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Editorial

A new era for the rule of law

No editorial published this year could go without mentioning the election of Barack Obama as the 44th President of the United States. From JUSTICE's perspective, it is to be hoped that 20 January 2009 marked a defining moment not only in US history, but in the furtherance of the international rule of law. The weight of expectation upon the new American administration has been enormous; in the sphere of human rights, the wrongs of the preceding years that stand to be righted are grave. While many are concerned that not enough has been done to repudiate the policies of the Bush administration in the 'war on terror', there have at least been symbolic moves towards the rule of law: the announcement of the closure of Guantánamo; the order to the CIA to close its secret prisons; the public statement by Attorney General Eric Holder that 'as we work toward developing a new policy to govern detainees, it is essential that we operate in a manner that strengthens our national security, is consistent with our values, and is governed by law'.[1]

Change has come to America, and gives an opportunity to the UK to examine its own policies and practices in the context of the 'special relationship' and beyond. The return of a British resident, Binyam Mohamed (BM), from Guantánamo and the publication of allegations by him and others of UK complicity in episodes of international torture and rendition has put the most shadowy corners of Crown activity squarely in the domain of public debate. A few years ago it would have been unthinkable for the Administrative Court to find, as it did in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs,*[2] that the Security Service:[3]

> *continued to facilitate interviews by the United States authorities … when also they knew BM was still incommunicado and when they must also have appreciated that he was not in a United States facility and that the facility in which he was being detained and questioned was that of a foreign government (other than Afghanistan) and that the United States authorities had direct access to information being obtained from him.*

This episode has highlighted the need for a prompt and thorough investigation of this and other potential cases where UK officials may have committed criminal offences. As the court in *Mohamed* pointed out, under the International Criminal Courts Act 2001 the offence of war crimes under the law of England and Wales includes grave breaches of the Geneva Conventions such as, as against protected persons, torture or inhuman treatment; wilful deprivation

of the rights of fair and regular trial; and unlawful deportation or transfer or unlawful confinement.[4] Ancillary conduct is also an offence under the Act, including aiding, abetting, counselling and procuring, inciting, conspiring, and concealing the commission of offences including war crimes.[5] A dossier has now been passed by lawyers to the Metropolitan police alleging British complicity in 29 cases of alleged torture or ill-treatment.[6]

Such cases are but one facet of a government attitude to human rights overseas which has prioritised international co-operation – where it is perceived as expedient – over any real concern to promote, and prevent breaches of, international laws against torture and other abuses. This approach may have legal ramifications for individual officials: as Len Berkowitz demonstrates in his article 'Legal advice and the rule of law', those advising public authorities on the legality of their acts bear a heavy burden of responsibility. It also has consequences for Britain's global reputation, as exposed by Eric Metcalfe's article 'The false promise of assurances against torture', in which he says:

> *… the failure of the courts to properly scrutinise the use of assurances against torture is only one part of the story. The ultimate responsibility lies with the UK government in its dishonourable pursuit of assurances in the first place. After all, post-return monitoring seems a fine idea until one remembers that Eichmann was willing to consider it too. Indeed, one might have thought that that example would be reason enough for the British government to choose a different path. But to solicit such promises under the fresh guise of protecting human rights is an even more discreditable sham, one that does nothing to protect detainees in the receiving state and serves only to cheapen Britain's own reputation in the international fight against torture.*

For now, it seems, international norms must always compete with realpolitik; at an EU level, this has been shown by the advancement of co-operative measures such as the European Arrest Warrant while individual fair trial rights are neglected. As Jodie Blackstock says in her paper on 'Four years of the European Arrest Warrant':

> *… the increasing intervention of the European Union in the area of criminal justice necessitates a common set of defence standards. The pattern in previous instruments shows strong concepts proposed by the Commission are weakened and confused once the Justice and Home Affairs Council has negotiated discretionary provisions to suit its governmental agendas. This instrument must remain robust if it is to provide the essential protections that each study has shown are lacking in almost every Member State and a defendant faced with a European arrest warrant surely deserves.*

On the global stage, the historic and lasting power balance at the United Nations has led to some international crimes being more equal than others, as Wafa Shah points out in her article 'The promise of international criminal justice':

> *… effectively three of the five veto-wielding members of the Security Council, China, Russia and the US, have not yet ratified the Rome Statute, and are therefore exempt from any possible referral to the ICC unless they accept a Security Council referral for a situation within their own territory, which is inconceivable. Such exemptions, through symptomatic of a flaw within the nature of the Security Council itself, leaves the system of international criminal justice open to accusations of being fraught with double standards and does not assist to entrench a culture of accountability within the international community.*

These latter three articles all detail situations where executives are powerful, and where judiciaries and legislatures either cannot or do not hold them properly to account. The role of Parliaments, judges and lawyers is crucial if human rights and humanitarian laws are to be anything more than euphemisms or fig-leaves, or newspeak in the mouths of the duplicitous, used to castigate the conduct of an enemy and praise that of a friend. It is incumbent on courts and legislatures to be rigorous in their search for the truth and their examination of the factual reality of the human rights situation on the ground, at the cutting edge, in the practices of individual soldiers and agents and police officers and in the orders they are given. Human rights violations are factual, painful and physical: they are not prevented merely by a signature on a treaty; a protestation of virtue from a foreign government; or a memo from a legal adviser assuring its recipient that an act is legal, or does not constitute torture, or whatever else they may want to hear.

In this regard, it is a matter of regret that both the Home and Foreign Secretaries have refused to answer questions from the Parliamentary Joint Committee on Human Rights concerning allegations of UK complicity in torture of British citizens and residents in Pakistan; and it is to be welcomed that the Foreign Secretary, at least, will face such questions from the Foreign Affairs Committee of the House of Commons.[7] It is a matter of continuing concern that courts are not doing enough to look behind assurances and international agreements to ensure that norms against torture and ill-treatment are, in reality, upheld. The International Commission of Jurists, of which JUSTICE is the British section, this winter agreed a *Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*[8] which underlines the importance and the responsibilities of judges and lawyers in safeguarding human rights and the rule of law in times of crisis, real or declared. Since in the context of the 'war on terror' the state of exception has become the norm, it should be required reading for all branches of government, and those who advise them.

Notes

1 As quoted in 'Guantanamo inmates no longer "enemy combatants"', Reuters, 14 March 2009.
2 [2008] EWHC 2048 (Admin).
3 Ibid, para 88.
4 International Criminal Court Act 2001 (c 17) ss50(1) and 51.
5 Ibid, ss52 and 55.
6 M Townsend, 'Police probe 29 UK torture cases', *Observer*, 5 April 2009.
7 I Cobain, 'Inquiry into torture allegations announced', *Guardian*, 4 April 2009.
8 Available on the ICJ website.

'The Promise of international criminal justice': The key components of the new era of international criminal accountability and the International Criminal Court

Wafa Shah

This article gives an overview of the judicial institutions which form the current regime of international criminal justice. The contributions made by ad hoc tribunals, hybrid tribunals and domestic courts (through the exercise of extraterritorial jurisdiction) will be identified and an assessment of the limitations of each these methods for enforcing international criminal law will be made. In light of the obstacles and criticism faced by its predecessors, the International Criminal Court's potential to become the alternative forum of choice and to actually combat impunity and deter the commission of future crimes is then considered.

Introduction

The International Criminal Court (ICC) is seen by many as arguably the most significant international organisation to be created since the United Nations. The trial of Thomas Lubanga Dyilo, the first trial in the history of the court, opened on 26 January 2009 before Trial Chamber I of the ICC. The trial began nearly six years after the establishment of the ICC and marks the dawn of a new era in the protection of human rights. As we witness the ICC becoming a political and legal reality, it is hoped that the first permanent international criminal court will develop into the nucleus of the emerging system of international criminal justice. At present it is but a part of a web of ad hoc international courts and tribunals, hybrid tribunals and domestic criminal processes designed to corner those responsible for violations of international criminal law.[1] In the post-Nuremburg world justice is pursued with as much zeal as peace and depending on how the ICC matures over the next decade it has the potential, with the right support, to help fulfil the promise of international criminal justice its creation has engendered.

This article maps the emergence of the current regime of international courts and tribunals and the domestic methods designed to hold perpetrators of international crimes accountable in a court of law. An effort will also be made to

bring into perspective some of the shortcomings of these existing mechanisms which have limited their ability to combat impunity and deter further violations of international humanitarian law. The concluding part of this article will focus on the ability of the ICC to bridge the gaps in this fragmented system of international criminal justice as its newest operational member.[2]

From Peter de Hagenbach to Duško Tadić

In order to appreciate the developments which have lead to the current web of tribunals and mechanisms to enforce international law and the creation of the ICC, it is essential to briefly revisit two interconnected milestones which have laid the foundations for the establishment of the current regime: the first is the creation of the Nuremberg Tribunal[3] (and to a lesser extent the Tokyo Tribunal[4]); the second is the crystallisation of the concept of individual responsibility which directs the responsibility for violations of international criminal law at the individual, away from entire communities and states.

For much of its existence the enforcement of international criminal law has largely been non-existent or at best ineffectual. Justice for victims of atrocities has been historically governed by the whim of victors. The first trial for international crimes was an ad hoc trial held in 1474 to hold Peter de Hagenbach accountable for violating the 'laws of God and man'.[5] He was convicted and beheaded for murder, rape, perjury and other crimes which 'he as a knight had a duty to prevent'[6] during the occupation of Breisach.[7] Despite the fact that the idea of a permanent international criminal court was proposed by Gustave Moynier in 1872,[8] it was not until after the Second World War that individual criminal responsibility in the wake of widespread atrocities really began to feature prominently in the global political consciousness. The creation of the Nuremberg and Tokyo war crimes tribunals in the 1940s was a milestone which not only paved the way for the codification of international criminal law, but also signalled the beginning of the evolution of the law of individual criminal responsibility.[9]

Since Nuremburg, the continued efforts of the UN to codify international law, particularly through the creation of the International Law Commission in 1948, led to law, rather than force, gaining popularity as a means to monitor relations between states. Gradually individuals have joined the ranks of states as subjects of international law, deriving rights and obligations from international law. As international law has developed to include the individual, it has also converged with criminal law over the last century. The concept of individual criminal responsibility has gradually become more meaningful as substantive international criminal law has gained precision during the tenure of the two ad hoc tribunals for the former Yugoslavia and Rwanda. The judgment delivered

by Trial Chamber II of the of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of Duško Tadić was declared:[10]

> *the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal.*

The indiscriminate application of international humanitarian law to individuals from opposing sides of a conflict[11] and the use of a truly international tribunal marked the fruition of the law of individual responsibility for international crimes since Peter de Hagenbach's trial. It is now possible for international tribunals to hold a whole range of perpetrators, with different degrees of culpability, responsible for international crimes as the law of individual criminal responsibility has over the last fifty years developed into a consolidated body of principles designed to extend criminal liability to all persons who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime'.[12]

The current system of international criminal justice

International criminal law and the concept of individual criminal responsibility has made more progress in the last century than it had between the 15th century and the 19th century and this progress is largely due to the multiple forums for enforcing international criminal law, created as a reaction to large-scale atrocities which 'shock the conscience of humanity'.[13] Over the last few decades two trends have developed simultaneously: the creation of international courts and tribunals to directly hold individuals to account for international crimes, and the implementation and enforcement by states of international law through domestic legal processes.

Ad hoc tribunals

Ad hoc tribunals are temporary tribunals which are created in response to specific situations. At present two completely international ad hoc tribunals exist for prosecuting gross violations of international humanitarian law: the ICTY; and the International Criminal Tribunal for Rwanda (ICTR). The following sections will attempt to put into perspective the contributions made by these two tribunals and the role they have played within the system of international criminal justice.

The ICTY

After the end of the Cold War the Balkans plunged into a devastating and violent conflict and the humanitarian crisis which ensued presented serious diplomatic and political challenges, similar to those faced by the international community as a result of the humanitarian crisis in Gaza after the latest Israeli

offensive began in December 2008. States did not want to appear to be taking sides in an intensely complex conflict and there was much legal debate amongst scholars about the right of states to use military force in another state, without United Nations Security Council authorisation, to prevent gross violations of international humanitarian law.[14] Since the decisions were taken by the North Atlantic Treaty Organisation (NATO) to embark on operation Deliberate Force in 1995 and Operation Allied Force in 1999, this debate about the legality of humanitarian intervention has continued to divide the defenders of state sovereignty and those who believe norms of international law should trump state sovereignty.[15] In fact, the whole realm of international criminal law – its substance, its enforcement, the law of state immunity etc – have always been subject to this 'tug of war' between those who believe respecting state sovereignty is essential to maintain a balance within the current world order and those who believe the enforcement of certain norms of international law justifies curbing state sovereignty.

The gravity and systematic nature of the violations of international humanitarian law which occurred in the former Yugoslavia tipped the balance away from state sovereignty in the 1990s and compelled the international community to infringe state sovereignty in two ways: through military force; and by trying to enforce justice through an international tribunal for crimes which occurred on the territory of a sovereign state. Before NATO embarked on its 'bombs for peace' campaign, the Security Council, acting under Chapter VII of the Charter of the United Nations, established the ICTY in 1993.[16] This ad hoc tribunal was distinct from its historical predecessors as it was not a means to enforce victor's justice, but demonstrated that the political will existed to take a step away from impunity towards accountability for grave violations of international criminal law. The use of force in Kosovo by NATO and the creation of the ICTY demonstrated that the norms underpinning international humanitarian law were taking precedence over the traditional uncontested priorities of the international legal order: state sovereignty and non-intervention. This shift in priorities and the fact that the political will existed to make the ICTY a reality made the prospect of a permanent international criminal court feasible.

The achievements of the ICTY

The aims of the ICTY are to render justice to victims of crimes committed in the former Yugoslavia after 1991, deter future crimes, and contribute to the restoration of peace.[17] To date the ICTY has indicted a total of 161 individuals and proceedings have been concluded against 117 individuals. Proceedings are ongoing for 44 accused individuals and only two of the accused, Ratko Mladić (the 'Butcher of Bosnia') and Goran Hadžić, are still at large. With the tribunal's 'completion strategy'[18] firmly in place, the goal is for the ICTY to complete all proceedings by 2012. By this date it would seem the tribunal will have, to

an extent, delivered justice to some of the victims in the former Yugoslavia. Whether the tribunal has been successful to deter international crimes and in promoting lasting peace can only remain to be seen.

The achievement that is most relevant to the development of the ICC is the jurisprudential legacy left behind by the ICTY. The legal precedents set by the tribunal have defined and expanded the principles of international criminal law and some of the refinements made by judges at the ICTY have already been incorporated into the statute of the ICC. For instance in the first case the Appeals Chamber defined an armed conflict as:

> *a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.*[19]

This definition expanded the term 'armed conflict' to cover civil wars and was a broader definition than the one provided in the 1949 Geneva Conventions and their Additional Protocols. It was subsequently incorporated into the statute of the ICC.[20] The ICTY has made a number of other contributions to the corpus of international law. Most notably it has refined the principles of individual criminal responsibility and elaborated on the modes by which international criminal liability can be attributed to individuals.

The ICTR

The Security Council, acting under Chapter VII of the United Nations Charter, created the ICTR in 1994[21] to prosecute Rwandan officials for genocide, crimes against humanity and war crimes committed between 1 January 1994 and 31 December 1994.

Since becoming operational the ICTR has made a number of significant contributions to international law. In 1998 the tribunal became the first to define rape under international law and to convict an accused not only of genocide, but also of using rape as an instrument of genocide.[22] Also in 1998, the former Prime Minister of Rwanda, Jean Kambanda, pleaded guilty to genocide and was sentenced to life imprisonment, becoming the first head of state to be convicted for war crimes since Nuremberg.[23]

The ICTR has to an extent also played a stabilising role within the region and has driven national compliance with international human rights obligations. For example, Rwanda abolished the death penalty in June 2007 in order to facilitate the transfer of cases from Arusha (where the ICTR is based) to its own national jurisdiction and to facilitate the extradition of suspected war criminals

from countries which declined extradition to countries which imposed the death penalty.[24]

Are ad hoc tribunals a viable means for enforcing international criminal law?

