliens*”, also called “*enemy combatants*.”⁽⁴³⁹⁾ In addition, those detained in Guantanamo facility had to be treated with humanity and non discrimination; when tried, they had to be judged for violations of the rules of war by military courts operating outside the military or civilian criminal justice system. Hence, the presidential order established military commissions, enabled to try “*enemy combatants*.”⁽⁴⁴⁰⁾

Among the charges on which trials were initiated were crimes of war such as the use of human shields, and crimes of terror, such as skyjacking. Such offences were punished if two-thirds of the commission members were convinced of the defendant’s fault beyond reasonable doubt. A sentence up to life imprisonment was determined by a separate vote of two-thirds, while for the death penalty to be imposed there had to be a unanimous vote of all seven members of the commission. Usually defendants were permitted to seek review from the executive branch, but they were forbidden recourse to

⁽⁴³⁸⁾ See *supra* note (401). The Military Order on the detention, treatment and judgement of certain non citizens in the war on terrorism was issued on 13 November 2001, and it is available in RATNER and RAY, note (378), pp.157-164.

⁽⁴³⁹⁾ The “*enemy combatants*” had already been used in a 1942 decision of the Supreme Court relating to the lawfulness of a trial before military commissions on German saboteurs. In the decision the Court declared to be incompetent to judge prisoners of war (POW), even though in such a case the German saboteurs could not be considered POWs. Hence, the Court created the expression “*enemy combatants*.” Subsequently, such an expression was used during World War II to designate Japanese fighters residing in the US, who were deprived of their liberty for the whole duration of the armed conflict, since they were supposed to be unfaithful to the US Constitution. The purpose of this expression is to avoid the application of the status of prisoners of war, which requires the application of the *Third Geneva Convention relative to the Treatment of Prisoners of War*, adopted on 12 August 1949. The Convention requires “a state party to treat prisoners of war humanely, abstain from demanding information unrelated to identification, give prisoners of war trials that conform to the convention and are at least as protective as those afforded the state’s own soldiers, and liberate and repatriate prisoners of war as soon as a conflict ends.” AMANN, note (435), pp.268-271; and RATNER and RAY, note (378), p.165. See DI STASIO, *supra* note (14), pp.508-509, note (51).

⁽⁴⁴⁰⁾ *Ibid.*, pp.268-269. “The military commissions were composed of three to seven officers appointed by the Defense Secretary’s Appointing Authority, which chose also one Presiding Officer for each commission, a Chief Prosecutor and a Chief Defense Counsel. A defendant would be aided by a defense group made of a Detailed Defense Counsel, an attorney assigned by the Chief Defense Counsel, who could be aided by a civilian attorney or a member of the judge advocate corps chosen by the defendant. A defendant would be allowed to retain a civilian defense lawyer to assist the Detailed Defense Counsel, but only if that lawyer was a U.S. citizen, held a security clearance of “SECRET” or higher, and signed an agreement to comply with all tribunal rules. Under this agreement, the government would be authorized to monitor client-counsel communications “for security and intelligence,” but not evidentiary, purposes. Though open proceedings were to be preferred, the Presiding Officer of each commission had wide discretion not only to close hearings to the public, to the defendant, and to any defense attorney except the Detailed Defense Counsel, but also to keep the identities of judges, witnesses, and other participants forever secret.” This latter aspect is often called the practice of “faceless” judges.

any domestic, foreign or national forum. Furthermore, if a commission resolved to acquit a defendant, he would be detained indefinitely at Guantanamo.⁽⁴⁴¹⁾

Since *enemy combatants* are not considered as prisoners of war (POW), they do not receive the protection of the 1949 Third Geneva Convention. Captives who did not wear the signs in the hostilities that made them recognizable by the opposite military or did not meet other requirements, had to be considered “unlawful combatants”, and for this reason they could not be treated as prisoners of war.

Two-thirds of the detainees in Guantanamo, affirmed US authorities, were alleged members of al-Qaeda, and they were nationals of various States, such as Saudi Arabia, Pakistan, Belgium, Yemen, Algeria, Australia, the UK, Sweden, France. Since they were members of a non state actor, which is the case of the al-Qaeda terrorist organization, they could not receive protection from the Geneva framework. The remaining one-third of the detainees, mostly Afghans, was alleged to have fought for the Taliban regime. Since the Taliban regime governed Afghanistan, they were entitled to the Geneva Conventions protection.

However, the above-mentioned Conventions did not apply in any of the two cases. At a certain point, in 2003, the International Committee for the Red Cross strongly criticized the activity within Guantanamo detention facility. In particular it criticized the indefinite nature of detention and the use of interrogations not to bring detainees to justice, but rather to gather intelligence information for investigative purposes, and using techniques of dubious lawfulness.⁽⁴⁴²⁾

The Bush Administration decided to eliminate the line between US and non US citizens in the treatment of prisoners at Guantanamo, and established that the status of *enemy combatant* had to be defined case-by-case. Thereby, the American Administration violated two important instruments: first, article 5 of the Geneva Convention, which requires that only the judicial authority was enabled to ascertain whether a prisoner is a lawful combatant or not. Second, the *Army Regulation*, which was issued in 1997 by the

⁽⁴⁴¹⁾ *Ibid.*, p.270. In July 2004, following the judgment *Hamdi et al v. D. Rumsfeld*, note (418), the Department of Defense established the *Combatant Status Review Tribunals* (CSRT), an administrative review mechanism to which detainees could appeal for review of their status of enemy combatants. Still they are allowed to present a petition for a writ for Habeas corpus to a federal court. The CSRT grants the detainee the right to be present at the process, to present his opinions and the defense documentation, and to ask for witnesses to testify. The CSRT mechanism is, however, not based on the presumption of innocence of the detainee, but it only aims at establishing whether the detainee has still to be considered an enemy combatant or whether he should no longer be classified as such. The mechanism does not establish whether he has ever been an enemy combatant. DI STASIO, note (14), pp.509-510.

⁽⁴⁴²⁾ *Ibid.*, pp.271-272. See also RATNER and RAY, note (378), pp.217-219, report of the Red Cross on torture in Guantanamo.

Department of Defense (DoD), and which established that a military court was competent to ascertain the status of prisoner of war.⁽⁴⁴³⁾

To face the strong activism of US courts, who recognized important procedural guarantees to Guantanamo detainees, the Congress adopted the *Detainee Treatment Act* (DTA) in 2005, and the *Military Commission Act* (MCA) a year later. These two acts aimed at preventing federal judges from having competency on petitions of *habeas corpus*, a practice called *Habeas stripping*. The purpose of the DTA was to limit proceedings before federal courts, and it did so by establishing that the only court competent to review the decisions of the *Combatant Status Review Tribunals* (CSRT) and of the military commissions was the District Court of Columbia. The MCA extended the prohibition to apply the DTA to cases initiated before its adoption, since the DTA itself does not apply to pending cases, but only to cases initiated after its adoption.

Thereby, the Congress imposed that the writ of *habeas corpus* could not be applied to non citizens, repealing it and excluding the Guantanamo detainees from the enjoyment of *habeas corpus*.⁽⁴⁴⁴⁾ Nevertheless, the US Supreme Court reaffirmed the inalienability of the *habeas corpus* in the case *Hamdam* (2006), and *Boumediene* (2008).⁽⁴⁴⁵⁾

The status of *enemy combatant* has often been used as deterrent. There are several cases in which persons accused of conspiracy or of being involved in terrorist activity had to plead guilty in order to avoid the label of *enemy combatant*, and not to be sent to Guantanamo. An example is John Walker Lindh, an American citizen fighting for the Taliban regime who was captured in Afghanistan during the hostilities. He was first detained in a metal container for two days, fastened with leather straps, naked and blindfolded, in a suffocating hot temperature. He was then handed to US military forces, who formulated charges against him. They granted him the right to defense and to be subjected to an ordinary criminal proceeding. He eventually negotiated and pleaded guilty, thereby risking up to life imprisonment or the death penalty. It is believed that he pleaded guilty because he had been threatened with denial of fair trial and up to life imprisonment in Guantanamo, which is the destiny of *enemy combatants*.⁽⁴⁴⁶⁾

⁽⁴⁴³⁾ DI STASIO, *supra* note (14), p.509.

⁽⁴⁴⁴⁾ *Ibid.*, p.511. For more information on the MCA, see J. M. BEARD, *The Geneva Boomerang: the Military Commission Act of 2006 and US Counter-terror Operations*, in *AJIL*, 2007, Vol.101, n. 1, pp.56-72.

⁽⁴⁴⁵⁾ *Boumediene et al. v. Bush et al.*, note (401).

⁽⁴⁴⁶⁾ RATNER and RAY, *supra* note (378), pp.47-48. The case *United States of America v. John Pjillip Walker Lindh*, 5 February 2002, Application No.02-37A, is available online at http://www.investigativeproject.org/documents/case_docs/129.pdf.

The capacity to accuse a person of being an *enemy combatant* is an example of the high power of the president of the US, who can destroy the life of a person only by alleging he is an enemy to the US, evaluation that is of military nature.

4.1. Torture and abuses: the Standard Minimum Rules for the Treatment of Prisoners.

The *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* defines torture as any act voluntarily intended to inflict serious pain or suffering, either physical or psychological, to a person in order to obtain from her or a third person information or confession, to punish her or a third person for an act they have, or are suspected to have, committed, to intimidate or put pressure on her or a third person, or for any other reason on the basis of whatever form of discrimination, when such pain and suffering are inflicted by a public authority or other persons with official tasks, or under instigation of such persons, or with their implied acquiescence. The term “torture” does not include pain or suffering arising from lawful sanctions, or strictly connected to them.⁽⁴⁴⁷⁾

Article 2 of the Convention establishes that no extraordinary circumstance, including warfare or other situations of extreme threat to national security, can be invoked to justify the use of torture.

According to certain jurists, the practice of torture on terrorist suspects is necessary to obtain relevant intelligence information which otherwise would certainly not be revealed. Alan Dershowitz agreed with this position, and advanced a proposal for the institution of a system on whose basis one could go before a court and ask for the authorization to torture somebody. Thereby, he argued, it was possible to control its use. Of course, such a proposal borders on insanity, and is dangerous, because the US Administration is famous for changing the real meaning of words in order to circumvent an obstacle. Indeed, instead of using the word “torture”, the words “stress and coercion” could be used, apparently changing the meaning.⁽⁴⁴⁸⁾

⁽⁴⁴⁷⁾ *Ibid.*, p.166, article 1. The Convention on torture is available online at <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>.

⁽⁴⁴⁸⁾ *Ibid.*, p.53.

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The methods used in Guantanamo clearly involve torture and inhuman treatment, and this happens from the beginning, when prisoners are captured in the battlefield and transferred to detention facilities. When they were captured, alleged those which were released, they were placed inside hot metal containers, as it happened to Lindh. Of the huge number of persons packed in the container, about 300-400 people, only 30 to 50 survived. Those who did not die for the hot temperature, died for the gunshots to the container done to let air come inside. From the battlefield they were transferred to the US army and then moved to Bagram or Kandahar, where they suffered torture during interrogations. They were repeatedly hit, kept in handcuffs, forced to lie on the floor. They almost starved and were kept on their knees up to sixteen hours. Bagram was labeled as the “torture chamber of the US.”⁽⁴⁴⁹⁾

The prisoners detained in Kandahar were then forced to wear orange suits, their hands were fastened with their legs and waist, and they were loaded on an aircraft directed to Guantanamo. During the travel, they were blindfolded and ear cuffed, lying on the floor for twenty-four hours among urine and feces.

When they landed to Guantanamo, they were placed in small cells at Camp X-Ray, similar to those used for greyhounds, and repeatedly subjected to torture and ill-treatment by the Immediate Reaction Force (IRF). They were subsequently moved to Camp Delta, where they got their beards and mustaches cut. Their toilets were holes in the ground and they had no privacy.⁽⁴⁵⁰⁾

The purpose of Guantanamo detention policy is to eradicate persons' identity and personality, to make persons become anonymous and without will. The only way to stop such treatment is to cooperate with the authorities, and this often happens, even though individuals do not actually have relevant information, since they give false confessions. This is a reason why information obtained by means of torture is often non reliable.

⁽⁴⁴⁹⁾ *Ibid.*, pp.54-55.

