



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**CURRENT CHALLENGES
REGARDING RESPECT OF
HUMAN RIGHTS IN THE
FIGHT AGAINST
TERRORISM**

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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

BRIEFING PAPER

**CURRENT CHALLENGES REGARDING RESPECT OF
HUMAN RIGHTS IN THE FIGHT AGAINST TERRORISM**

Abstract

Three years after the European Parliament's Resolution on the transfer and illegal detention of prisoners, this briefing paper assesses progress on the key external policy issues raised and recommendations made by the 2007 Resolution. The author acknowledges that human rights standards have become more seriously integrated both into UN and EU work on counter-terrorism, although there remains a need for further standard-setting on issues including accountability of intelligence services. The system of terrorist lists, despite recent reforms, also continues to pose serious problems of human rights protection. In the past year, the United States has taken significant steps towards compliance with international law and has in principle accepted international human rights and humanitarian law as the appropriate framework for counter-terrorism. However, much of the legacy of the past eight years' counter-terrorism practices remains in place, including the Guantanamo Bay detention centre. Investigations in EU Member States into allegations of complicity in renditions and secret detentions have been hampered in particular by claims of state secrecy and there has been little progress concerning providing reparations to the victims of rendition, or bringing to justice responsible officials, in either Europe or the United States. Regarding the recent impetus for EU-US co-operation, it is essential that co-operative counter-terrorism measures uphold EU standards of human rights and the rule of law.

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EXECUTIVE SUMMARY

Three years after the European Parliament's Resolution on the transfer and illegal detention of prisoners highlighted some of the most egregious human rights violations perpetrated in the course of the "war on terror", and the extent to which EU Member States had become involved in them, this paper assesses progress on the key issues raised by the 2007 Resolution.

Since 2007, there have been significant changes in the legal and political landscapes in both the EU and US, with positive implications for human rights protection in counter-terrorism. However, the scale of the damage done to international human rights law, and to the practical protection of human rights, by the "war on terror" should not be underestimated, and concerted efforts will be needed to reverse it. Fundamental standards of human rights were called into question, leading to serious violations of human rights through counter-terrorism laws and practices, not only in the US, but around the world. In the past year, the US has taken significant steps towards compliance with international law and has in principle accepted international human rights and humanitarian law as the appropriate framework for counter-terrorism. The rhetoric of the "war on terror" is still used, however, and in practice serious problems remain, including the continued authorisation of renditions and short term detentions by the CIA; continued administrative detention for certain non-nationals suspected of involvement in terrorism; and trials by military commissions.

At an international level, human rights are increasingly integrated into UN work on counter-terrorism, although there remains a need for further standard-setting on issues including accountability of intelligence services. The system of terrorist lists, despite recent reforms, continues to pose serious problems of human rights protection.

At a national level, in both EU and non-EU states, the past eight years have seen the growth of administrative counter-terrorism measures, including administrative detention, control orders and measures based on immigration law, and many of these remain in place, displacing the primacy of the criminal justice system and providing insufficient protection for human rights.

Much of the legacy of the past eight years' counter-terrorism practices remains in place. Guantanamo Bay detention centre remains in use: it is likely that whilst some of the detainees held there will be tried in the ordinary courts, others will be tried in military commissions, where trials fall short of international standards; others will be resettled outside the US, principally in European states; and, most problematically, some will be held in continued administrative detention. Detention by US forces in Afghanistan also raises serious human rights concerns, in particular regarding the refusal to recognise habeas corpus rights of detainees there. Investigations in EU Member States into allegations of complicity in renditions and secret detentions have been hampered in particular by claims of state secrecy and there has been little progress concerning providing reparations to the victims of rendition, or bringing to justice responsible officials, in either Europe or the US. The absolute nature of the right to *non-refoulement* to face a risk of torture, cruel inhuman or degrading treatment or other serious violation of human rights has recently been clearly reasserted by the European Court of Human Rights, but deportations of terrorist suspects from European states regularly pose problems of *non-refoulement*, and several EU states rely on unenforceable diplomatic assurances to justify removals.

Since the change of administration in the US, there is a new impetus for EU-US co-operation. Such co-operation carries risk for human rights protection, and it is essential that the EU insist that co-operative counter-terrorism measures uphold EU standards of human rights and the rule of law. In light of recent developments, the EU should now re-evaluate both internal and external policies on counter-terrorism, with a view to achieving effective and sustainable human rights protection for the long term.

1 OVERVIEW

In February 2007, the European Parliament's resolution on the transfer and illegal detention of prisoners,¹ following the report of the Temporary Committee, drew attention to some of the most egregious and systematic violations of human rights perpetrated in the war on terror, and illustrated the degree to which EU states had become enmeshed in these violations. The 2007 resolution called for the relevant committees of the Parliament to follow up on the work of the Temporary Committee and to monitor developments. This paper will analyse the most significant developments in the protection of human rights in counter-terrorism since early 2007, focussing in particular on issues of EU and EU Member State co-operation with third countries in counter-terrorism, and the consequences of this co-operation for human rights protection and for the integrity of the international human rights legal framework. The paper does not aim to deal comprehensively with all aspects of counter-terrorism and human rights, but seeks to identify the most significant trends and challenges for EU counter-terrorism policy, and to highlight points where EU action is most needed.

1.1 The long-term consequences of the "war on terror"

The scale of the damage that "war on terror" policies have done to human rights protection, and to national and international human rights legal frameworks, must not be underestimated. States around the world have long contended with terrorist threats, and many continue to face real and serious threats of terrorism, either from local or from international terrorism.² The threat of international terrorism that emerged in 2001, however, led to an unprecedented questioning by a number of states of previously unchallenged principles of international human rights law, including the freedom from torture and cruel, inhuman or degrading treatment, and rights and obligations ancillary to it, such as the right to *non-refoulement* to face such treatment, and the non-admissibility in legal proceedings of information obtained by torture or other ill-treatment. International humanitarian law was also challenged and reinterpreted in an attempt to justify special measures. The development by the US of counter-terrorism operations outside the rule of law, in particular renditions and secret detentions, and arbitrary detention at extra-territorial bases such as Guantanamo, had profound legal and political effects which will not quickly be reversed. Furthermore, a number of governments around the world have seized the opportunity of the global "war on terror" to provide legitimacy to laws and practices that violate human rights. In 2008, the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights concluded that: "ignoring lessons from the past, some states have allowed themselves to be rushed into hasty responses, introducing an array of measures which are undermining cherished values as well as the international legal framework carefully evolved over at least the last half century".³ Many of these measures remain in place, and it is far from clear that the "war on terror", with all its destructive consequences for human rights protection, is over.

From 2001, the newly perceived international terrorist threat, and new international responses to it, shaped the domestic counter-terrorism policies of some EU Member States and altered their co-

¹ P6_TA-PROV(2007)0032, Transportation and illegal detention of prisoners, European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)).

² *Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, p.22-23*

³ Eminent Jurists Panel Report, op cit p.159

operation with both the United States, as well as with other non-EU states, in particular in the gathering and exchange of intelligence, and in co-operation in intelligence-led counter-terrorism operations.⁴ Domestically, the increased reliance on intelligence services in counter-terrorism, in preference to the criminal justice system with its stringent procedural safeguards, has had significant internal consequences for many legal systems including in some EU Member States, with the creation of special courts, special legal regimes, and lower procedural standards.⁵

Several aspects of these systems are likely to have a long-term legacy for human rights protection. One is the increased reliance on intelligence services, and intelligence information, in countering terrorism, which has brought with it an increased resort to administrative counter-terrorism measures, rather than criminal prosecutions. This has consequences for both the victims of terrorism, who are less likely to see the perpetrators of terrorist acts convicted of crimes of terrorism, or to have the full truth regarding such acts disclosed in court, and for suspects, who do not benefit from the procedural protections of the criminal justice process. It has also exposed serious flaws in scrutiny of intelligence services for compliance with human rights, and their accountability for human rights violations. A second development likely to have long-term implications is the predominance of international co-operative strategies and operations, to counter an internationalised terrorist threat, a trend that will continue to pose challenges to national mechanisms of human rights review and accountability.

Third, the proliferation of national counter-terrorism legislation, in part in implementation of obligations imposed by Security Council resolutions or other international obligations,⁶ often enacted in haste, will also have a long-term impact on human rights around the world. Overly broad criminal law definitions of terrorism, as well as of associated crimes such as "extremism", and wide or vaguely defined offences of indirect incitement to terrorism, are now permanent features of the statute books of many states, and have the potential to allow for violations of freedom of expression, association, assembly and the right to liberty, amongst others. A further trend, which is unlikely to be reversed, has been the erosion of privacy rights through extensive gathering and exchange of data, increased interoperability of databases, and cross-border exchange of information. In this regard, there are acute questions as to whether data protection safeguards can keep pace with the increasing sophistication of the database systems, and whether sufficient safeguards are in place for the transfer of information to authorities of non-EU states where lesser data protection safeguards apply.⁷

These developments have in some cases direct consequences for EU external policy. For example, the use of counter-extremism legislation in the Russian Federation to suppress dissent,⁸ including criticism of alleged government human rights violations, should be a significant issue for the EU's relations with the Russian Federation; and reports of torture and arbitrary detention by intelligence agencies in

⁴ Eminent Jurists Panel Report, op cit, chapter 4.

⁵ Eminent Jurists Panel Report, op cit, chapters 5 and 6.

⁶ Including for example obligations under Security Council Resolution 1373

⁷ See for example, the SWIFT agreement, European Parliament legislative resolution of 11 February 2010 on the proposal for a council decision on the conclusion of the Agreement between the EU and the USA on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Programme, 05305/1/2010 REV1-C7-0004/2010, 2009/0190(NLE)' Council of the EU, 2997th Council Meeting, General Affairs, Press Release, 22 February 2010, 6737/10 (Presse 37).

⁸ ICJ submission to the Human Rights Committee on the Periodic Report of the Russian Federation, 2009, www.icj.org

Pakistan⁹ must have consequences for EU co-operation in intelligence exchange, immigration measures and mutual legal assistance in criminal matters with Pakistani authorities. But EU justice and home affairs policy on counter-terrorism, as well as national legislation and policy of EU Member States, also has significant effects internationally. Such legislation often serves as a model for legislation elsewhere. Broadly defined criminal offences of incitement to terrorism, for example, in an EU Member State may be carefully applied so as to intrude minimally on freedom of expression, but where similar legislation is enacted in a state with weak checks and balances against excessive or arbitrary application, it may have very different consequences. This has been the experience, for example in states including Algeria, Tunisia, Uganda and the Russian Federation.¹⁰ European states' response to allegations of involvement in renditions, on question of investigation, prosecution and reparation, will also be seen as setting standards for the response elsewhere, for good or ill.

1.2 The European Union and counter-terrorism co-operation

Since the coming into force of the Lisbon Treaty, EU work to counter terrorism, and to protect human rights takes place in a changed framework, and the Treaty's enhanced powers for the European Court of Justice and the European Parliament will increase the space for human rights scrutiny of counter-terrorism powers. In external relations, the Treaty's creation of a new High Representative of the Union for Foreign Affairs and Security Policy¹¹ working with a European External Action Service¹² is designed to enhance the ability of the Union to influence international affairs, in accordance with principles of the rule of law, human rights, and international law. The Treaty's entrenchment of the EU Charter of Fundamental Rights, and its opening of the way for EU accession to the European Convention on Human Rights (ECHR) are restatements of the EU's commitment to human rights, also reflected in Article 21 TEU which identifies the rule of law, human rights and international law as key principles in EU foreign policy. The EU's commitment to human rights in counter-terrorism is strongly reiterated in the new Stockholm programme on justice and home affairs,¹³ and in the recent strategy discussion paper of the EU Counter-terrorism co-ordinator.¹⁴

Another important development in this new legal context concerns the Union's international agreements related to the fight against terrorism. These agreements have commonly been based on Articles 38 and 24 TEU-Nice, which do not foresee any European Parliament involvement. Under the Lisbon Treaty, the ordinary legislative procedure (co-decision between EU Council and the European Parliament) will apply regarding EU legislation on combating terrorism and organised crime.¹⁵ Therefore international agreements falling into this policy area should be subject to the consent procedure. Considering Parliament's strong engagement in pursuing human rights in the context of counterterrorism policies, this is potentially quite significant.

⁹ Eminent Jurists Panel report, op cit, pp.76-77

¹⁰ Eminent Jurists Panel report, op cit, pp.130-132

¹¹ Article 18 Treaty on the European Union (TEU)

¹² Article 27.3 TEU

¹³ Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens* 17024/09, Brussels, 2 December 2009, para.4.5

¹⁴ Council of the European Union, EU Counter-terrorism Co-ordinator, *EU Counter-terrorism Strategy – discussion paper*, 15359/1/09, REV 1, 26 November 2009

¹⁵ Article 83 of the Treaty on the Functioning of the European Union (TFEU-Lisbon Treaty)

Political and legal changes on both sides of the Atlantic have led to a renewed openness to EU / US co-operation, as can be seen from the recent EU/US Joint Statement on Guantanamo, as well as in the recent affirmation of the EU counter-terrorism co-ordinator in his recent discussion paper that it is crucial to make "the case that effective counter-terrorism measures and the promotion of human rights are really mutually enforcing goals."¹⁶ The counter-terrorism co-ordinator stressed the importance of the EU-US relationship, and considered that the change of administration provided an opportunity to deepen this. In this context, he recommended concluding an agreement with the US on data protection and sharing; and a long-term agreement to support the Terrorist Finance Tracking Programme.¹⁷ The Stockholm Programme also notes the need for enhanced co-operation in counter-terrorism.¹⁸

Such co-operation carries risks, not least for internal EU laws and policies, which may be altered to better enable co-ordination with the US or other third countries. The potential for discord between the demands of efficient counter-terrorism co-operation, and the protection of human rights within the EU, can be seen in the recent refusal of the European Parliament to approve the SWIFT agreement which would have allowed the US Treasury Department to obtain, without judicial oversight, data on financial transactions in the European Union for the purpose of investigating terrorism financing. The agreement had prompted concerns that the use of personal information subject to such transfers of information could lead to violations of the right to privacy. The European Parliament recommended that the European Council and the Commission renegotiate the Agreement in light of the obligations contained in the Treaty of Lisbon and the provisions of the Charter of Fundamental Rights of the European Union.¹⁹ For the future, the report of the counter-terrorism coordinator points to the merits of better and more coherent data collection in the EU, and an EU PNR policy, measures which are likely to raise similar issues of privacy rights.²⁰

This is an opportune moment, at a time of transition in both the EU and US, when there are continuing serious problems of human rights protection in counter-terrorism around the world, for EU institutions to re-evaluate how they can influence global developments in counter-terrorism. EU institutions need to marshal their international influence to ensure that the opportunity is seized to effect real rather than merely rhetorical change, and establish counter-terrorism practices that respect the rule of law and human rights that are sustainable for the long term. At the same time, the EU must lead by example, developing its justice and home affairs policies in strict accordance with its own commitments to human rights standards, and seeking to influence EU Member State policies to the same effect.