The ICTY and the ICTR have been the subject of much criticism for their spiralling costs, shortcomings in case management, prosecution strategy and for the alleged criminals who got away (most prominently Slobodan Milošević). It was always going to be difficult to strike the right balance between expeditious trials and ensuring the trials were procedurally fair, keeping in mind the complexity of the cases and the amount of evidence required for a successful prosecution. It has also not helped that both tribunals have faced resistance from countries in handing over suspects and assisting with investigations. The perception held by some that the ICTY was a charade to justify NATO's 'bombs for peace' by demonising Serb leaders and branding them as war criminals[25] has undermined the value of the tribunal as an instrument to promote reconciliation and has exacerbated the problems of obtaining evidence and arresting alleged war criminals. Radovan Karadžić, former President of the Serbian Democratic Party, charged with genocide among other crimes, was first indicted in 1995 and was only arrested by the Serbian authorities nearly thirteen years later in July 2008, illustrating the lack of co-operation which has plagued the operation of the tribunal from its outset.

The distance between the seats of the ICTY (located in the Hague) and the ICTR (located in Arusha, Tanzania) and the communities affected by the atrocities with which they are concerned has also raised concerns that there has been a lack of local engagement with the trials which has prevented many of the victims of the gravest crimes from participating, witnessing and even knowing about the justice being handed out on their behalf. This distance has also been blamed for compromising the value of the tribunals as a means for obtaining peace and reconciliation, as it has contributed to suspicion about the activities of the tribunals amongst local communities affected by the Balkan war and the Rwandan genocide.

These criticisms, coupled by huge operational costs, have disenchanted donors and have led to questions being raised about the practical value of ad hoc tribunals as means of implementing international criminal law. In 2004 the UN Secretary General voiced concerns about the economic viability of the ad hoc tribunal model:[26]

> *Although trying complex legal cases of this nature would be expensive for any legal system and the tribunals' impact and performance cannot be*

measured in financial numbers alone, the stark differential between cost and number of cases processed does raise important questions.

The factors mentioned above have certainly raised questions about the value of ad hoc tribunals as a means for enforcing international criminal justice. As the jurisdiction of the ICC is limited to crimes which were committed on or after 1 July 2002, its establishment does not in theory preclude the creation of other ad hoc tribunals. However, in light of the intense criticism both tribunals have faced and the costly nature of their structure, it looks unlikely that completely international ad hoc tribunals will be created again.

Hybrid tribunals

Hybrid tribunals, often referred to as the 'third generation' of international criminal tribunals, are typically established by an agreement between the United Nations and a national government in the aftermath of a conflict to hold perpetrators of international crimes accountable. The structure of hybrid tribunals has developed as a response to some of the criticisms raised against ad hoc tribunals. There is no precise definition of a hybrid tribunal and the organisational structure and legal framework of existing hybrid tribunals vary. Broadly, hybrid tribunals are those which combine international and domestic elements, both within their institutional framework and in the law which they apply.

A variety of criminal bodies are referred to as hybrid tribunals. Tribunals with varying degrees of international involvement have been established in East Timor (the Serious Crimes Panels of the District Court of Dili);[27] Kosovo ('Regulation 64' panels in the courts of Kosovo);[28] Sierra Leone (the Special Court for Sierra Leone);[29] Cambodia (the Extraordinary Chambers in the Courts of Cambodia, hereinafter 'ECCC');[30] and Lebanon (The Special Tribunal for Lebanon).[31] The War Crimes Chamber in Bosnia and Herzegovina established in March 2005 can also be described as a hybrid international tribunal, despite the fact that it is a part of the Bosnian State Court. This is because it is funded with international support and is assisted in its operations by international personnel (including judges). Similarly, the Iraqi Special Tribunal (IST), which was created by the Iraqi Transitional National Assembly in 2005 to try Saddam Hussein and other Iraqi nationals or residents accused of genocide, crimes against humanity, and war crimes committed between 1968 and 2003, is sometimes also referred to as a hybrid tribunal.

Hybrid courts go some way in addressing the criticisms lodged against the ICTY and the ICTR. They combine the credibility of internationalised justice with the benefits of local prosecutions. Domestic input in trials can allay the concerns of those who resent the paternalism of wholly international

UN-led justice. The costs of operating hybrid courts are also supposedly more manageable than the costs of running international courts. In theory, the hybrid model can make justice feel more local rather than foreign by holding perpetrators to account in the region where the crimes were committed and by using a mélange of international and local laws. This may in turn prove to be a means of strengthening a tradition of justice within communities. It may also have a positive effect on domestic justice systems and local institutions, leading perhaps to a more lasting deterrent effect by revitalising the concept of accountability within societies. Many aspirational claims are made about the benefits of hybrid courts, some of which do have the potential to become reality. However, in practice just as hybrid tribunals vary in their organisation and structure, their success as legitimate, reliable institutions capable of handing out judgments concerning the most serious war crimes and crimes against humanity has also varied.

Attempts to assimilate different local laws with international law, local personnel with international personnel and different management and financial structures have led to some colossal failures and sham trials. It is widely accepted that the Serious Crimes Panels of the District Court of Dili and the IST failed to deliver the accountability they promised and failed to take advantage of the numerous benefits of hybrid models. The procedural integrity of some of the cases in both Dili and Iraq were seriously compromised, so much so that it would no longer be correct to say the tribunals met minimum international fair trial standards.[32]

Other manifestations of hybrid tribunals have been more successful in fulfilling their mandate. The Special Court of Sierra Leone has proved more effective than the hybrid model in East Timor in gaining local support and providing a legitimate tribunal which meets international standards. Its success is in part due to the fact that it is a sui generis court which operates independently of both the UN and the government of Sierra Leone. It receives its funding directly from donors, has concurrent jurisdiction and primacy over the national courts of Sierra Leone, and is guided by the jurisprudence of the ICTY, the ICTR and the Supreme Court of Sierra Leone. The court has a dedicated Defence Office which contributes to ensuring international standards of fair trial rights are met during the proceedings. One of the enduring successes of the Special Court of Sierra Leone is the efforts made by the prosecutor and the registrar to implement an outreach programme to make the Sierra Leonean population aware of the mandate of the court and to promote the concept of accountability in Sierra Leone.[33] The outreach programme, which has included town-hall meetings,[34] seminars,[35] posters and radio programmes among other initiatives, has contributed to Sierra Leonean people engaging with the work of the court.[36] These efforts will hopefully contribute to a renewed faith in the rule of law and

lead to a future in which Sierra Leonean people resort to law instead of turning to violence.

In spite of its successes, the Special Court of Sierra Leone, like other hybrid tribunals, has had its fair share of setbacks – the most prominent of which was Charles Taylor's ability to escape arrest for three years after his arrest warrant was issued. A lack of co-operation by states to assist with prosecutions is a recurring problem faced by all of the international criminal bodies established to try war crimes and crimes against humanity. Other issues which have hampered the success of hybrid tribunals include a lack of public support for fear the pursuit of accountability will destabilise a fragile peace. The decision to hold Charles Taylor's trial in The Hague (although he is being tried by the Special Court of Sierra Leone and not the ICC) rather than in Freetown was motivated by a desire to avoid fresh instability in Sierra Leone and Liberia.[37] The ECCC has also been opposed by Cambodians who feel revisiting the past and endangering stability may not be worth it when only a small proportion of perpetrators will be held accountable.[38]

The lack of support for the work of the tribunals by some states and sections of the local communities the tribunals set out to serve is attributable to a number of criticisms raised against hybrid tribunals. A common criticism of hybrid tribunals is that they are not as well equipped as wholly international tribunals to ensure trials are fair. It is claimed by some that establishing courts in countries recovering from devastating conflicts, like Cambodia where there is a distinct lack of faith in the rule of law, will only ever deliver sham trials which will have no legitimacy. Another criticism often voiced against hybrid tribunals, which is also raised against the ICC, is that hybrid tribunals, which are often established with artificial limitations on their temporal jurisdiction, are representative of the double standards in international criminal justice. The jurisdiction of the ECCC only extends to crimes committed during the regime of the Khmer Rouge between 1975 and 1979. This artificially exempts foreign leaders like Henry Kissinger who were allegedly responsible for the carpet-bombing of Cambodia and the fighting that took place prior to 1975.[39] Similarly the Special Tribunal for Lebanon only has jurisdiction to prosecute 'persons responsible for the attack of 14 February 2005 resulting in the death of former Prime Minister Rafiq Hariri and in the death or injury of other persons'.[40] The creation of a tribunal motivated by the need to investigate the death of one individual in Lebanon has raised eyebrows, considering there have been many calls for a tribunal to investigate and provide justice to the victims, on all sides, of the fighting between Hezbollah and Israeli forces in 2006 which allegedly led to the deaths of more than 1,000 people in Lebanon.[41] Selecting which deaths are important enough to warrant accountability is a dangerous game to be playing when the

international system of justice is still trying to gain legitimacy and international support.

As with any mechanism for implementing international criminal law, hybrid tribunals have their advantages and their drawbacks. The fact that hybrid tribunals have succeeded in some aspects and failed in others demonstrates that some conflicts require unique mechanisms for enforcing post-conflict justice. The ability of hybrid tribunals to increase local engagement and assist in promoting the concept of accountability within communities makes them an indispensable feature of a system of international criminal justice which aims to promote peace and reconciliation.

Domestic procedures for enforcing international criminal law

In addition to the special courts and tribunals created by the international community, several states have taken measures which initiate domestic mechanisms to combat impunity. These include, among other measures, extradition treaties, the formation of investigative commissions, and the enactment of legislation which enables domestic courts to prosecute perpetrators of serious violations of international criminal law. Notwithstanding the value of other measures introduced by states, this article will only focus on the exercise of extraterritorial jurisdiction by domestic courts as a measure for enforcing international law.

Many states have implemented legislation authorising their courts to exercise jurisdiction over international crimes committed abroad by utilising one or more of the principles of extraterritorial jurisdiction.[42] However, as states differ in their position on the inter-relation between international law and municipal law, domestic courts in many countries have been left with limited extraterritorial jurisdiction over international crimes. The next section of this article will briefly look at some of the more prominent cases in which extraterritorial jurisdiction has been exercised to prosecute perpetrators of international crimes in order to illustrate some of the issues and concerns which have restrained the exercise of extraterritorial jurisdiction within domestic courts and prevented the widespread exercise of universal jurisdiction[43] to combat impunity for international crimes.

The most recent example of a state exercising extraterritorial jurisdiction on the basis of the active personality principle[44] occurred in 2008 with the trial of Charles 'Chuckie' Taylor, the son of Charles Taylor, former Liberian President and warlord. In January 2009 Charles 'Chuckie' Taylor was sentenced to 97 years in prison[45] for committing torture and conspiring to commit torture. He was the first person to be convicted under the United States 'Extraterritorial Torture Statute'[46] which grants US courts jurisdiction over torture committed abroad so long as the alleged offender is a US national or is present in the US. The statute

was enacted to implement obligations under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and similar legislation was also passed by the other states parties and the UK.[47] In granting US courts jurisdiction over non-nationals present in the US for committing acts of torture abroad, the 'Extraterritorial Torture Statute' indicates the US has embraced a theory of universal jurisdiction. However, there have been no cases in the US utilising the principle of universal jurisdiction yet.

Another fairly recent landmark event which awakened the world to the possibility of trials in national courts utilising the principle of universal jurisdiction was the arrest of Augusto Pinochet in London on 16 October 1998 in response to an international arrest warrant issued by Balthasar Garzón, a Spanish magistrate. The charges against him included, inter alia, 94 counts of torture of Spanish citizens. The House of Lords ruled that Pinochet was not entitled to immunity from prosecution for torture committed during his tenure as head of state and stated that in principle Pinochet could be extradited to face trial for torture and conspiracy to torture committed after 29 September 1988, when the UK enacted section 134 of the Criminal Justice Act 1988 and made torture an extraterritorial offence.[48] Much has been written about the importance of this groundbreaking judgment and there is no doubt that the judgement of the House of Lords in *Pinochet 3* has laid the foundations for some of the recent developments in international criminal law. Before *Pinochet 3* the trials of Radovan Karadžić and Charles Taylor Senior for crimes committed as former heads of state may have seemed unlikely, and the warrant issued by the ICC for a serving head of state, President Omar al-Bashir of Sudan, may have been inconceivable. However, despite the storm which followed *Pinochet 3* universal jurisdiction has yet to be exercised readily by states and though some states have enacted legislation granting their domestic courts universal jurisdiction over some international crimes, not all international war crimes and crimes against humanity are covered.

Leaving aside jurisprudential arguments about the right of states to exercise universal jurisdiction, one of the major reasons why the potential of universal jurisdiction has not been tapped as effectively by national courts as it could be to truly combat impunity is a lack of political will. The political opposition to the exercise of universal jurisdiction has its foundations in the traditional commitment within the doctrine of international law to state sovereignty and non-interference. Opponents of universal jurisdiction claim that allowing the national courts of a foreign state where violations of international law have not occurred to subject past and present leaders of another nation to prosecution sets a dangerous precedent and threatens the international political order.[49] Some also claim the exercise of universal jurisdiction, and the exercise of extraterritorial jurisdiction on the basis of nationality or state interests, opens

the floodgates for politically motivated trials, and to 'lawfare' (a form of warfare waged by using international law to attack an opponent on moral grounds to promote state interests and military objectives).[50]

It has also been argued that the double standards exhibited by Western states during the selective exercise of extraterritorial jurisdiction are demonstrative of a will to use international law to promote foreign policy objectives. Whilst Garzón's efforts to hold Pinochet to account have been applauded by many, Judge Jean-Louis Bruguière, a former French magistrate, has come under intense criticism for attempting to indict the Rwandan president Paul Kagame and for issuing arrest warrants for 9 other senior Rwandan officials for allegedly orchestrating the 1994 assassination of President Juvenal Habyarimana in order to provoke the genocide against their own ethnic group for personal political gain.[51] The Rwandan official position is that the indictments are politically motivated attempts by France to distract from its own role in the in the 1994 Rwandan genocide.[52] Rwanda's chief of protocol, Rose Kubuye, who was arrested in Germany in November 2008 on a French arrest warrant, stated:

> *These indictments are an abuse of international law. It is political and judicial bullying that Rwanda will not accept.*[53]

Rwanda's position, if correct, provides support for the contention that granting national courts the jurisdiction to try foreign leaders can set a dangerous precedent. Rwanda's desire to counter-indict French officials for their complicity in the Rwandan genocide[54] further demonstrates the diplomatic pitfalls the exercise of extraterritorial jurisdiction can present. Two sides of a protracted international conflict could take advantage of national courts in unconnected countries, empowered with universal jurisdiction over war crimes, to win the moral high ground in a conflict by targeting officials from adversary states and subjecting them to extradition requests. A comparable situation occurred in the Belgian courts through the use of a broad universal jurisdiction law enacted by Belgium in 1993 (amended in 1999) which gave Belgian courts jurisdiction over perpetrators of genocide, crimes against humanity and war crimes regardless of where the crimes took place or whether the suspects were Belgian.[55] Cases alleging violations of international humanitarian law, which could have led to arrest warrants and extradition requests, were lodged against both Ariel Sharon and Yasser Arafat in Belgium despite the fact that neither was in the country. Belgium eventually had to trim its universal jurisdiction laws in 2003 when it came under political pressure by the US, after cases were lodged against President Bush, Colin Powell and Dick Cheney through the same law.[56]

Though the exercise of extraterritorial jurisdiction has been welcomed in the cases of Pinochet and Charles Taylor Junior, other cases demonstrate that the

use of extraterritorial jurisdiction to combat impunity can lead to a number of complications, especially when it is exercised on the basis of the principle of universality. There is no way to ensure the discretion available to national prosecutors with regard to selecting whom to prosecute is handled responsibly in order to avoid universal jurisdiction becoming another tool for promoting foreign policy objectives. The arbitrary exercise of universal jurisdiction could eventually prevent the fulfilment of the promise of international justice as it raises questions about the motivations behind and the impartiality of the enforcement of international law. Just as arbitrary enforcement would be detrimental for a domestic criminal justice system, it is lethal for a nascent system of international criminal law, which is still struggling to gain legitimacy. The ICC therefore has a vital function to perform in preventing the perception of international criminal justice as a means for 'lawfare' or an arbitrary system of flawed, selective accountability.