⁽⁴⁵⁰⁾ *Ibid.*, pp.55-56. Guantanamo is divided into different camps. There is a series of cells which have the form of warehouses. Within Camp Delta there are four levels, which depends on the level of cooperation of the detainees. On the first level there are fully cooperative detainees; from level two to level four, detainees do not cooperate. Then, there is also level 4-, which is complete isolation: detainees do not have personal effects and are subjected to endless torture. Another camp, Camp Echo, has been recently built, and it is used for persons under trial. It is alleged that this camp has a separate branch used for death sentences. Other two new camps have been built, Romeo and Tango. These are alleged to be even worse than Camp Echo, because here individuals are placed in cells without clothes. They are given only a pair of shorts. Islamic religion does not allow men to show their knees. The objective is to humiliate them and destroy their identity in order to obtain information. *Ibid.*, p.57.

The *Standard Minimum Rules for the Treatment of Prisoners* have been adopted in 1955 by the Economic and Social Council, within the UN First Conference on the prevention of crime and treatment of culpable.⁽⁴⁵¹⁾

The Rules provide for the right of a prisoner to be promptly informed of the charges against him and to defense (art.30); the prohibition to be detained in cells without light, and to be subjected to physical punishment involving torture and inhuman treatment (art.31); the prohibition of punishments involving isolation or food reduction, unless under authorization by a doctor who has visited the detainee; the prohibition of punishment involving constraints such as handcuffs, chains, irons, unless used for transfer of the detainee or to avoid self-inflicted injuries (art.33).⁽⁴⁵²⁾

However, the Rules have non binding effects because the Economic and Social Council has not legislative powers. Hence, they are usually not respected at Guantanamo. The Rules are recommendations of political and moral nature, taken as a point of reference for reforms in the area of detention.

The controversial extraterritorial nature of Guantanamo has led to an absence of jurisdiction of any US or foreign court. Since conventions and other international instruments need state actors to be adopted or ratified, the fact that Guantanamo is neither under US nor under Cuban jurisdiction makes the situation of prisoners even worse. Whenever they try to appeal to a court, they are rejected because of a lack of competency of such court. The alleged extraterritoriality of the detention center is a matter of political opportunity, and apparently enables US authorities to detain forever, without granting basic rights of due process and fundamental judicial guarantees, individuals alleged to have links with terrorist organizations and labeled as *enemy combatants*, most of them not having any charge against.

⁽⁴⁵¹⁾ *Standard Minimum Rules for the Treatment of Prisoners*, adopted in 1955, and approved by the Economic and Social Council in 1957 are available online at http://www.unhchr.ch/hrml/menu3/b/h_comp34.htm.

⁽⁴⁵²⁾ DI STASIO, *supra* note (14), pp.513-514, note (64).

4.2. The cases of *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Rumsfeld v. Padilla*.⁽⁴⁵³⁾

The cases of *Rasul*, *Hamdi*, and *Padilla* have been decided by the Supreme Court, which issued three sentences known with the name “Guantanamo”, even though only *Rasul* is currently detained in Guantanamo Bay.

In all the three cases, the executive defense claimed the power to arrest and detain those individuals labeled as “*enemy combatants*”, being they US citizens or foreigners. The defense also claimed the power to deny basic judicial guarantees, because such a status does not fall under the Geneva Convention on the treatment of prisoners of war, since they are unlawful combatants.

The Supreme Court, in the three cases, did not question the power to arrest and detain *enemy combatants*, but it affirmed that the three plaintiffs as well as any other person are entitled to the right of personal security and protection.⁽⁴⁵⁴⁾

In the case *Rasul v. Bush*, the Court declared that the jurisdiction on the lawfulness of the detention of the plaintiff fell upon the Federal Court, since it had the competency to examine the lawfulness of detentions of foreigners captured abroad (*Rasul* is a British citizen captured in Afghanistan and transferred to Guantanamo). The Court of Appeal had previously rejected the plaintiff’s petition to examine the lawfulness of his detention because it denied its competency to decide on the case, on the basis of a precedent case, “*Eisentrager*”, where German citizens were denied the writ of *habeas corpus*. The Supreme Court, instead, argued that it was not bound by the case “*Eisentrager*”, since the German citizens to whom *habeas corpus* was denied were nationals of a State involved in the hostilities with the US, while *Rasul* is a British citizen.⁽⁴⁵⁵⁾

The Court rejected the claim of the Federal Government, which argued that to grant *habeas corpus* to Guantanamo detainees would have meant to apply the Congress acts in a place not subject to US jurisdiction, in violation of US domestic law. Conversely, the Supreme Court affirmed that the notion of extraterritoriality cannot be applied to individuals detained on a territory subject to US indefinite control and jurisdiction, in accordance with an international agreement (notably the US-Cuba lease agreement). In

⁽⁴⁵³⁾ *Shafiq Rasul, et al. v. Bush, President of the US, et al*, Case No.03-334; *Yaser Esam Hamdi, et al. v. D. Rumsfeld, Secretary of Defense, et al*, Case No.03-6696, note (418); and *D. Rumsfeld, Secretary of Defense, et al. v. José Padilla, et al*, Case No.03-1027. All the cases have been decided by the Supreme Court of the US on 28 June 2004. The cases can be consulted online at <http://www.supremecourt.gov>. See also AMANN, *supra* note (435), pp.282-285.

⁽⁴⁵⁴⁾ DI STASIO, *supra* note (14), p.520.

⁽⁴⁵⁵⁾ US Supreme Court, *Johnson, Secretary of Defense v. Eisentrager*, 339 U.S. 763, 5 June 1950, Application No.306, is available online at <http://supreme.justia.com/cases/federal/us/339/763/case.html>.

addition, the Court declared that the possibility to take habeas actions must be extended also to foreign citizens, in case they have been deprived of their personal liberty in consequence of a decision of the executive which is in violation of the Constitution or other instruments of US law, even though such foreign citizens are detained outside US borders.⁽⁴⁵⁶⁾

The second case, *Hamdi v. Rumsfeld*, refers to a US citizen captured in Afghanistan who has been detained for two years at Guantanamo for being an *enemy combatant*, and then, when it was found that he is an American citizen, at Norfolk base, in Virginia. The Court of First Instance of Virginia had authorized the petition for *habeas corpus* submitted by Hamdi's father; however, the Court of Appeal of the Forth Circuit rejected it, because Hamdi had been captured during the hostilities and, for that reason, he had been subjected to war powers granted to the President of the US by the Congress after 11 September 2001. In other words, the Court denied its competency to judge on the lawfulness of Hamdi's detention.

The Supreme Court reversed the Court of Appeal's decision, affirming that every US citizen to whom liberty is restricted should be granted the basic judicial guarantees of due process. In particular, the plaintiff should be promptly informed of the charges against him; he should be granted the right to defense before a competent, independent and impartial court; and should have access to counsel.

The extraordinary powers given to the President of the US in wartime shall not represent a "blank check". The President has an obligation to respect basic human rights and grant defendants' basic judicial guarantees of fair trial.

This sentence represents a reaffirmation of the importance of a balance between national security exigencies and human rights protection. However, the Supreme Court has failed to the extent to which it affirmed that the President of the US has extended powers in time of emergency, with specific reference to the law of war. Indeed, if the President has the power to arrest and detain individuals accused of fighting in an armed conflict, in accordance with the law of war, he has an obligation to treat them as prisoners of war, whereas Hamdi was accused of being an *enemy combatant*.⁽⁴⁵⁷⁾

The third sentence, *Rumsfeld v. Padilla*, involves Josè Padilla, an American citizen who lived in the Middle East for four years. When he came back to the US, he was stopped and arrested at Chicago airport, with the charge of being a supporter of al-Qaeda

⁽⁴⁵⁶⁾ See *supra* note (454), pp.521-522.

⁽⁴⁵⁷⁾ *Ibid.*, pp.522-524.

and a terrorist. He was declared *enemy combatant*, and transferred to a military prison in South Carolina, where he spent two years without access to family or counsel.

His lawyer in New York, being a “close friend”, applied for *habeas corpus* to the Federal Court of New York against the Secretary of Defense, Donald Rumsfeld. The Federal Court rejected the petition, affirming that the executive was not accountable to the judiciary for having labeled Padilla as *enemy combatant*. The Court of Appeals of the Second Circuit, instead, reversed the decision of the Federal Court, arguing that the executive had to present formal charges against the plaintiff in order to detain him.

The Supreme Court, however, repealed the decision of the Court of Appeals, because the petition of *habeas corpus* had been presented to the Federal Court of New York, and not to the Court where he was detained. This can be interpreted as a sort of *forum shopping*, because it seems that the executive chose the forum only on the basis of political opportunity, since it moved the plaintiff to South Carolina, where local executive is known to be traditionally close to the Government’s opinions.

These three sentences changed the situation of certain prisoners of Guantanamo, because they helped remove the status of *enemy combatants*. In particular, the US Secretary of State, the day after the pronouncement of the sentences, established the already mentioned *Combatant Status Review Tribunals* (CSRT).⁽⁴⁵⁸⁾

5. The treatment of terrorist suspects: breach of human rights for intelligence gathering purposes.

Between 2002 and 2004, the International Committee of the Red Cross (ICRC) published a report denouncing the serious abuses suffered by Guantanamo detainees during detention and interrogation procedures. It is believed that such information was obtained through dissidents within the executive. Other information about the situation in which live Guantanamo detainees has spread from *memoranda* of the FBI, which was forced to give them to non governmental organizations (NGOs) appealing to the US

⁽⁴⁵⁸⁾ *Ibid.*, pp.524-526. See also note (441).

Freedom of Information Act. Of course, the persons released from Guantanamo denounced the abuses they suffered while detained.⁽⁴⁵⁹⁾

Some of the abuses included sexual humiliation and sneer for religious motivations. According to a testimony provided by Shafiq Rasul and Asif Iqbal, released in March 2004, detainees were chained for long periods, and were forced to urinate on themselves, because they were prohibited from moving. A common practice was the “short shackling”, which forced prisoners to take a position with their legs up, their hands fastened between their legs, and back chained on the floor, before interrogation. This practice could last up to twelve hours. Temperature ranged from tropical (about 43° Celsius) up to polar. Other practices included the use of strobe lights, extremely dangerous for epileptics, and loud music. Because many of the detainees feared dogs, they were often used during interrogation. Prisoners almost starved and did not receive enough food for basic survival. Soldiers often went in cells and beat prisoners. They were beaten so hard that some of them went to the hospital, as it happened to a detainee from Yemen, who was beaten so hard that he stayed in hospital for eighteen months. Soldiers alleged he attempted suicide, of course it was a lie.⁽⁴⁶⁰⁾

US agents demonstrated to act in violation of several national and international instruments, first of all the Convention against torture, already mentioned; they also violated the *Uniform Code of Military Justice*, whose basis is international humanitarian law, and the Eight Amendment, which imposes the prohibition of cruel sanctions and ill-treatment.⁽⁴⁶¹⁾

5.1. Detention.

Guantanamo prisoners are subject to indefinite detention, which causes mental diseases and psychological harm. There is nothing worse than the belief that they are not going to escape such a situation. Persons entering Guantanamo detention center cross the line of the “never come back”, meaning that they believe they will die there.

⁽⁴⁵⁹⁾ *Ibid.*, p.533. See also K. J. GREENBERG, J. L. DRATER, *The Torture Papers: the road to Abu Ghraib*, Cambridge, Cambridge University Press, 2005.

⁽⁴⁶⁰⁾ Letter from Shafiq Rasul and Asif Iqbal to members of the Commission of the Senate Armed Forces, in RATNER and RAY, *supra* note (378), pp.207-211. See also DI STASIO, note (14), pp.533-534.

⁽⁴⁶¹⁾ DI STASIO, *supra* note (14), pp.534-535.

They are not granted basic judicial safeguards, and denied the right to a fair trial; they do not have access to counsel, or to an independent and impartial court; and are not informed of the charge against them.

The UN Working Group on Arbitrary Detention required the US to “allow visits of detention sites or at least give information regarding detention practices.” However, the United States did not answer. In May 2003, the Working Group affirmed that “no legal basis justifies the deprivation of liberty.”⁽⁴⁶²⁾

Detention should be based on procedures prescribed by law, implemented by the executive, and promptly reviewed by the judiciary. The right to review implicitly involves the right to counsel and to defense, including the petition of habeas corpus.