¹⁶ EU Counter-terrorism co-ordinator, Discussion Paper, *op cit* para.2.

¹⁷ *ibid.*

¹⁸ Stockholm Programme, *op cit*, para.4.5: "Cooperation with third countries in general and within international organisations need to be strengthened..."

¹⁹ European Parliament legislative resolution of 11 February 2010 on the proposal for a council decision on the conclusion of the Agreement between the EU and the USA on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Programme, 05305/1/2010 REV1-C7-0004/2010, 2009/0190(NLE)' Council of the EU, 2997th Council Meeting, General Affairs, Press Release, 22 February 2010, 6737/10 (Presse 37).

²⁰ EU Counter-terrorism co-ordinator, Discussion Paper, *op cit* para.6

The Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights

The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, an independent body of experts convened by the International Commission of Jurists (ICJ), published its final report, *Assessing Damage, Urging Action*, in 2009. The report followed a three year, worldwide, investigation by the Panel into the impact of counter-terrorism laws and practices on human rights, during which the Panel held sixteen hearings covering forty countries in all regions of the world, including hearings which examined past experiences of terrorism and counter-terrorism in Latin America and in Northern Ireland; other hearings addressed more recent experiences, including in Europe, the United States, Israel and the Occupied Palestinian Territory, East Africa, (Kenya, Tanzania and Uganda), the Middle East (Egypt, Jordan, Syria and Yemen), North Africa (Algeria, Morocco and Tunisia), Pakistan, the Russian Federation, South Asia (Bangladesh, India, Maldives, Nepal and Sri Lanka), South-East Asia (Indonesia, Malaysia, the Philippines and Thailand), Canada and Australia.

The Panel stressed that there are real and substantial threats of terrorism in different parts of the world, and that states have a duty to protect all within their jurisdiction against such threats. It found, however, that in the formulation and implementation of counter-terrorism policies, established principles of international human rights and humanitarian law were being questioned and at times ignored. The report drew attention to the increasing power of intelligence agencies and the central role that they have in counter-terrorism policies; to the use of unsubstantiated and possibly faulty intelligence to take action against individuals and organisations that can have devastating consequences for them; to the cloak of secrecy that surrounds detention and interrogation to gather intelligence; to methods used for that purpose including torture and cruel, inhuman or degrading treatment; and to the impunity allowed to those who engage in these practices.

The report concluded that many governments had confronted the threat of terrorism with ill-conceived measures that have undermined cherished values and resulted in serious violations of human rights. It emphasised that the criminal justice system should be at the heart of the response to terrorism, and called for a fundamental rethink of counter-terrorism laws and policies at the global, regional and national levels.

1.3 US Developments and their international impact

In the last year, the change of administration in the United States has had a significant impact on the international counter-terrorism debate, as well as on the legal protection of human rights in counter-terrorism. At the very outset of the Obama administration, crucial reversals of the Bush administration's policy on counter-terrorism and human rights were signalled in three executive orders of 22 January 2009, which ordered an end to the use of torture and to CIA detentions; committed the President to the closure of Guantanamo Bay detention centre and instituted a review of military commissions.²¹ One year later, there has undoubtedly been significant progress in US respect for international law and upholding the prohibition on torture. It has also become clear, however, that not all of the Obama administration's policy reversals will be unqualified, and that some key policies raising serious human rights and rule of law concerns are likely to be retained. Given the extent of political pressure in the US to continue with many of the previous administration's counter-terrorism policies, no assumptions can be made that, either in US, international or European policy, the policies of the past will be reversed, or their legacy fully addressed. The rhetoric of the US policy reversals has yet to be fully matched in reality.

At a rhetorical level, too, it should be noted that the US has not abandoned the paradigm of a "war" against terrorism. In a key speech in May 2009 President Obama said that: "Al-Qaida terrorists and their affiliates are at war with the United States, and those that we capture – like other prisoners of war – must be prevented from attacking us again."²² In January 2010, following the attempted airline bombing on Christmas Day, President Obama again used the rhetoric of a "war" on terrorism.²³

Internationally, the policy changes in the US have brought about a change in tone and focus of the counter-terrorism debate. There is no longer quite the chasm there once was between a US tied to an aggressive "war on terror", which dismissed or circumvented legal and human rights constraints, and a Europe committed to a rule of law based approach, rooted in criminal justice, as well as newer, more innovative and controversial administrative measures. Nevertheless, fundamental differences in approach remain. It is also the case that with the US no longer the driver of a militant counter-terrorism, the necessity and proportionality of European countries' own counter-terrorism measures face renewed scrutiny.

In part as a consequence of the political change in the US, and in part due to investigations in Europe,²⁴ Canada²⁵ and elsewhere, an important development in the last three years has been a slow but steady accumulation of information about human rights violations carried out in the course of the "war on terror". Since the change of administration in the US, there have been additional revelations about the

²¹ See *infra* Part 2, Chapter 2

²² Obama's remarks on US national security as prepared for delivery 21 May 2009, www.guardian.co.uk

²³ www.canada.com, *Obama sharpens tongue to escalate language in War against Terror*, 8 January 2010

²⁴ See *infra*, Part 2, Chapter 2.3.

²⁵ Reports of the Canadian Commission of Inquiry into actions of Canadian Officials relating to Maher Arar, 12 December 2006, www.ararcommission.ca; Amnesty International, *Partners in Crime, Europe's Role in Renditions*, Eur 01/008/2006. However the US under the Bush administration denied that it rendered suspects to countries where it believed they would be tortured: Condoleezza Rice, Remarks on her departure for Europe, 5 December 2005.

previous administration's counter-terrorism practices, including the use of interrogation practices amounting to torture, and systems of rendition and secret detention.²⁶

More information is also emerging in Europe on renditions and secret detentions as well as on allegations of European complicity in interrogations of detainees held arbitrarily or questioned under torture. Shortly after the 2007 European Parliament resolution, the 2nd report of Senator Marty for the Council of Europe Parliamentary Assembly found strong evidence of secret detention centres in Poland and Romania, leading to a resolution of PACE finding it "established with a high degree of probability" that such centres existed.²⁷ Since then, investigations in a number of European countries have led to further disclosures.²⁸ These developments are significant first steps towards meeting obligations of investigation and prosecution of serious human rights violations, as well as realisation of the rights of victims to reparations. There remains a long way to go, however. Thorough disclosure of information, as well as repudiation of and accountability for past abuses is an important and necessary element of restoring the rule of law and respect for human rights in countering terrorism.

Following the change of administration in the US, therefore, there is now an opportunity to redress some of the damage done to human rights and the rule of law, both directly in the United States, and indirectly because of its influence internationally; there is however also a real and increasing risk that some of the ground eroded will not be won back. In its external relations, the EU must guard against the potential for enhanced US-EU co-operation on counter-terrorism to undermine its ability to influence counter-terrorism policies in other third states. The EU in its external relations with the US needs to encourage and insist on a full return to human rights and the rule of law – in practice as well as in principle, and without concessions to the exceptionality of the post-Bush era. Making such concessions – on issues such as administrative detention or renditions – would hamper the EU in its ability to influence law and policy elsewhere, in accordance with international law and EU human rights standards (potentially including, for example, the EU torture guidelines). The EU therefore needs to undertake particularly close scrutiny of the extent to which the US has returned to respect for international law and the rule of law in counter-terrorism, both in principle and in practice.

²⁶ On 24 August 2009, the US Government released documents, including a 2004 CIA Inspector General's report, which provide a detailed official account of the CIA's detention, interrogation and rendition programmes and describe the use of abusive interrogation techniques, including "waterboarding", mock executions, and threats to kill or rape detainees' family members; CIA Inspector General, Special Review, Counter-terrorism Detention and Interrogation Activities, (September 2001 – October 2003) (2003 – 7123-IG) 7 May 2008. The ICRC, in a 2007 report on the treatment of 14 "high-value" detainees, leaked to the press in March 2009, described consistent accounts of interrogation techniques which the ICRC considered amounted to torture: New York Review of Books, *US torture: voices from the Black Sites*, 9 April 2009

²⁷ Resolution 1562 (2007) on Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States, para.4; Committee on Legal Affairs and Human Rights, *Secret Detentions and illegal transfers of detainees involving Council of Europe Member States: Second report*, Doc.11302rev.Explanatory Memorandum by Mr Dick Marty, Rapporteur, paras. 126- 127, 197 – 200.

²⁸ See *infra* Part 2, Chapter 2.3.

2 PROGRESS ON KEY ISSUES SINCE THE 2007 EUROPEAN PARLIAMENT RESOLUTION

2.1 International law and standards

The 2007 European Parliament Resolution was anchored in the need to uphold core principles of international human rights law, affirming the absolute and peremptory nature of the prohibition on torture,²⁹ urging ratification of relevant treaties, including the UN Convention on Enforced Disappearances,³⁰ and stressing that counter-terrorism measures must have their basis in human rights and the rule of law. The Resolution stressed that EU counter-terrorism efforts should be co-ordinated internationally, within the framework of the UN counter-terrorism strategy and in accordance with international human rights standards.³¹ It also recognised the significant role of Council of Europe standards, in particular the European Convention on Human Rights.

At the time of the Resolution, the principle that counter-terrorism measures must comply with international law was under pressure, from US doctrines of the exceptionality of the terrorist threat, as well as assertions of the need for innovative emergency measures from a range of states facing terrorist threats. This Chapter assesses recent developments in the international legal and strategic framework on counter-terrorism and human rights, and considers to what extent, three years on from the Resolution, there has been a reassertion and acceptance of the international rule of law in counter-terrorism.

2.1.1 Progress in international standards on counter-terrorism and human rights

International law contains no agreed general definition of terrorism: attempts to agree a definition in a draft UN Comprehensive Convention on International Terrorism, established in 1996, remain stalled, and seem unlikely to progress, due to disagreements on issues of liberation movements and the activities of State forces.³² Nevertheless, a total of 13 specific international conventions address particular terrorist crimes, such as hijacking, and the financing of terrorism, and evidence a degree of international consensus on the core meaning of terrorism.³³

Human rights standards have been increasingly well integrated into the United Nations' counter-terrorism work.³⁴ The UN Counter-terrorism strategy, adopted by the General Assembly by consensus

²⁹ European Parliament Resolution on transfer and illegal detention of prisoners, *op cit*, paras G, H

³⁰ *ibid* para.214, 217, 219, 220

³¹ European Parliament Resolution on transfer and illegal detention of prisoners, *op cit*, para.1.

³² Report of the Ad Hoc Committee, 12th session, 25 and 26 February and 6 March 2008, General Assembly, Official Records, Sixty-third session, Supplement no.37 (A/63/37). At an EU level, see Article 1 of the EU Council Framework Decision of 13 June 2002 on Combating Terrorism, (2002/475/JHA)

³³ Conventions listed at <http://www.un.org/terrorism/instruments.shtml> ; See generally, report of the Eminent Jurists Panel, *op cit*, pp.7-8.