The ICC: eradicating impunity and deterring further violations of international humanitarian law

As is evident from the preceding discussion, no method for enforcing international criminal law is flawless. The ad hoc tribunals are expensive to run and are limited in their ability to revitalise a belief in accountability by their lack of permanence and their distance from the regions where the atrocities were committed. Hybrid tribunals are unpredictable in their effectiveness and despite being able to accommodate unique solutions for post-atrocity justice some of them have failed to provide credible forums for accountability, which undermines the quest for impunity. The exercise of universal jurisdiction is open to abuse and its arbitrary exercise has lead to disenchantment with international criminal law as a whole. Keeping in mind this struggling fragmented system for the enforcement of international criminal law, the ICC has many gaps to fill in order to make the promise of international criminal justice a reality. This article will now move on to assess the ability of the ICC to fulfil the two primary aims of the system of international criminal justice: ending impunity and deterring future atrocities and violations of international criminal law.

Eradicating impunity

The ICC has jurisdiction over genocide, crimes against humanity and war crimes[57] taking place after 1 July 2002.[58] It does not have universal jurisdiction but can only exercise jurisdiction when:

i The accused is a national of a state party or a state otherwise accepting the jurisdiction of the court;

ii The crime took place on the territory of a state party or a state otherwise accepting the jurisdiction of the court;[59] or

iii The United Nations Security Council has referred the situation to the

> Prosecutor, irrespective of the nationality of the accused or the location of the crime.[60]

As a permanent court which is not limited to jurisdiction over crimes committed within a specified region, the ICC is much better equipped to make a real contribution towards eradicating impunity. However, there are two shortcomings with the jurisdictional authority of the ICC. The first is in relation to the inability of the court to exercise jurisdiction over events taking place before the entry into force of the Rome Statute, which could well translate into impunity for perpetrators who committed atrocities before that date unless preventative measures are taken by the international community. Ideally national courts should hold perpetrators to account, but in reality countries recovering from widespread atrocities seldom have the institutional capability or the will to hold perpetrators to account in their own national courts. The only alternatives are the exercise of universal jurisdiction by other states or the creation of ad hoc or hybrid tribunals. However, Belgium's failed attempt at providing its courts with universal jurisdiction and the reluctance by states like the US, and to some extent the UK,[61] to allow their courts and the courts of other states to fully exercise universal jurisdiction due to ideological opposition and the political inconvenience it causes makes it unlikely that universal jurisdiction will make any systematic attack on impunity. This leaves the option of the creation of more hybrid international tribunals. The agreement between the UN and Cambodia to create the ECCC was reached in 2003, after the establishment of the ICC, to try perpetrators for crimes committed between 1975 and 1979, indicating that perhaps the political will does exist to close the jurisdictional loophole in the Rome Statute. However, funding controversies, allegations of corruption and doubts about the fairness of the trials which have plagued the ECCC[62] suggest the creation of such tribunals in the future may not be very popular. Even if they are, the arbitrary temporal limits to the jurisdiction of both the ECCC and the Special Tribunal for Lebanon illustrate that at present the jurisdictional rules within the system of international criminal justice, despite its many tribunals and the option of universal jurisdiction, have effectively granted some perpetrators freedom from prosecution.

The second shortcoming relates to the provision for exercising jurisdiction through a Security Council referral. By virtue of Article 13(b) of the Rome Statute, the Security Council has the power to confer the ICC with jurisdiction over crimes committed by the nationals of states which have not accepted the jurisdiction of the court and over crimes committed on the territory of such states. This power was exercised when the Security Council referred the situation in Darfur to the ICC,[63] conferring the ICC with jurisdiction over nationals of Sudan, a state which is not a party to the Rome Statute. The Security Council

has already exercised its powers under Chapter VII of the Charter of the United Nations to create international criminal tribunals and confer them with jurisdictional authority over crimes committed on the territories of Yugoslavia and Rwanda. However, what makes Article 13(b) controversial, and perhaps detrimental to the success of the court, is that effectively three of the five veto-wielding members of the Security Council, China, Russia and the US, have not yet ratified the Rome Statute, and are therefore exempt from any possible referral to the ICC unless they accept a Security Council referral for a situation within their own territory, which is inconceivable. Such exemptions, though symptomatic of a flaw within the nature of the Security Council itself, leaves the system of international criminal justice open to accusations of being fraught with double standards and does not assist to entrench a culture of accountability within the international community.

For the ICC to be successful in eradicating impunity it is essential that the justice it promotes is demonstrably apolitical and indiscriminate, otherwise it will face the same pitfalls the exercise of universal jurisdiction has faced. There is hope that the ICC will eventually achieve this goal. Most domestic criminal jurisdictions, in the early years of their establishment, were unable to guarantee that everyone would be subject to the law: the rich and powerful often escaped, and in some countries, still escape prosecution. Perhaps with time, and increasing international support, the ICC will be able to wield jurisdiction over the three Security Council members through voluntary ratification.

Deterrence

The ICC differs from its predecessors in that it has prospective jurisdiction and was not created to adjudicate on violations of international law which have already occurred, but on those that may occur after its establishment. The fact that the ICC has jurisdiction to investigate the situations in Congo, Uganda, the Democratic Republic of Congo and the Central African Republic is evidence that the ICC has not had an immediate deterrent effect and the long-term effect of the ICC in preventing atrocities is yet to unfold.

In order to deter the commission of violations of international humanitarian law it is instrumental that the ICC plays a role in providing closure for victims of atrocities and promoting reconciliation and stability amidst wartorn communities. One of the criticisms against the ad hoc tribunals was that their existence sabotaged the prospect of peace. It was claimed that the indictments by the ICTY 'demonized Serb leaders and made them ineligible for any peace negotiating process'.[64] Before the ICC issued a warrant for President Omar al-Bashir, speculation was rife about the effect the warrant would have on the situation in Darfur. Some claimed it would lead to unrest and derail the peace process;[65] others insisted the threat of a warrant was an extremely effective

negotiating tool.[66] It was even suggested that Joseph Kony, the leader of the Lords Resistance Army in Uganda, be offered amnesty from prosecution in exchange for ceasing hostilities.[67] It is unclear whether indicted rebels, oppressors and warmongers are likely to settle if they know that whatever the final result of the conflict, victory or defeat, they will face prosecution at the ICC. It is also unclear whether or not the threat of a warrant or the offer of amnesty will lead to the abandonment of hostilities in favour of amnesty or domestic prosecution. What is clear is that in its operation the ICC will be making choices between justice and peace. As peace and stability are vital to prevent further atrocities, the Prosecutor of the ICC will always be treading on thin ice. Withdrawing indictments or deferring prosecutions in exchange for peace and in response to stiff negotiating tactics by perpetrators of international crimes will lead to impunity for tougher negotiators. This may undermine the pursuit of international criminal justice, and it is possible that prosecutions that can be avoided by clever strategy may not have a genuine deterrent effect at all.

The road ahead

Attempts at enforcing international criminal law have always struggled to combat financial, ideological, practical and political obstacles. The ICC cannot provide accountability for many of the most serious international crimes which have occurred in the past; it is also incapable of single-handedly providing a forum of accountability for the international crimes which may occur in the future. In light of this it is essential that:

- There is a concerted campaign to ensure states enact legislation empowering courts to exercise universal jurisdiction over the full range of war crimes and crimes against humanity which occurred before 1 July 2002;
- To ensure universal jurisdiction remains a credible means for combating impunity, countries must strengthen their methods of investigating war crimes and where possible create independent specialist units to monitor the exercise of universal jurisdiction;
- It is essential to promote awareness about the work of the ICC to encourage citizens to persuade their governments to co-operate with the ICC;
- Citizens, NGOs and pressure groups in countries which have not accepted the jurisdiction of the ICC, especially the US, China and Russia, must campaign to persuade their governments to become states parties to the Rome Statute;
- Awareness of the different hybrid tribunals created in post-conflict regions must also be promoted so that states are encouraged to offer them funding; where the ICC is unable to exercise jurisdiction, and the national courts are not equipped to try individuals for international crimes, further hybrid tribunals should be created to complement the work of the ICC.

Up until now, the enforcement of international criminal law has often reeked of of victor's justice, double standards and paternalism. It has also been subject to the demands of state interests. The development of the current patchy system of international criminal justice has been moulded by the tension between states that are reluctant to allow an encroachment of their sovereign authority, and the need to end impunity and promote a culture of accountability for the sake of victims of mass atrocities. The ICC will continue to face obstacles which are symptomatic of this tension, in the form of a lack of international co-operation; challenges to its legitimacy; and the constant undermining of its credibility. The length of time it took for the first trial to start at the ICC is evidence of how complex the business of international criminal justice is and will continue to be. It is therefore those who have the most to gain from an effective system of international criminal justice: citizens, NGOs and pressure groups, not states, who will be instrumental in assisting the work of the ICC through political support and continued pressure on their governments.

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Notes

1 In this article 'international criminal law' will be used to refer to genocide, war crimes, crimes against humanity, and torture, as opposed to 'transnational crimes' (ie crimes under domestic law which have transborder effects).

2 Two hybrid tribunals have become operational after the ICC: the Special Tribunal for Lebanon, which became operational on 1 March 2009 in The Hague; and the Extraordinary Chambers in the Courts of Cambodia which became fully operational in June 2007 in Cambodia.

3 Established by the London Charter of the International Military Tribunal, issued on 8 August 1945.

4 The International Military Tribunal for the Far East was established on January 19, 1946, by order of General Douglas MacArthur, the Supreme Commander of the Allied Forces in the South Pacific.

5 CK Hall, 'The First Proposal For a Permanent International Criminal Court', *International Review of the Red Cross*, 31 March 1998, pp57-74.

6 Ibid, p59.

7 W Schabas, An introduction to the International Criminal Court, Cambridge University Press, 2001, p1.

8 CK Hall, n6 above.

9 Prior to the creation of the Nuremburg Tribunal the status of individual responsibility for the violation of international humanitarian was ambiguous. The Hague Conventions of 1899 and 1907 and the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War had no clear provisions on the punishment of individuals who violated their rules. The 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field had a vague reference to repercussions for individuals who violated the convention in Article 30: 'On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention; when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.'

10 *Prosecutor v Duško Tadić,* Opinion and Judgement, Case No IT-94-1-T, 7 May 1997, para 1.

11 Along with Serbs, the Prosecutor of the ICTY has also indicted at least 15 Croats, 8 Muslims, 8 Albanians and 3 Macedonians. A complete list of indictments is available on

the ICTY website.
12 Article 7(1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia S/RES/827 (1993).
13 Preamble to the Rome Statute of the International Criminal Court (1998), UN Doc. A/CONF.183/9.
14 For views regarding the right of unauthorised humanitarian intervention see B Simma, 'NATO, the UN and the use of force: legal aspects', *European Journal of International Law*, September 1999, pp1-22 and A Cassese, 'Ex iniura ius oritur: Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?', *European Journal of International Law,* February 1999, pp23-30.
15 For a general overview of the debate see P Hilpold, 'Humanitarian intervention: is there a need for a legal reappraisal?', *European Journal of International Law*, September 2001, pp437-468.
16 On 22 February 1993, the Security Council unanimously adopted S/RES/808 (1993), deciding in principle to establish the ICTY. The resolution incorporating the Statute of the ICTY is S/RES/827 (1993).
17 Message from PL Robinson, the President of the ICTY delivered in The Hague in December 2008, available on the ICTY website.
18 Endorsed by the UN Security Council in resolution S/RES/1503 (2003) and S/RES/1534 (2004).
19 *Prosecutor v Tadic*, Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72 (1995), para 71.
20 Article 8(2)(e)-(f) of The Rome Statute of the International Criminal Court (1998), UN Doc. A/CONF.183/9.
21 S/RES/955 (1994).
22 *Prosecutor v Jean-Paul Akeyesu*, Case No ICTR-96-4 (1998).
23 *The Prosecutor v Jean Kambanda*, Judgement and Sentence, Case No ICTR-97-23-S (1998).
24 'Rwanda Abolishes Death Penalty', *Amnesty International News and Updates*, 2 August 2007.
25 M Mandel, How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity, Pluto Press, 2004, p127.
26 Report of the UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616 (2004), p14.
27 Created by the United Nations Transitional Administration of East Timor (UNTAET) on 6 March 2000 by adopting UNTAET/REG/2000/15.
28 Created by the United Nations Mission in Kosovo (UNMIK) on 15 December 2000 by adopting UNMIK/REG/2000/64.
29 Created by the UN and the Government of Sierra Leone on 16 January 2002 by adopting the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court of Sierra Leone.
30 Created by the UN and the Government of Cambodia on 6 June 2003 by adopting the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of democratic Kampuchea.
31 Created by the UN and the Lebanese Republic by adopting the Agreement on the establishment of the Special Tribunal for Lebanon, which entered into force on 10 July 2007.
32 For a more detailed discussion of the institutional failures of the Special Panels for Serious Crimes see David Cohen, 'Indifference and accountability: The United Nations and the politics of international justice in East Timor', *East-West Center Special Reports,* No 9, June 2006; for more on the failure of the IST to provide defendants with due process see Human Rights Watch, 'Iraq: flawed tribunal not entitled to U.N. legitimacy', January 14, 2004.
33 'The Prosecutor launches 'Accountability Now Club' at Fourah Bay College', Special Court of Sierra Leone press release, 1 July 2004.
34 'Prosecutor for the Special Court begins holding town hall meetings', Special Court of Sierra Leone press release, 27 September 2002.
35 'Special Court Prosecutor addresses seminar participants; encourages perpetrators to talk to the TRC', Special Court of Sierra Leone press release, 27 February 2003.