5.2. Interrogation.

The US Government admitted it carried out 300 interrogations per week. In mid 2004, 2,800 civilians and military carried out interrogations and supervised the detainees, who in two years amounted to little more than 700 prisoners. Recently released persons alleged to have been questioned about 200 times.⁽⁴⁶³⁾

Interrogations took place in rooms to which the Red Cross was not allowed. Inside the room there was a stool-chair and a steel ring on the floor, which reminded of the slave trade. In particular, it was used to tie detainees with the “three pieces-cloth”, a belt-chain tied to another leg-chain which is tied to an arm-chain. Prisoners were forced to lie on the floor with their wrists tied to the ring for hours.

The interrogators were intelligence services, including the FBI, the CIA, Department of Defense officials, Mossad and Israeli agents, British MI5. Their purpose was to gather valuable information on persons in other countries in order to arrest and interrogate them.

It often happens that revelations obtained during interrogations are used in criminal proceedings. However, it is of utmost importance to underline the fact that such confessions should be considered wasteful and non reliable. They are absolutely useless to protect the world from terrorist attacks. Persons subjected to torture and inhuman

⁽⁴⁶²⁾ AMANN, *supra* note (350), pp.321-322.

⁽⁴⁶³⁾ RATNER and RAY, *supra* note (378), p.61.

treatment can tell whatever their prosecutors want to know; they give false confessions, because they want the torture to stop, or they hope to have something to eat, or simply to be transferred to a less cruel or humiliating detention branch.⁽⁴⁶⁴⁾

Interrogations are based on a system of punishments and rewards. For example, if they need a medicine or medical assistance, they are given it only if they cooperate by giving some information. The medical center in Guantanamo is managed by intelligence services, who decide which prisoner can receive medical assistance.⁽⁴⁶⁵⁾

Interrogations are videotaped. Perhaps this is connected to the fact that certain prisoners have been transformed into informants, they were released to go back to their country and provide information to the US intelligence forces. It is possible that such videotapes, highly embarrassing and humiliating, were used to threaten and blackmail Islamic informants.⁽⁴⁶⁶⁾

The most common techniques of interrogation are repeated physical beating, including forcible teeth extraction⁽⁴⁶⁷⁾, stress positions for hours, sleep deprivation, loud music and strobe lights, the use of dogs, icy and hot temperature, waterboarding, hooding, psychological distress. The latter include the threat of death, mock executions, "Russian roulette" games, the use of mind-altering drugs.⁽⁴⁶⁸⁾

As said before, the purpose of interrogations is to get valuable information "from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators."⁽⁴⁶⁹⁾

Interrogations must be planned and deliberate actions which take into consideration the interrogation history of a detainee, his physical and psychological performance and stability. Often, interrogators ask doctors and psychologists to visit a detainee in order to tell them his weaknesses. Interrogators work in cooperation with detention guards, involved in searching, silencing and segregating, who tell them what detainees do, or whether they have any psychological disease.

⁽⁴⁶⁴⁾ *Ibid.*, pp.62-63.

⁽⁴⁶⁵⁾ *Ibid.*, p.64.

⁽⁴⁶⁶⁾ *Ibid.*, pp.68-69.

⁽⁴⁶⁷⁾ GREENBERG and DRATEL, *supra* note (459), pp.193-194. Reference to *Mehinovic, Bicic, Hadzialijagic v. Vuckovic*.

⁽⁴⁶⁸⁾ AMANN, *supra* note (435), p.323.

⁽⁴⁶⁹⁾ GREENBERG and DRATEL, *supra* note (459), p.340.

5.2.1. Intelligence interrogation techniques from Guantanamo to Iraq.

The first commander of the Guantanamo prison was Brigadier General Rick Baccus, who was considered too soft towards detainee, because he distributed copies of the Qur'an, or he adjusted meals during Ramadan. Because of his behaviour there was tension between him and intelligence officials. In October 2002 he was relieved of his post, and D. Rumsfeld, Secretary of Defense, introduced intelligence control at all levels of Guantanamo detainee operations. In November 2002 Major General Geoffrey Miller was appointed as commander of the Joint Task Force Guantanamo (JTF-GTMO).⁽⁴⁷⁰⁾ With MG Miller, according to released detainees, things changed in Guantanamo. He started to use loud music, sleep and food deprivation, no comforts, the use of dogs, and short shackling.

From August to September 2003, MG Miller flew to Baghdad with a team of personnel experienced in strategic interrogation to provide assistance to the Joint Task Force-7 and the Iraqi Survey Group (ISG) Head Quarters.

According to MG Miller, in order to improve the effectiveness of counterterrorism interrogations, intelligence agents must implement three important functions: integration, synchronization, and fusion. The first, integration, implies an organization of HUMINT collection and analytical resources under a coordinator, who has to task, direct, and conduct analytical intelligence obtained through interrogations. In order to collect and conduct effective analysis of intelligence information, it is necessary to establish a central coordinating authority, which should also have functions in collection management operations. It is important not to waste information and to improve the focus and the priorities of interrogation tasking and operations.

A second area of improvement is synchronization, which establishes a clear and defined procedure to integrate the prioritization and tasking of interrogations. It is necessary that information collectors share their information in a forum where other intelligence agencies can participate and have access to detainees' information.

A third area is fusion, which assures a proper integration of all sources and actions to support interrogations. Such sources and actions are supervised and executed to meet

⁽⁴⁷⁰⁾ AMNESTY INTERNATIONAL USA REPORT ON TORTURE 2004, *Human dignity denied. Torture and accountability in the "war on terror"*. A report based on Amnesty International's 12-point Program of Torture by Agents of the State, available online at <http://www.mafhoum.com/press7/213S28.htm>. Miller retired in July 2006, supposedly because his reputation had been damaged by allegations of abuses of prisoners in Guantanamo Bay and Abu Ghraib.

and support the commander's intent. Iraqi information collectors and analysts are not aware of the resources that can be provided by the national intelligence community, including Defense Intelligence Agency's (DIA) Joint Intelligence Task Force Combating Terrorism (JITF-CT), the CIA's Counterterrorism Center (CTC), or CT analytical centers. It is important that Iraqi intelligence services share information with other national intelligence agencies in order to better improve the analysis and integration of interrogation techniques.⁽⁴⁷¹⁾

MG Miller also defines three areas of activity of intelligence agencies which help obtain valuable information. These are interrogations, detention operations, and information technology (IT). These three have to be integrated under one command authority.⁽⁴⁷²⁾

Interrogation has the main function of setting the conditions to exploit detainees in order to obtain valuable intelligence information. Interrogation can be of two types: tactical or strategic. In general terms, tactical interrogations do not have clear long-term objectives and lack resources and reach-back data systems. Conversely, strategic interrogations are much more effective and integrate detention operations and other information collection sources, such as DIMS, CT-link, web-safe, CIA Source, Harmony or Coliseum. Furthermore, interrogations need doctors and behavioural consultants, grouped in a Behavioural Science Consultation Team (BSCT), since detainees' physical and psychological stability must be assessed.

As far as detention operations are concerned, their function is to provide a safe and humane environment, and they support the information collection procedure. It is essential that guards make active efforts to create good conditions to successfully exploit detainees. Detention guards should be efficiently trained to assist the detainee during the detention period, and should support interrogations.

In Iraqi detention centers disciplinary procedures for detainees are arbitrary and not clearly defined. Further, men, women and children are detained all in the same camp; it is necessary that they are separated in order to prevent unauthorized contact. With reference to mentally insane detainees or with infectious medical conditions, they should be separated from the other detainee population.

Finally, information technology (IT) is necessary to analyse intelligence information collected during interrogation, and functions as a support platform of valuable processed

⁽⁴⁷¹⁾ GREENBERG and DRATEL, *supra* note (459), pp.451-453.

⁽⁴⁷²⁾ *Ibid.*, pp.453-456.

information. Iraqi center, according to Miller, should improve the rapidity of its current database and link it with other national intelligence community databases, for the purpose of information sharing and techniques improving.⁽⁴⁷³⁾

5.3. Barack Obama and the Executive Order on the closure of Guantanamo detention facility.

The outcries and controversies which burst out as a consequence of the reports on torture at Guantanamo and in other unofficial detention centers in the Middle East led to the publication of various executive orders on the part of the new President of the United States, Barack Obama, who took up office in November 2008.⁽⁴⁷⁴⁾

The two most relevant executive orders were those published on 22 January 2009: the *Executive Order on the Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, and the *Executive Order on Ensuring Lawful Interrogations*.⁽⁴⁷⁵⁾

The first order makes reference to the need to transfer Guantanamo detainees, because of the alleged torture perpetrated by agents of the State, and to close the detention center. In particular, the order reaffirms that “the individuals currently detained at Guantanamo have the constitutional privilege of the writ of *habeas corpus*.” Most of them, indeed, have filed petitions for habeas actions to Federal Courts to challenge the lawfulness of their detention. In addition, the executive has all the interests to initiate review procedures to control the factual and legal basis for the detention of individuals currently held at Guantanamo.⁽⁴⁷⁶⁾

⁽⁴⁷³⁾ An interesting analysis of the interrogation techniques to which detainees at Guantanamo were subjected can be found in GREENBERG and DRATEL, at pp.286-359. This memo on the Working Group Report on Detainees Interrogations in the Global War on Terrorism, was classified by Secretary of Defense D. Rumsfeld on 4 April 2003 (declassification was scheduled in ten years), and declassified by Executive Secretary of the Defense W. P. Marriott on 21 June 2004.

⁽⁴⁷⁴⁾ DI STASIO, *supra* note (14), pp.535-539.

⁽⁴⁷⁵⁾ The *Executive Order on the Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, issued on 22 January 2009, is available online at http://www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities; and the *Executive Order on Ensuring Lawful Interrogations*, issued on 22 January 2009, is available online at <http://www.whitehouse.gov/the-press-office/ensuring-lawful-interrogations>.

⁽⁴⁷⁶⁾ *Ibid.*, section 2(c) and (d).

Section 3 of the order requires that Guantanamo facilities shall be closed “...as soon as practicable, and no later than one year...” The detainees shall be released or transferred, according to information resulting from the review process. Those who do not meet the requirements to be released or transferred to a third country shall be moved to other detention facilities on US territory. According to the order, the Military Commissions shall not formulate charges against any detainee, and shall halt all current proceedings pending decisions for the whole duration of the review process.

The other executive order makes reference to interrogation techniques and detainees’ treatment before interrogation. In particular, all interrogations shall be carried out pursuant to the conditions, principles, and processes listed in the Army Field Manual 2-22.3.⁽⁴⁷⁷⁾ Section 4(a) requires that “the CIA shall close as expeditiously as possible any detention facilities that is currently operating, and shall not operate any such detention facility in the future.” In addition, in order to review interrogation and transfer policies, a Special Task Force shall be instituted, whose tasks shall be to initiate review processes; make recommendations, taking into consideration international and domestic law obligations; and provide a report to the President. The Special Task Force aims at ensuring a humane treatment and respect of individuals in custody or control of the US.

However, in May 2009 the US Senate voted an amendment to stop eighty million dollar funds, which were necessary to close Guantanamo facilities. Such amendment caused a delay in the closing process of the detention center. Few days later, President Obama affirmed in a statement that the closure of Guantanamo is absolutely necessary in order to fight against terrorism. In particular he declared that

Instead of building a durable framework for the struggle against al-Qaeda that drew upon our deeply held values and traditions, our government was defending positions that undermined the rule of law.⁽⁴⁷⁸⁾

Obama, in his executive order, also asked European States to cooperate in the transfer of released detainees, because they could not go back to their country of origin, due to a feasible risk of ill-treatment, and wish to be accepted in certain European States. The EU Council met in June 2009 and confirmed the importance of USA-EU cooperation

⁽⁴⁷⁷⁾ *Executive Order on Ensuring Lawful Interrogations*, *supra* note (475), section 3(b).

⁽⁴⁷⁸⁾ DI STASIO, *supra* note (14), p.537. *Remarks by the President On National Security*, 21 May 2009, available online at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.

in the fight against terrorism. However, as a consequence of the Schengen Agreement, EU internal borders have been abolished, implying that a released detainee accepted in one of the Member States has freedom of movement within EU external borders, across all the other countries of the Union. The Council concluded that information sharing before and after the release of the detainee is of utmost importance, and asserted that for a first period the detainees accepted on EU territory may be subjected to restriction of their freedom of movement for national security matters, to which would follow gradual integration.⁽⁴⁷⁹⁾

5.4. The other sites of the “US torture chamber.”

Guantanamo is not the only detention center where human rights have been allegedly violated. Detainees transferred to other sites, situated in Afghanistan, Iraq, Jordan, Pakistan, even onboard of military ships, have reported of several human rights and judicial guarantees violations.⁽⁴⁸⁰⁾ The interest of the media for the situation of detainees at Guantanamo has been allegedly used by the Bush Administration to deviate attention from other secret, illegal sites located all around the world. First of all, because there is not a clear definition of the status of the detainees, of the rules on whose basis detainees are treated, on which actors supervise such sites (the Army, the CIA, the Department of Justice?). Furthermore, Guantanamo prison cannot be considered a discrete place, since it is not located on a hidden territory, but on a bay.