³⁴ The Security Council's initial response to the 11 September attacks, Resolution 1373 of 28 September 2001, adopted under Chapter VII of the UN Charter did not prominently affirm the need to protect human rights in counter-terrorism. Subsequently, however, Resolution 1624 of 2005, adopted under Chapter VI of the Charter, concerning criminalisation of incitement to terrorism, included a clause stipulating that the measures taken respect international human rights, humanitarian and refugee law.

on 8 September 2006,³⁵ provides the framework for the counter-terrorism work of all UN bodies, including those relevant to human rights protection.³⁶ In its Resolution and Plan of Action, it affirms the central role of human rights in counter-terrorism, and recognises that “international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law ... in particular human rights law, refugee law and international humanitarian law.” Although the Strategy does not expressly state the primacy of the criminal justice system, it resolves “to develop and maintain an effective and rule of law-based national justice system” to ensure prosecution or extradition of those responsible for terrorist acts.³⁷

Importantly, the centrality of human rights was again emphasised in General Assembly Resolution 62/272 of 15 September 2008, which reviews progress made in the implementation of the strategy, following the report of the Secretary General on the first two years of its operation, and reaffirms the General Assembly’s commitment to the strategy. The Resolution calls upon UN entities involved in supporting counter-terrorism efforts to facilitate the promotion and protection of human rights while countering terrorism.³⁸ The Secretary General’s report, which formed the basis for the resolution, stresses that in UN technical assistance work it is underlined that States’ efforts to counter terrorism should be: “based on a strong criminal justice approach, guided by the normative framework provided by the universal legal regime against terrorism and embedded in respect for the rule of law and human rights.”³⁹

Nevertheless, although on paper human rights are well integrated in the Counter-terrorism Strategy, there is a need for better integration of human rights in the work of the Security Council and its subsidiary bodies, in particular the CTC, charged with monitoring compliance with Resolution 1373 and 1624, and the Counter-Terrorism Executive Directorate (CTED) which supports it.⁴⁰ Initially, the CTC suggested that it had no mandate to monitor or take into account human rights in the implementation of SC Resolution 1373 of 2001, but this has now changed as a result of the prominence of human rights considerations in Resolution 1624 of 2005.⁴¹

Elsewhere within the UN system, the UN Human Rights Council has regularly addressed the protection of human rights in counter-terrorism, in resolutions of 2007, 2008 and 2009⁴² and has affirmed States’

³⁵ A/RES/60/228

³⁶ See further *United Nations Global Counter-Terrorism Strategy: activities of the United Nations system in implementing the Strategy, Report of the Secretary General, 7 July 2008, A/62/898*; General Assembly, Resolution 62/272 *The United Nations Global Counter-terrorism Strategy*, 15 September 2008,

³⁷ *op cit*, Part IV para.4

³⁸ General Assembly Resolution 62/272, para.7

³⁹ Report of the Secretary General, para.81

⁴⁰ ICJ Press Release, *ICJ briefs members of the UN Security Council on the need to integrate human rights in counter-terrorism*, www.icj.org

⁴¹ See further Resolution 1805 (2008) which refers to the mandate of the CTC and CTED in integration of human rights in the implementation of the resolutions.

⁴² Human Rights Council, Resolution 6/28, 14 December 2007, Protection of human rights and fundamental freedoms while countering terrorism; mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Human Rights Council, Protection of human rights and fundamental freedoms while countering terrorism, resolution 7/7, 27 March 2008; Human Rights Council, Tenth Session, Resolution 10/15, Protection of human rights and fundamental freedoms while countering terrorism, 26 March 2009.

obligations to ensure that counter-terrorism measures comply with their international law obligations.⁴³ Special procedures of the Human Rights Council have also maintained their contribution to the development of human rights standards on counter-terrorism. In particular the Special Rapporteur on the protection of human rights while countering terrorism has recently made recommendations on thematic issues including intelligence in counter-terrorism,⁴⁴ and privacy rights in counter-terrorism. The Special Rapporteur on Torture has also continued to address relevant issues⁴⁵ including the use of diplomatic assurances against torture,⁴⁶ and in 2009, the Working Group on Arbitrary Detention published a set of principles on the Deprivation of Liberty of Persons Accused of Acts of Terrorism.⁴⁷ Furthermore, the Concluding Observations of the UN Treaty Bodies, in particular the Human Rights Committee and the Committee against Torture, have continued to be an important forum for the authoritative application of general human rights principles and standards to new counter-terrorism measures, including administrative control measures, extra-territorial detentions, wide definitions of terrorism and speech offences.

Standard-setting in the Council of Europe has also been significant in this area. The Council of Europe Convention on the Prevention of Terrorism⁴⁸ has influenced both national laws and the European Union's amendments to the Framework Decision on Counter-terrorism. The Committee of Ministers' Guidelines on Human Rights and the Fight against Terrorism⁴⁹ remain a key standard for counter-terrorism policies in Europe, and the Parliamentary Assembly of the Council of Europe has addressed many of the most difficult issues of human rights and counter-terrorism, including renditions and secret detentions, listing, and impunity.⁵⁰ The work of the Council of Europe Commissioner for Human Rights has also regularly drawn attention to problems of human rights protection in counter-terrorism law and practice, as has the Committee for the Prevention of Torture.

2.1.2 Progress in ratification of relevant human rights treaties

Regarding binding international law standards, which the 2007 Resolution recommended should be ratified by EU Member States,⁵¹ the Convention on Enforced Disappearances has not yet entered into

⁴³ Resolution 7/7, para.1

⁴⁴ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Sheinin, A/HRC/10/3, 4 February 2009

⁴⁵ UN General Assembly, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 5 February 2010, A/HRC/13/39/Add.5

⁴⁶ See report of the Special Rapporteur on his visit to Denmark, op cit.

⁴⁷ Report of the Working Group on Arbitrary Detention, A/HRC/10/21, 16 February 2009, para.54.

⁴⁸ *Council of Europe Convention on the Prevention of Terrorism*, Warsaw, 16 June 2005

⁴⁹ Committee of Ministers, *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Minister's Deputies

⁵⁰ See for example, PACE, *The State of Human Rights in Europe: the need to eradicate impunity*, Committee on Legal Affairs and Human Rights, Rapporteur Mrs Herta Daubler-Gmelin, Doc11934, 3 June 2009; PACE, UN Security Council Blacklists, Committee on Legal Affairs and Human Rights, Rapporteur Senator Dick Marty, AS/Jur (2007) 14, 19 March 2007

⁵¹ para.214, 217

force, but is likely to do so soon: there are currently 81 signatories and 18 ratifications,⁵² and the Convention will come into force after 20 ratifications. Of EU Member states, France, Spain and Germany have ratified. The majority of the others have signed⁵³ – in respect of some countries, ratification is awaiting the enactment of implementing legislation.⁵⁴

The Optional Protocol to the Convention against Torture now has a total of 50 state parties, and 24 signatories. The highest numbers of ratifications are from the European and Latin American regions, with only 5 ratifications in Africa, and Cambodia the only Asian country to have ratified.⁵⁵ The United States and Canada have not ratified. The Optional Protocol has now been ratified by twelve EU Member States, and signed by a further eight.⁵⁶ EU states which have not yet either signed or ratified the Optional Protocol include Bulgaria, Greece, Hungary, Latvia, Lithuania and Slovakia.

2.2 Acceptance of international human rights law and the primacy of the criminal justice system

2.2.1 United States: moves towards acceptance of international law

Under the Obama Administration, there has, at least in principle, been an end to United States exceptionalism and an acceptance of the international law framework. This is evident from the Joint EU/US statement on the Closure of the Guantanamo Bay Detention Facility and Future Counterterrorism Cooperation, which affirms the importance of respect for the rule of law and international law obligations, including under international human rights, refugee and humanitarian law. Most crucially, the new administration has accepted the absolute prohibition on torture and cruel, inhuman and degrading treatment.

The Executive Order on Ensuring Lawful Interrogations⁵⁷ unequivocally committed the United States to abide by international human rights law and in particular by the absolute prohibition on torture, as regards all persons within US authority and control, including those held outside the jurisdiction. One of the Order's stated aims was to bring counter-terrorism practice within the national and international rule of law. It stipulated that treatment in the custody of the US should be "consistent with the requirements of ... the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict".⁵⁸ The Special Task Force on Interrogations and Transfer Policies concluded in August 2009 that the Army Field Manual provides appropriate guidance on interrogation for military interrogators and that no additional or different

⁵² United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-16&chapter=4&lang=en

⁵³ European countries that have neither signed nor ratified include the United Kingdom, Switzerland, Poland, Czech Republic, Hungary, Latvia, and Estonia.

⁵⁴ e.g. the UK, House of Commons, written parliamentary questions, 15 July 2009, statement of Ivan Lewis, Minister of State for Foreign and Commonwealth Affairs HC Deb, 15 July 2009, c451W

⁵⁵ In the Pacific region, the Maldives and New Zealand have ratified, and Australia has signed.

⁵⁶ Association for the Prevention of Torture, *Global Status of OPCAT Ratification*, <http://www.apt.ch/content/view/40/82/lang,en/>

⁵⁷ The White House, *Executive Order: Ensuring Lawful Interrogations*, 22 January 2009

⁵⁸ Executive Order on Ensuring Lawful Interrogations Section 3.a.

guidance was necessary for other agencies.⁵⁹ However, there remain serious concerns that some techniques authorised by the army field manual, such as regimes of isolation, together with restrictions on sleep,⁶⁰ violate international standards on cruel, inhuman and degrading treatment.

Despite the end of the CIA secret detentions and interrogations programme,⁶¹ renditions and administrative detention are likely to continue with CIA detention at least for the duration of the rendition, or otherwise for short periods (discussed further below section 3.3.1). The continued authorisation of these practices calls into question commitment not only to the international law framework, but also to the primacy of the criminal law.

Although President Obama has stated that counter-terrorism detainees will be prosecuted wherever possible, administrative detention continues, and on a legal basis that remains inconsistent with international human rights and humanitarian law. The US now no longer designates detainees at Guantanamo or other extra-territorial detention centres as “unlawful enemy combatants”, but as “unprivileged enemy belligerents”, whose continued detention may be justified, not only where they have been apprehended in the course of an armed conflict, but also where they are suspected of providing “substantial” support to al-Qaeda or the Taliban.⁶² The difference between these legal bases for detention is marginal,⁶³ and the new definition remains deeply problematic for international humanitarian law. It allows for detentions beyond those permitted by international humanitarian law, which allows states to detain as prisoners of war those apprehended in the course of an international armed conflict for the duration of the conflict.⁶⁴ In this the US continues to rely on the notion of a “war on terror” beyond the conventional armed conflicts that exist or have existed, notably in Afghanistan.

The new legal basis for detention has been challenged in a number of *habeas corpus* cases. Most worrying for adherence to the international law framework is the recent case of *Ghaleb Nassar Al-Bihani v Obama*,⁶⁵ where the Federal Court of Appeals of the District of Columbia denied *habeas corpus* to a Guantánamo detainee. The Court rejected all arguments based on the international law of war, finding that the US President’s war powers could in no way be limited by the Geneva Conventions, since they had not been incorporated into US domestic law.

⁵⁹ Department of Justice, Press Release, *Special Task Force on Interrogations and Transfer Policies Issues its recommendations to the President*, 24 August 2009

⁶⁰ *Army Field Manual, Human Intelligence Collector Operations*, FM2-22.3 (FF 34-52), September 2006, Appendix M, paras.M-1, M-30, which allows sleep to be restricted to 4 hours in every 24 hours, for up to 30 days, in combination with a regime of “separation” in which detainees are held in isolation.

⁶¹ As confirmed by the Statement of the Director of the CIA, Leon Panetta, *Message from the Director: Interrogation Policy and Contracts*, April 9 2009, <https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html>

⁶² Justice department statement, March 2009

⁶³ The Military Commissions Act defined as “unlawful enemy combatants” for the purpose of trial by military commissions for war crimes, not only those who take part in hostilities, but also people who “purposefully and materially” support hostilities against the US or its “co-belligerents”, regardless of whether they have been arrested in the battlefield.

⁶⁴ Geneva Convention III Article 4; Article 118

⁶⁵ Federal Court of Appeals of the District of Columbia, 5 January 2010, No.09-9051

Although the compliance of such detentions with international law is highly problematic, it is notable that President Obama has sought to justify the current use of administrative detention as in accordance with the rule of law, and has stated that priority will be given to criminal prosecutions.⁶⁶ He has stressed that administrative detention policies will be reshaped “to ensure they are in line with the rule of law” and “clear, defensible and lawful”. Any EU dialogue with the US on this issue would need to press for strict compliance with international humanitarian law, and for the release or prosecution of all those whose continued detention is not justified by that law.

2.2.2 Administrative measures and the primacy of the criminal justice system

In contrast to the US, European states eschewed the “war” paradigm of counter-terrorism and, in their domestic counter-terrorism laws and practices – if not always in their entanglements with US operations – have sought to act within an international law and rule of law framework. Both in Europe and worldwide, however, there has been a significant challenge to the primacy of the criminal justice system in counter-terrorism, in the use of administrative counter-terrorism measures – such as control orders, measures of immigration control and deportations, as well as listings and measure to freeze assets at national and EU levels – which take the place, to varying degrees, of criminal prosecutions. Such measures are intelligence based, and allow for preventative action to be taken against persons perceived to pose a threat, without the application of the rigorous procedural safeguards of the criminal process or a criminal standard of proof. For the victims of terrorism, they also mean that the perpetrators of terrorist acts are less likely to be brought to justice and held criminally accountable for their acts. In Europe, immigration law measures have been particularly heavily relied on as a counter-terrorism measure.⁶⁷ Particularly widespread is reliance on deportations with diplomatic assurances.⁶⁸

Administrative detention in counter-terrorism, though not now used in any EU country, is widespread in many other regions, in particular in South Asia, East Africa, and in the Middle East and North Africa, in many cases leading to serious violations not only of the right to liberty but to freedom from ill-treatment.⁶⁹ In Malaysia, for example, administrative detention in national security cases, which can be prolonged, has virtually sidelined the criminal justice system in such cases.⁷⁰ In Pakistan, the November 2007 state of emergency, declared on the grounds, *inter alia*, that members of the judiciary were “working at cross purposes with the executive and legislature in the fight against terrorism” led to many lawyers and other protesters being administratively detained under the Maintenance of Public Order Ordinance.⁷¹

Administrative measures have been subject to intense human rights challenge in the courts. Notably, in Canada, measures of detention or control of non-nationals under security certificates were declared unconstitutional by the Supreme Court in 2007 because of insufficient due process, leading to the introduction of a special advocates system for such orders.⁷² In the past year, judgments of both

⁶⁶ In his speech of May 2009, *op cit*, the President vowed to “exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country.”