36 *First Annual Report of the President of the Special Court for Sierra Leone*, 31 March 2004.
37 'The Prosecutor's meeting with Civil Society of Sierra Leone', Special Court of Sierra Leone press release, 12 April 2006.
38 S Peou, contribution to 'The Promises and Limits of International Criminal Justice: The "Extraordinary Chambers" in Cambodia', roundtable discussion, University of British Colombia (UBC), February 2006, available on UBC Centre for Southeast Asia Research website.
39 C Hitchens, The Trial of Henry Kissinger, Verso, 2002, p5.
40 'If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks, Article 1, Statute of the Special Tribunal for Lebanon, annexed to Security Council Resolution 1757 S/RES/1757 (2007).
41 'Revisiting a War That's Seldom Discussed', *Washington Post*, 20 April 2008.
42 The four principles of extraterritorial jurisdiction are: (1) the active personality principle whereby states reserve the right to exercise jurisdiction over crimes committed abroad on the basis of the nationality of the perpetrator; (2) the passive personality principle whereby a state exercises jurisdiction whenever one of its nationals is the victim of an offence committed abroad; (3) the protective principle whereby a state exercises jurisdiction when an offence committed abroad harms that state's vital national interests; and (4) the universal jurisdiction principle whereby states claim the right to try someone for a crime committed in another state which is not linked to the forum state by the nationality of the perpetrator or the victim or by harm to the state's own national interests. For a more thorough explanation of the principles of extraterritorial jurisdiction see G Gilbert, Transnational Fugitive Offenders in International Law: Extradition and other mechanisms, Martinus Nijhoff Publishers, 1998, pp86-104.
43 Cf n41 above for a definition.
44 Ibid.
45 'Liberian warlord's son gets 97 years in US prison', Reuters, 9 January 2009.
46 United States Code ss2340 and 2340A (1994).
47 S134 Criminal Justice Act 1988.
48 Cf *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* (No 3) [1999] 2 All ER 97 (HL), hereinafter referred to as 'Pinochet 3'.
49 H Kissinger, 'The Pitfalls of Universal Jurisdiction', *Foreign Affairs*, July/August 2001.
50 The term 'lawfare' was used by Charles J Dunlap, Jr in 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts', presented at the Humanitarian Challenges in Military Intervention Conference, Kennedy School of Government, Harvard University, Washington, DC, 29 November 2001.
51 See J-L Bruguière, *Deliverance de Mandats d'Arret Internationaux*, Tribunal de Grande Instance de Paris, 17 November 2006.
52 'Rwandan Government's reaction to Judge Brugiere's indictment saga', at http://www.rwandagateway.org/IMG/pdf/bruguiere_2_-2.pdf.
53 'Top Rwandan aide chooses French terror trial', *Guardian*, 10 November 2008.
54 Ibid.
55 Officially titled 'Loi du 16 Juin 1993 relative a la repression des infractions graves aux Conventions internationales' (The Act of 16 June, 1993 Concerning the Punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977). This statute incorporated the 1949 Geneva Conventions into the Belgian legal system, and provided for universal jurisdiction as applied to war crimes only. In 1999, the law was amended to include crimes against humanity and genocide.
56 Other defendants included Iraqi President Saddam Hussein, Rwandan President Paul Kagame, Cuban President Fidel Castro, former Chadian President Hissène Habré and former Chilean President General Augusto Pinochet. However many of these cases were not taken forward by the Belgian justice system.
57 Article 5(1) of the Rome Statute.
58 Article 11 (1) of the Rome Statute.
59 Article 12 of the Rome Statute.

60 Article 13(b) of the Rome Statute.
61 The UK is yet to enact legislation to enable it to prosecute individuals suspected of having committed genocide before 2001.
62 'Cambodia's Khmer Rouge tribunal makes slow progress', Open Society Justice Initiative, 12 December 2008.
63 UN Doc. S/RES/1593 (2005).
64 ES Herman, 'The Hague tribunal: The political economy of sham justice – Carla del Ponte addresses Goldman Sachs on justice and profits', *Global Research*, 20 November 2005.
65 *Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur*, UN Doc S/2009/83, 19 February 2009, para 58.
66 'If peace comes to Darfur, thank the International Criminal Court', *Telegraph*, 18 December 2008.
67 'Ugandan rebel leader offered amnesty', *Independent,* 5 July 2006.

Four years of the European Arrest Warrant: what lessons are there for the future?

Jodie Blackstock[1]

The Council Framework Decision (the Framework Decision) on the European Arrest Warrant[2] *(the EAW) was the first instrument adopted under the Hague Programme's ambitious attempts to harmonise elements of criminal procedure across the European Union member states. It has now been in force in the majority of member states for four years. This article seeks to examine how the scheme introduced by the Framework Decision (the scheme) has been received in the member states, and what improvements, if any, are required in the European Union area of criminal justice.*

The European Commission website proclaims as follows:[3]

> *The European arrest warrant implements a decision taken in October 1999 by the European Council - the heads of state or heads of government of all 15 EU countries - at Tampere, Finland, to improve judicial co-operation in the European Union and, in particular, to abolish formal extradition procedures for persons "who are fleeing from justice after having been finally sentenced". Its effectiveness depends on EU Member States trusting each other's legal systems and accepting and recognizing the decisions of each other's courts. Its objective - which is agreed by all EU states - is to ensure that criminals cannot escape justice anywhere in the EU.*

At the time of the proposal, JUSTICE was heavily involved in the scrutiny of the instrument, and once adopted, produced a publication titled European Arrest Warrant: A solution ahead of its time?[4] The publication detailed the effects of each provision and provided the implementing legislation for a number of member states. It outlined as follows:[5]

> *The EAW fundamentally changes extradition practice in a number of ways. The key changes introduced by the EAW are:*
>
> ***Removal of the double criminality requirement*** *for 32 types of offence for which, in pre-conviction cases, a maximum sentence of three years' imprisonment or more can be incurred and, in conviction cases, a sentence of four months has been imposed. There is also a possibility of abolishing double criminality for all extradition offences.*

Removal of the role of the executive *in the extradition process so that it becomes an exclusively judicial procedure between the designated judicial authorities of the issuing and executing member states.*

Optional abolition of specialty *by prior declaration in relation to all states that have made similar declarations.*

Abolition of the exception to extradite own nationals.

Abolition of the political offence exception.

Imposition of strict time limits *at each stage of the extradition proceedings.*

Effectiveness of the EAW

Since the Framework Decision came into force in 2004, the Commission in its most recent report (the Commission report) has heralded the EAW as 'successful.'[6] It is the first instrument to demonstrate the effectiveness of judicial co-operation in the area of criminal justice. The Commission reaches these positive conclusions by analysing criteria that evaluate the implementation of framework decisions in general (practical effectiveness, clarity and legal certainty, full application, compliance with the time limit for transposition) and criteria specific to the EAW (principally the fact that it is a judicial instrument, its efficiency and its rapidity). It explains that all member states have transposed the Framework Decision and its use has increased year on year with surrender taking place overall within the binding time limits, which are much shorter periods than following conventional extradition procedures.

According to the study by Nadja Long, *Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level*[7] (the LIBE study), 6,900 arrest warrants were issued in 2005. In 2007 this had increased to 9,413, issued by 18 member states. Germany, France and Poland issued the most EAWs in 2007, at 1,785, 1,028 and 3,473 respectively. In both years, 22% of those requested were actually surrendered. The most requests honoured were those issued by the UK at 99 of 185. The fewest requests complied with were those issued by Poland at 434 of 3,473.

The UK position

In the UK in the fiscal year 2007/2008, 1,274 EAWs were received by the Serious Organised Crime Agency. As of 27 August 2008, it had already received 1,255 for the year 2008/2009.[8] 37% of those received in 2007/2008 were for minor offences from Poland.[9] The number of warrants received in the UK have increased year on year since its inception. The large number emanating from Poland results

from the absence of a public interest test in the decision to prosecute there, necessitating the prosecution of every alleged offence.

Maurice Kay LJ observed in the stolen mobile telephone case of *Zak v Regional Court in Bydgoszcz*:[10]

> *one is becoming used to European extradition cases for less serious offences than used to come before the courts for extradition, but in my reasonable experience of cases under the 2003 Act I have never seen one quite as low down the calendar as this.*

Giving effect to the surrender requests received has been costly for the UK. Detective Sergeant Gary Flood of Scotland Yard's extradition unit was quoted in the *Guardian* saying that the majority of these offences would receive either a caution or no action at all in the UK,[11] yet a Polish military plane is required every three weeks to send back those surrendered. The same article recorded the observations of District Judge Evans of the City of Westminster Magistrates' Court, where all extradition hearings are heard. He considered that the CPS needs more lawyers and the court needs more time and courtrooms to cope with the increase in requests for surrender. He thought it doubtful that the necessary resources would be made available due to a £90m shortfall in the courts' budget. He also condemned the present arrangements for legal aid for defendants in extradition hearings, describing them as a disgrace.

Whilst the Metropolitan Police Service Management Board has apparently taken the decision to delegate responsibility for executing EAWs to forces around the country,[12] such a move would require training for police, prosecutors, defence lawyers and judges to handle such cases. The required funding is unlikely to be made available in the near future. However, the UK government proposes for the UK to join the Schengen Information System II, if and when it begins to function.[13] At that point, substantially more surrender requests will be received through the alert system, which will no doubt put more strain on the system. However, migrant workers from the EU are registered throughout the UK, with the largest numbers in Anglia and the Midlands.[14] Inevitably, EAWs require transport of the defendant to London for the surrender process to run its course. This process is likely to cause difficulties for the person arrested whilst going through the court process, which should take between 10 days where the person consents to surrender and 90 days on a contested hearing with appeal (although the UK does not specify a time limit for appeals). A lengthy process will separate arrested persons from their home, work and family. If remanded in custody (a likely corollary given the type of proceeding), this will no doubt cause problems with maintaining work and family life. There is therefore a strong argument for the surrender process to be decentralised, and for resources to be made available

for a national system, through appropriate training of specialist units located around the country.

An obvious resolution to the large increase in EAWs would be for minor offences to be removed from the process. Rosemary Davidson advocates caution in that an offence that may seem trivial to the requested state may not be so in the issuing state. A simple mobile phone theft (such as in *Zak*) may be one of a string of such offences committed by the person, or endemic in that member state. She observes that these details are not included in the EAW and should not be:[15]

> *An investigation into the reasons for the inclusion of a particular offence in the EAW would undermine the purposes of speed and efficiency set out in the Framework Decision, and fly in the face of the mutual trust upon which the system is based.*

Placed in context, however, the Framework Decision came very swiftly after the 11 September 2001 terrorist attacks on the United States. Its use was intended for serious offences. One way of reducing the number of requests that have to be processed would be to impose a higher sentencing threshold. Although a crime must be punishable by a maximum sentence of at least three years for an offence where dual criminality is abolished and the person is requested for trial, that period reduces to a maximum of at least twelve months where dual criminality checks are made.[16] It also reduces when the person has been convicted and is requested to serve the imposed sentence, to a maximum of at least twelve months for an offence where dual criminality is abolished, or four months where dual criminality checks are made.[17] This period could be increased to a three year threshold throughout to ensure that less serious crimes are excluded.

Instigation in Europe

Part of the recent increase in requests can be attributed to the resolution of initial problems experienced in attempting to transpose the Framework Decision. Its implementation was not an easy process for all member states: provisions conflicted with constitutions, leading to the transposing law being struck down by constitutional courts in Poland, Germany, and Cyprus. In those states, amendments were made not to the transposing legislation, but to existing constitutional provisions to enable the scheme to work as envisaged in the Framework Decision.[18] In contrast, the Constitutional Court of the Czech Republic[19] held that member states of the European Union had to have mutual trust in each other's legal systems, including in criminal matters, and that Czech citizens, being in possession of European citizenship, had to assume the obligations as well as enjoy the rights that went with that status. Accordingly,

the temporary surrender of a Czech citizen for sentencing or punishment is not contrary to the Czech Constitution, which cannot be construed as forming an obstacle to the effective transposition of a rule of European law.[20]

Equally, the European Court of Justice (ECJ), when asked to rule as to whether the Framework Decision was in conformity with the Treaty of the European Union (TEU), confirmed that it infringed neither the principle of legality in criminal matters nor the principle of equality and non-discrimination (Articles 34(2)(b) TEU and 2(2) of the Framework Decision respectively). Significantly, the ECJ clarified that it could consider questions as to the interpretation and validity of framework decisions insofar as they conform with primary law, in this instance Article 34 TEU. With respect to the choice of offences to which dual criminality no longer attaches, the court looked to the basis of the principle of mutual recognition in the light of the high degree of trust and solidarity between the member states. Whether by reason of their inherent nature or the punishment incurred of a maximum of at least three years' imprisonment, the categories of offences in question are sufficiently serious, in terms of adversely affecting public order and public safety, to justify dispensing with the verification of double criminality, and are therefore objectively justified.[21] The judgment affords a legally legitimate reason why minor offences should not be included in the scheme.

Uniformity of implementation in the member states

The LIBE study equally observes that:[22]

> *Due to the varying national implementation Acts throughout Europe, the grounds for refusal of execution listed in the Framework Decision are often treated differently from one country to the next.*

It suggests that this can be explained by practical difficulties, such as incomplete information through which the designated authority is to identify the requested person. Implementing legislation also includes refusal to surrender in order to protect fundamental rights. This arguably converts Recitals 12[23] and 13[24] into mandatory grounds for non-execution. Given the context of these recitals it is difficult to see how else they should be addressed, yet the Commission report criticises this approach (particularly of Italy) because it goes beyond the Framework Decision.[25]

The UK mandates refusal at sections 21 and 25 of the Extradition Act 2003 (EA) when a surrender would not be compatible with the person's rights under the Human Rights Act 1998 or when it would be unjust or oppressive in light of the person's physical or mental condition. Additional bars to extradition that are not provided by the Framework Decision are found in s11 EA:

…
(b) extraneous considerations (race, religion, nationality, gender, sexual orientation, political opinions);
(c) the passage of time;
…
(e) hostage-taking considerations;
…
(g) the person's earlier extradition to the United Kingdom from another category 1 territory;
(h) the person's earlier extradition from a non-category 1 territory.

With respect to removal of the dual criminality requirement, this is in fact still checked in Germany where there is no clear national equivalent, in Poland where a national is requested and in the UK when the crime has been partially or wholly committed outside of the requesting Member State. Italy and Estonia even continue to check dual criminality for all crimes.[26]

The Commission report equally observed that some Member States are still not fully complying with the scheme envisaged in the Framework Decision.[27] Transitional provisions in some countries do not conform with the dates prescribed in the Framework Decision, and nationals are either not surrendered before a particular date or only upon a dual criminality check. Provisions have been 'erroneously' modified upon transposition as follows:[28]

- modification of the required minimum sentence thresholds (Article 2/NL, AT, PL; Article 4(7)(b)/UK);
- appointment of an executive body as the competent judicial authority in whole (Article 6/DK) or in part (DE, EE, LV, LT);
- decision-making powers entrusted to the central authorities, going beyond the mere role of facilitation (Article 7/EE, IE, CY);
- alteration of grounds for mandatory non-execution (Article 3(1)/DK, IE); Article 3(2)/IE), or worse, introduction of grounds for refusal going beyond the Framework Decision (Article 1(3)/EL, IE, IT, CY, PL);
- imposition of additional conditions (Article 5(1)/MT, UK; Article 5(3)/NL, IT) or of particulars or documents not mentioned on the form (IT, MT);
- routinely asking for additional information or even to insist on the arrest warrant being reissued (UK, IE);
- in relation to the surrender of nationals, introduction of a time limit (Article 4(6)/CZ and PL for nationals) and of conversion of the sentence imposed in another Member State (CZ, NL, PL);
- procedural vagueness when it comes to obtaining the wanted person's consent (Article 13/DK; Article 14/DK);
- diversity of practices in relation to 'accessory surrender';

- absence of a maximum time limit for the higher courts' decision (Article 17/ CZ, MT, PT, SK, UK) or a total maximum time limit exceeding the standard 60 days (BE) or the 90-day ceiling in the event of a final appeal (FR, IT).

Also of relevance is the Council Report on the Netherlands, where it was noted, amongst detailed observations, that there is no appeal mechanism in place.[29]

Cases before the courts in England and Wales

Bars to extradition are frequently raised before the courts and have been considered on appeal. The majority of reported decisions consider ss21 and 25 EA and passage of time arguments under s14 EA as set out below. It seems that there are no reported appellate decisions regarding the other s11 EA bars.

In *Slivka v District Court of Prague, Czech Republic*,[30] the Administrative Court held that reliance upon an interference with Article 8 of the European Convention on Human Rights (ECHR) had to be based on an exceptional feature of the case. In the circumstances of the case, Mr Slivka was being returned to serve a sentence. The fact of that return would place him in no different position to being remanded in custody to serve a sentence in the UK. Leveson LJ did not consider that the effect on Mr Slivka's family would be such as to amount to an Article 8 infringement, as he did not consider, given that his children had been present in the UK for nine years, that their immigration status would be affected by the return of Mr Slivka.