The existence of these prisons still has to be confirmed by the interested governments, and they are known only thanks to media investigations. These sites have been classified as “off shore prisons” and the detainees held suffer any form of abuse. Off shore prisons are situated on a specific State’s territory, but are actually under the jurisdiction of a different government. For example, Guantanamo and Charleston are US naval bases; Abu Ghraib (Iraq) and Bagram air base (Afghanistan) depend upon the CENTCOM, which is the US command force for the Middle East. In general terms, all

⁽⁴⁷⁹⁾ *Ibid.*, pp.538-539. The *Conclusions of the Council and representatives of the Governments of the Member States on the closure of the Guantanamo Bay Detention Centre*, 2494th Justice and Home Affairs Council meeting, Luxembourg, 4 June 2009, are available online at <http://www.consilium.europa.eu>.

⁽⁴⁸⁰⁾ C. BENNA and F. CINTOLESI, *Le altre gabbie del terrore*, in RATNER and RAY, *supra* note (378), pp.116-138.

sites are subject to the control and supervision of US intelligence forces or indirectly connected to them through local intelligence services. Their connection to US authorities is particularly evident when interrogation and detention techniques are examined.⁽⁴⁸¹⁾

5.4.1. Afghanistan.⁽⁴⁸²⁾

In November 2001, the town of Kunduz was destroyed by Uzbek General Dostum. His army caught Tajik and Taliban soldiers. Prisoners were transferred to Sherberghan prison; most of them died during the transfer, the others were killed by the guards when they stopped in the desert, not far from Sherberghan. Also the fortress of Qala-i-Nang, not far from Mazar-i-Sharif, was used to collect the prisoners, who were all slaughtered. In this context, also a CIA agent died, fact that brought to light the need for safer places to detain and interrogate prisoners. Bagram resulted the most suitable place to create such a detention area.⁽⁴⁸³⁾

Bagram is an air base built by the USSR in the 1970s a few miles from Kabul, and served as the core operational center of the Red Army. However, after 1992, the base was abandoned and bombed. In 2001, the US Army and its allied restored the base's functions and started to use it as a detention, interrogation and clearing center.

Very little is known about Bagram air base, because the area is difficult to reach, and is subject to strict controls on the part of intelligence services. Nobody knows who and how many the persons detained are. The only information available is given by the released detainees. Some of them referred that they were subjected to sleep deprivation, stress positions, and humiliations by women soldiers. During interrogations they had to lie naked on the floor.

The then army spokesman, R. King, denied some of these treatments, but confirmed that they undress detainees to avoid illicit army introduction. However, an investigative branch of the US Army is still inquiring five suspicious deaths in Bagram, occurred at the end of 2002, but no formal charge has been formulated yet, and no US soldier has been accused of anything.

⁽⁴⁸¹⁾ *Ibid.*, pp.118-119.

⁽⁴⁸²⁾ *Ibid.*, pp.122-127.

⁽⁴⁸³⁾ *Ibid.*, pp.123-124.

Bagram is the most important detention center of Afghanistan, together with Kabul and Kandahar. Other smaller centers of which notice has been given are located in Asadabad, Jalalabad, Gardez, and Khowst. To these and other unknown detention areas, often called “transit stations”, no international organization has been authorized access. The only place where a limited access has been granted is the base of Bagram, but only to the Red Cross.⁽⁴⁸⁴⁾

5.4.2. Pakistan.⁽⁴⁸⁵⁾

During the fall of the Taliban regime in Afghanistan, a group of foreign citizens who lived there decided to escape through the Pakistan border. Unfortunately, the Pakistani army was waiting for them at the border and managed to catch at least 150 of them, who were collected in the prison of Adizai, in the area of Khyber. Then, they were transferred to Kohat, not far from Peshawar. The transfer was apparently due to the need for a safer place to detain prisoners, even though the actual reason was the big military airport of Kohat, which could be used for discrete and apparently lawful transfers.

In July 2003, the news reported of five Kuwaitis who were arrested and detained for a certain period in Adizai and Kohat, and then were transferred to Guantanamo. Their story seemed to confirm the fact that Kohat base was used as transit and clearing station of suspected members of al-Qaeda apprehended in Pakistan in 2001.

Since those events, no more information on Kohat base has been revealed. It seems that US intelligence agents have moved there to obtain valuable information directly from the detainees held in Kohat.

5.4.3. Iraq.⁽⁴⁸⁶⁾

⁽⁴⁸⁴⁾ *Ibid.*, pp.125-127.

⁽⁴⁸⁵⁾ *Ibid.*, pp.128-129.

⁽⁴⁸⁶⁾ *Ibid.*, pp.129-134.

The most known prison in Iraq is Abu Ghraib, not far from Baghdad. It was used by Saddam Hussein as a prison, and did not change its function after his death. Indeed, the use of torture on detainees held at Abu Ghraib is well documented by photographs taken in 2004, and is impossible to negate. However, the US Administration has denied any complicity or implication in such treatment, despite the evidence, and has accused a group of guards which were actually too ignorant to devise such a terrible and humiliating torture.

Intelligence sources reported of several secret operations, authorized by Secretary of Defense Rumsfeld, under different names, which were used as codes of behavior, implying for example the use of torture and violent interrogations, physical constraints, sexual assaults and humiliations of detainees in order to obtain as much information as possible. Ex Commander of detention centers in Iraq, J. Karpinski, declared that prisoners in such centers have improved their living conditions so much in respect of the life they lived before detention, that agents fear they do not want to leave.

Abu Ghraib is not the only detention center in Iraq, since the country has two other camps: Camp Cropper, in the nearby of Baghdad, and Camp Bucca, near Bassora. All three camps hold detainees with different status. At first only “prisoners of war” and “interned civilians” were detained respectively under the Third and Fourth Geneva Convention. However, as the war ended, US authorities added “security detainees”, which were suspected to cause harm to the US if released. In September 2003, the number of “security detainees” amounted to 4.400. One year later, US authorities transferred judicial powers to Iraqi Administration, except for 6.300 “security detainees”, half of which is still detained at Abu Ghraib camp.

5.4.4. Jordan.⁽⁴⁸⁷⁾

In the Jordanian desert, the most arid place of the Middle East, the ex prison of Al Jafr was particularly known for the air base of King Faisal built by Saudis and Americans. At the end of 1990s, Al Jafr was reopened to host a high security prison placed under the

⁽⁴⁸⁷⁾ *Ibid.*, pp.136-138.

supervision of Jordanian intelligence service, the Mukhabarat. After the 9/11 events, the prison was completely hidden, it became a ghost jail, impossible to detect even in maps.

Detainees at Al Jafr suffer the most terrible abuses, and are questioned day and night by the CIA and the Mukhabarat. Al Jafr detainees are alleged to be important operational elements of al-Qaeda terrorist cells.

Al Jafr prison was alleged to detain at least eleven members of bin Laden's terrorist group in 2004. intelligence sources and Human Rights Watch have reported of horrible abuses and torture inflicted to Al Jafr detainees. Again, the US Administration has been accused of complicity in carrying out interrogations because of the similarities with Guantanamo and Abu Ghraib techniques.

6. Intelligence preventive measures: detention, expulsion and deportation, administrative detention and control orders.

Due to higher cooperation, intelligence services have strongly influenced the international security system, and their methods have gone far beyond national borders. At first, intelligence services' duty was simply to respond after the terrorist act had occurred, usually through information collection. However, after the events of 11 September 2001, national governments have extended intelligence powers to prevent terrorists from causing harm.

Intelligence services are now authorized to detain, interrogate, eject and deport non nationals, and flexibility is granted also in the practice of administrative detention and control orders. This flexibility of the intelligence mandate is linked to a desire of national governments not to involve law enforcement mechanisms or judicial authorities in the trials of terrorist suspects for a reason of utmost relevance: they are not subject to control.

Security intelligence services can easily bypass legal judicial mechanisms in order to obtain more information, which may result useful for the investigations. Furthermore, during criminal justice proceedings, the evidence collected may not be sufficient to charge the suspect of a criminal offence; or evidence may not be admissible in court; or a government may want to protect the secrecy of its sources.

With reference to intelligence preventive measures, the Panel on Terrorism, Counter-Terrorism and Human Rights has not only asked but also required States to limit

certain freedoms in case of credible risk that an individual is dangerous for the population. However, States must always ensure that their preventive measures are in compliance with the framework of international law, in particular with human rights, humanitarian, and refugee international law.

Limitations on a person's freedom shall be provided for by law, used only to the extent strictly necessary imposed by the circumstances, and proportionate to the purpose; limitations shall not be arbitrary or discriminatory. States shall not be allowed to deport or deprive individuals of their liberty if such actions are carried out upon information obtained by means of torture or cruel treatment.⁽⁴⁸⁸⁾

A violation of human rights is easier to detect when the criminal justice system is operating, because terrorist suspects are tried under criminal law, and they have access to all fundamental rights and judicial guarantees. However, this is not always the case when intelligence services perform their duties, because they often violate international human rights law and are not accountable for their activity before a court.

6.1. Detention, expulsion and deportation in the area of immigration.⁽⁴⁸⁹⁾

The transnational nature of terrorism has urged States to adopt new laws in the area of immigration flows controls. In particular, they have adopted mechanisms which included deportation, detention pending deportation, and other methods to prevent terrorist threats.

States changed their immigration law in order to better counter terrorism, since it is not clear whether the right to a fair trial (art. 6 ECHR) applies also to expulsion and deportation proceedings. It is well known that human rights law places weaker obligations on immigration proceedings than on criminal legal proceedings.

Thereby, States take advantage of a lack of consensus in this area by extending intelligence powers also to immigration law, even though such extension poses some important questions. In particular, States' discretion in immigration controls is perceived as less interesting by the public opinion, because it affects only foreigners. In addition,

⁽⁴⁸⁸⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.91.

⁽⁴⁸⁹⁾ *Ibid.*, pp.93-100.

some States have argued that those preventive measures affecting immigration law have been established with the purpose of protecting their own citizens.

Nevertheless, it is worth recalling that foreigners residing within the jurisdiction of a State may have not the same political rights as citizens have, even though they should be granted all basic human rights and judicial guarantees of fair trial.

A State asserting that it fights against transnational terrorism by controlling immigration flows or by ejecting or deporting foreigners, may entrench a general feeling of fear of the foreigner, perceived as a real threat to national security. Consequently, it is true that the preventive measures in place fall on concrete threats to national security, but it is also true that they affect those foreigners that have not committed criminal offence, but that are unfairly deported or ejected.

6.1.1. National security removal.

International human rights law allows the removal of a foreigner for national security reasons, including lawful residents. However, the question arises when the deportation and expulsion procedures do not follow the legal steps of due process or violate the principle of *non-refoulement*.

France is a good example of a State where national security removal is at the core of the counterterrorism strategy. In particular, there are two mechanisms of removal of foreigners suspected of posing a threat to national security. The first is deportation, proposed by courts as a punishment for an individual involved in terrorist activity. A terrorist suspect is usually detained for a certain period before being deported and banned from returning to France for some time or permanently. A second mechanism is based on a decision of the Minister of the Interior who orders an administrative expulsion on the basis of intelligence information.⁽⁴⁹⁰⁾

However, it is worth noting that even though these orders of deportation can be appealed within the administrative justice system, the appeal does not automatically suspend the order. Hence, individuals can be, and actually have been, deported before

⁽⁴⁹⁰⁾ French Criminal Code, articles 131-30(1) and (2), and 422-4, and Law 2003-1119 of 26 November 2003 on immigration control, the stay of foreigners in France and nationality, published on the Official Journal No.274 on 27 November 2003. EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.94.

their appeals are examined, unless a stay has been issued. If an individual appeals expulsion, the evidence can be found in intelligence reports called “notes blanches”, because they involve classified material and are unsigned. Such reports cannot be reviewed by independent bodies.⁽⁴⁹¹⁾

In 2003, the French Government amended its immigration law, extending administrative expulsion to cases including incitement to discrimination and violence against specific individuals or groups. It has been argued that the 2003 amendment is an excuse of the French Government to rely on administrative expulsion rather than on criminal prosecution in order to manage non citizens accused of extremism. Indeed, it is not specified what the term “incitement” exactly means; therefore, the bare freedom of expression may be confused with the criminal offence of fomenting radicalization and discrimination.