⁶⁷ See Eminent Jurists Panel report, *op cit*, pp.93-97

⁶⁸ See *infra* Part 2, Chapter 2.5

⁶⁹ Eminent Jurists Panel Report *op cit* pp.106-110

⁷⁰ *ibid*, p.107

⁷¹ *ibid*, p.108

⁷² *Charkauoi v Canada*, 2008 SCC 38, 26 June 2008

international and national courts have applied fair hearing rights to significantly restrict the use of administrative measures based on secret intelligence, even with a special advocates system. Both the European Court of Human Rights, in relation to the (now abolished) UK law on administrative detention,⁷³ and the UK House of Lords in relation to control orders,⁷⁴ have imposed a high standard of fair process in such cases, requiring that persons subject to such measures based on sensitive intelligence information must be given sufficient information about the allegations against them to enable them to challenge the allegations. Disclosure to a Special Advocate (prohibited from communicating with the person subject to the order) did not provide sufficient protection in these cases. In the UK, following these judgments, the continued viability of the system of control orders has recently been reviewed by Lord Carlile, the independent reviewer of counter-terrorism legislation, who recommended that the system be retained, but reformed by inclusion of a new category of low-level “travel restriction orders”.⁷⁵ In the Netherlands, the system of “disturbance orders” used to disrupt the lives of suspected terrorists and their associates has been recently criticised by the Human Rights Committee.⁷⁶

There is a risk that restriction by the courts of administrative detention or control measures will lead, not to a return to the criminal justice system, but to other equally problematic administrative measures, such as deportations with diplomatic assurances (discussed below). Both in EU external policy and in EU Member States, the primacy of the criminal justice system is a principle that needs sustained support, as an essential protection for the rule of law.

2.2.3 Terrorist lists: reform and the application of international human rights law

A particularly difficult issue has been the impact on human rights of terrorist listings, at international, national and EU levels, based on Security Council Resolutions made under Chapter VII of the UN Charter. On the authority of SC Resolution 1267, members of Al-Qaida and the Taliban and other individuals, groups, undertakings and entities associated with them are included in a ‘Consolidated List’ which is a basis for action including asset freezing and travel restrictions. These lists are supported, within the EU, by implementing EU Regulations⁷⁷ and in both EU and non-EU states, by national legislation. Whether such measures are legally required to comply with international human rights law remains controversial, as it has been argued that binding Security Council resolutions under Chapter VII of the Charter supersede all other international law treaty obligations, except obligations of *jus cogens* (higher international law).⁷⁸

⁷³ *A v UK*, Application no. 3455/05, Grand Chamber, Judgment of 19 February 2009

⁷⁴ *Secretary of State for the Home Department v AF*, [2009] UKHL 28 Judgment of 10 June 2009

⁷⁵ 5th report of the Independent Reviewer Pursuant to s.14(3) of the Prevention of Terrorism Act 2005, Lord Carlile of Berriew QC, 1 February 2010.

⁷⁶ Concluding observations of the Human Rights Committee, The Netherlands, CCPR/C/NLD/CO/4, 25 August 2009, para.15.

⁷⁷ EU Regulation 881/2002, Council Position 2002/402/CFSP

⁷⁸ Article 103 of the UN Charter states that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. See for example, *R (Al-Jedda) v Secretary of State for Defence*, [2007] UKHL 58

Judgments of the European Court of Justice and Court of First Instance have been fundamental in instigating reform of both EU and UN terrorist lists. In *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council (Kadi case)*,⁷⁹ the ECJ held that the implementation within the EU of resolutions of the Security Council need to fully comply with human rights law and called for urgent reform of the sanctions system. It found that Regulation (EC) No 881/2002 implementing the Security Council sanction system infringed the right to be informed of the reasons for the listing and the right to contest such reasons before an independent body under the EC Law.⁸⁰ Following the *Kadi* case, there has now also been a reform of the EU system implementing the UN lists, which allows listed persons or organisations to receive a statement of reasons following their inclusion on the list; to make observations on their inclusion to the European Commission, and to request a review of their listing.⁸¹ National courts have also been highly critical of the listing regime,⁸² which has been described by the Federal Court of Canada as “a denial of basic legal remedies and ... untenable under the principles of international human rights.”⁸³

Recognition of the arbitrary nature of the system as it was originally conceived, its potential for significant restrictions on the rights of those listed and the lack of due process for listing and delisting, have led to reforms in a series of Security Council Resolutions⁸⁴ designed to remedy the worst injustices of the listings system. Most recently, Resolution 647 (2009)⁸⁵ established a new system for delisting, under which a person listed on the Consolidated List submits a delisting request to an independent Ombudsperson, to be appointed by the Secretary General.⁸⁶

⁷⁹ The UN level reforms were also driven by recent Human Rights Committee decision (*Sayadi*) in which a SC listing was found to amount to a disproportionate interference with rights of freedom of movement and privacy rights; the Sanctions Committee delisted two people as a result.

⁸⁰ The Court annulled the Regulation insofar as it concerned the petitioners, while maintaining its effects for three months to allow the EU Council to remedy the infringements.

⁸¹ Council Regulation (EU) No 1286/2009 of 22 December 2009, amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban; On the independent EU lists under Regulation (EC) No.2580/2001, see Council Implementing Regulation (EC) No.1285/2009 of 22 December 2009, inter alia removing the applicant in the *Sison* case from the list following the judgment of the Court of First Instance in *Sison v Council of the EU* (30 September 2009)

⁸² Most recently, in *H M Treasury v Mohammed Jaber Ahmed*, [2010] UKSC 2, the new UK Supreme Court, quashing the Al-Qaeda and Taliban (United Nations measures) Order 2006, which implemented the UN listings system noted that, even following the 2009 reforms, there remained no effective judicial remedy to which listed persons could have recourse: Lord Hope, para.78, Lord Phillips at para.149

⁸³ *Abdelrazik v The Minister of Foreign Affairs* [2009] FC 580 para 51

⁸⁴ Resolution 1617; Resolution 1735; Resolution 1822

⁸⁵ Security Council Resolution 647 (2009) of 15 December 2009

⁸⁶ para.20 of Resolution 647, The Ombudsperson forwards the request to members of the Committee, relevant states and relevant UN bodies, asks them to provide additional information and views, and engages in dialogue with them (but not with the listed person). The request for delisting is also forwarded to a Monitoring Team, which provides the Ombudsperson with information on the listed individual or organisation. The Ombudsman may then request additional information from the petitioner. The Ombudsperson then submits a report to the Committee which must “lay out for the Committee the principal arguments concerning the delisting request”.

The new procedure is not a judicial process, however. It remains the Committee, rather than the Ombudsperson which, informed by the Ombudsman's report, makes its decision on delisting in accordance with its usual procedures. Neither is it clear to what extent the reasons for the decision are communicated to the petitioner;⁸⁷ or how sensitive intelligence will be dealt with. Therefore, although the reform is positive, it still does not provide for full due process rights compatible with international human rights standards of fair hearing.⁸⁸

The process of reform of the listing system will continue, as Resolution 647 contains commitments to further reform, and a review in 2011. There is therefore a climate of reform which EU and EU Member States could seek to influence. Although several EU states have been active proponents of reform, a stronger and more unified EU policy on human rights compliant reform of listings systems, consistent across UN, EU and national levels, would be highly desirable. Any such policy should insist on the need for effective due process and redress for listed persons and entities, but should also address the significant interference with human rights – including private and family life and freedom of movement – caused by inclusion on the lists and the consequent need for time limits on such inclusion. The Stockholm Programme provides a potential basis for this, stating that the EU will “work towards enhancing the design, implementation and effectiveness of sanctions by the UN Security Council with a view to safeguarding fundamental rights and ensuring fair and clear procedures”.⁸⁹

⁸⁷ Although the Ombudsperson is to communicate the committee's decision to them, explanatory comments are to be conveyed “as appropriate” and “to the extent possible”, and all communications with the petitioner must reflect the confidentiality of Committee deliberations and confidential communications between the Ombudsman and Member States.

⁸⁸ In particular, it does not appear to meet the standard set by the ECJ in the *Kadi* case, where the Court criticised the 1267 delisting procedure for “the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto..... an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.” Para.323 – 324 .

⁸⁹ Stockholm programme, op cit, para.4.5.

3 HUMAN RIGHTS PROTECTION IN PRACTICE

This section of the paper considers some of the key practical issues of human rights protection raised in the 2007 European Parliament Resolution, and assesses how the law and practice in relation to them has developed in the past three years. Many of these issues principally concern co-operation with the US, but all have wider implications for the EU's external relations and for the influence it can exert on protection of human rights in other third countries. As the legacies of the war on terror begin to be addressed, the EU should now re-assess how its policies and strategies on the practical protection of human rights and counter-terrorism can be developed so as to provide effective and sustainable protection for the long term.

3.1 Closure of Guantanamo Bay and resettlement of detainees

Closure of Guantanamo Bay detention centre was a key recommendation of the 2007 Resolution of the European Parliament.⁹⁰ Pressure for closure has been mounting for some time, and even before the change of administration in the US the Bush administration had made a commitment to closure, albeit without any timeline, and had sought the assistance of European and other states in resettling detainees. Also before the change of administration, the courts had already played an important role in mitigating to some extent the legal vacuum created at Guantanamo. Of great significance was the finding of the Supreme Court, in June 2008, in *Boumediene v Bush*⁹¹ that "enemy combatants" held at Guantanamo Bay were entitled to habeas corpus review of the lawfulness of their detention.

Immediately following the change of administration, an Executive Order provided for the closure of the Guantánamo detention facilities within one year, for steps to suspend the Military Commissions to try detainees, and for an immediate review of all individual Guantánamo detentions.⁹² The deadline for closure of Guantanamo has not been met, but the administration continues to work towards closure, at an unspecified date, probably in late 2010 or 2011.⁹³ About 190 detainees remain at Guantanamo. The Guantanamo Review Task Force continues to process individual cases, through an administrative process of classification, under which it makes recommendations to the administration on whether individual detainees are suitable for trial, release and resettlement or continued administrative detention.⁹⁴ Currently it appears likely that about 30-40 detainees will be prosecuted either in military commissions or in federal courts; just under 50 will be held in administrative detention; about 80 are cleared for either repatriation or resettlement in third states. A further group of about 30 Yemeni detainees - a particular difficulty since transfers to Yemen were suspended in January 2010 following the revelation of the Yemeni links of the suspect in the Christmas Day attempted plane bombing⁹⁵ - are cleared for release but held in "conditional detention" pending changes in conditions in Yemen. The key issue now is to what extent the closure of Guantanamo will merely be the closure of a single detention facility, and to what extent it will involve real and principled legal change.

⁹⁰ European Parliament Resolution on transfer and illegal detention of prisoners, *op cit*, para.189

⁹¹ US 553 (2008)

⁹² The White House, Executive Order – Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009.

⁹³ www.bbc.co.uk, *Obama admits delay on Guantanamo*, 18 November 2009

⁹⁴ www.bbc.co.uk, *The man who decides the fate of Guantanamo detainees*, 17 January 2010

⁹⁵ www.bbc.co.uk, *Obama reaffirms Guantanamo Bay prison closure plans*, 5 January 2010

3.1.1 Trial and military commissions

Military commissions to try “unprivileged enemy belligerents” including those who have not taken part in an armed conflict, will now continue in modified form, under legislation enacted in October 2009.⁹⁶ At least five cases have been allocated for trial before military commissions. The new legislation limits, though does not exclude, the use of hearsay evidence and coerced testimony, and allows defendants greater access to evidence. However, these amendments are insufficient to comply with the right to fair trial, and the new military commissions are not independent of the military chain of command. There is no sunset clause, raising the possibility that the commissions will become a permanent part of the legal system. The continuance of the military commission system, with minor modifications, is a significant decision to retain a key counter-terrorism policy of the Bush administration, despite serious flaws in its compliance with human rights standards. The inadequate protection of fair trial rights raises issues of mutual legal assistance – e.g. provision of evidence – by EU states in these trials.

3.1.2 Administrative detention

The President has also signalled that administrative detention will be used in respect of some former Guantanamo detainees.⁹⁷ Reports indicate that detainees will be transferred to US territory to be held in administrative detention at a maximum security US prison,⁹⁸ probably on the current legal basis of “unprivileged belligerent” (discussed above). There have not been any recent indications that the government intends to legislate for administrative detention.

Continued administrative detention is likely to be one of the most difficult issues for European – US dialogue on Guantanamo closure and on counter-terrorism in general.

The European Convention on Human Rights is particularly clear that administrative detention can only be used in a declared state of emergency threatening the life of the nation, and then only to the extent that it is necessary, proportionate and non-discriminatory.⁹⁹ Furthermore, administrative detention that continued indefinitely – as it might well do in respect of some Guantanamo detainees – could well amount, after a time, to cruel, inhuman or degrading treatment (in particular if they are held under the regime of a US maximum security prison).¹⁰⁰ These principled limitations on administrative detention need to be maintained in any dialogue with the US, bearing in mind also the precedent that could be set for the EU’s capacity to influence the many instances of administrative detention in counter-terrorism in other states.

⁹⁶ House of Representatives, National Defense Authorization Act for Fiscal Year 2010, Report 11-228, F:\SLC\ASCR10\H2647CONFRPT.XML

⁹⁷ Obama’s remarks on US national security as prepared for delivery 21 May 2009, www.guardian.co.uk

⁹⁸ Amnesty International, *USA: Still failing human irhgts in the name of global “war”*, 20 January 2010, AI Index: AMR 51/006/2010

⁹⁹ See generally, *Eminent Jurists Panel report*, p.110; European Court of Human Rights, *A v UK*, *op cit*.

¹⁰⁰ See *A v UK*, *op cit*, where the administrative detention of the applicants in that case was found in the circumstances not to amount to a violation of Article 3, in particular because of the judicial review of their detention available to them.