With respect to Article 3 ECHR, in *Ignaoua and others v the Judicial Authority of the Courts of Milan and others*[31] the Administrative Court rejected the argument that the appellants, who were accused of involvement in a terrorist organisation in Italy, if surrendered, could face onward extradition to Tunisia where they would be subjected to ill-treatment. The court accepted the categorical assurance given by Italy that it intended to try the appellants in Italy and would not extradite the appellants without the UK's consent.

In *Jaso and Others v Spain*,[32] the appellants argued that there was a real possibility that the evidence upon which the prosecution against them was based was obtained by torture. Furthermore, if they were extradited to Spain there was a real risk that they would be subjected to incommunicado police detention for up to five days before being brought before a judge, in breach of Articles 3, 5 and 6 ECHR. The Administrative Court dismissed the appeal, holding that the relevant question was whether there was a real possibility that, if such evidence was indeed obtained by torture, it would be admitted. There was no evidence that the Spanish court would not faithfully seek to apply the right to a fair trial under Article 6 ECHR. Spanish law provided for the exclusion of unlawfully obtained evidence, and evidence showed that there was no suggestion of

evidence obtained by torture being admitted by the Spanish courts. Although incommunicado detention was permitted under Spanish law if the court had grounds to believe that knowledge of a suspect's detention would prejudice the investigation, the arrests had long since been publicised throughout Spain. In those circumstances, incommunicado detention could not be justified, and as such there was no risk of breach of Convention rights.

As to s14 EA, in *Lisowski v Regional Court of Bialystok (Poland)*,[33] the Administrative Court considered that a delay of 11 years was sufficient to create a bar. This was in circumstances where the evidence of the appellant given during the extradition hearing was such that he would have difficulties locating witnesses and evidence by which to defend himself. Furthermore, the Polish authorities had not produced any evidence to support the contention that after such a passage of time they would be in a position to pursue the allegations. Poland raised an allegation that the appellant had evaded the charges. The District Judge had made no finding to that effect however, and the appellant had given evidence that he had returned to Poland throughout the period of residing in the UK, including for one period of three weeks where he had hired a car. He maintained that he had no idea that charges had been laid against him, rather he had been interviewed at the outset and released. Walker J, in considering that extradition would be unjust, relied upon the oft-quoted passage of Lord Diplock in *Kakis v Government of the Republic of Cyprus*:[34]

> *'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair.*

In *Oraczko v District Court of Krakow*[35] the Administrative Court considered that surrender would not be unjust or oppressive given the passage of nine years living in the UK, when the District Judge had made findings that the appellant had fled the country to evade the conviction and service of sentence and there was no reason to conclude that the judge was wrong on those findings. The court again relied upon Lord Diplock in *Kakis* where he said that when a person evades charge, any consequent difficulties arising from the delay are of his own choosing, and it will only be in exceptional circumstances that an extradition will be unjust or oppressive.[36]

In *Louca v the Office of the Public Prosecutor in Bielefel, Germany, and others,*[37] the court dismissed the appeal on the basis that Mr Louca had not established a causal link between the four year period of delay and the estimated effect on his

family and business, which in any event he had not produced any evidence to support. There was no reason why the same effects would not have taken place four years earlier. The alleged result would not be as a consequence of the delay. He also relied upon Article 8 ECHR. The court referred to *Jaso*[38] in which it was held at paragraph 57 'that there would have to be striking and unusual facts to lead to the conclusion that it would be disproportionate to interfere with an extraditee's article 8 rights.' It was observed in *Louca* that if Article 8 were to be relied upon successfully in this type of case, there would be a real danger that the Framework Decision would become a dead letter.

In *Jaworski v Regional Court Katowice, Poland,*[39] the Administrative Court made similar findings in that the appellant fled from serving a ten month sentence and caused the delay himself, such that he could not rely on passage of time. However, with regards to a second charge laid after he had fled to the UK and alleging behaviour constituting an offence some 14 years previously, the position was different. Not only would it be difficult to mount a defence given the passage of time, the fact that he was a registered carer for his wife and received benefits for this in the UK meant that an extradition to face the charges would be unduly oppressive to his wife's care. His return was therefore ordered to serve the finite 10 months sentence in respect of the first request, and the second request was dismissed. Cases will inevitably turn on the facts presented to the courts. However, a decision of the House of Lords in *Goodyer and Gomes v Trinidad and Tobago*[40] is expected imminently to resolve the question of when delay, in part attributed to the actions of the suspect, can be effectively relied upon.

With respect to s25 EA, in *Olah v Regional Court in Plzen, Czech Republic*[41] the Administrative Court was faced with an interlocutory appeal from the refusal of the District Judge to grant an adjournment to obtain a psychiatric assessment, which might then have provided grounds for dismissal of the EAW. The court was satisfied that the application should have been granted, given that there had not been time in the chronology of the proceedings to have had such an assessment carried out prior to that stage. There was no mechanism provided in the Act by which the matter could be remitted and so the court reconstituted itself to deal with the matter by way of judicial review, quashing the extradition order and remitting the matter back to the District Judge to allow the medical assessment to take place.

Two interesting decisions taken at first instance are firstly, that of *Famagusta District Court, Cyprus v Jason Wright and others,*[42] in which Senior District Judge Workman refused the surrender request having heard the accounts of the defendants alleging serious assault, ill-treatment and racial abuse by the Cypriot police in order to gain confessions and guilty pleas to 31 charges. The defendants

relied upon the expert evidence of Dr John Joyce of the Medical Foundation for the Care of Victims of Torture who concluded that the allegations and injuries were consistent with ill-treatment. Whilst the Cypriot authority denied this conduct, the judge criticised the adequacy of their inquiries and ruled that their treatment was contrary to Article 3 ECHR. Significantly, the judge was satisfied that, had it been an accusation case, the Cypriot courts could have dealt with such allegations appropriately. However, given that it was a conviction case and that the defendants had been present to enter guilty pleas, he was not satisfied that they would be entitled to a retrial at which their Article 6 ECHR rights would be protected.

Second is the case of *Germany v Dr Frederick Toben,*[43] which would have proved highly controversial, given that the charge was alleged anti-Semitism and holocaust denial disseminated through the internet, but the request was denied by District Judge Wickham for want of particularity as to the location and times of the offences. It would be reasonable to conclude that for the most part the UK courts are attempting to ensure that interpretation of the arguments before them is not only in conformity with the intentions of the Extradition Act 2003, but also the principles contained within the Framework Decision.[44]

Mutual recognition, co-operation and trust

However, in the European Criminal Law Academic Network's study, *Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union*[45] (the ECLAN study) the writers conclude, having reviewed the progress so far, that mutual trust was simply assumed to exist by the European Council of Cardiff and equally presupposed by the Council of Tampere. In reality, this trust is still not spontaneously felt and is by no means always evident in practice, even if mutual confidence between member states' judicial and prosecution authorities appears to be growing. All those interviewed agree that mutual confidence is a learning process; it really does have to evolve and grow, and this requires nurturing and a positive frame of mind of the two parties: confidence is given, but it is also earned.

The European Council has been conducting research over the past couple of years into the implementation of the EAW, with 19 reports concluded.[46] The detail in these reports provides comprehensive analysis of the practical application of the scheme. An overview of the first seven countries has been prepared,[47] from which it is possible to briefly summarise some findings which accord with the studies already mentioned. The report starts positively:

> *in general terms, stakeholders and authorities involved in the operation of the EAW have a very positive opinion of the new system. An immense majority is of the view that the EAW has significant advantages compared*

> *with the previous extradition regime and emphasize its benefits. This is further underlined by the statistics that shows* [sic] *that in general in the EU, a contested procedure for surrender takes on average 43 days.*

However, the writers observe that in some member states, judicial authorities are reluctant to fully accept the principle of mutual recognition: dual criminality is still a reality in a number of instances (although Estonia has now indicated that it is due to legislate to remove this), and requests for excessive or over detailed information, and even re-issue of the warrant are prevalent in the UK and Ireland (as found above). There are also instances where the law is not clear and judges have not made use of *Pupino*.[48] The writers did, however, consider that these initial difficulties would phase out the more the scheme was used, and familiarity between member states increased.

The report further comments that central authorities, rather than judicial authorities, are still playing a large part in governing the procedure. This is so on decisions to postpone or to conditionally surrender. In Denmark the Ministry of Justice continues to decide whether to issue or whether to execute a warrant. SIS alerts are scrutinised and requests for further information are being raised centrally, rather than through a judicial authority. The experts considered these interventions to be against the letter and spirit of the Framework Decision. Interpretation of the law differs widely so that similar cases are treated differently, notwithstanding the common instrument and form of the Framework Decision. Consequently a handbook has been devised which may lead to a more uniform approach to decision-making.[49]

The report highlighted communication problems between some member states and frustration that judicial authorities expressed at the lack of information provided by their counterparts. Conversely, some member states had arrangements in place which they praised as working very efficiently. The report gives the example of the Ghent prosecutors' office initiative, which has translated the basic documents and legal provisions concerning in absentia judgments into all EU languages, to be made available on request.

There were practical problems in complying with member states' time limits, which diverged across the differing implementing legislation, and particular resource problems with translation within those time limits. This could lead to poor translation, so that additional requests were necessary, thereby increasing the time taken and leading to further frustration with the other member state. Mechanisms aimed to assist facilitation of EAWs were underused, both those within national systems, and also 'fiches Françaises',[50] the European Judicial Network Atlas and Eurojust. Although some countries, Portugal in particular, had commendable training practices, there was much need for improvement across

the member states. There was wide disparity between publicly funded defence representatives and judicial and prosecuting authorities with respect to their familiarity with EAW procedure and other member states' legal systems. There was also a clear need for improvement in knowledge of other EU languages.

The report concludes by raising the question whether, given four years of operation and the cumulative experience observed, supplementary action is now required. The Czech Presidency announced a review of the scheme at the outset of its presidency in January 2009.[51] No doubt this will make use of the practical observations made in the implementation reports, together with feedback from the institutions at EU level. The assertion of Czech Justice Minister Jirí Pospísil that improvements could be made, in answer to comments that the procedure is being abused, is a positive indication that practical benefit may be gained from the detailed scrutiny undertaken in this area since the scheme commenced.

Protection of defence rights

Notwithstanding the multitude of variations that the member states have included in their transposing legislation of the Framework Decision, conspicuous by their absence are mutual procedural safeguards for defendants faced with an EAW. It is accepted that contained within the Framework Decision are obligatory provisions that the person arrested has the right to be informed of the content of the EAW (Article 11) as well as the right to be heard by a judicial body in case he or she opposes surrender (Article 14). Also, the surrender may be 'temporarily postponed for serious humanitarian reasons' (Article 23(4)) and Recitals 12 and 13, as explained above, recall the prevention of human rights violations. It is submitted that these alone are insufficient.

The ECLAN study explains that all lawyers report that at present the principle of mutual recognition does not benefit the defence and that there is no real balancing of interests between prosecution and defence.[52] Since the time limits in the scheme are very short and the grounds for refusal limited, defence lawyers play a minor role in the hearing and surrender procedures. In addition, they do not have access to the file or any contact in the issuing member state. Added to that is the fact that the legal profession does not have sufficient access to information and training on the new instruments, and lacks the means to ensure continuity and a fully effective defence in cross-border situations.

The Tampere European Council Presidency Conclusions[53] requested the Council and Commission to adopt a programme of measures to include work on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, while respecting the fundamental legal principles of the Member States. The Commission Communication to the Council and the

European Parliament of 26 July 2000 on Mutual Recognition of Final Decisions in Criminal Matters[54] considered this to mean as follows:

> *it must therefore be ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the principle [of mutual recognition] but that the safeguards would even be improved through the process.*

This was endorsed in the Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters[55] which provided that this programme should include 'mechanisms for safeguarding the rights of … suspects' (parameter 3) and 'the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition' (parameter 4).

The successor to Tampere, the Hague Programme, adopted by the European Council on 4 November 2004, set out the objectives for the area of freedom, security and justice for the period 2005-2010. It contained the following declaration at paragraph 3.3.1:

> *The further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions. In this context, the draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005.*

The Proposal for Procedural Safeguards[56] (the proposal) was presented by the Commission in April 2004. Its aims were to ensure access to legal representation both before and at trial, access to interpretation and translation, protection of vulnerable suspects and defendants, consular assistance for foreign detainees, and the notification of suspects and defendants as to their rights. Its explanatory memorandum considered it incumbent upon the Member States to ensure that proper care is taken of the growing number of EU citizens who could find themselves involved in criminal proceedings in a Member State other than their own, given the increasing number of people exercising their right to freedom of movement.

The study *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*[57] consists of an examination of the replies to a Commission questionnaire. The analysis focuses on the five rights contained in the proposal. The study sets out a comprehensive list of questions and answers in tabular

form, which document the legislative provisions of each Member State as at 2002/2003 when they responded. Although the report contains detailed analysis, it is possible to provide a summary here. Most Member States do provide some level of safeguard, but at that time, this varied widely in terms of its provision and did not in many circumstances guarantee the rights as envisaged in the proposal. For example, the point when legal representation may be made available, whether a lawyer will be present in the interview, on what basis legal aid can be provided, whether interpreters or translators require qualification, whether and what provision is made for vulnerable persons and what type is recognised. Pointedly, provision varies even between England and Wales, Scotland and Ireland, never mind the newer, Eastern Bloc countries.

Notwithstanding both the declarations, and the assertion to Parliament that procedural safeguards would closely follow the Framework Decision on the EAW, this has not come to fruition. The Council unceremoniously rejected the proposal in 2007[58] on the basis that agreement could not be reached. It is thought that this is largely due to a mission on the part of the UK to subvert its adoption, for reasons that can be suspected.[59] It is hoped that the Swedish Presidency will reintroduce the proposal in the second half of 2009, but it will naturally not take the previously comprehensive form, and suggestions coming from within Sweden are that they will propose a focus on one right at a time, with consideration as to whether any binding requirements can be agreed in relation thereto. This does not differ too markedly from the Commission's stance in the Green Paper (the precursor to the proposal),[60] where it was considered that:[61]

> *Some rights are so fundamental that they should be given priority at this stage. First of all among these was the right to legal advice and assistance. If an accused person has no lawyer, they are less likely to be aware of their rights and therefore to have those rights accepted. The Commission sees this right as the foundation of all other rights.*

However, there is a risk that 'rights' viewed in isolation may be as ineffective as no safeguards at all. Having a lawyer is all very well, if you can pay for him/her, and if you can understand what he/she is saying. A holistic approach must therefore continue to be considered.

It is anticipated that the position will be clarified in the 'Stockholm Programme' to follow Hague. Of course, if the Lisbon Treaty is adopted, unanimity will no longer be required. As a consequence there may be more chance of a set of rights being agreed. However, these rights may well be insufficient if the process of debate reduces their impact. JUSTICE will continue to pay close attention to developments in this area, and as a member of the Justice Forum and Experts

Meeting will hope to contribute to the proposal that the Commission will put forward.

In light of the Council's rejection of the proposal, the Commission tendered for studies that would provide empirical evidence of the need for such a set of standards, notwithstanding the accession of all EU Member States to the ECHR. JUSTICE, together with the Open Society Justice Initiative, University of the West of England and the University of Maastricht, is currently conducting a study on Effective Criminal Defence Rights.[62] The research seeks to identify a set of specific minimum 'practical and effective' safeguards required of any state to meet the underlying principles of a fair trial as developed by the European Court of Human Rights. It compares the provision of defence safeguards across nine countries: two new member states (Poland and Hungary); three old member states where data suggest that there may be an issue about compliance with ECHR with regard to indigent defendants (France, Italy and Germany); two old member states where no issues of compliance appear to arise (England and Wales and Finland) and an accession state (Turkey). The study will produce detailed reports on the criminal justice system of each country and present its findings in book form during 2010.