National security removal is often used in the place of criminal prosecution, since it allows the removal of undesirable aliens without strong evidence or conviction. This is possible because national security removal orders are based on intelligence information, the source of which is classified. In addition, intelligence mechanisms of information collection cannot be independently verified.

It has been argued that deportation and ejection of non citizens lack the necessary legitimacy that makes them an effective counterterrorist measure. It has been said that they are a disguised form of extradition that may undermine also the principle of international law “to extradite or prosecute”, because they are used as an alternative to court action. It is worth recalling the importance of the right of an individual to family and private life, which are completely destroyed upon removal.

The Parliamentary Assembly of the Council of Europe expressed concern on the potential for the violation of basic human rights resulting from the implementation of some counterterrorism measures:⁽⁴⁹²⁾

The application of expulsion measures against [long-term immigrants] seems both disproportionate and discriminatory: disproportionate because it has life-long consequences for the person concerned, often entailing separation from his/her family and enforced uprooting from his/her environment, and

⁽⁴⁹¹⁾ *Ibid.*, p.95.

⁽⁴⁹²⁾ *Ibid.*, p.97. Council of Europe, Recommendation 1504 (2001) of the Parliamentary Assembly on non-expulsion of long-term immigrants, adopted on 14 March 2004, para.3, available online at <http://www.consilium.europe.eu>.

discriminatory because the State cannot use these procedures against its own nationals who have committed the same breach of law.

6.1.2. Detention pending deportation.

Besides national security removal, a State may decide to detain an individual before deporting him, especially in cases where there is a real risk for an individual to be subjected to torture or serious human rights violations in the country of origin.

An example of national security detention pending deportation is Canada which, with its “security certificates”, authorizes the detention of non citizens pending deportation, without charge or trial. The Canadian Government argues that the individual affected is inadmissible on the basis of security matters, in particular when he is involved in human rights violations and serious criminality or organized crime.

However, Canadian security certificates have been accused of lacking the right to due process and a clear time limit to the detention period, which caused prolonged detention. Canadian detention pending deportation relies on intelligence information, which cannot be disclosed before a court.

Still in Canada, a relevant example is the case of *Adil Charkaoui v. Canada*⁽⁴⁹³⁾, where a Canadian permanent resident originally from Morocco, Adil Charkaoui, was subjected to a security certificate. In 2003 he was arrested and detained for twenty-one months, accused of representing a threat to national security. He was then deported to Morocco being assured he would not be tortured. The charges on him were discriminating, because he was said to fit the typical al-Qaeda's sleeping agent, due to the fact that he was Arab, Muslim, married with three children, practiced martial arts, and had contacts at his mosques. He reported to have suffered degrading treatment and torture, and to have been limited in leading a normal life. He was released in February 2005, after the Canadian Supreme Court declared that the legal regime governing his detention was unconstitutional. Upon release, Charkaoui was not authorized to examine the documents of evidence, because they were classified.

⁽⁴⁹³⁾ *Ibid.*, p.98, note (230). Supreme Court of Canada, *Charkaoui v. Canada* on citizenship and immigration, 26 June 2008, Application No.2008 SCC 38. The judgment is available at <http://www.unhcr.org/refworld/docid/48abd5780.html>.

The case of Adil Charkaoui clearly shows the weakness of Canadian immigration law safeguards, because they are based on unreliable information provided by secret intelligence services. Such services, in addition, have provoked ill-treatment to the person of Charkaoui, thereby infringing the human rights provisions to which Canada is Party.⁽⁴⁹⁴⁾

The Canadian Government made an attempt to implement immigration law safeguards by granting greater access to the courts to challenge the lawfulness of detention, and avoiding the use of intelligence information obtained with torture or ill-treatment during trials. It also improved the judicial system by introducing the “special advocates”, lawyers appointed by the government who have access to classified documents and may attend any proceedings from which the appellant and his lawyer are excluded. Special advocates are established in order to represent the interests of the appellant and may call for greater disclosure of documents.

However, the practice of “special advocates” has been strongly criticized, because it remains unfair, since the “special advocate” is not allowed to communicate with the appellant upon examining classified material, and the appellant himself is not able to challenge the whole system and its charges. Therefore, it is necessary that national governments establish fair safeguards ensuring that no violation of the basic rights of an individual would be accepted.

6.2. Administrative detention and control orders.

Besides detention, expulsion and deportation, intelligence services can use other measures to prevent an individual or an entity from becoming a terrorist threat. Such measures include the practice of administrative detention and control orders.⁽⁴⁹⁵⁾

Administrative detention and control orders represent a form of detention without trial, also called preventive detention, which is used to lawfully authorize security intelligence agencies to interrogate an individual suspected of being involved in criminal activity, in this specific case terrorist activity.

Therefore, administrative detention and control orders highly rely on intelligence techniques aimed at collecting valuable information on other individuals, who will be then

⁽⁴⁹⁴⁾ *Ibid.*, pp.98-99.

⁽⁴⁹⁵⁾ *Ibid.*, pp.106-113. See also CONTE, *supra* note (21), chapter 18, pp.551-583.

subjected to administrative detention or against whom a control order will be issued, for the purpose of interrogating them.

6.2.1. Administrative detention does not protect the detainee.

Administrative detention is not new to national governments and intelligence services. It was openly used in the past, but, after the 9/11 events, its use faced a rapid growth. An individual is placed under administrative detention when he is imprisoned or highly restricted in his normal life without charge or trial. Restrictions of freedom may include other forms of detention, the most common of which is house arrest. Administrative detention acts as a preventive mechanism, and is based on suspicion and secret information. It does not aim at punishing the individual, but at preventing him from committing a criminal offence.

Nevertheless, it is worth noting that administrative detention does not protect the detainee. There are some cases of torture and ill-treatment to individuals placed under administrative detention because they are believed to represent a terrorist threat. For example, in South America witnesses reported to the Panel on Terrorism, Counter-Terrorism and Human Rights' Hearing of grave violations of human rights, notably torture, *desaparecidos*, extra-judicial executions.⁽⁴⁹⁶⁾

Australia is a good example of a legislation on administrative detention, whose Terrorism Preventive Detention Act 2006 introduced the Preventative Detention Orders (PDOs). The PDOs allow administrative detention for up to forty eight hours on a federal level and fourteen days on a national level. However, the PDOs have been strongly criticized for the engagement of important rights of the detainees. In particular, the Australian administrative detention system does not fully allow judicial review as the detention order is in force; the detainee is strongly limited in his contacts with the outside and with his counsel; in addition, little information is available to the individual and his counsel to challenge the detention order.⁽⁴⁹⁷⁾

⁽⁴⁹⁶⁾ *Ibid.*, p.106, note (255).

⁽⁴⁹⁷⁾ *Ibid.*, p.107. For more information on the PDOs, see Section 105-34 and 105-35 of the Australian Criminal Code Act.

Sometimes, administrative detention is used to detain people without charge for a longer period of time and bypassing the criminal justice system. For example, the Malaysian Internal Security Act (ISA) allows any police officer to detain an individual for up to sixty days if he has reason to believe that individual represents a threat to national security. Once the sixty days have passed, the Home Minister may order an extension of detention of two years, which can be renewed for an indefinite number of times. An individual may file petitions, but the courts can only judge on procedural irregularities, not on the substance of detention. An additional question in the Malaysian system is posed by this last statement. Indeed, the lack of power of the courts has led to an abuse of administrative detention, which has been used against political opposition members and social activists.⁽⁴⁹⁸⁾

Another example is the Pakistani declaration of emergency in 2007, when several human rights defenders protesting against the executive for its involvement with the judiciary were subjected to house arrest or administrative detention and detained without charge.⁽⁴⁹⁹⁾

The frequent use of administrative detention is often justified by national governments as a consequence of the special nature of terrorism, which knowingly poses threats to national security. This apparently enables States to act without establishing safeguards for the protection of the rights of the detainee, and leading them to strong violations of basic human rights.

It is worth noting that even though administrative detention is supposed to be a preventive tool, which “prevents” an individual from committing a criminal offence, the real use that national governments make of such a practice is for investigative purposes or for punishment (the case of Malaysia above-mentioned).

Since there is not a charge on the person, but only a suspicion, often based on non reliable intelligence information, a detainee should maintain his privilege against self-incrimination. Indeed, during interrogations under administrative detention, an individual often says something apparently relevant for the case, especially if he has been subjected to ill-treatment before or during interrogation. However, it is obvious that information obtained through ill-treatment during interrogation should not be used at trial.

⁽⁴⁹⁸⁾ *Ibid.*, pp.107-108. Reference to the Case of *Mohamad Ezam bin Mohd, Noor v. Ketua Polis Negara and Others*, of 2002, Federal Court of Appeals of Malaysia, [2002] 4 M.L.J. 449.

⁽⁴⁹⁹⁾ *Ibid.* Reference to the Proclamation of Emergency issued by President General Musharraf on 3 November 2007.

The privilege against self-incrimination is particularly important under common law and is concerned with the right not to incriminate oneself, intimately linked to the presumption of innocence until proven guilty, guaranteed under article 14(2) ICCPR and article 6(2) ECHR.⁽⁵⁰⁰⁾ The European Court of Human Rights affirms that if a statute imposes an obligation to answer questions, then the answers cannot be used as evidence against the individual affected, as demanded by the privilege against self-incrimination.⁽⁵⁰¹⁾

The main question posed by administrative detention is the lack of safeguards against a potential abuse of power. In particular, administrative detainees are subjected to lower protection than criminal suspects, because administrative detention often does not authorize a prompt access to counsel. National governments justify this behavior as a consequence of the special context in which the action is carried out, since the individual may represent a threat to national security.

Nevertheless, administrative detention should be limited to genuine cases of emergency based on true information and not on unsubstantiated intelligence. It should be used only when strictly necessary; be proportionate to the threat and non-discriminatory. It should grant the detainee prompt access to counsel, be time-limited, and there should be a judicial system competent to decide on the lawfulness of detention. Finally, detainees should be allowed to challenge the detention order and should receive equal treatment as accorded to individuals accused of criminal offence.⁽⁵⁰²⁾

6.2.2. Control orders: derogation from human rights. The UK case law.

Unlike administrative detention, control orders are not a full detention or limitation of the liberties of an individual. Instead, they aim at restricting the activities of an individual upon suspicion of his involvement in terrorist acts.

Before introducing control orders, it is worth considering the concept of derogation from the right to liberty. Under article 4 ICCPR and article 15 ECHR, it is possible to

⁽⁵⁰⁰⁾ ICCPR, *supra* note (85), art.14(2); ECHR, *supra* note (87), art.6(2).

⁽⁵⁰¹⁾ CONTE, *supra* note (21), chapter 15, pp.471- 472.

⁽⁵⁰²⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.110.

temporarily suspend the application of certain rights during a state of emergency where there is a threat to the life of a nation, for example an act of terrorism.⁽⁵⁰³⁾

Certain rights are capable of derogation, others are not.⁽⁵⁰⁴⁾ A State Party to the conventions above-mentioned shall first of all establish whether the right from which it wants to derogate is capable of derogation under the ICCPR and the ECHR. Both instruments provide that the State officially proclaim and notify a derogation to the Secretary-General of the United Nations (ICCPR) or to the Secretary-General of the Council of Europe (ECHR).

A relevant case is that of the United Kingdom. Since 1970, the United Kingdom has been involved in countering Northern Ireland terrorist initiatives, which aimed at promoting independence from the motherland. In 1971, the 1922 *Civil Authorities (Special Powers) Act* was recalled. This Act pushed the English authorities to implement the so-called “five techniques”, used during suspects’ interrogations. They were: wall-standing, hooding, deprivation of sleep, limited sustenance and subjection to loud, persistent sound.⁽⁵⁰⁵⁾ The ECtHR condemned these methods as inhuman and degrading treatment, because they infringed ECHR fundamental provisions of article 3.

In 1998, to create a long lasting situation of peace in Northern Ireland, the UK promoted the “*Good Friday Agreement*”, the implementation of which depended on the ceasefire of paramilitary groups. However, terrorist acts did not stop, and the Government decided to maintain the emergency status, imposing stricter executive measures.