3.1.3 Resettlements of Guantanamo detainees and EU/US co-operation

The potential for the EU and European states to play a role in helping to end arbitrary detentions at Guantanamo Bay was recognised by the European Parliament in its 2007 Resolution.¹⁰¹ European resettlements are all the more needed, given the US government's decision not to release Guantanamo detainees on the territory of the US.¹⁰² The effect of this policy is to undermine the Supreme Court's ruling in *Boumediene* that the remedy of *habeas corpus* was available to detainees at Guantanamo. Although the Government accepts in principle the availability of *habeas corpus* review and the obligation to release following a court order on such a review, it contends that in practice it is not required to release detainees for so long as they cannot for reasons of *non-refoulement* be returned to their home state, and where no third country has accepted them for resettlement. In other words, it is argued that the order does not require that the individual be released in the US. This approach is contrary to the international human rights law requirement of real and effective *habeas corpus* review¹⁰³ as well as the right to an effective remedy to end arbitrary detention.¹⁰⁴ The matter is currently before the US Supreme Court, in the case of *Kiyemba v Obama*.¹⁰⁵

Currently, therefore, those detainees who cannot be settled abroad, and whom there are no grounds to prosecute, are likely to face continued arbitrary detention – or transfer in violation of the right of *non-refoulement*. It was therefore significant that the Joint EU /US statement on closure of Guantanamo Bay Detention Facility¹⁰⁶ agreed a framework for resettlement of Guantanamo detainees in EU Member States. It provides for a mechanism on the exchange of information among EU Member States and Schengen partners concerning former Guantanamo detainees to be resettled in any one state. It provides for the US to share with Member States considering resettlement, all available, including confidential, relevant information on the individual, and for the US and EU Member States to continue to share relevant information after transfer. The statement does not however address human rights issues that may arise in the resettlement of detainees, such as the imposition of restrictions on freedom of movement, or of control orders, or the use of surveillance.

¹⁰¹ para.189. See also statement of the Council of Europe Commissioner for Human Rights Thomas Hammarberg <https://wcd.coe.int/ViewDoc.jsp?id=1455269&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>

¹⁰² The Homeland Security *Appropriation Bill*, passed by the Senate on 20 October 2009, prohibits resettlement of Guantanamo detainees in the US, except for prosecution in the federal courts.

¹⁰³ Article 9(4) ICCPR

¹⁰⁴ Article 2(3) ICCPR in combination with 9(1)

¹⁰⁵ On 5 February 2010, the Department of Justice requested that the Supreme Court dismiss the case, since all of the applicants have now either been resettled or offered resettlement abroad, www.scotosblog.com/2010/02/U-S-seeks-to-end-kiyemba-case/

¹⁰⁶ Joint Statement of the European Union and its Member States and the United States of America on the Closure of the Guantanamo Bay Detention Facility and Future Counterterrorism Cooperation, based on Shared Values, International Law, and Respect for the Rule of Law and Human Rights, Press Release, 2951st Council meeting, External Relations, 10939/09 (Presse 174), 15 and 16 June 2009

A number of European countries have accepted or have reportedly indicated a willingness to accept a certain number of detainees. Such countries include Albania,¹⁰⁷ Bulgaria¹⁰⁸, Italy¹⁰⁹, Lithuania¹¹⁰, Spain¹¹¹, Estonia¹¹², Latvia¹¹³, Ireland¹¹⁴, Belgium¹¹⁵, Portugal¹¹⁶, Slovakia¹¹⁷, France¹¹⁸, Hungary¹¹⁹, UK¹²⁰, Sweden¹²¹, Germany¹²², Denmark¹²³ and Finland.¹²⁴ Italy¹²⁵ agreed to accept Guantanamo inmates to faced criminal charges there. Among the countries that officially rejected accepting any Guantanamo detainees are Austria¹²⁶, the Czech Republic¹²⁷, and the Netherlands.¹²⁸ Poland said it was “not eager” to

¹⁰⁷ <http://www.balkaninsight.com/en/main/news/26080/>

¹⁰⁸ <http://jurist.law.pitt.edu/paperchase/2009/12/bulgaria-to-consider-accepting.php> ;
<http://www.nytimes.com/2009/12/01/world/europe/01briefs-Italybrf.html?partner=rss&emc=rss>

¹⁰⁹ http://www.google.com/hostednews/ap/article/ALeqM5j3yCfdOcwjQwGYUHS_M-q3ECvGAD9CAN4000

¹¹⁰ <http://en.rian.ru/world/20091015/156479935.html>

<http://en.rian.ru/world/20090908/156057072.html>

¹¹¹ <http://www.google.com/hostednews/afp/article/ALeqM5halKZSuzs3S8sSY3lpEjM1LpqANQ>

¹¹² <http://www.oochoo.com/2009/12/01/estonia-has-refused-to-accept-prisoners-from-guantanamo/>
<http://www.baltictimes.com/news/articles/23432/>

¹¹³ <http://en.rian.ru/strange/20091106/156736939.html>

¹¹⁴ <http://jurist.law.pitt.edu/paperchase/2009/09/three-guantanamo-detainees-transferred.php>

¹¹⁵ <http://www.diplomatie.be/en/press/homedetails.asp?TEXTID=98023>;
<http://jurist.law.pitt.edu/paperchase/2009/09/belgium-accepts-guantanamo-bay-detainee.php>

¹¹⁶ <http://www.andyworthington.co.uk/2009/09/03/who-are-the-two-syrians-released-from-guantanamo-to-portugal/>

<http://jurist.law.pitt.edu/paperchase/2009/08/portugal-accepts-two-guantanamo-bay.php>

<http://www.miamiherald.com/news/americas/guantanamo/story/1207289.html>

¹¹⁷ <http://www.spectator.sk/articles/view/37682/10/newspaper-reports-that-slovakia-will-accept-three-guantanamo-prisoners.html>

¹¹⁸ <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/30/AR2009113002950.html>

¹¹⁹ <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/30/AR2009113002950.html>

¹²⁰ <http://www.hrw.org/en/news/2009/05/15/franceus-guantanamo-detainee-resettlement-welcome-step>

¹²¹ *Ibid.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ <http://www.icenews.is/index.php/2009/08/14/finland-discusses-granting-guantanamo-prisoners-asylum/>

¹²⁵ <http://www.andyworthington.co.uk/2009/07/17/italys-guantanamo-obama-plans-rendition-of-tunisians-in-guantanamo-to-italian-jail/>

¹²⁶ <http://www.austriantimes.at/index.php?id=10762>

¹²⁷ <http://www.radio.cz/en/article/115069>

¹²⁸ <http://www.nrc.nl/international/Features/article2116675.ece/Dutch-keep-doors-closed-to-Guantanamo-detainees>

accept detainees.¹²⁹ Further resettlements in EU and other European states, in compliance with the human rights obligations of those states, need to be supported and facilitated by EU external and internal policies.

3.2 Extra-territorial counter-terrorism detentions: political and judicial oversight

The 2007 European Parliament resolution encourages European states conducting military operations abroad to “ensure that any detention centre established by their military forces is subject to political and judicial supervision and that incommunicado detention is not permitted” and to “take active steps to prevent any other authority from operating detention centres which are not subject to political and judicial oversight or where incommunicado detention is permitted.”¹³⁰ The second recommendation in particular remains of relevance in regard to military operations in Afghanistan. No European state operates its own detention facilities there, but the US continues to maintain a large detention facility at Bagram Airbase, which reportedly holds more than 600 detainees.¹³¹ These include some apprehended outside of the armed conflict in Afghanistan. However, although the names of detainees have been disclosed under the Freedom of Information Act, details of citizenship, length of detention, and circumstances of apprehension have been withheld.¹³² There has been speculation that Bagram is becoming a more significant site of detention under the Obama administration, following the closure of secret detention centres, and the planned closure of Guantanamo.¹³³

A new system for review of detention of those detained by the United States at Bagram airbase was implemented from September 2009.¹³⁴ Under the new system, each detainee is assigned a military officer as personal representative. The detention is reviewed periodically by a board of three field-grade officers, and the detainees are provided with interpreters and permitted to testify and call witnesses, although they may not have access to classified evidence used against them. The new procedures have been criticised as applying lesser safeguards to Bagram detainees than to detainees held at Guantanamo.¹³⁵ They do not provide independent judicial review of detention, as required by Article 9 ICCPR.

Most worryingly, the US Government has sought to preserve Bagram detentions from the scrutiny of the US courts in *habeas corpus* applications, and the issue remains under litigation. In *Fadi Al-Maqaleh et al v Robert Gates*¹³⁶ the US District Court for the District of Columbia, following the judgment of the US Supreme Court in *Boumediene*, held that three non-Afghan detainees held at Bagram could invoke *habeas corpus* in the US federal courts. It was crucial that all three detainees had been captured outside of Afghanistan and therefore outside of the “theatre of war”; they could not legitimately be deprived of the right to *habeas corpus* review by moving them to the battlefield for the purposes of detention.¹³⁷

¹²⁹ <http://jurist.law.pitt.edu/paperchase/2008/12/poland-minister-not-eager-to-accept.php>

¹³⁰ European Parliament Resolution on transfer and illegal detention of prisoners, *op cit*, para.196

¹³¹ ACLU, Press Release, *ACLU Obtains List of Bagram Detainees*, 15 January 2010

¹³² *ibid*

¹³³ New York Times, *US to Expand Detainee Review in Afghan Prison*, September 13 2009

¹³⁴ Department of Justice, *Bagram Detention Facility to Implement Case Review Panels*, 14 September 2009

¹³⁵ HRW report, *Counter-terrorism and Human Rights, a report card on President Obama's first year*, 14 January 2010

¹³⁶ Civil Action No.06-1669, judgment of 2 April 2009

¹³⁷ *ibid*, para.25

The Government is now appealing the case before the Court of Appeals for the District of Columbia. In its brief to the Court of Appeals, the Government argues that detainees at Bagram are not of comparable status to those at Guantánamo, and that US courts have no jurisdiction over detentions at Bagram, even of those apprehended outside of the battlefield, because of the armed conflict in Afghanistan.¹³⁸

The European Court of Human Rights has also addressed the applicability of ECHR rights to detentions by ECHR States Parties, in the course of the armed conflict in Iraq. In a recent decision,¹³⁹ the Court held that there was ECHR jurisdiction regarding the detention of two suspected insurgents by UK forces in Iraq, and the subsequent transfer of the suspects to the custody of Iraqi forces. The Court applied a test of control and authority over the detained individuals, and found that the UK exercised “total and exclusive” control and authority both in fact and in law.¹⁴⁰

A particular difficulty arises where protection of human rights of detainees conflicts with obligations of the occupying forces under a Resolution of the Security Council under Chapter VII of the UN Charter. In the UK, in the case of *R (Al-Jedda) v Secretary of State for Defence*,¹⁴¹ where a detainee held by British forces in Iraq challenged his detention as a violation of Article 5 ECHR (the right to liberty), the House of Lords held that, in accordance with Article 103 of the UN Charter, binding resolutions under Chapter VII of the Charter took precedence over obligations under the ECHR. Only obligations of *jus cogens* (higher international law) could, it held, supersede a Chapter VII resolution. The case is currently awaiting consideration by the European Court of Human Rights.

Issues of *non-refoulement* arise for European states regarding transfer of detainees apprehended by them on the battlefield in Afghanistan, to the custody of either the United States, or of the Afghan authorities.¹⁴² The application of the principle of *non-refoulement* in these circumstances needs to be emphasised, to forestall transfers to situations where detainees have insufficient safeguards against ill-treatment and arbitrary detention. Furthermore, given the potential future importance of Bagram as a counter-terrorism detention centre, the EU should press the US to apply habeas corpus to detainees there.

3.3 Renditions and secret detentions: accountability, reparations and reform

3.3.1 Continuance of renditions

The 2007 European Parliament Resolution recognised the seriousness of the human rights violations involved in renditions and secret detentions,¹⁴³ condemned them as illegal practices,¹⁴⁴ and called on

¹³⁸ ICJ e-bulletin on counter-terrorism and human rights, No.36, September 2009, www.icj.org

¹³⁹ *Al-Saadoon v UK* Application no. 61498/08

¹⁴⁰ *ibid*, paras.87-89. See also the judgment of the House of Lords in *Al-Skeini v Secretary of State for Defence*, [2007] UKHL 26

¹⁴¹ [2007] UKHL 58

¹⁴² See Special Rapporteur on Torture, *Report on Visit to Denmark*, A/HRC/10/44/Add.2, 18 February 2009; Conclusions and Recommendations of the Committee Against Torture on Denmark, CAT/C/DNK/CO/5, para.12; Human Rights Committee, *Concluding Observations, United States of America*, CCPR/C/USA/CO/3/Rev.1, para.16

¹⁴³ European Parliament Resolution on transfer and illegal detention of prisoners, *op cit*, Para. F

¹⁴⁴ *ibid*, para.39

the Council and Member States to urge the US government to end these practices.¹⁴⁵ The extent of European complicity in renditions and secret detentions, highlighted by the Resolution, has since been further documented, in particular by the second report of Senator Marty for the Parliamentary Assembly of the Council of Europe, and most recently by the Joint Study of UN Special Procedures on global practices in relation to secret detention in the context of countering terrorism.¹⁴⁶ Senator Marty's second report, in 2007, documented in particular evidence of secret detentions in Poland and Romania, leading to a resolution of the Parliamentary Assembly concluding that it was now "established with a high degree of probability" that such detentions took place. The report also drew attention to the role of NATO in providing authorisation and a framework for European States' assistance in renditions.¹⁴⁷

More generally, it is clear that many states continue to resort to secret detention of persons suspected of involvement in terrorism. The joint special procedures report on secret detention found evidence of secret detention in connection with counter-terrorism practices on a global scale, not limited to detentions as part of the renditions system, or proxy detentions by states in the Middle East, North Africa or Asia on behalf of the CIA, but also extending to independent use of secret detention of counter-terrorism suspects in countries in all regions of the world.¹⁴⁸

Following the change of US administration, the US renditions programme has not been definitively ended. The executive order of 22 January on Ensuring Lawful Interrogations allows for renditions that do not transfer detainees to torture or ill-treatment, or do not themselves involve treatment amounting to torture or ill-treatment. As regards arbitrary detention, although the Executive Order orders the closure of CIA operated detention centres, and prohibits the CIA from establishing any such detention centre in the future,¹⁴⁹ the order for closure is stated not to apply to "facilities used only to hold people on a short-term, transitory basis".¹⁵⁰ The CIA Director, in a statement of April 2009, confirmed that the CIA retains authority to detain individuals on a short-term transitory basis.¹⁵¹ It therefore appears that

¹⁴⁵ *ibid*, para.8

¹⁴⁶ Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, Advance unedited version, A/HRC/13/42, 26 January 2010. The report concluded that a number of European states had been complicit in secret detentions by the United States, including the UK and Germany, by sending interrogators to question those held in secret detention; and Italy and the Former Yugoslav Republic of Macedonia, for participating in a transfer to secret detention (para.159)

¹⁴⁷ PACE report on renditions and secret detentions, 2007, *op cit*, paras.85-91.