Prison conditions

The Commission also initiated the study *An Analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU*.[63] The initial draft of the report shows that it looked at the numbers in the pre-trial detention population in each member state, reasons for initial detention, grounds for continuing detention and length of detention amongst other observations. Again, the report is very detailed.

The study, referring to European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) reports, states that overall many member states have overcrowding in terms of the number of pre-trial places available, such that in a number of countries, long periods could be spent in police custody before transfer to remand accommodation. This was particularly the case for juvenile defendants. Consequent to this problem it was found that there was reduced availability to work or attend activities; unhygienic, cramped conditions; lack of privacy; burden on healthcare facilities; and increased tension leading to more violence amongst prisoners and staff. With the overcrowding problems, some member states' rules are observed in the breach. In a large number of countries (including the UK), remand prisoners could be in their cells for as much as 23 hours per day, although in Malta, prisoners are out of their cells for 11 hours a day and in Cyprus 17 or 18 hours. The study noted with concern the possibility of being held incommunicado, a practice in Spain in some circumstances (as observed above in *Jaso*).

With respect to juveniles, the age of criminal responsibility varied between 8 in Greece, to 18 in Belgium, with all age ranges in between, and variation of treatment depending upon the alleged offence. Approximately half of the member states have specific juvenile regimes, while half do not treat juveniles differently to adults. Most countries did not make a distinction for the treatment of women in prison. Foreign prisoners are over-represented in most member states, both at pre-trial and sentence stages. In nearly all circumstances, they are to be expelled upon release and are therefore not afforded the same reintegration programmes as nationals.

Almost all countries legislate for the provision of information sheets explaining the rights of the detainee, right to legal aid, right to consular assistance, and to be assisted by an interpreter. However, they observe that these rights are often not provided in daily life. Most countries have a time limit for detention (up until the point of trial), though this can be extended by judicial decision. Luxembourg does not have a time limit, but remand will be terminated as soon as it equals the likely imposed punishment for the offence! In some countries the period of remand depends upon the seriousness of the offence. Few countries provide average figures for length of time on remand, and count from different periods, ie including the trial phase, or pre-sentence phase, and from different years, making it virtually impossible to compare these periods. The final report will no doubt provide interesting conclusions on the evidence collected, and possibly ammunition in surrender proceedings.

The position of overseas territories

It should be recalled that a number of member states continue to hold overseas territories: the UK,[64] France,[65] Spain,[66] the Netherlands[67] and Portugal.[68] These are not routinely considered when arguments with respect to defence rights are made. There is very little information available as to the standards of the systems in these territories in comparison to their governing/mainland state, or indeed the rest of Europe. However, it is possible to discern from the declarations made that the EAW scheme does apply to the outermost regions of the EU,[69] being the French overseas departments,[70] the Azores, Canaries and Maldives. The EAW also applies in Gibraltar,[71] which has transposed its own Extradition Act. It is therefore entirely possible that an EAW could be requested for the return of a person either to or from one of these territories.

The United Nations Committee Against Torture noted in its 2005 meeting on the third periodic report of France, that there was no mention by France in the report as to its overseas territories.[72] Mention is not made of the overseas territories in the most recent reports on Spain, the UK or Portugal. The CPT has carried out observations on some territories, however. It visited Réunion in 2005.[73] The overall recommendations were that overcrowding had to be reduced,

particularly in pre-trial detention, by means of legislative act and/or judicial supervision; hygiene and sanitary conditions needed improvement; activities should be provided for detainees; and an increase in medical staff was required, with a first aid trained member of staff being present at all times. Confidentiality with respect to medical records was required. There were concerns with regard to violence and abuse amongst detainees and by officers, and sanctions for abuse were recommended. The rights of pre-trial detainees needed to be disseminated, and access to a lawyer should be provided. The Committee also sent a delegation to French Guiana in December 2008 which assessed the conditions in the only prison, the police cells and immigration detention. The release of the report will be subject to the French government's approval.

Human Rights Watch prepared a report on the position of immigrant children in the Canary Islands during 2007.[74] The results are worrying. Following the unprecedented arrival of some 900 unaccompanied children by boat from Africa in 2006, Canary Islands authorities opened four emergency centres to provide for their care, which are makeshift and large-scale facilities. The centres are regularly overcrowded due to the inability of authorities to keep pace with the continuous flow of arriving children. They are isolated from residential neighborhoods and cut off from municipal services, freedom of movement is severely limited, and few hours of education are provided. Children are at risk of being subject to violence and ill-treatment by other boys as well as by the staff in charge of their wellbeing. Notwithstanding recent agreements for repatriation of children to their home countries, with the building of centres to receive them (some through funding from the EU Commission), many children were returned through ad hoc repatriation flouting the principle of non-refoulement.

It was reported in Gibraltar last year[75] that the prison population had soared and that there was a pressing need for the building of the new prison to be completed. There were concerns about security and welfare in the old prison, with some cells lacking basic sanitation. The isolated position of the outermost regions should not be forgotten when advocating the need for minimum procedural safeguards across the member states.

The way forward

As mentioned above, the Czech Presidency has announced a review, amongst calls for further consideration of the practical effects of the Framework Decision. There are clear deficiencies identified in the reports, both with transposing domestic legislation, but also with the content of the Framework Decision itself. It is hoped that the planned review will use the Working Group Fourth Round Reports, together with the other available studies, to propose effective amendments to the scheme.

There has been much legislative activity since the Framework Decision came into force, which will also have a bearing on the scope of the review. The implementation of the Framework Decisions on mutual recognition of sentences[76] will enable enforcement in the executing member state, and should not require the person in the case of post-conviction EAWs to leave that member state at all. As Davidson observes,[77] enforcement of non-custodial penalties will ease the burden placed on the scheme and the concerns of extraditees,[78] certainly in the UK; this should not, however, allow the free flow of arrest warrants for minor offences. Given that the intention of the Framework Decision was to provide for the detection and prosecution of serious crime, a philosophical consensus is required between member states before the remit of mutual recognition can be extended this far, rather than simply allowing its current reach to continue by default. Equally, 'Eurobail'[79] is under consideration and, provided the appropriate parameters are included in its use, this will further alleviate concern amongst defence practitioners and their clients as to lengthy spells in foreign prisons on remand.

The recently adopted Framework Decision on Racism and Xenophobia[80] attempts to deal with one of the difficulties identified when the scheme was created: the erroneous assumption that the 32 offences for which dual criminality is removed share a cohesive construction across the member states. The instrument attempts to provide a common definition but in fact still allows considerable discretion and is unlikely to alter the way member states already operating laws in this area treat such crime.

As such, the instrument illustrates how the assumed area of mutual trust and co-operation is still in its infancy. Indeed, such instruments can increase rather than reduce the level of trust between states. German law relating to holocaust denial, a crime which does not exist in the UK, can yet apply through the scheme and has caused objection amongst not only members of the British public who feel that freedom of speech is a cornerstone of liberty, but politicians who have observed that European law has in some circumstances encroached on British traditions of liberty and freedom.[81] This goes to the heart of the mutual recognition debate in the EU; member states are comfortable with co-operation so far as the detection of crime in their country is aided, but are not ready to give away traditional values perceived to be part of their identity as a nation in the trade-off. The extension of jurisdiction from one member state into another as now mandated by the Framework Decision on Racism and Xenophobia is sure to provoke such discussion when the time for implementation arrives.

Member states are bound to accept these new concepts of criminal procedure in time, with closer communication and the provision of training. Yet the increasing intervention of the European Union in the area of criminal justice

necessitates a common set of defence standards. The pattern in previous instruments shows strong concepts proposed by the Commission are weakened and confused once the Justice and Home Affairs Council has negotiated discretionary provisions to suit its governmental agendas. This instrument must remain robust if it is to provide the essential protections that each study has shown are lacking in almost every member state and a defendant faced with a European arrest warrant surely deserves.

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Notes

1 With thanks to Kymn Butcher, JUSTICE intern, for research on overseas territories.
2 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p1.
3 *http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm*
4 S Alegre and M Leaf, JUSTICE, 2003.
5 Ibid, Ch 1, p10.
6 *Report From the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2007) 407 final, p2.
7 European Parliament, DG Internal Policies of the Union, Policy Dept C, Citizen's Rights and Constitutional Affairs, January 2009, PE 410.67, which was requested by LIBE.
8 Figures provided by SOCA in R Davidson, 'A Sledgehammer to Crack a Nut? Should there be a Bar to Triviality in European Arrest Warrant Cases?' Crim LR 1 [2009] 31, p35, n14.
9 Ibid.
10 Ibid, p31, n1, which explains that the comments were made at an adjourned appeal. The ultimate decision in [2008] EWHC 470 upheld the extradition order.
11 'Door Thief, Piglet Rustler, Pudding Snatcher: British Courts Despair at Extradition Requests', *Guardian*, 20 October 2008.
12 Ibid.
13 The Schengen Information System has been in operation since 1995 and is a computer-based network containing information on wanted persons (for arrest or missing) and stolen items. Member States' police bodies are able to place and access alerts through the system.
14 UK Border Agency, Home Office, *Accession Monitoring Report May 2004 – December 2008*, 2009, p19.
15 Cf R Davidson, n8 above.
16 Arts 2(1) and 2(2) of the Framework Decision.
17 Art 2(1) of the Framework Decision and s65(2) EA.
18 LIBE study, p5.
19 Constitutional Court decision of 3 May 2006, 434/2006 Sb.
20 This approach has been followed in the UK House of Lords in the cases of *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 57 and *Dabas v Spain* [2007] UKHL 6.
21 Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad,* [2007] ECR I-03633, paras 57 and 58.
22 LIBE study, p20.

23 *'This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (1), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.'*
24 *'No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'*
25 N6 above, p8
26 LIBE study, p23.
27 N6 above, p8.
28 NL (Netherlands), PL (Poland), AT (Austria), UK (United Kingdom), DE (Germany), EE (Estonia), LV (Latvia), LT (Lithuania), IE (Ireland), CY (Cyprus), IT (Italy), EL (Greece), MT (Malta), CZ (Czech Republic), DK (Denmark), PT (Portugal), SK (Slovakia), FR (France).
29 Working Group for Cooperation in Criminal Matters, *Evaluation Report on the Fourth Round of Mutual Evaluations "The Practical Application of the European Arrest Warrant and Corresponding Surrender Procedures Between Member States" - Report on the Netherlands*, Council of the European Union, 15370/2/08 REV 2, Brussels, 27 February 2009.
30 [2008] EWHC 595 Admin.
31 [2008] EWHC 2619.
32 [2007] EWHC 2983 Admin.
33 [2006] EWHC 3227 Admin.
34 [1978] 1 WLR 779, p782.
35 [2008] EWHC 904.
36 N34 above, p782.
37 [2008] EWHC 2907.
38 N32 above.
39 [2009] EWHC 858.
40 Judicial sitting was 17 – 19 February 2009. The decision below is reported at [2007] EWHC 2012 (Admin).
41 [2008] EWHC 2701.
42 7 March 2007.
43 29 October 2008.
44 In light of the decision in *Criminal proceedings against Pupino* (Case C – 105/03) [2006] 1 QB 83, pp109-110 as applied in *Dabas*, n20 above:

> *'[A] national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of cooperation binding on member states under article 10 of the EC Treaty. Thus while a national court may not interpret a national law contra legem, it must "do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with article 34(2)(b) EU.'*

45 G Vernimmen-Van Tiggelen and L Surano, Institute for European Studies, Université Libre de Bruxelles ECLAN – European Criminal Law Academic Network, 20 November 2008, EC DG JLS.
46 See http://www.consilium.europa.eu/showPage.aspx?id=245&lang=EN.
47 Working Group for Co-operation in Criminal Matters, *Fourth round of Mutual Evaluations "The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" - Report on the first seven evaluation visits (Ireland, Denmark, Belgium, Estonia, Spain, Portugal and the United Kingdom),* Council of the European Union, 8409/08, Brussels, 15 April 2008.
48 N44 above.
49 Final version of the European handbook on how to issue a European Arrest Warrant 8216/2/08 REV 2, Brussels, 18 June 2008.
50 Or 'Belges,' as appear on the EJN website with information on all aspects of criminal procedure per country.

51 'Justice : Czechs To Rate Effectiveness Of European Arrest Warrant', *Europolitics*, 22 January 2009.
52 At p15.
53 15 and 16 October 1999; cf para 37.
54 COM(2000) 495 final, 29.7.2000.
55 OJ C 12, 15.1.2001, p10.
56 Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, 28.04.2004, COM(2004) 328 final.
57 T Spronken and M Attinger, University of Maastricht, EC, DG JLS, 12 December 2005.
58 2807th meeting of the Council of the European Union (Justice and Home Affairs), held in Luxembourg on 12/13 June 2007, 10699/07.
59 The Press Notice (Justice and Home Affairs Council, 12-13 June 2007) recorded that the question was whether the Union was competent to legislate on purely domestic proceedings (at least 21 member states share this view) or whether the legislation should be devoted solely to cross border cases.
60 COM(2003) 75 final.
61 Ibid, para. 2.5.
62 Which is in association with the experts who prepared the initial report at n57 above. See the University of Maastricht website for current progress.
63 Tilburg/Griefswald, *Draft Introductory Summary*, EC DG JLS/D3/2007/01, January 2009.
64 Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Islands, Saint Helena, South Georgia and the South Sandwich Islands, Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands. The Channel Islands and Isle of Man are Crown Dependencies.
65 Guadeloupe, Guyane, Martinique, Réunion, Mayotte, Saint-Barthélemy, Saint-Martin, Saint-Pierre-et-Miquelon, the Wallis and Futuna Islands, French Polynesia, New Caledonia, French Southern and Antarctic Territories and Clipperton.
66 Canary Isles.
67 Aruba, Bonaire, Curacao, Saba, St. Martin, St Eustatius.
68 The Azores, Madeira.
69 Article 299(2) Treaty on the European Community.
70 French law applies directly to Guadeloupe, Guyane, Martinique, Réunion, Mayotte, Saint-Barthélemy, Saint-Martin, Saint-Pierre-et-Miquelon, the Wallis and Futuna Islands and French Polynesia pursuant to Article 73 of the French Constitution 1958, as amended. New Caledonia is governed by Title XIII. The French Government may extend law by ordinance, where it still has discretion, to New Caledonia, French Southern and Antarctic Territories and Clipperton pursuant to Article 74.
71 Article 33(2) of the Framework Decision.
72 Thirty Fifth Session, 7 – 25 November 2005, CAT/C/FRA/CO/3 3 April 2006.
73 *Rapport au Gouvernement de la République Française relatif à la visite effectuée par le Comité Européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) dans le département de la Réunion du 13 au 20 décembre 2004,* Council of Europe, CPT/Inf (2005) 21.
74 *Unwelcome Responsibilities: Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands*, Human Rights Watch, July 2007, volume 19, no 4(D).
75 B Reyes, 'Gibraltar's prison population has risen sharply in the past few weeks and is currently at its highest level for over a decade', *Gibraltar Chronicle*, 16 May 2008.
76 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, p102 and Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5.12.2008, p27.
77 Cf Davidson, n8 above.

78 Davidson points to the implementation of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition of financial penalties, OJ L 76, 22.3.2005, p16 which is due to be implemented by way of ss80-92 Criminal Justice and Immigration Act 2008.
79 Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, COM/2006/0468 final.
80 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p 55.
81 A view expressed across the media during Dr Toben's case, and in particular by Chris Huhne, Liberal Democrat MP during Parliamentary debate, *Hansard*, HC Debates Col 543, 19 January 2009.