In the same year, the British Government adopted the *Human Rights Act (HRA)*, which also was established to solve the problems in Ireland, mainly to stop the terrorist activity of the Irish Republican Army (IRA). The UK HRA enabled the Secretary of State, under section 14, to derogate from the rights of the ECHR, in accordance with article 15 thereof. Such derogation is in force for the “Convention rights”⁽⁵⁰⁶⁾, it is valid for five years, and it must be renewed by the government. This procedure is provided for as far as the ECHR is concerned, there is no similar procedure for the ICCPR.

⁽⁵⁰³⁾ CONTE, *supra* note (21), chapter 17, p.523.

⁽⁵⁰⁴⁾ *Ibid.*, pp.524 and following.

⁽⁵⁰⁵⁾ C. WARBRICK, *Emergency Powers and Human Rights: the UK Experience*, in FIJNANT, *supra* note (317), p.371. These interrogation techniques are very similar, if not identical, to those used in Guantanamo and other detention camps by the US. It is possible that they have learnt such techniques from the British intelligence services.

⁽⁵⁰⁶⁾ Under section 1(2) of the Human Rights Act 1998 (UK), the Convention rights are those rights which have been incorporated in UK law and which are subject to any designated derogation or reservation. CONTE, *supra* note (503).

Why a State cannot derogate from all rights? What are the criteria on the basis of which a right is capable of derogation? It depends on what the margin of appreciation is. In other words, what the international community agrees to consider the fundamental element for derogation. The margin of appreciation is used in order to prevent abuse, or excessive use, of the derogating power. In order to derogate from a right there must be an evident state of emergency that threatens the life of a nation, for example a terrorist act. Then, the measure must be used only if strictly required, depending on the exigencies of the situation. A third point is inconsistency: a derogating measure must not be inconsistent with the State's other obligations under international law. Finally, a derogating measure must not be based on discrimination.⁽⁵⁰⁷⁾

The necessity of a derogating measure has been widely criticized, because in their investigations courts have used different margins of appreciation. For example, in the case *Ireland v United Kingdom*, the European Court of Human Rights has applied a broad margin of appreciation, by simply asking why the government thought the derogating measure was strictly necessary. A different approach is that of the Human Rights Committee, which affirms that States must fully justify the necessity of a derogating measure.⁽⁵⁰⁸⁾

After a review of the English counterterrorist legislation, Lord Lloyd, a senior judge of the House of Lords, promoted together with the Government the *Terrorist Act 2000* (TA).⁽⁵⁰⁹⁾ The main counterterrorist power mentioned in the TA 2000 is arrest without warrant, the purpose of which is to collect information on the individual's involvement in terrorist activity through interrogations, with a view to potential prosecution. It is used with terrorists because it is believed that they shall be stopped as soon as intelligence information gives accurate evidence of an individual's suspect behavior. It gives wider powers of investigation to the competent authorities.⁽⁵¹⁰⁾

⁽⁵⁰⁷⁾ *Ibid.*, p.528. According to article 4 ICCPR, the substantive requirements for a derogation from the application of the rights of the ICCPR are: the existence of a state of emergency that threatens the life of a nation; a derogating measure must be strictly required, not inconsistent with a State's obligation under international law; and it must not be discriminatory. The first three requirements are reflected also within article 15 ECHR. The non discrimination condition is not expressly mentioned but is applied under the European Convention.

⁽⁵⁰⁸⁾ *Ibid.*, p.526. Reference to the case *Ireland v United Kingdom* (n. 5) para.214. With reference to the Human Rights Committee, see GENERAL COMMENT NO.29 (n. 6) para.5, at note (324).

⁽⁵⁰⁹⁾ WARBRICK, *supra* note (505), p.361.

⁽⁵¹⁰⁾ C. WALKER, *Blackstones Guide to the Antiterrorist Legislation*, Oxford, Oxford University Press, 2002, p.119.

After the events of 11 September 2001, the United Kingdom enacted the *Anti-terrorism, Crime and Security Act 2001* (ATCSA)⁽⁵¹¹⁾, and issued a designated derogation order under section 14 of the Human Rights Act 1998. This allowed the UK to derogate from article 5 ECHR, because it faced a threat from international terrorism, which gave rise to a state of emergency. Its purpose was to detain non nationals suspected of terrorism for an indefinite period of time, since immigration laws permitted detention only for a time-limited period, and there was insufficient evidence allowing criminal charges against them. Derogation from article 5 ECHR authorized the UK to detain non nationals suspected of being involved in terrorist activity with a view to the individual's deportation or extradition. However, deportation or extradition of a non national is not always possible. It is worth thinking about the *Chahal* case, where a foreign national, Chahal, has been detained for six years pending deportation to India; if expelled, he risked to be subjected to torture and inhuman treatment. The court established that an individual facing the risk of torture, if deported to his home country, could not be detained indefinitely, even though he is judged to be a threat to national security.⁽⁵¹²⁾

Section 23 of the ATCSA 2001 authorized detention of individuals suspected to be involved in terrorist activity (as designated under section 21 of the Human Rights Act 1998), even though they might not be deported or expelled because of a real risk of torture. Section 23 provided that:⁽⁵¹³⁾

- A suspected international terrorist may be detained under a provision specified in [the Immigration Act] despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by –
- (a) a point of law which wholly or partly relates to an international agreement,
 - or
 - (b) a practical consideration.

⁽⁵¹¹⁾ WARBRICK, *supra* note (505), p.364. The ATCSA 2001 authorizes the detention of suspects of terrorism without trial for extended periods, clearly derogating from the ECHR. In particular, the ATCSA imposes detention pending deportation of individuals considered “undesirable aliens”. However, many of those under detention could not be deported to their home country because of the principle of *non-refoulement*. In order to arrest individuals under the ATCSA detention procedure, English authorities rely in most cases on the accuracy of intelligence information. Persons could be detained for indefinite time, or deported to their national state. Nevertheless, the starting point is intelligence information about how serious is the threat that the person poses. See D. BOUMER, *Executive Measures, Terrorism and National Security*, Aldershot, Ashgate, 2007, p.218.

⁽⁵¹²⁾ CONTE, *supra* note (503), p.538 and following, note (58) and (59). *Chahal v. United Kingdom* (1996) 23 EHRR 413, paras.37 and 113.

⁽⁵¹³⁾ *Ibid.*, p.539.

Section 23 was contrary to article 5 ECHR and article 9 ICCPR. In order not to violate the ECHR and the ICCPR, to which the UK is a State Party, the British Government derogated from both provisions. However, the strong critics alleged, which accused the Government of the violation of article 5 and article 14 ECHR, brought the matter to the House of Lords in December 2004. The House of Lords decided that section 23 of the ATCS Act 2001 was incompatible with article 5 and article 14 ECHR.

In particular, section 23 had a discriminatory effect on non UK nationals, since the indefinite detention provision applied only to non citizens suspected to be involved in terrorist activities. At first, the UK Government argued that the main objective of the provision was to protect UK nationals from threats to national security. Therefore, it should have been rational to remove non nationals from the country if they represented a threat to national security, and, if they risked torture in their home country, they should have been detained as long as the threat persisted.

The Special Immigration Appeals Authority rejected the argument and concluded that article 14 would have been satisfied simply by alleging that *all* suspects of international terrorism should be detained pending deportation, or, if not possible, for an indefinite period of time.

The main objection to the ATCSA concerns the non equality of arms in the decision making process: the evidence of guilt may be obtained through torture and psychological violence. In addition, the delay in the appellate process produces a longer period of custody in high security conditions, with the detainees not yet sentenced guilty or innocent.⁽⁵¹⁴⁾

As a consequence, the British Government repealed the detention provisions and resolved to require diplomatic assurances from the receiving country that a foreign national would not suffer torture, in order to deport him.⁽⁵¹⁵⁾ In case that an individual could not be removed from the UK, he would be subjected to control orders under the Prevention of Terrorism Act 2005 (PTA), which has been established in order to respond to the problems the ATCSA might pose: proportionality and discrimination, whose non compliance infringe ECHR provisions.⁽⁵¹⁶⁾

In general terms, measures that derogate from the right to liberty must comply with international instruments, in particular with customary international law. All persons

⁽⁵¹⁴⁾ BOUMER, *supra* note (511), p.220.

⁽⁵¹⁵⁾ See also CONTE, *supra* note (503), pp.540-542; and EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), pp.100-104.

⁽⁵¹⁶⁾ BOUMER, *supra* note (511), p.232.

deprived of their liberty have the right to be treated with humanity and respect for the dignity of the human person. Hence, no derogation is admitted from article 2 (right to life), article 3 (prohibition of torture), article 4 (prohibition of slavery and forced labor), and article 7 (no punishment without law) ECHR, as required by article 15 thereof.⁽⁵¹⁷⁾

Control orders are of a different nature and scope, but their impact on the life of a person can be harsh. They include restriction of movement and association with named individuals; curfews and tagging devices; other restrictions on access to technological devices; requirement to remain at their premises. If an individual, against whom a control order has been issued, does infringe the order causing criminal offence, then he may be detained for several years.⁽⁵¹⁸⁾

6.2.3. Comparison between the UK and Australia. Derogating and non derogating control orders.

Derogation from certain rights is very important in the context of control orders, because when they are in force, they engage important basic rights, in particular the rights to liberty and fair hearing. Australia, as the UK, is a clear example of a State making strong use of control orders.

In Australia, control orders must always comply with the right to liberty, according to the limitations imposed by the ICCPR, while control orders in the UK may be made together with a derogation from the right to liberty.⁽⁵¹⁹⁾ With reference to the UK, section 1 of the PTA defines control orders as orders that impose obligations on an individual because he is believed under reasonable suspicion to pose a threat to national security, in particular a threat of terrorism.

The PTA 2005 distinguishes two types of control orders, on the basis of restrictions imposed to an individual: derogating control orders, which engage the right to liberty, concerned with close confinement or imprisonment, for example house arrest. They require derogation from article 5 ECHR. A second type of orders is non derogating control orders, which only restrict an individual's normal life, since they do not amount to a

⁽⁵¹⁷⁾ ECHR, *supra* note (87), art.15

⁽⁵¹⁸⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), pp.110-111.

⁽⁵¹⁹⁾ CONTE, *supra* note (495), p. 552.

sufficient deprivation of liberty under Article 5 ECHR.⁽⁵²⁰⁾ Non derogating control orders are issued by the Home Secretary when he believes there are reasonable grounds for suspecting that an individual has been involved in terrorist activity.⁽⁵²¹⁾

Non derogating control orders include various restrictions, of which the most used are: limitation of movement/residency; long curfews imposition; travel documents surrender and reports to police; communication restrictions; limitations on financial transactions or employment; and limitations on specific mosque attendance.

A normal procedure of making a non derogating control order involve the Home Secretary, who will apply to the court for permission. There are two exceptions to the requirement for judicial approval. First of all, the court is not involved if the order contains a statement by the Secretary of State saying that the case is urgent and does not need the approval of the court; secondly, the court is not required to give the approval if the person is designated as a “suspected international terrorist”. However, also in these exceptional cases, the control order must be referred to the court within seven days after it has been made by the Home Secretary. If the court grants permission, it must also give directions for a hearing in connection with the order. The individual subjected to the control order will be notified of the hearing.

Instead, the Home Secretary must apply to the High Court for a derogating control order against an individual suspected of terrorism. The Court then holds a preliminary hearing on the application of the request, and resolves to impose a control order if (a) there seems to be material evidencing that the individual is involved in terrorist activities (*prima facie*); (b) there are reasonable grounds for believing in the necessity of the obligations imposed in order to protect the public from terrorist threats; (c) there seems to be a public emergency, derived from the individual’s threat; and (d) the obligations include derogating obligations inside the derogating control order.⁽⁵²²⁾

As it happened in Canada, in order to compensate for some procedural failings, the UK Government introduced the “special advocates”, lawyers who have access to classified documents and who can participate to hearings where the defendant is not

⁽⁵²⁰⁾ *Ibid.*, pp.552-553. See also EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.111.

⁽⁵²¹⁾ CONTE, *supra* note (519). Involvement in terrorism-related activity includes: (1) the commission, preparation or instigation of acts of terrorism; (2) a conduct which facilitates the commission, preparation or instigation of acts of terrorism, or which is intended to do so; (3) a conduct which gives encouragement to the commission, preparation or instigation of acts of terrorism or which is intended to do so; (4) a conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity.