¹⁴⁸ Joint Study on Secret Detention, *op cit*, pp.89-129.

¹⁴⁹ Executive Order, section 4(a)

¹⁵⁰ Under section 2(g) .The Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, Advance unedited version, A/HRC/13/42, 26 January 2010, also expressed concern on this point.

¹⁵¹ Statement of the Director of the CIA, Leon Panetta, *Message from the Director: Interrogation Policy and Contracts*, April 9 2009,

<https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html>

some form of renditions are authorised to continue, with detention at least for the duration of the rendition, or whilst awaiting transfer, or otherwise on a short-term basis.¹⁵² Even for a short period, detentions at CIA facilities, or informal locations, that are outside any criminal justice process, where detainees are held incommunicado and /or in secret, would undoubtedly amount to arbitrary detention in violation of the US's obligations under the ICCPR.¹⁵³ Furthermore, renditions, even where they are not renditions to face torture or inhuman and degrading treatment, are highly likely to involve arbitrary detention of the transferred person, in the course of apprehension and transfer, in the absence of a clear legal basis for the detention of the individual in the country where he is apprehended, as well as access to judicial review of detention, and to legal advice, before his transfer from that jurisdiction. Renditions, even "renditions to justice" of the kind used by the Clinton administration which transferred people to the US for criminal trial, take place outside the rule of law, and bypass the legal framework for transfer of suspects, in particular the extradition process.

The prospect of a continuing rendition programme is an issue for European states in their relations with the US, as well as with third states that may be involved in the programme – both at a political level, and potentially at a practical level if there are requests for mutual legal assistance in criminal prosecutions following a rendition.

It also creates a need for continuing vigilance, and appropriate legal standards and review and accountability mechanisms, in particular of the intelligence services, to ensure that European states themselves do not once again become complicit in a system that may involve serious violations of human rights, in violation of European states' own obligations under the ECHR, ICCPR, etc.

Also of concern for EU external policy is the development of systems of rendition unrelated to that of the US. The Shanghai Co-operation organisation and its conventions have provided for a system that includes informal transfers and kidnappings as well as expedited or legally dubious expulsions or extraditions between states in the CIS region (and China) in particular of those suspected of crimes of extremism, terrorism, separatism, or other political opposition to government.¹⁵⁴ The emergence of

¹⁵² *Message from the Director: Interrogation Policy and Contracts*, April 9 2009,

<https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html> The report of the Task Force on Interrogations envisages several forms of transfers including renditions. It states that: "in keeping with the broad language of the Executive Order, the Task Force considered seven types of transfers conducted by the U.S. government: extradition, transfers pursuant to immigration proceedings, transfers pursuant to the Geneva Conventions, transfers from Guantanamo Bay, military transfers within or from Afghanistan, military transfers within or from Iraq, and transfers pursuant to intelligence authorities."

¹⁵³ The detention will become arbitrary at the point of seizure if the suspect is apprehended by CIA agents acting abroad without legal authority from the authorities of the state in which they operate: *Ocalan v Turkey* App No 46221/99. If the suspect is initially lawfully arrested or otherwise lawfully detained by the authorities of the state in which he is present, and subsequently handed over to US authorities for rendition, or detention for interrogation, or another unauthorised purpose, then the detention will become arbitrary at that point. If, as is generally the case, the rendered person does not have access to court to challenge the lawfulness of his detention, there will be a breach of Article 2.3 and Articles 9.3 and 9.4 ICCPR. Secret detentions, where a detainee is held incommunicado and without any information being provided as to whether or where he is detained, will violate Article 9.1, as well as Articles 9.3, 9.4 and 2.3 ICCPR.

¹⁵⁴ See for example, *ICJ submission to the Human Rights Committee on the Periodic Report of the Russian Federation*; *ICJ submission to the Human Rights Committee on the Periodic Report of Uzbekistan*, www.icj.org; Eminent Jurists Panel report, *op cit*, pp.82

this system illustrates the continuing need for safeguards to be applied in European States' intelligence co-operation with third states.

3.3.2 Reparations and accountability for renditions and secret detentions in Europe

The 2007 European Parliament resolution recognised the importance of investigations by EU states into the extent of their authorities' involvement in the renditions and secret detentions system, urging prompt, independent and thorough investigations.¹⁵⁵ The same call has been made repeatedly by institutions of the Council of Europe and United Nations, in particular by the Parliamentary Assembly of the Council of Europe, and by the recent joint study by four UN special procedures.¹⁵⁶ In general, however, European states' responses to calls for investigations have been relatively poor. There has, however, been one criminal trial, concerning the kidnapping and rendition of Abu Omar in Italy by CIA agents, with the apparent co-operation of Italian intelligence services, which has led to a number of convictions (*in absentia*) of CIA agents. Further criminal investigations are ongoing, including by prosecutors in Spain and Poland.¹⁵⁷ In Portugal, a prosecutor's investigation was closed on 29 May 2009 for alleged lack of evidence.¹⁵⁸ Little information has been publicly available on the ongoing Polish criminal investigation, which is classified as secret, but according to media reports, it has been limited to questions of state officers acting beyond their powers and the loss of sovereign power over a section of Polish territory, and may not extend to acts involving international crimes or serious violations of human rights.¹⁵⁹ New information on flight logs has recently come to light in Poland under freedom of information laws, appearing to confirm the passage of rendition flights through Poland.¹⁶⁰

New allegations concerning a secret prison in Lithuania¹⁶¹ led to an inquiry by the Lithuanian parliament (Seimas) Committee on National Security and Defence whose recommendations were published in January 2010.¹⁶² Whilst acknowledging the existence of facilities for secret detentions, the Committee failed to establish whether CIA detainees were transported into or through Lithuania.¹⁶³ The

¹⁵⁵ European Parliament Resolution on transfer and illegal detention of prisoners, *op cit*, para.187, para.188, para.189

¹⁵⁶ The Joint Study on Secret Detention recommended independent investigations into allegations of secret detention, *op cit*, para.292(e)

¹⁵⁷ *ICJ Submission to the Human Rights Committee on the Periodic Report of Poland*, January 2010; *ICJ Submission to the Committee Against Torture on the Periodic Report of Spain*, 2009, www.icj.org; *Joint Study on Secret Detentions*, *op cit*.

¹⁵⁸ ICJ e-bulletin on counter-terrorism and human rights, No.35, July 2009.

¹⁵⁹ *Gazeta Wyborcza.pl, Government Triggers Official Inquiry into Alleged CIA Prisons in Poland*, 2 September 2002

¹⁶⁰ Open Society Justice Initiative, Press Release, *Fresh Evidence shows Government, CIA cooperation on renditions*, 22 February 2010

¹⁶¹ <http://abcnews.go.com/Blotter/story?id=8373807>
http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4859

¹⁶² *The Baltic Course, Investigation of possible CIA prison in Lithuania is put a period to*, <http://www.baltic-course.com/eng/legislation/?doc=22661>

¹⁶³ *Ibid.*

Committee proposed that the Prosecutor General initiate further investigations into possible abuses of power and misuse of office by Lithuanian officials.¹⁶⁴

National investigations have been hampered by a number of factors. First, European governments have been reluctant to seek extradition of suspects – this frustrated the progress of the Abu Omar trial in Italy (leading to many of the accused being tried *in absentia*) and prevented trial of suspects in the El Masry case in Germany, where the Ministry of Justice refused to forward the extradition requests of German prosecutors to US authorities.¹⁶⁵ If European investigations and prosecutions are to be fair and effective, there is a need for European governments to demand, and the US government to provide, full mutual assistance in relation to prosecutions, including in the extradition of suspects.

State secrecy has continued to be a block to investigations and prosecutions in European states, as recognised by the 2007 European Parliament resolution in relation to the investigation in Poland.¹⁶⁶ State secrets laws have hampered investigations or prosecutions in Romania, Germany and Italy, amongst others. The Parliamentary Assembly of the Council of Europe, in its resolution and recommendation following the second report by Senator Marty,¹⁶⁷ recognised the problems caused by the invocation of state secrecy, and called on Council of Europe Member State governments¹⁶⁸ to make available to their national parliaments all relevant information held by them on the State's role in renditions and secret detentions. In Germany, in July 2009, the Constitutional Court ruled that the Government's refusal to provide testimony and access to information to the Parliamentary Inquiry into alleged cooperation of its intelligence services in renditions was unconstitutional, in the absence of detailed reasons for the non-disclosure, and that a general risk of impeding relations with other states alone without detailed substantiation could not be a basis for refusing Parliament access to the information.¹⁶⁹

The 2007 European Parliament Resolution also recognises the importance of reparation by European States to the victims of rendition in which European States have been complicit,¹⁷⁰ and "calls on

¹⁶⁴ *Seimas of the Republic of Lithuania: Draft Resolution on the Findings of the Parliamentary Investigation* by the Seimas Committee on National Security and Defence approved, http://www3.lrs.lt/pls/inter/w5_show?p_r=4028&p_d=94195&p_k=2

¹⁶⁵ Spiegel online, *Germany Drops Pursuit of CIA Kidnappers*, 24 September 2007

¹⁶⁶ European Parliament Resolution on transfer and illegal detention of prisoners, *op cit*, para.170. The Resolution called for review of state secrets laws, by limiting and restrictively defining the exceptions that flow from the notion of state secrets: para.194

¹⁶⁷ PACE resolution 1562 (2007), PACE recommendation 1801 (2007), *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*

The resolution also called on NATO to disclose (18.4.) the additional components to the NATO authorisation of 4 October 2001 that have until now remained secret. The recommendation noted that invocation of concepts of state secrecy and national security had hampered judicial and parliamentary inquiries, (para3) and proposed a Committee of Ministers recommendation on the subject, to ensure that state secrecy did not extend to protect agents of the state from accountability for violations of human rights.

¹⁶⁸ *ibid*, para18.1.2.

¹⁶⁹ Bundersverfassungsgericht, 2 BvE 3/07, 17 July 2009 www.bundesverfassungsgericht.de

¹⁷⁰ Full reparation to the victims of rendition should include compensation, rehabilitation, satisfaction, including restitution and guarantees of non-repetition See, *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International*

European countries to compensate the innocent victims of extraordinary rendition and to ensure that they have access to effective and speedy compensation, including access to rehabilitation programmes, guarantees that there will be no repetition of what happened as well as appropriate financial compensation.¹⁷¹ The duty of States involved in renditions or secret detentions in violation of human rights to provide effective remedies and reparations for the victims is clearly established in international human rights law, including under the European Convention on Human Rights¹⁷² and, most recently, the EU Charter of Fundamental Rights.¹⁷³ Awards of compensation have been made to victims of renditions in Sweden in the *Alzery* and *Agiza* cases,¹⁷⁴ although no measures of restitution or rehabilitation appear to have been taken, and in November 2009 the Swedish authorities declined to issue the two victims with residency permits.¹⁷⁵ In Italy, awards of compensation were made to Abu Omar, following the conviction of a number of US intelligence agents for his rendition.¹⁷⁶

3.3.3 Reparations and accountability in the US

A significant shortcoming of the new US administration's policy is its failure to disclose key information regarding the past use of secret detentions. The locations of the CIA's secret detention facilities have never been disclosed by the US authorities. Furthermore, although the identities of some of those held in secret detention are now known, there is still a need for comprehensive disclosure of the identities of those detained, the dates of their detention, and records of the treatment of each detainee whilst held in secret detention. As the Special Procedures' Joint Study on Secret Detention noted, "clarification is required as to whether detainees were held in CIA "black sites" in Iraq and Afghanistan or elsewhere when President Obama took office, and, if so, what happened to the detainees who were held at that time."¹⁷⁷ Disclosure of such information is essential if the US is to fulfil the right to reparations of former detainees.¹⁷⁸ Full compliance with the right to reparation to the victims would also include measures of compensation, rehabilitation, and apology and guarantees of non-repetition.

Humanitarian Law, adopted by the UN General Assembly in resolution 60/147 of 16 December 2005, paragraphs 15-24.

¹⁷¹ *Op cit* Para.192. A similar call is made in the report of the UN Special Rapporteur on Counter-terrorism and Human Rights on intelligence, *op cit*, para.72

¹⁷² Article 13 ECHR; Article 2.3 ICCPR; *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, *op cit*.

¹⁷³ Article 47

¹⁷⁴ Sweden awarded damages of 3 million SEK each to the two victims of rendition from its territory, Mohammed Alzery, see *New York Times*, *Sweden to compensate exonerated terror suspect*, 3 July 2008, and Ahmed Agiza, see *The local*, *Egyptian compensated for forced deportation*, 19 September 2008.