Legal advice and the rule of law

Len Berkowitz

Given that certainty in legal advice is often not available in both the private and public sectors, advice may need to reflect the prospect of a successful challenge. Risk aversion in advice, if carried too far, can itself be damaging in the pursuit of otherwise appropriate or desirable objectives. But if it is accepted that only qualified advice is available in many cases, having regard to the need to comply with the rule of law, should there be criteria for the level of qualification that is acceptable in the public sector, and, if so, what should they be? And as a related issue, what, if any, requirements are there, or ought there to be, in relation to the independence of the provider of the advice? The considerations which are relevant in this context, which are discussed in this article, will overlap with those which apply more generally to the management of legal risk in the public sector.

The issue

An obligation to act in accordance with the rule of law raises a question as to what level of assurance that a public authority is so acting is required in order to discharge that obligation. The aim of this article is to explore practical issues which may arise in providing legal advice to meet a need to comply with the rule of law. In particular it considers the level of assurance required of such legal advice in order to meet such a need. Certainty is often not available in assessing the lawfulness of any particular course of action (or inaction) and as a consequence legal advice may need to take account of the prospect of successful challenge. Does an obligation to act generally in accordance with the rule of law imply an obligation to be satisfied as to the level of assurance provided by any legal advice which may be sought and, if so, what level of assurance?

This article focuses on considerations involved in a prospective exercise by a public authority of powers vested in it, whether in making laws or regulations or exercising powers and discretions under existing laws or regulations. The considerations which apply to decisions relating to disputes about past exercises of such powers, particularly where the disputes are likely to be, or are being, litigated may differ and some comments relating to the conduct of public authorities in this context are included towards the end.

The particular issue with which this article is concerned is illustrated by the advice given by The Right Honourable, The Lord Goldsmith QC, HM Attorney General, to the government on the legality of military intervention

in Iraq in 2003. The advice, which in ordinary circumstances would never have been publicly available, addressed the issue of uncertainty. The substantive correctness or otherwise of the legal analysis disclosed by the Attorney General is outside the scope of this enquiry;[1] it is the recognition of uncertainty and expression of the level of assurance reflected in the process leading up to the final legal advice reflected in his statement to Parliament which is of interest here. This will be considered in more detail later. At this stage it is sufficient to note that in his written advice to the Prime Minister on 7 March 2003 (the 7 March advice),[2] Lord Goldsmith, after detailed analysis, writes in para 24: '…I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution' (emphasis added). In para 30, he writes (emphasis added):

> *But a '**reasonable case**' does not mean that if the matter ever came before a court I would be confident that the court would agree with this view. I judge that, having regard to the arguments on both sides, and considering the resolution as a whole in the light of the statements made on adoption and subsequently, a court might well conclude that [Operative Paragraphs] 4 and 12 do require a further Council decision in order to revive the authorisation in resolution 678. **But equally I consider that the counter view can reasonably be maintained**.*

On 17 March 2003 Lord Goldsmith made a written statement to Parliament, which set out his final advice, in unqualified terms, to the effect that authority for the use of force against Iraq existed. The statement contained his reasons, which included in para 8 the conclusion that 'the authority to use force under Resolution 678 has revived and so continues today.' The subsequent publication of the 7 March advice gave rise to widespread public interest in what had occurred between 7 March and 17 March 2003 to enable the Attorney General to provide such a clear statement as to the lawfulness of the use of armed force. This became the subject of proceedings under the Freedom of Information Act 1998. In response to an Enforcement Notice under that Act dated 22 May 2006,[3] the Cabinet Office and Legal Secretariat to the Law Officers made and published a Disclosure Statement.[4] In para 24 of the statement it is recorded that (emphasis added):

> *after further reflection, having particular regard to the negotiating history of resolution 1441 and his discussions with Sir Jeremy Greenstock and representatives of the US Administration, … [the Attorney General]… had reached the clear conclusion that **the better view** was that there was a lawful basis for the use of force without a second resolution … In coming to the conclusion that **the better view** was that a further resolution was not legally necessary, he had been greatly assisted by the background material he had seen on the negotiation of resolution 1441.*

These passages show ways in which the inherent uncertainty in legal advice may manifest itself, both in substance and in the manner in which it might be expressed. The issue addressed in this article is the level of certainty or, perhaps more accurately, uncertainty, as to the legality of any action which might be considered to be acceptable in determining whether such action accords with the rule of law.

The rule of law

There is neither place nor need here for a detailed analysis of the nature of the rule of law. In a lecture given in Cambridge in November 2006[5] on the rule of law, The Right Honourable Lord Bingham of Cornhill, whilst recognising the need for exception and qualification, said that the 'core of the existing principle is … that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts.' Our concern here relates to its application to public authorities. This principle is amplified in Lord Bingham's sixth 'sub-rule', which he considers many would, with reason, regard as the core of the rule of law. It is 'that ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers'. Failure to meet these conditions will, in general, mean that the powers have not been exercised in accordance with the law and are, as a consequence, judicially reviewable on well-established and familiar grounds. (There are, of course, important areas in which the courts will not intervene, such as certain decisions under or relating to the prerogative, obligations under international treaties which have not been incorporated into domestic law, or where the doctrine of deference or judicial restraint applies).

These passages from Lord Bingham's lecture set out, in terms which are likely to be generally accepted and are adopted for the purposes of this article, the aspects of the rule of law relevant in the present context. They also establish what appears to be a clear test of whether the exercise of a power by a public authority is lawful, although it must be accepted that considering the conditions of the lawful exercise of a power in general terms and testing their application to a particular case in the course of judicial review proceedings may raise very different issues. What they do not do, however, is address the basic issue in the present enquiry – that is, the level of assurance required as to compliance with the law in determining whether the public authority is acting in accordance with the law.

The lawfulness or otherwise of a particular course of action may raise a wide range of issues involving matters of law, of fact and of mixed law and fact. These include statutory interpretation in the context of public authority powers

and duties; the scope of delegated powers and whether they are mandatory or directory; the interpretation of policy; the inhibition on the exercise of powers for extraneous purposes; and the identification of relevant or irrelevant considerations. There is some authority for the proposition that the courts will expect a public authority to seek legal advice in appropriate circumstances[6] and failure to take such advice may contribute to fulfilment of one of the ingredients of liability for misfeasance in public office.[7] However, this article is concerned only with the narrower issue of the level of assurance required for legal advice relating to the lawfulness of the action or any aspect of the matters upon which legal advice is sought in determining whether or not to take such action.

Official guidance

Paragraph 1.1 of the Ministerial Code[8] is a 'general principle' that requires ministers 'to behave in a way that upholds the highest standards of propriety'. Paragraph 1.2 indicates that this should be read against 'the background of the overarching duty on ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice …'. This clearly extends to compliance with the rule of law.

This is reinforced by other provisions of the code. Paragraph 2.10 of the code provides that the Law Officers (the Attorney General, the Solicitor General and the Advocate General for Scotland) must be consulted in good time before the government is committed to critical decisions involving legal considerations. Paragraph 5.1, (another 'general principle') requires that ministers do not 'ask civil servants to act in any way which would conflict with the Civil Service Code'. This is particularly relevant in the context of the next paragraph.

The Civil Service Code[9] provides in paragraph 5 that civil servants must 'comply with the law and uphold the administration of justice.' It also requires civil servants to act in a way that is 'professional' which 'includes taking account of ethical standards governing particular professions.' This could be relevant as the issues raised by this enquiry relate essentially to the provision of legal advice, which will in the ordinary course be provided by barristers and solicitors employed by the Government Legal Service (which includes lawyers in the Treasury Solicitor's Office and other government departments and in the Legal Secretariat to the Law Officers). These lawyers, bound as they are by the by the codes of conduct applicable to their respective professions, are independent professionals whose need to uphold the administration of justice and act in accordance with professional standards is thus reaffirmed in the Civil Service Code.

These provisions support and reflect the requirement that ministers and others in authority act in accordance with the law.

Compliance mechanisms

In a lecture entitled 'Government and the rule of law in the modern age' given by Lord Goldsmith at the London School of Economics and Political Science on 22 February 2006,[10] he made it clear that 'all the organs of the state – the executive, legislature and judiciary – have a shared responsibility for upholding the rule of law.' While the courts would provide a critical long-stop guarantee, in practice the rule of law would have little real meaning if the organs of state did not observe their obligations to respect it. He then pointed to three particular mechanisms other than judicial supervision for supporting compliance with the rule of law within government.

The principal of these was 'the internal validation of proposals with our domestic and international legal obligations.' This was not limited to new legislation but extended to 'every area of activity, executive or legislative, domestic and international'. The second extra-judicial mechanism was the growing use of independent commissioners and reviewers charged with ensuring compliance with the law, for example in relation to the working of the Regulation of Investigatory Powers Act 2000, the Terrorism Act 2000 and the Prevention of Terrorism Act 2005. The third, and most important, was Parliament itself, providing a high degree of scrutiny of both the effectiveness and lawfulness of legislation and government action.

The lecture, understandably, focuses on the mechanisms for securing compliance with the rule of law rather than (except in one respect which will be referred to below) what constitutes compliance, particularly the level of assurance required.

The scope of legal advice

While there may be circumstances where no express or implied assurance as to legality is sought, it is assumed for the purposes of the following analysis that assurance will be reflected in legal advice.

If it is accepted that the exercise of a power must comply with the law in the sense outlined above, the legal adviser addressing the issue of compliance will need to be aware of both the circumstances (the factual context) in which, and the legal basis on which, the power has been, or is proposed to be, exercised. The legal adviser will then need to form a view as to whether the exercise of the power in those circumstances on that legal basis meets the requirement that the power should be properly exercised: that is, exercised reasonably, in good faith, for the purpose for which it was conferred and without exceeding its limits.

This will often present the legal adviser with a wide range of challenges. It may not be possible to establish the relevant circumstances either in all material respects or in the time in which a decision must be made. The legal basis for the exercise of the power may be unclear in its terms. Reliance on the legal basis may not be clearly appropriate in the circumstances. All these and other considerations will need to be taken into account in the formulation of the advice. What is clear is that unqualified advice that a particular exercise of a power complies with the law will often be impossible to provide.

The difficulty of establishing the relevant circumstances may in practice be met by reliance on assumptions or information provided by third parties. Clearly it will be necessary for the legal adviser to be satisfied that any assumptions are soundly based and reasonable or that information provided by a third party is information which may reasonably be considered to be within that party's knowledge and which that party can properly and authoritatively provide.

Difficulties in establishing the legal basis for the exercise of the power, or in applying the legal basis to the circumstances, may be addressed by analysis of the relevant material leading to a reasoned conclusion that provides an appropriate level of assurance. On the face of it, taking a decision to exercise a power based on material assumptions and qualified as to the level of assurance in relation to the legal basis of the power or legal effect of its exercise may be difficult to reconcile with an unqualified obligation to act in accordance with the law. However, seeking the kind of absolute legal certainty which that term implies is, in reality, impractical and unsustainable in the context in which it applies and would seriously constrain active and efficient government. The next stage of this enquiry is to consider some of the practical implications of this conclusion, including particularly the appropriate level of assurance, and limits which may need to be imposed in order to safeguard compliance with the requirements of the rule of law.

The level of assurance

The way in which the level of assurance is expressed may differ according to the particular circumstances. It is essential to keep in mind that ultimately the level of assurance is no more or less than the judgment of the party or parties responsible for giving the advice and that there are many ways of expressing it. The risk of a successful challenge may be said to be very high, high, medium, low or negligible. Alternatively, the outcome of the legal analysis may be expressed in terms of the party concerned having a reasonable, reasonably arguable or good arguable case. Other formulations might be considered. These types of assessment may be easier to comprehend if the likelihood of successful challenge is expressed as a percentage or within a percentage range.

The difficulties to which the way in which the assessment is expressed may give rise are illustrated by the advice given in relation to Iraq. As reported earlier, in paragraph 28 of the 7 March advice[11] Lord Goldsmith accepted that a 'reasonable case' could be made for revival of the authorisation. However, he went on to say in paragraph 30 that this did not mean that if the matter ever came to court he would be confident that the court would agree with this view, and it might well conclude to the contrary. Interestingly, he does point out that '[i]n reaching my conclusions I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was *'no more than reasonably arguable*' (emphasis added). He goes on to point out that in those cases 'the degree of public and Parliamentary scrutiny of the legal issue was nothing as like as great as today.' Pausing here, and ignoring any literal interpretation, reading these passages together seems to imply that a reasonably arguable case would provide a lower level of assurance than a reasonable case and that, while a reasonably arguable case might previously have been sufficient, it might not be sufficient in 2003 given the scrutiny to which it would be subject (which appears to be a political rather than legal consideration). It is also unclear in the context of the minute (and indeed generally) whether a reasonably arguable case or even a reasonable case would be one which it was considered would be likely to succeed.

It appears, however, from the opening words of paragraph 32 of the minute that Lord Goldsmith was not seeking to draw any such distinction in his advice. He sets out there to assess the risks of acting on the basis of a 'reasonably arguable case', presumably thereby accepting at that time that the level of assurance offered by the advice in the minute was no higher than that provided by his predecessors but liable to be subject to much closer scrutiny.

Sometimes the level of assurance may be provided in relative terms. This is, to some extent, illustrated in the previous paragraphs. Advice that competing views are equally likely to prevail will obviously provide less assurance than advice that a chosen view is more likely to prevail than another. This is again illustrated by the advice provided in relation to Iraq. Paragraph 24 of the Disclosure Statement made by the Cabinet Office and the Legal Secretariat to the Law Officers provides, so far as is relevant here:[12]

> *… the Attorney General confirmed … that, after further reflection, having particular regard to the negotiating history of resolution 1441 and his discussions with Sir Jeremy Greenstock and the representatives of the US Administration, he had reached the clear conclusion that the* ***better view*** *was that there was a lawful basis for the use of force without a second*

> *resolution … The Attorney General made it clear that he had fully **taken into account the contrary arguments** as set out in his 7 March minute to the Prime Minister. In coming to the conclusion that the **better view** was that a further resolution was not legally necessary, he had been greatly assisted by the background material he had seen on the negotiation of resolution 1441.*

The import of the words 'that the better view was' in this extract was not reflected in the statement made by Lord Goldsmith to Parliament on 17 March 2003. Their function is, however, clear. They were designed to convey the element of uncertainty in the analysis without detracting from the overall conclusion. The experience of advising a client in corresponding circumstances will be familiar to most, if not all, practising lawyers. While a conclusion that one view is better than another would not of itself provide assurance as to the likelihood of a court upholding that view, it is clear from the context that assurance to that effect was intended.

The context in which the advice is given will clearly be relevant. In the context of compliance with the rule of law it seems clear that an obligation to act in accordance with the law implies an obligation to be satisfied that an action, if challenged, will be upheld by the courts. Given the previous discussion, absolute certainty that this will be the case will often be impracticable and unattainable so some lesser level of assurance is required. It is, however, desirable in the context of the rule of law that the test of compliance should be clear and not require interpretation. The risk of a successful challenge expressed as low, negligible or less than 50% would imply a judgment that it is more likely than not that a court, if required to determine the issue, would not uphold or would dismiss the challenge. It is suggested against this background that a condition of the exercise of any relevant power might be prior assurance that, in the event of challenge in a relevant court, the exercise of the power is more likely than not to be upheld by the court.

The formulation 'more likely than not that the courts will uphold the proposal as compliant' is referred to by Lord Goldsmith in the lecture he gave at the London School of Economics in February 2006.[13] In the context of statements of compatibility of legislation with the European Convention on Human Rights (ECHR) required by section 19 of the Human Rights Act 1998 (HRA), he notes that 'good proposals will not be precluded because they might arguably be non-compliant' nor will a statement of compatibility be given 'just because it is arguable that the provision is ECHR compliant.' He sets out the practice which has been followed. The minister giving the certificate must be satisfied that it is more likely than not that the courts will uphold the proposal as compliant.[14] The minister's judgment is thus necessarily based on legal advice expressed in

terms of whether, if tested in court, it is more likely than not that the exercise of the power will be upheld.