⁽⁵²²⁾ BOUMER, *supra* note (511), p.238.

allowed. “Special advocates” should represent a bridge between the court/government and the individual/counsel, because they have access to more information. However, the use of “special advocates” does not prevent procedural failings, since it is important to look at the process as a whole to determine whether or not justice has been fulfilled.⁽⁵²³⁾

A derogating control order lasts up to six months, but it can be renewed for a further six month-period, or revoked. A non derogating control order has effect for twelve months and may be renewed yearly.⁽⁵²⁴⁾

Usually, an individual subjected to a control order is bound by the order only if he has received a notice of the terms, renewal, or modification of the order. If he fails to comply with such obligations, he commits a crime offence punishable by up to five years imprisonment, if convicted on indictment (section 9(1) of the PTA). If, instead, a controlled person notices that the circumstances leading to the control order have changed during the life of the order, he may apply to the Secretary of State for revocation or modification of a specific obligation imposed by the order (section 7). Where the application is refused or modified without the consent of the controlled person, he may ask for judicial review (section 10).⁽⁵²⁵⁾

The Australian use of control orders is more precise than the UK use. The purpose of control orders in Australia is to protect the public from *a terrorist act*, which is something different from the UK purpose of protecting the public from *a risk* of terrorism.

Another difference lies in the fact that the Australian Police must establish that a control order would substantially *assist in preventing a terrorist act*. In other words, the Police must establish on reasonable grounds that a person has provided or received training from a listed terrorist organization. The UK system, instead, only requires *suspicion* that an individual is or has been involved in terrorism-*related* activity.

The Australian procedure is very similar to the English one, except for the fact that it does not take into account derogating control orders, because Australia does not allow derogations from the right to liberty.

Division 104 of the Criminal Code 1995 establishes that, after an interim control order is issued, the controlled person must be provided with notice, within forty eight hours. Then, the controlled person is entitled to appear at a confirmation hearing, where he can contest the order. A non derogating control order has effect for twelve months,

⁽⁵²³⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.112.

⁽⁵²⁴⁾ BOUMER, *supra* note (511), p.239.

⁽⁵²⁵⁾ CONTE, *supra* note (495), pp.554 and following.

and it may be renewed indefinitely. An individual subjected to a control order can always apply to an issuing court for a revocation or variation of the order.⁽⁵²⁶⁾ A unique characteristic of the Australian system of restrictions is the fact that a controlled person is required to participate in specified counseling or education.

Besides the right to liberty, also the right to a fair hearing is affected by the issue control orders, because this right is concerned with two aspects: the open administration of justice and the disclosure of information used as evidence. Sometimes, national governments take advantage of information obtained through intelligence sources that cannot be disclosed to the defendant during the trial, otherwise the agent's covert activity would be compromised. Fair hearing is not always possible when the matter is international terrorism. This is what several countries say to justify the non compliance with the rights of a person.

Australia and the UK are not the only countries where classified information is not disclosed. For example, New Zealand protects by law such information, in particular when designation lists are considered.

Conversely, with reference to the open administration of justice, relevant information is provided by article 14 ICCPR, which ensures transparency of the proceeding and provides safeguards for the controlled person. Also article 6 ECHR provides protection for the interests of the individual and of the society as a whole. However, article 14 ICCPR allows for the exclusion of the press and other media because of national security matters. Of course, this takes place only in strictly necessary circumstances where publicity would prejudice the interests of justice.

The right to a fair hearing is also related to the disclosure of information. The ECHR and the ICCPR do not expressly set the obligations arising for the disclosure of information, because article 14(3)(b) ICCPR and article 6(3)(b) ECHR refer to civil rather than criminal proceedings, whereas control orders are relevant for criminal proceedings.⁽⁵²⁷⁾ However, fair hearing can be referred to both criminal and civil proceedings.

The right to a fair hearing implies equality of arms, given to the defendant to guarantee the safeguards he needs to challenge the control order issued against him. In this case, an important principle is that of "*audi alteram partem*" ("hear the other side"), which forms part of the right to a fair hearing.

⁽⁵²⁶⁾ *Ibid.*, pp.556-557.

⁽⁵²⁷⁾ *Ibid.*, pp.558-559.

In a decision of the ECtHR related to the UK, the European Court affirmed that the measures that limit the right to disclosure of information must be strictly *necessary* and *sufficiently* balanced by judicial safeguards so that the right to a fair hearing remains into force.⁽⁵²⁸⁾

The disclosure of information to the defendant depends on the material on which officials have made a control order. There are three possible situations. The first is the most unproblematic, because the control order is largely or completely based on open material. The second situation needs a more careful approach: fair hearing may not always be guaranteed, since the control order is largely based on closed material. The third situation usually results in a violation of fair hearing, because the control order completely relies on closed material and the defendant has not access to it.⁽⁵²⁹⁾

In conclusion, control orders can amount to a deprivation of liberty of the controlled person. In particular, they engage the rights to liberty and fair hearing, involving limitations to the open administration of justice and the disclosure of information.

Control orders undermine the right to be presumed innocent until proven guilty, as said by the Law Council of Australia, which affirmed that control orders in Australia are issued on the basis of a future intention of an individual, and for such reason, should be considered extremely broad.⁽⁵³⁰⁾

The aim of control orders is to restrict the activities of individuals suspected of involvement in terrorism against whom there is not sufficient admissible evidence to bring criminal proceedings, but who are perceived as threats to the life of a nation.

7. The role of Intelligence in the strategy against terrorism.

In general terms, intelligence measures, which have shifted from a reactive to a preventive function, together with information gathering, can be considered the core elements of an effective strategy against terrorism, provided they act in respect of human rights provisions.

⁽⁵²⁸⁾ *Ibid.*, p.561, note (31) and (32).

⁽⁵²⁹⁾ *Ibid.*, p.567.

⁽⁵³⁰⁾ *Ibid.*, p.575. For more information about the Law Council of Australia, Anti-Terrorism Reform Project, November 2008, visit http://www.lawcouncil.asn.au/initiatives/anti-terrorism_reform.cfm.

However, strategies prescribed by law cannot be the only solution to the problem of terrorism, even though they are an essential component. The fear is that national governments are supplanting the ordinary criminal justice system with intelligence measures, which often lack accountability. It is then essential that governments understand the importance of human rights protection while implementing counterterrorism measures. Intelligence measures cannot be the sole answer to terrorism. Secret services have to cooperate with law enforcement mechanisms on lawful grounds.⁽⁵³¹⁾

As far as immigration law is concerned, it is worth noting that, even though international law provides for deportation and extradition of individuals suspected of posing a threat to national security, immigration law should not overcome the criminal justice system; and if a detention order is issued, it should be subject to regular review by a judicial body.

In case of detention pending deportation, there must be a time-limit for detention and the measure should not be a disguised form of administrative detention; it should also comply with the principle of non discrimination. Furthermore, there must be compliance with the principle of *non-refoulement*, even though the sending country requires diplomatic assurance that an individual will not suffer inhuman treatment. Finally, a person should be granted access to effective remedies if he has been mistaken for somebody else or if he wants to appeal detention prior deportation before a civilian judicial authority.

There is no general consensus on the necessity for an individual to be heard by an independent and impartial tribunal in case of detention pending deportation or expulsion. Indeed, for some countries immigration law has become a fundamental tool to fight against international terrorism, even though this was not the primary purpose of immigration law itself.⁽⁵³²⁾

With reference to administrative detention and control orders, it can be noticed that they involve a continuous risk of human rights violations, even though they should be limited to exceptional situations of emergency threatening the life of a nation. However, even in those cases, there must be clear and effective safeguards that prevent violations. For example, the use of administrative detention must be strictly necessary, proportionate and non discriminatory. An individual subjected to administrative detention should have

⁽⁵³¹⁾ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, *supra* note (154), p.118.

⁽⁵³²⁾ *Ibid.*, pp.118-119.

access to counsel, to enable confidential conversation, and should be heard by an independent judicial authority.

Even if there is a threat to national security, a court should decide on the lawfulness of an administrative detention, and there should be regular and effective review, on both the substance and the relevant procedure of the case. As said for immigration law measures, also administrative detention should be time-limited, even more so when it is issued without charge or trial.⁽⁵³³⁾

Control orders have the objective of placing restrictions on an individual. They should be considered of exceptional nature, hence, used only in specific situations of emergency. They should also be subjected to time-limits, judicial review, to the principles of legality, necessity, proportionality and non discrimination.

Safeguards placed on control orders are particularly low in Australia and the UK, where denunciations of human rights violations are frequent, as the only necessary requirement to make a control order is to have “reasonable suspicion” that a person is involved in terrorist activity.⁽⁵³⁴⁾ In addition, control orders are based on intelligence information, which is often neither disclosed nor verified. They have no time-limits, and restrict the individual from accessing to counsel. Often, the defendant is denied the right to a fair hearing before an independent and impartial tribunal.

As previously mentioned, in Canada and the UK there are new forms of safeguards against control orders, called “special advocates”, which have a rather prejudicial effect on controlled persons, since they have access to secret information, whereas they do not help the individual and his counsel in effectively challenging the system.

Finally, intelligence preventive measures include also the listing procedure, apparently harmless, but actually producing dangerous restrictions of the right to associate, to privacy and to make use of one’s property, even though it does not cause physical harm. Furthermore, an individual whose name is on international and national lists usually does not have the possibility to effectively make complaints or appeal to tribunals. Indeed, several States have proposed to introduce certain reforms of the procedural safeguards for delisting. In particular, they asked that an independent judicial appeals mechanism is introduced together with a clear system of rules to list and delist names, and with time-limits for listing decisions. The listing should be clear, publicly available and fair. Listed individuals should be immediately informed of the listing, and

⁽⁵³³⁾ *Ibid*, pp.119-120.

⁽⁵³⁴⁾ *Ibid.*, pp.120-121.

should be allowed to effective remedies in case of mistakes. Lists should be periodically reviewed by an independent mechanism.⁽⁵³⁵⁾

Therefore, it can be argued that “the more intrusive the interference with a person’s rights, and the more irreparable the potential harm, the higher the requirement for evidence.” Typical of intelligence preventive measures are the secret nature of information and the lack of due process, which create serious perceptions of the unfairness of the system. As a consequence, the perception of unfairness can undermine the effectiveness of a State’s counterterrorist activity.

Security Intelligence Services have a fundamental role in promoting and coordinating counterterrorist initiatives. At the present time intelligence agencies’ activities are more and more intertwined, and this is due to higher cooperation among States both at a regional and international level.⁽⁵³⁶⁾

The need for higher cooperation among countries has been perceived as absolutely necessary after the 2003 terrorist attacks in Madrid, when the Council of Europe decided to set more aggressive measures to fight international terrorism, involving higher coordination among regional intelligence agencies.

At first, intelligence agencies were tasked to gather information for investigative purposes, but then they started to be used for issues of national security. For example, in the United Kingdom a formal document officially introduced a relationship between police and intelligence services, the Police International Counter-Terror Unit.⁽⁵³⁷⁾

Security intelligence services, argued several countries, can be no longer separated from the ordinary law enforcement mechanisms, because terrorism is such a complex threat that it is necessary to give intelligence agencies more powers to better counter it.⁽⁵³⁸⁾ Of course, they must comply with international human rights standards, but the fact that they extend their influence to other areas is not for itself a violation of international law. However, some countries voluntarily shift from law enforcement measures to intelligence measures, in order to avoid human rights compliance, abusing the secrecy of intelligence operations.

In order to prevent intelligence agencies’ non compliance with human rights safeguards, and to make agents liable for their acts, states must establish some important

⁽⁵³⁵⁾ *Ibid.*, p.122.

⁽⁵³⁶⁾ For information about regional intelligence agencies, in particular from a European point of view (Europol, Eurojust, Sitcen, Frontex), visit specific sites, <http://www.frontex.europa.eu>, http://euce.org/eusa/2011/papers/3a_cross.pdf.

⁽⁵³⁷⁾ CONTE, *supra* note (345), p.489.

⁽⁵³⁸⁾ *Ibid.*, at note (72). Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

measures.⁽⁵³⁹⁾ A first step to do so is to establish a clear and transparent legislative framework which clearly defines the mandate of intelligence agencies, in order to easily detect any violation.