¹⁷⁵ *Le Monde*, *La Suède refuse un permis de séjour à deux Égyptiens exfiltrés par la CIA en 2001*, 8 December 2009

¹⁷⁶ Sentenza del Tribunale Ordinario di Milano in Composizione Monocratica, sez. 4 Penale, Sentenza no. 12428/09 del 04/11/2009, depositata il 1 febbraio 2010, Motivazione, pp. 161-162

¹⁷⁷ Special Procedures Joint Study, *op cit*, para.161

¹⁷⁸ The UN Principles on Rights to a Remedy and Reparations for victims of Gross Violations of Human Rights, *op cit*, state that "victims and their representatives ... should be entitled to seek and obtain information on the causes leading to their victimisation ... and to learn the truth in regard to these violations." Pr.24; See also UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (E/CN.4/2005/102/Add.1, 8 February 2005, recommended by Commission on Human Rights Resolution

Accountability of US officials for renditions and secret detentions has been hampered by the excessive application of the state secrets doctrine to block civil suits by victims of rendition.¹⁷⁹ The Obama administration issued, in September 2009, a new policy on the use of state secrets, which states that the Department will not defend the invocation of the privilege in order to conceal violations of the law, inefficiency or administrative error or to prevent embarrassment to a person, organisation, or agency of the United States government. How the new policy will take effect in practice remains unclear; the Obama administration had previously continued to defend the use of secret of state privilege in civil suits related to renditions.¹⁸⁰

The question of the criminal accountability of those US government lawyers and other officials that authorised, directed and participated in acts amounting to international crimes, including torture and disappearances, in the course of the “war on terror” also remains unresolved. Assistant US Attorney John Durham has begun a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations.¹⁸¹ However, the Attorney General has stated that “the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.”¹⁸² Given that, under the Bush Administration, the Office of Legal Counsel provided advice that authorised acts clearly amounting to torture, this statement raises concerns that the scope of prosecutions being considered by the Department of Justice will be considerably more limited than that required by international law, which requires criminal prosecution both of officials who carry out acts of torture and those who authorise or are otherwise complicit in torture.¹⁸³ Furthermore, a recent decision of the Associate Deputy Attorney General clears the legal architects of the enhanced interrogation programme of professional misconduct.¹⁸⁴

E/CN.4/RES/2005/81 of 21 April 2005) which establish the victim’s right to know how, when, why and by whom the violations were committed.

¹⁷⁹US Court of Appeals for the 9th Circuit, *Binyam Mohammed v Jeppesen Dataplan Inc*, Case No.08-15693, D.C. No.5:07-CV-02798-JW, 28 April 2009; Brief for Redress and the International Commission of Jurists as Amici Curiae in Support of the Plaintiffs-Appellants, http://www.redress.org/documents/JeppesenAmicusFinal.REDRESS_ICJ.July10-2008.pdf

¹⁸⁰ See *Mohammed et al. v. Jeppenson, op cit*, where victims of renditions are suing the Boeing company Jeppenson for complicity in renditions. The report of the Special Rapporteur on Human Rights and Counter-terrorism on intelligence February 2009, *op cit* para.60, drew attention to the reliance on blanket claims of State Secrecy to block investigations, prosecutions or civil claims in rendition cases, and the need for a public interest test to moderate such blanket claims.

¹⁸¹ Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, www.justice.gov/ag

¹⁸² *ibid.* This reflects President Obama’s 16 April 2009 speech where he indicated that his administration did not intend to pursue prosecutions against CIA agents who carried out torture or other unlawful ill-treatment in reliance on the legal advice and instructions from superiors. He stated that it was a matter for the US Attorney General to determine whether those who formulated the policy would be subject to investigation and prosecution.

¹⁸³ ICJ Press Release, *United States: Broader mandate for prosecutor essential to achieve accountability over torture and other “war on terror” crimes*, 26 August 2009

¹⁸⁴ ICJ, Press Release, 22 February 2010, *USA: Torture is a serious crime, not “poor judgment”*; Department of Justice, Office of Professional Responsibility, Report, *Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the CIA’s use of “Enhanced Interrogation” Techniques on Suspected Terrorists*, 29 July

3.4 Intelligence cooperation and human rights

There has been increasing recognition that one of the root causes of involvement of European and other countries in renditions and secret detention was the inadequacy of intelligence review and accountability mechanisms, in particular as regards international co-operation of intelligence services. Although oversight and accountability mechanisms for the intelligence services exist in most EU Member States, they failed to raise the alarm concerning involvement in renditions and secret detentions, as well as other problematic practices of which there is now good evidence, including sending interrogators to question detainees detained arbitrarily or being interrogated under torture. The European Parliament Resolution of 2007 affirmed the principle that states cannot circumvent their international law obligations by allowing other countries' intelligence forces to operate unchecked on their territory, and recommended "that all European countries should have specific national laws to regulate and monitor the activities of third countries' secret services on their national territories, to ensure better monitoring and supervision also of their activities, as well as to sanction illegal acts or activities, in particular those in violation of human rights."¹⁸⁵ The Resolution also recognised that it was: "necessary to enhance the Conference of the Oversight Committees on the Intelligence bodies of the Member States, in which Parliament should be fully involved".¹⁸⁶ It further urged the establishment of a system for the democratic monitoring and control over the joint and coordinated intelligence activities at EU level, with the involvement of the Parliament."¹⁸⁷

Problems of lack of accountability in cooperation between intelligence agencies in counter-terrorism were also addressed by the second report of Senator Marty and the PACE resolution and recommendation that followed it¹⁸⁸, and have more recently been highlighted by the Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, and by the report of the Special Rapporteur on Human Rights and Counter-terrorism on intelligence.¹⁸⁹ Such issues do not, of course, arise only in Europe: the report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights found grave problems of arbitrary and unacknowledged detention by intelligence services in countries including Algeria, Egypt, Morocco, Jordan and Pakistan and was told at its hearing in the Middle East that the power of the intelligence services in some countries was such that they had become a "state within a state"¹⁹⁰ The report of the Eminent Jurists Panel emphasised that the new

2009. The Bar Associations of the District of Columbia and the State of Pennsylvania might yet choose to take up cases of the disciplinary proceedings in respect of the two lawyers concerned, John Yoo and Jay Bybee.

¹⁸⁵ European Parliament Resolution on transfer and illegal detention of prisoners, *op cit* Para.204

¹⁸⁶ *ibid* para.203

¹⁸⁷ *ibid* Para.206

¹⁸⁸ PACE Recommendation 1801 (2007): para.5. "As regards the improvement of democratic supervision of the activities of national intelligence services, the Committee of Ministers is invited to look into the need for member states to provide such supervision in respect of, in particular, military intelligence services as well as those foreign intelligence services operating on their territory."

¹⁸⁹ February 2009, *op cit*, paras.70-73. The report emphasised that all intelligence co-operation should be clearly governed by national law, including human rights safeguards, and recommended enhanced co-operation between national intelligence oversight bodies, and in particular that States insert a clause in their intelligence-sharing agreements making the application of the agreement subject to scrutiny by the States' review bodies and allowing the review bodies of both states to cooperate in assessing the performance of each others' services.

¹⁹⁰ Report of the Eminent Jurists Panel, *op cit*, pp.77-78.

importance of intelligence in counter-terrorism, and the human rights violations that had occurred in intelligence co-operation, meant that better regulatory frameworks were now vital.¹⁹¹

Recent reports of complicity of European intelligence services in interrogations of those held in arbitrary detention or questioned under torture have also led to calls for review of intelligence accountability mechanisms. Several European states have been accused of sending interrogators to question detainees held in Afghanistan, Guantanamo, or at other detention centres following rendition; there have also been accusations that European agencies sent questions to be put to detainees likely to be interrogated under torture. In the United Kingdom, for example, litigation in the *Binyam Mohammed* case has disclosed serious allegations of the complicity of British intelligence agents in the interrogation of a victim of rendition in Morocco. The High Court ordered disclosure of information regarding the alleged torture of Mr Mohammed, a victim of rendition detained from 2004 to 2009 in Guantanamo Bay, following his rendition to Morocco, and suggesting that British intelligence agents knew of, prior to interrogating him in Morocco. The UK government had argued that the disclosure threatened intelligence cooperation with the US, and could lead to a refusal by US intelligence agencies to continue to share information with the UK.¹⁹² Additional allegations of UK agents' involvement in interrogations abroad are now under police investigation, and there have been calls for an independent inquiry into intelligence complicity in torture.¹⁹³

At a European level, there has been little political will for intergovernmental action to set standards on accountability of intelligence services. The 2006 recommendations of the Secretary General of the Council of Europe,¹⁹⁴ for European standard-setting in the Council of Europe Committee of Ministers, on issues including intelligence accountability, were not taken up by the Committee of Ministers.¹⁹⁵ Neither has there been notable progress on standard setting at a global level, although the Special Rapporteur on Counter-terrorism and Human Rights has recommended that the Human Rights Council adopt

¹⁹¹ *Op cit* pp.163,166.

¹⁹² *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2973 (Admin); *R (Biyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] WEHC 2549 (Admin).

¹⁹³ Parliamentary Joint Committee on Human Rights, 23rd report of session 2008-2009, *Allegations of UK complicity in torture*, HL 152/HC230 paras.99-101; The Independent, *Goldsmith calls for investigation into UK's role in torture*, 14 February 2010, Equality and Human Rights Commission, Press Release, *Urgent Review needed of allegations of torture of suspects held abroad, says Commission*, 20 February 2010

¹⁹⁴ Document SG(2006)01 "Follow-up to the Secretary General's reports drawn up under Article 52 of the European Convention on Human Rights (ECHR) on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies (SG/Inf(2006)5 and SG/Inf(2006)13)

¹⁹⁵ Council of Europe, Committee of Ministers, *Secret Detentions and illegal transfers of detainees involving Council of Europe Member States: Second Report – Recommendation 1801(2007) reply from the Committee of Ministers*, adopted at the 1015th meeting of the Committee of Ministers' deputies on 16 January 2008, Doc.11493, 19 January 2008. While reaffirming governments' obligations to investigate and bring to justice those responsible for serious human rights violations, the Committee of Ministers stated only that "if necessary, [it] will consider undertaking further work in this respect." Although guidelines on impunity are currently being developed by an expert group of the Committee of Ministers steering committee on human rights, these appear unlikely to address the specific concerns relating to accountability and impunity of intelligence services.

standards on human rights and intelligence services and the Council has requested him to prepare a compilation of good practices by states in this regard.¹⁹⁶

3.5 The right to *non-refoulement* and the use of diplomatic assurances

The 2007 European Parliament Resolution, stressing the absolute international law prohibition on torture, affirmed that the use of diplomatic assurances against torture is incompatible with this obligation.¹⁹⁷ It called on the Council to adopt a common position ruling out the use of such assurances as a basis for extradition. The resolution also stressed the need to comply with the ECHR prohibition on *non-refoulement*.

The right to *non-refoulement* to face a real risk of torture, other cruel, inhuman or degrading treatment or other serious violation of human rights, has continued to face challenge, as states rely heavily on deportations as a means to protect national security. Real problems of *non-refoulement* remain in the expulsion on national security grounds of non-nationals from European states;¹⁹⁸ in transfers from the United States, including transfers of Guantanamo detainees; and in the regular transfers of suspects between states of the Shanghai Cooperation Organisation, in particular returns to Uzbekistan of individuals wanted in connection with the Andijan protests of 2005.

The absolute nature of the *non-refoulement* obligation has however been trenchantly reasserted by the European Court of Human Rights. In 2008, the absolute nature of the prohibition was challenged before the Court in *Saadi v Italy*,¹⁹⁹ in particular by a coalition of government interveners led by the United Kingdom. The interveners argued that in cases of expulsion of terrorist suspects, the risk that of treatment contrary to Article 3 ECHR by a third state should be weighed against the threat they posed to the community; and that where an individual posed a terrorist threat, stronger evidence than usual had to be adduced to demonstrate a risk of ill-treatment following transfer. The Court rejected these arguments, and affirmed that, following *Chahal v UK*, "it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another state."²⁰⁰ It held that, consistently with the absolute nature of Article 3 rights, protection of national security could not justify a higher risk of torture or inhuman or degrading treatment.²⁰¹ This was further underlined by the

¹⁹⁶ Special Rapporteur on counter-terrorism and human rights, *Report on Intelligence, op cit*; Resolution of the Human Rights Council 10/15 *Protection of human rights and fundamental freedoms while countering terrorism*, 43rd meeting, 26 March 2009, para.12.

¹⁹⁷ European Parliament Resolution on transfer and illegal detention of prisoners, *op cit*, para.G.

¹⁹⁸ See for example, Italy, Report of the Council of Europe Commissioner for Human Rights following his visit to Italy on 13-15 January 2009, CommDH(2009)16, 16 April 2009 expressed concern at deportations of terrorist suspects from Italy to Tunisia, and by credible reports that some of those deported had later been subjected to torture; Report of Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment, Report on visit to Denmark A/HRC/10/44/Add.2, 18 February 2009 expressing alarm at consideration being given by the Government to employ diplomatic assurances to return suspected terrorists to countries known for their practice of torture stressing that such assurances against torture amounted to attempts to circumvent the absolute prohibition of torture and *non-refoulement* and, are unreliable and ineffective in protection against torture and ill-treatment.

¹⁹⁹ Application no. 37201/06

²⁰⁰ *ibid* para.138

²⁰¹ *ibid* para.140

Court in the subsequent case of *Ismoilov v Russia*,²⁰² where the Court, considering a transfer from Russia to Uzbekistan of an applicant suspected of crimes of terrorism, affirmed that, despite the “immense difficulties faced by States in modern times in protecting their communities from terrorist violence ... even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct”.²⁰³

Diplomatic assurances against torture continue to be used as a means of removing terrorist suspects (and others) to countries where torture is widespread or systematic; but governments' claims that such assurances meet their obligations of *non-refoulement* continue to be met with great scepticism from authoritative sources, even where elaborate mechanisms for monitoring assurances are established. Critics emphasise that diplomatic assurances are unenforceable, allow for no redress where they are breached, and are generally sought from states where torture and ill-treatment is so prevalent as to make a government undertaking to prevent it in a particular case highly unreliable. On a more general level, it is argued that diplomatic assurances undermine the universality of international human rights protection, by insisting on human rights being upheld in one particular case, whilst implicitly acknowledging and accepting that the same rights are violated in other cases.²⁰⁴

Courts have been cautious in their approach to diplomatic assurances – not ruling out entirely their use, or their capacity to affect the treatment of detainees, but requiring careful consideration of their practical impact in each case, with particular caution being exercised as to their usefulness in countries where there is documented systematic or widespread use of torture and ill-treatment. The European Court of Human Rights held in *Ismoilov v Russia*²⁰⁵, that diplomatic assurances against torture, from the government of Uzbekistan, did not provide a reliable guarantee against the risk of ill-treatment to satisfy the obligation of *non-refoulement*, since in that country torture was reliably reported to be systematic.²⁰⁶ In *Ben Khemais v Italy*, regarding a transfer to Tunisia on foot of a diplomatic assurance against ill-treatment, the Court held the diplomatic assurance insufficient, since there was no convincing evidence of a reliable system of accountability for torture, and documented difficulties in accessing detainees in Tunisian prisons, so that there was a risk that, following transfer, it would be impossible to verify or challenge the situation of the applicant.²⁰⁷

The US continues to make use of diplomatic assurances against torture as a means of satisfy obligations of *non-refoulement*, including in the repatriation of Guantanamo detainees. The report of the Special

²⁰² Application no. 2947/06

²⁰³ *ibid* para.126

²⁰⁴ UN Special Rapporteur on Torture, Manfred Nowak, August 2005 report to the General

Assembly; UN High Commissioner for Human Rights, Louise Arbour, statement to the Council of Europe's Group of Experts on Human Rights and the Fight against Terrorism, 29-31 May 2006; EU Network of Independent Experts on Fundamental Rights, Opinion No. 3-2006, May 2006; European Parliament, February 2007 resolution P6_TA-PROV(2007)0032; Council of Europe's European Commission for Democracy through Law (Venice Commission), Opinion no. 363 / 2005, March 2006; Council of Europe Commissioner for Human Rights, Thomas Hammarberg, Viewpoint: 'The protection against torture must be strengthened', 18 February 2008.

²⁰⁵ Application no.2947.06; see further *Saadi v Italy*, Grand Chamber, Application no.37201/06; *Ryabikin v Russia*, Application no. 8320/04.

²⁰⁶ Application no. 2947/06, Para.127

²⁰⁷ *Ben Khamais v Italy* Application no.246/07 para.61

Task Force on Interrogations and Transfer Policies, in its recommendations issued in August 2009,²⁰⁸ considered that, when the US transfers individuals to other countries, it may rely on assurances from the receiving country. The Task Force recommended that all assurances should be evaluated by the State Department; that there should be an annual report on all transfers with diplomatic assurances, by the Inspector Generals of the Departments of State, Defence and Homeland Security; and that agencies obtaining assurances from foreign states should require a monitoring mechanism, to ensure consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining Government.²⁰⁹

Proposals for international or European standard-setting on diplomatic assurances (which were rejected within the Council of Europe in 2006²¹⁰) have since been raised informally by EU governments but no proposals have been officially tabled in the EU or Council of Europe. In particular, the Danish Minister for Integration suggested in 2008 the development of European Union standards on diplomatic assurances.²¹¹ This proposal was not followed up either domestically or at a European level, but such proposals may arise again under the Stockholm programme on justice and home affairs, or in any debate on joint EU/US counter-terrorism principles.

3.6 EU / US co-operation and proposed joint principles on counter-terrorism and human rights

The Joint EU/US statement on the Closure of the Guantanamo Bay Detention Facility and Future Counterterrorism Cooperation affirms the importance of respect for the rule of law and international law obligations, including under international human rights, refugee and humanitarian law. It addresses EU-US counter-terrorism co-operation generally, beyond Guantanamo resettlements, based on changes, and the expectation of further changes, in US counter-terrorism policy.

It commits the US and EU Member States to continue and deepen dialogue on international law and counter-terrorism, in particular through meetings of Legal Advisers to EU MS Foreign Ministries and the US State Department. The statement raises the possibility (cautiously) of a set of joint principles that would “serve as a common reference point within the context of our shared efforts to counter terrorism”.

The statement also contains a general commitment to deepen cooperation in counter-terrorism and related areas, including exchange of data for law enforcement purposes “while ensuring high standards of data protection”.

The potential for human rights difficulties with such co-operation is highlighted by the recent controversy regarding the SWIFT agreement on the transfer of financial transaction data between the

²⁰⁸ *op cit*

²⁰⁹ The Statement of the Task Force, *op cit* stated that “In addition, the Task Force made classified recommendations that are designed to ensure that, should the Intelligence Community participate in or otherwise support a transfer, any affected individuals are subjected to proper treatment.”

²¹⁰ Following consideration by the Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER). See ICJ Press Release, *Reject Attempts to Legitimise No-Torture Promises*, 7 December 2005

²¹¹ ICJ, Amnesty International, Human Rights Watch and Redress, Submission to the Human Rights Committee on the Periodic Report of Denmark, June 2008

EU and the US for counter-terrorism purposes, and the refusal of the Parliament to approve the agreement, in light of human rights concerns.²¹²

In any wider dialogue on international law and counter-terrorism will be important that the European Parliament should be involved in and kept informed of progress, including in the preparation of any principles. There is also a wider question of transparency, and the involvement of and consultation with NGOs and other civil society actors. The transparency of COJUR dialogue, and the involvement of the European Parliament, has been an issue in the past, notably in the 2007 European Parliament Resolution, which noted that significant meetings of COJUR, at which EU Member State knowledge of the rendition programme was discussed, were kept from Parliament and others.²¹³

In light of the current state of US counter-terrorism policy discussed in this paper, joint EU-US counter-terrorism principles are likely to bring to light fundamental differences. For the EU, it would be essential to ensure – given the obligations of all EU Member States as well as the planned accession by the EU to the ECHR – that the content of the principles did not fall below the level of protection afforded by the ECHR, the Charter of Fundamental Rights, and the human rights, rule of law and international law commitments of the Lisbon Treaty. This could be a particular issue in relation to the death penalty; renditions; administrative detention; special courts and the right to fair trial; and the right to *non-refoulement*, including the use of diplomatic assurances against torture and other serious violations of human rights. Any joint principles would need to commit the US and EU states to full investigation of all credible allegations of serious human rights violations in counter-terrorism allegedly committed by their agents or on their territory, to bringing to justice those responsible for such serious violations and to full reparations for the victims. Another baseline must be the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, adopted by the Council of Europe's Committee of Ministers in 2002. These standards would be significant in dialogue with the US, including for example in relation to the prohibition of the death penalty for crimes of terrorism²¹⁴ and the prohibition on extradition or *refoulement* to face the death penalty.²¹⁵

²¹² European Parliament legislative Resolution of 11 February 2010, *op cit*.

²¹³ European Parliament Resolution on transfer and illegal detention of prisoners *op cit* para.P, para.23 and pra.26.

²¹⁴ Principle X para.2

²¹⁵ Principle XII para.2; Principle XIII para.2

4 CONCLUSIONS AND RECOMMENDATIONS

RECOMMENDATIONS

1. As the EU renews its organisation under the Lisbon treaty, reaffirms its commitment to human rights, and responds to changes in the international climate on counter-terrorism, this is an opportune time for a stocktaking of its arrangements for counter-terrorism co-operation and their compliance with human rights, as well as of domestic counter-terrorism laws and practices. This follows from the recommendation of the European Parliament in its 2007 resolution where it: “asks the commission to undertake an evaluation of all anti-terrorist legislation in the Member States and of both formal and informal arrangements between Member State and third country intelligence services, from a human rights perspective, to review legislation which international or European human rights bodies consider could lead to a breach of human rights and to present proposals for actions in order to avoid any repetition of the matters under the remit of the Temporary Committee.”²¹⁶ Such a stocktaking exercise should now begin at EU level, possibly involving the Fundamental Rights Agency, as well as Parliament, in particular the sub-committee on human rights and the LIBE committee, working in co-operation.
2. In their foreign policy statements, and as regards their own actions, the EU institutions, including the High Representative for Foreign Affairs and Security Policy, should repudiate the serious human rights and humanitarian law violations that have been committed worldwide by many States in the name of countering terrorism. They should consistently reiterate that all forms of torture, cruel and inhuman or degrading treatment, extraordinary renditions, and secret detention are illegal and unacceptable.
3. Given the extent of the damage that has been caused to the international law framework, it remains important for the EU in its dialogue on security issues with third states to affirm the importance of international human rights and humanitarian law in countering terrorism; that the ordinary criminal justice system should be the primary means to counter terrorism; and that there is no conflict between international human rights law and effective counter-terrorism measures. In particular, in dialogue with the United States, it is crucial that the EU press for an end to renditions, administrative detention, and military commission trials that fall short of international fair trial standards.
4. The EU and European Parliament should press for consistency between internal counter-terrorism policies in EU Member States, and external policies, on the basis of the human rights commitments in the Lisbon treaty, as well as obligations under the Charter of Fundamental Rights and the European Convention on Human Rights.
5. The European Parliament should scrutinise carefully the human rights implications of counter-terrorism related projects funded through the Instrument for Stability, to ensure that human rights standards are upheld in the EU’s dealings with project partners in the target countries.
6. The European Parliament should encourage EU states to work with the US authorities in accepting Guantanamo detainees for resettlement, on conditions which respect their human rights. EU Member States should take all possible measures, including accepting detainees for resettlement, to prevent the transfer of detainees to countries where they may face torture or other serious human rights violations.

²¹⁶ para.193 See also recommendation of the Eminent Jurists Panel: “Regionally, relevant organisations should conduct a comprehensive review of regional agreements and measures on counter-terrorism, and review, where necessary, the mechanism to ensure compliance with human rights standards, including mechanisms for monitoring implementation by Member States.”

7. EU and European Parliament policy positions on US counter-terrorism detentions should not focus solely on the closure of the Guantanamo detention facility, but should look more broadly to detentions in Afghanistan, and to the likelihood of administrative detention on the territory of the US. It should question the international legal basis for such detentions, irrespective of individual detention facilities. Any joint US-EU counter-terrorism standards should reject administrative detention of suspects; and should reject “war on terror” paradigms for counter terrorism, and the administrative detention of “unprivileged belligerents” apprehended outside of armed conflicts.
8. EU institutions should encourage EU Member States to refrain from mutual legal assistance in US military commission trials, they fall short of international fair trial standards; and to refrain from transfer of suspects to US custody in Afghanistan, where detention is subject to insufficient procedural safeguards.
9. EU states should refrain from any future co-operation in informal transfer or renditions of terrorism suspects, either with the US, or with other third states. The EU should press the US to repudiate renditions and to focus attention on developing extradition treaties and other forms of mutual assistance to bring the perpetrators of crimes of terrorism to justice. In its external relations, the EU should advocate against involvement of other states in renditions – EU led or not – drawing on Europe’s own difficult experiences with renditions and secret detentions.
10. The EU and its Member States should work towards clear standards, guidelines and review mechanisms to prevent any complicity in torture, ill-treatment or arbitrarily detention. The European Parliament should consider reviewing allegations of complicity of EU states’ intelligence services in human rights violations in third states, in particular through involvement in interrogations. This review could address both Member State’s compliance with human rights obligations, and the external human rights policy implications in the third states concerned.
11. European states should lead by example in complying fully with the duty to investigate allegations of renditions and secret detentions on their territory, and to provide reparations to victims. This requires state secrecy laws and their application to be limited so as not to prevent the disclosure of information on the grounds that it discloses wrongdoing or violations of human rights or is damaging to international relations. The EU and EP should press for the US and other third states to disclose information essential to reparation for violations of human rights committed in the war on terror – including information related to secret detentions by the CIA.
12. The EU should emphasise the need for accountability for serious violations of human rights in counter-terrorism, both internally in EU member states and in third countries, including for involvement in renditions, secret detentions, and the formulation, authorisation, implementation and complicity in interrogation practices amounting to torture.
13. EU states should put in place independent and effective oversight and accountability mechanisms to ensure that their intelligence services, in particular where they cooperate with the services of other states, comply with the state’s international human rights law obligations, and do not become complicit in torture or ill-treatment, disappearances, or other international crimes. The EU and EP should facilitate co-operation between intelligence review and accountability mechanisms, and encourage the development of such mechanisms in non-EU states.
14. The EU should guard against any attempt to legitimise or regulate at EU or international levels the use of diplomatic assurances against torture, since these assurances are insufficient to satisfy the absolute prohibition on *refoulement* to torture or other serious violation of human rights. The European Parliament should call on EU states to refrain from using such assurances, first, because they lead to violations of human rights and undermine international human rights law, and second, because it weakens EU advocacy against torture in general, for the EU to be seen to strike

deals against torture in individual cases, implicitly acknowledging the prevalence of torture more generally.

15. The European Parliament should press for human rights compliant reform of listings systems, at UN, EU and national levels, insisting on the need for effective due process and redress for listed persons and entities, as well as time limitations and regular reviews of persons and entities included on terrorist lists.
16. EU foreign policy, and the European Parliament, should press for ratification of the UN Convention on Enforced Disappearances, and the Optional Protocol to the Convention against Torture by both EU and non-EU Member States, and should support the development of national preventative mechanisms, as required by the Optional Protocol to the Convention against Torture.

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