A second step concerns the use that intelligence agencies make of the information gathered. This measure is very important if it is considered that the difference between information used for strategic intelligence and information used as evidence in criminal proceedings has become less defined. Analysts should take care when studying the nature and sources of information, and information should be subjected to judicial approval before being used as evidence in criminal proceedings, to avoid the use of information obtained under torture, which can be often a false confession.

Another important measure concerns the review mechanism, both ex-ante and post-facto. The activity of security intelligence must always comply with human rights standards, hence there should be a specific independent organ competent to verify the lawfulness of such activity. Of course, this is possible provided that intelligence agencies are liable for their acts. Immunity or indemnity provisions, however, are still in force in several countries, and they can impede effective access to courts and access to an effective remedy.

7.1. Intelligence cooperation between Europe and the US.⁽⁵⁴⁰⁾

Before examining the relationship between European countries and the US with reference to intelligence activity, in particular the branch related to counterterrorism initiatives, it is necessary to consider that the two groups have adopted different approaches towards the same issue. For instance, the US strategy is mainly focused on the external nature of terrorism. Within American borders the Government has fewer sources of threat, and there is little if no reference to internal terrorist activity. This is due to the fact that terrorism is perceived as a threat coming from outside.

The European approach to counterterrorism activities is exactly the opposite, because the member States of the European Union have to face terrorist threats which

⁽⁵³⁹⁾ *Ibid.*, pp.490-491.

⁽⁵⁴⁰⁾ R. J. ALDRICH, *US-European Intelligence Co-operation on Counter-Terrorism: Low Politics and Compulsion*, *The British Journal of Politics & International Relations*, Vol.11, Issue 1, February 2009, pp.122-139, available online.

develops within their borders. This different approach is certainly due to the fact that several European countries do not want to join a “kinetic war on terror”⁽⁵⁴¹⁾, but it is not limited to this, since it is widely known that European member States lack a common and coherent foreign policy dimension.

The EU has adopted various counterterrorism measures, even though a lack of consensus is still present. European countries adopted the European Arrest Warrant; expanded the activities of Europol and Eurojust; adopted a common definition of “terrorism” and important financial countermeasures; and intensified cooperation with other international actors. However, if such measures are not fully implemented by the EU community, they will not be effective at all.

Despite the different approaches to the matter, the US and EU have increased greatly their cooperation, both in terms of information sharing and of regional and international joint operations. However, a certain tendency of European governments to publicly complain about US intelligence services has been noticed, whereas in the private sphere the same governments seem to largely accept US activity. A noteworthy example of this tendency is the web of extraordinary renditions which were carried out by CIA agents with the cooperation of some European countries. Indeed, EU members involved in renditions remained silent about the fact, while they denied their involvement and strongly condemned such practices. In April 2007, CIA Director Michael Hayden publicly complained about the hypocrisy of European political leaders, who denounce the CIA activity to the media, but privately enjoy the enhanced security provided by joint intelligence operations.⁽⁵⁴²⁾

Nevertheless, it is necessary that EU and US intelligence agencies work together, because they have a common enemy, terrorism, which does not respect borders, since it is a transnational phenomenon. It is in their best interest to cooperate fully and trusting one the other, because otherwise they would not manage to eradicate the threat posed by terrorism.

Since the events of 11 September 2001, transatlantic intelligence cooperation has spread heterogeneously, on the basis of perceived threat. Indeed, the first European countries to increase intelligence sources were those which already had troubles with suicide bombers, namely the UK, France, Germany, Spain, and the Netherlands. Their intelligence services envisage the need for a weak EU intelligence structure. On the

⁽⁵⁴¹⁾ *Ibid.*, p.122.

⁽⁵⁴²⁾ *Ibid.*, p.124.

contrary, Ireland, Belgium and Austria now play a small role in intelligence advancement, even though ten years before they had been compared to the US FBI.⁽⁵⁴³⁾

The EU disparity of resources can be noticed in the fact that recent developments in intelligence technologies and collection techniques have all come from the US, which can be rightly considered the most advanced country in intelligence systems.

7.2. EU regional intelligence agencies.

European countries have discussed the possibility of creating strong federal intelligence structures, in particular after the 2004 Madrid bombings, but this proposal has been dismissed, mainly because of the pressures exerted by the countries where stronger intelligence structures were present. They feared a possible erosion of their relations with US agencies.

In Europe there are only domestic intelligence agencies and regional unofficial agencies with limited functions. The only official regional intelligence structure is the EU Situation Centre (SitCen), established in February 2002 and based in Brussels, with around 110 staff members, both of civilian and military backgrounds. Not all European member States participate to the SitCen, but its reports are forwarded to all members.⁽⁵⁴⁴⁾ Except for the SitCen, no other regional intelligence agency similar to CIA or FBI exists.

Another intelligence structure is the Club of Berne, which meets on a regular basis and discusses intelligence and security matters. It is formed by the heads of EU member States. After the 2001 attacks to the US, the Club of Berne established the Counter Terrorism Group (CTG), which welcomed the US as observer. The CTG provides a forum for experts to develop cooperation on specific projects and serves as a focus for multilateral exchange. Some of its members are security and intelligence services of EU countries.

A further structure with whom the EU has relations is NATO, formed in December 1952. At first, NATO's tasks involved military information exchange with the US. After

⁽⁵⁴³⁾ *Ibid.*, p.125.

⁽⁵⁴⁴⁾ M. K. DAVIS CROSS, *EU Intelligence Sharing & The Joint Situation Centre: A Glass Half-Full*, 2011, Meeting of the European Union Studies Association of 3-5 March 2011, pp.4-5. It is available online at http://euce.org/eusa/2011/papers/3a_cross.pdf. The SitCen has no formal mandate to engage in intelligence gathering and relies to some extent on intelligence provided by member states on a voluntary basis.

NATO's arrival in Afghanistan in 2002, the intelligence and security branch has developed enormously. In November 2006, the NATO Riga summit established a NATO interim information cell formed by the chiefs of the intelligence services of NATO members.

An important structure involving the central and eastern area of Europe is the Middle European Conference, which brought modernisation and development to intelligence and security services of the eastern part of the European Union.

The problem with these bodies is that they are deeply connected with the US, if not directly proposed by it. The EU does not have its own, totally European born structures.

Europol's tasks involved, thanks also to the creation of the Counter-Terrorism Task Force, activities of intelligence collection and analysis, risk assessment and assistance to national police forces. Unfortunately, being the organization too small, it was absorbed into the Europol's Serious Crime Department in 2003.⁽⁵⁴⁵⁾

Perhaps the fact that EU has not an official regional intelligence agency is due to the high interest of European countries in avoiding political risk. Lower involvement in secret intelligence matters leads to higher political security. It seems that EU countries are much more interested in judicial and administrative issues.

7.3. The changing nature of terrorism requires new intelligence.

Reviews of information exchange between intelligence agencies before September 2001 revealed that in the US, the FBI, the CIA, and the National Security Agency (NSA) exchanged little or no information on terrorist activity.⁽⁵⁴⁶⁾

The changing nature of terrorism, which is now different from past traditional terrorism, requires a certain level of modernization of the agencies, whose aim is to eradicate it. Indeed, the "new" terrorism has adapted to the changing world: it is more globalized, and it is stronger in places where deregulation is higher, since terrorist attacks need freedom from rules and controls to be effective. In addition, "new" terrorism is internal and external at the same time.

Conversely, intelligence services have grown in terms of technological advancement, but there is still a defined division between domestic and foreign intelligence

⁽⁵⁴⁵⁾ ALDRICH, *supra* note (540), pp.126-127.

⁽⁵⁴⁶⁾ *Ibid.*, pp.128-129.

services. Instead, a new form of intelligence should be envisaged. Exactly because terrorism is both internal and external, national intelligence agencies should create a web of information exchange which goes to both directions. Intelligence agencies cannot stay still or be impenetrable to information flows.

A possible solution is, therefore, the creation of national intelligence fusion centres totally dedicated to terrorism information collection and analysis of operational intelligence. The core element is fusion. Thereby, intelligence agencies communicate not only with domestic and foreign services, but also with public government authorities and private actors, for example airline companies.

Practical examples are the US National Counterterrorism Centre (NCTC); the Canadian Integrated Threat Assessment Centre (ITAC); the UK Joint Terrorism Analysis Centre (JTAC); the Spanish Centro Nacional de Coordinación Antiterrorista (CNCA); the German Joint Counterterrorism Centre (GTAZ); the Australian National Threat Assessment Centre (NTAC); or the New Zealander Combined Threat Assessment Group (CTAG).⁽⁵⁴⁷⁾

National intelligence fusion centres have definitely improved the activity of intelligence services, because they are located in one specific place, which makes them relatively easy to contact (it is worth thinking about the huge number of small agencies based everywhere on a State's territory), and also because they exchange a new kind of operational data that are halfway between abstract and raw information.

7.4. Conclusions.

In conclusion, what is the role of intelligence agencies in the fight against terrorism? How can they contribute to the eradication of such a terrible phenomenon?

This last chapter clearly shows that the importance of intelligence and security services' activities has grown enormously. It is worth recalling the interest that the media and the press have in the intelligence activity, or the growth of intelligence agencies' budget.

⁽⁵⁴⁷⁾ *Ibid.*, pp.129-130.

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Intelligence tasks were first of all of risk management. Their function was to provide as much information as possible on persons and groups connected to terrorism, even though it is obvious that intelligence does not only concern counterterrorist activities.

In recent past, intelligence role has changed considerably, and this is the reason why it has become a central component of the fight against terrorism. An intelligence agency is tasked to gather valuable information, at first only through interceptions or by means of agents undercover; to analyze such information and transform it into valuable abstract and operational data, which are immediately disseminated to the various levels of the agency, or to other intelligence hubs.

However, intelligence has gone further in its tasks. It has been involved in joint operations. Now, intelligence plays an active role in the apprehension, detention and interrogation of terrorist suspects. It works close to law enforcement authorities. In addition, intelligence information is used as evidence before courts. Therefore, intelligence activity has positively changed the world, since it has enabled an advancement in technology, a closer relationship between governments.

Nevertheless, it is important to acknowledge the dark sides of intelligence activity in the fight against terrorism, the most known of which is represented by the Bush Administration and its allies. Guantanamo, Abu Ghraib, Al Jafr, Kandahar, are only some of the various detention camps supervised by intelligence services. The media and international non governmental organizations denounced what such services have been doing there, in the so called "war on terror."

National governments know that terrorist attacks hide a political message behind their apparent foolishness, but it is clear from what happens in these detention camps that the response to terrorism has amplified such messages, leading intelligence agencies to forcibly extract information which probably has nothing to do with terrorist activity, by means of torture and inhuman treatment.⁽⁵⁴⁸⁾

The terrible crimes perpetrated by the US Administration and its allies have caused an opposite reaction on the part of terrorist organizations, which believe that the Americans and their allied are evil because they torture people. For this reason hatred and anger towards the Americans and Western Allies intensify terrorist attacks. Of course, this is not a solution to the problem of terrorism, instead it makes the fight harsher, leading to a vicious cycle of cruel actions.

⁽⁵⁴⁸⁾ *Ibid.*, p.132.

In order to make things change and let the rule of law and human rights grow genuinely against terrorism, national governments should stop torturing people, and respect their fundamental human rights and judicial guarantees. Intelligence agencies should be liable for their actions: agents of the state should be punished for what they do acting in behalf of a State.

To ensure a genuine contribution of intelligence agencies to the fight against terrorism, national governments should clearly establish a comprehensive legislative framework which defines the mandate of intelligence services and their extended powers. In addition, because of alleged torture during interrogations, intelligence information obtained by means of torture or ill-treatment should not be used as evidence at trial. Finally, to ensure liability, an independent oversight mechanism should be established and implemented at all levels of the intelligence structure, involving domestic and foreign intelligence services.⁽⁵⁴⁹⁾

It has been argued that intelligence agencies have not always the purpose of gathering information, but of ensuring the predominance of certain States in the international scenario.⁽⁵⁵⁰⁾ It is exactly what is happening. Intelligence agencies circumvent international law, and act in behalf of national governments, because if States have adopted unlawful measures, they would be immediately found guilty of non compliance with the international instruments to which they are parties. Instead, by leaving the unlawful activities to agents who are immune to international law, they can deny any complicity with them, and avoid any risk to be condemned by the international community.

⁽⁵⁴⁹⁾ CONTE, *supra* note (345), pp.490-491.

⁽⁵⁵⁰⁾ RATNER and RAY, *supra* note (378), p.69.

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