This practice is referred to as part of the process of internal validation to ensure compliance of proposals with the UK's domestic and legal obligations. Such validation is seen as a 'critical safeguard for the rule of law' and 'one I see first hand at work day in day out.' He makes it clear that the auditing of proposals to ensure compliance with legal obligations applies to every area of activity, executive and legislative, domestic and international. What is not apparent from his lecture is whether the approach expressed to apply in relation to section 19 certificates would apply generally to all advice provided in relation to acts by government or other public authorities.

It is important to be clear that the proposal of a standard for levels of assurance outlined above is limited to the consideration of prospective action by public authorities. While the extent of endeavours to comply with the standard may have some relevance to a court's subsequent determination as to the lawfulness of the act, it is clear that compliance with the standard will provide no assurance as to the outcome. There are many reasons for this. Even though the legal advice may be honestly and reasonably provided, the court may come to a different conclusion because it has different facts, or takes a different view on the facts, the legal basis or the application of the legal basis to the facts. Some of the implications of adopting that approach (referred to for convenience as the 'basic approach') generally are considered below.

The law

The lack of clarity in the law has already been noted. But does an obligation to act in accordance with the law and adoption of the basic approach exclude the possibility of taking into account the prospect of a court extending, modifying or reversing an existing legal provision in deciding whether an action is permissible? If one accepts the formulation that the action will be compliant if it is more likely than not that a court will hold it to be permissible, then action in such circumstances should be permissible. This does seem appropriate, as public authorities should not be unnecessarily constrained in their actions. It will, however, place a significant added responsibility on the provider of legal advice to satisfy him- or herself as to the robustness of the grounds on which the conclusion is reached.

Fairness

There are aspects of the basic approach which suggest that its application to public authorities would put them in a position significantly different to recipients of advice in the private sector. The effect might be to constrain them unfairly or inappropriately. Legal analysis might suggest that it is as likely as

not that a particular proposal will be upheld by the courts, but this would be insufficient to satisfy the basic approach. Or it might suggest that, while neither more or as likely to prevail, a respectable and reasonable argument which has a real prospect of success would be excluded. Should the government or other public authorities be placed in a situation in which they are precluded by the basic approach from pursuing a proposal which is honestly and reasonably believed to have some real prospect of success? There might be circumstances where the law as it stands might be reasonably clear but generally regarded as unsatisfactory and/or otherwise potentially amenable to modification or development. There might be reasonable grounds for believing that the factual basis known and/or assumed for the purpose of the analysis might turn out to be different when tested in court. Should these lines of approach be regarded as impermissible because they are not consistent with the basic approach? This could be particularly relevant in the case of pecuniary claims by or against public authorities. The issue is more stark in the context of the role of legal advice in the analysis of risk. In the private sector the analysis of the legal implications of a proposed course of action will commonly involve, either expressly or implicitly, an analysis of the risks of adopting that course of action. This will start with an analysis of the legal position based on the relevant facts and/or assumptions which will reflect the likelihood of a challenge succeeding. Depending on the outcome of that analysis (particularly having regard to the level of assurance) consideration will also be given to (a) the likelihood of any such challenge being made and (b) the likely consequences if the challenge were to succeed. The decision as to whether to adopt the course will involve balancing these considerations both in relation to the proposed course and other courses that might be available. The analysis and balance will clearly be different if civil or criminal consequences are involved but ultimately the same process will be adopted.

Does the requirement that government act in accordance with the law mean that an approach of that kind is inappropriate? If it is accepted that the basic approach should apply to the prospect of success, that is, that the action if challenged in court is more likely than not to be upheld, the prospects of successful challenge and the likely consequences of such a challenge should not affect the determination of that issue. However the prospect of successful challenge and likely consequences of such a challenge may still be relevant to the decision as to whether to adopt the course of action. It will not affect its consistency with the rule of law but may affect the level of assurance (above that provided by the basic approach) required before a decision to take a particular course of action is considered to be appropriate. The prospect of widespread challenge or heavy pecuniary costs if the challenge is successful may lead the decision-maker to require a level of assurance significantly higher than the basic level. On the other hand, the fact that a challenge is unlikely, or the relative

insignificance of the cost or other consequences of a successful challenge, should not reduce the level of assurance required as a condition of such action.

It has been generally assumed for the purposes of the foregoing analysis that the over-riding consideration in determining whether an action accords with the rule of law depends on the level of assurance meeting the basic approach. If something less were required, the type of risk analysis outlined above would take on additional significance. Legal advice to the effect that there is a real (but less than likely) prospect of an argument prevailing coupled with advice that the prospect of a challenge was low or negligible and/or the consequences of successful challenge immaterial might well lead a private sector decision-maker to consider the action worth pursuing. Such an approach appears difficult, if not impossible, to reconcile with a public sector decision-maker's obligation to act in accordance with the law.

Lord Goldsmith, in paragraphs 32 to 34 of the 7 March advice,[15] appears to have adopted the distinction between the substantive issue of lawfulness of the action and assessment of the risks in terms of prospects of challenge and consequences of successful challenge. Although not apparent from the 7 March advice whether the assessment of these risks was intended to be put in the balance in determining whether or not to act in reliance on the equivocal advice on the substantive issue, the potential for such an assessment to influence such a decision is clear.

Disputes and litigation

The issue arises in an indirect way in the context of decisions made in the conduct of disputes or litigation arising out of disputes relating to the exercise of public functions. The question here is whether the public authority and its advisers should aim to either: (a) assess whether the exercise of the relevant power was in accordance with the law and, if it was not, seek to achieve an outcome which corresponds to what it would have been had the action not been taken or had been taken lawfully, or (b) aim to achieve the best outcome possible consistent with the otherwise proper conduct of the matter. There is no statutory code in the United Kingdom, as there is in Australia, which imposes an obligation on public authorities to act in contested matters as 'model litigants'.[16] The Australian code was introduced to prevent unfair and oppressive conduct of litigation by public authorities and, in essence, requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation. This obligation is supported by requirements to avoid delay, limit the scope of proceedings, minimise costs and so on. Although not expressly addressed, it is clear that defending a claim that was more likely than not to be accepted by the court would be inconsistent with the code which, for example, requires 'payment of legitimate claims without litigation'.

There is no equivalent to the Australian code in the United Kingdom. There are however a range of instruments or conventions which, taken together, have similar effect across the whole range of matters involving legal assurance. In addition to those referred to above, there are both legal and professional obligations which are relevant.

Section 28 of the Courts and Legal Services Act 1990 (inserted by the Access to Justice Act 1999) requires 'every person who exercises ... a right to conduct litigation granted by an authorised body' to comply with 'a duty to the court to act with independence in the interests of justice' and 'a duty to comply with the rules of conduct of' that body. There is no reason to suppose that this provision does not bind lawyers individually when acting as advisers to the government or other public authorities. If there were any doubt it will soon largely be removed when the Legal Services Act 2007 comes into force. Section 193(5) will impose on the Treasury Solicitor and 'solicitors to other government departments' exercising rights of audience or conducting litigation by virtue of their rights and privileges a duty to the court to act independently in accordance with the interests of justice. Turning to the rules applicable to the professions, individual lawyers are bound to act in accordance with the relevant conduct of practice regimes. Completing the circle, the Civil Service Code confirms this as a proposition which the Crown respects. So, although there is no duty to act as model litigants, there is a duty and an expectation that advisers to government and other public authorities will always act professionally and in accordance with the law and the interests of justice. The difficulty which remains is that this does not provide an answer to the question raised in the preceding paragraph.

Conclusion

It is suggested that an obligation to act in accordance with the law implies an obligation to be satisfied as to the level of assurance that such action would comply with the law and that level comprises an honest and reasonably held view that a court of relevant jurisdiction is more likely than not so to hold.

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Notes

1 The substantive correctness of the views expressed has been challenged by Lord Alexander of Weedon QC, former Chair of JUSTICE Council in the 2003 JUSTICE Annual Lecture 'Iraq: Pax Americana and the Rule of Law'; by Phillipe Sands QC in Lawless World: the Making and Breaking of Global Rules, (2nd ed, 2006) and by the Rt Hon Lord Bingham of Cornhill KG in the British Institute of International and Comparative Law's Annual Lecture 'The Rule of Law in the International Order' delivered on 18 November 2008.

2 Annex A to Annex 6, the Disclosure Statement made by the Cabinet Office and the Legal Secretariat to the Law Officers responding to an Enforcement Notice dated 22 May 2006 issued by the Information Commissioner pursuant to his powers under the Freedom of Information Act 2000. The Enforcement Notice and Annexes are available on the Information Commissioner's Office website.

3 Ibid,, Annex 6.

4 Ibid, Annex 6.

5 The Sixth Sir David Williams Lecture at the Centre for Public Law, Cambridge, given by the Rt Hon Lord Bingham of Cornhill and entitled 'The Rule of Law'.

6 See *R v Somerset County Council,* ex p Fewings [1995] 1 All ER 513, 523c-d per Laws J, and *R v Secretary of State for Education,* ex p Prior [1994] ELR 231, 251A-B per Brooke J.

7 *Three Rivers District Council and others v Governor and Company of the Bank of England* [2000] UKHL 33.

8 The Ministerial Code, Cabinet Office, July 2007.

9 The Civil Service Code, June 2006.

10 'Government and the Rule of Law in the Modern Age', A lecture given by the RT Hon Lord Goldsmith QC, HM Attorney General, at the London School of Economics and Political Science on 22 February 2006. *JUSTICE Journal* (2006), vol 3, no 1, p10.

11 Cf n2, above.

12 Cf n3, above (emphasis added).

13 N8 above, p16.

14 Ibid.

15 Cf n2, above.

16 Legal Services Directions 2005 (as amended) made under section 55ZF of the Judiciary Act 1903.

The false promise of assurances against torture

Eric Metcalfe[1]

This article examines the British government's use of assurances against ill-treatment in cases involving deportation on national security grounds to countries known for their use of torture. It considers the history of assurances in the context of extradition and deportation, examines the relevant Strasbourg case-law, then considers the various memoranda of understanding negotiated by the government with various North African and Middle Eastern countries and analyses the approach of the UK courts to those assurances.

Aeschylus once wrote, 'it is not the oath that makes us believe the man, but the man the oath'.[2] The Home Secretary's recent victory in the case of *RB, U and OO* in the House of Lords makes the credibility of promises particularly important.[3] For the Law Lords unanimously upheld the conclusion of the Special Immigration Appeals Commission (SIAC) that it was safe to deport two men to Algeria and one man to Jordan – notwithstanding the reputation of both countries for using torture – because of assurances the UK had received from their governments that that the suspects would be not be ill-treated.

These assurances were, of course, the realisation of Tony Blair's famous announcement following the 7/7 bombings that the 'rules of the game are changing'.[4] Adverting to his long-standing[5] irritation that Article 3 of the European Convention on Human Rights (ECHR) barred the deportation of suspects to countries where they faced a real risk of torture, he spoke of a 'new approach to deportation orders':

> *… the circumstances of our national security have self evidently changed, and we believe we can get the necessary assurances from the countries to which we will return the deportees, against their being subject to torture or ill treatment contrary to Article 3.*

Specifically Blair revealed a 'Memorandum of Understanding' (MOU) with Jordan concerning the treatment of suspects and indicated that 'there are around 10 such countries with whom we are seeking such assurances'.[6] Three and a half years later, memoranda have since been concluded with Lebanon, Libya and most recently Ethiopia.[7] Formal negotiations on a memorandum with Algeria collapsed but SIAC nonetheless had regard to assurances from the Algerian authorities that suspects returned from the UK would not be mistreated.

The reliance upon assurances against torture – first by the government and now by the courts – raises a number of questions, the most obvious of which is can they be trusted? Specifically, can the promise of a country with a well-established reputation for torture safely be relied upon to discount the risk of torture to particular individuals whose custody it seeks? This article seeks to answer that question, first by considering the origin of assurances against ill-treatment, then examining the case-law in relation to such assurances. It then turns to look at the various assurances against ill-treatment negotiated by the UK government with various North African and Middle Eastern countries and analyses the approach of the UK courts to those assurances.

The origin of assurances

Despite the flourish of Tony Blair's announcement in 2005, the use of assurances concerning the treatment of suspects removed from one country to another is not new. On the contrary, the practice of seeking assurances has gone on – in the extradition context at least – for well over a century. In 1876, Lord Derby notably refused to allow the extradition of one Ezra Winslow, wanted for forgery in Boston, unless the US government agreed to provide an assurance that he would not be tried for any other offence:[8]

> *Her Majesty's Government do not feel themselves justified in authorising the surrender of Winslow until they have received the assurance of your Government that this person shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offence committed prior to his surrender other than the extradition crimes proved by the facts on which the surrender would be grounded, and requesting that this decision be communicated to this Government.*

This request was prompted by the requirements of the 1870 Extradition Act and the 'speciality' rule which motivated it is now a well-established feature of extradition law generally.[9] The United States, for its part, denied the British request, arguing that the UK had no right to seek assurances above and beyond the terms of the 1842 treaty which, among other things, provided for the mutual extradition of suspects.[10] In response to the British refusal to extradite Winslow, President Grant suspended the treaty for several months until both countries relented (although too late to capture Winslow, who had in the meantime been freed from custody following a successful habeas application and long since fled).[11]

The practice of seeking assurances against ill-treatment in relation to other kinds of removal has a much less principled history, as the following account makes plain:[12]

> *In the spring of 1942 about 17,000 Jews were taken from Slovakia to Poland as workers. It was a question of an agreement with the Slovakian Government. The Slovakian Government further asked whether the families of these workers could not be taken to Poland as well. At first Eichmann declined this request.*
>
> *In April or at the beginning of May 1942 Eichmann told me that henceforward whole families could also be taken to Poland. Eichmann himself was at Bratislava in May 1942 and had discussed the matter with competent members of the Slovakian Government. He visited Minister Mach and the then Prime Minister, Professor Tuka. At that time he assured the Slovakian Government that these Jews would be humanely and decently treated in the Polish ghettos. This was the special wish of the Slovakian Government. As a result of this assurance about 35,000 Jews were taken from Slovakia into Poland. The Slovakian Government, however, made efforts to see that these Jews were, in fact, humanely treated; they particularly tried to help such Jews as had been converted to Christianity. Prime Minister Tuka repeatedly asked me to visit him and expressed the wish that a Slovakian delegation be allowed to enter the areas to which the Slovakian Jews were supposed to have been sent. I transmitted this wish to Eichmann and the Slovakian Government even sent him a note on the matter. Eichmann at the time gave an evasive answer.*
>
> *Then at the end of July or the beginning of August, I went to see him in Berlin and implored him once more to grant the request of the Slovakian Government. I pointed out to him that abroad there were rumors to the effect that all Jews in Poland were being exterminated. I pointed out to him that the Pope had intervened with the Slovakian Government on their behalf. I advised him that such a proceeding, if really true, would seriously injure our prestige, that is, the prestige of Germany, abroad. For all these reasons I begged him to permit the inspection in question. After a lengthy discussion Eichmann told me that this request to visit the Polish ghettos could not be granted under any circumstances whatsoever. In reply to my question "Why?" he said that most of these Jews were no longer alive.*

The possibility of using assurances against ill-treatment in the context of removals and deportations was, therefore, well-known to the drafters of the 1951 Refugee Convention (the Refugee Convention) and, later, the 1984 UN Convention Against Torture (the Torture Convention) and it is telling that neither instrument makes reference to their use. By contrast, the 1957 Council of Europe Convention on Extradition made explicit allowance for the use of assurances against the death penalty:[13]

> *If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.*

As a US federal court noted in 1958, there was no corresponding requirement in the case of deportations:[14]

> *The language of the statute … is clear. It provides simply for deportation to a country 'willing to accept' the alien. It does not impose upon our Government, as a condition of deportation, an obligation to assure that once accepted the deportee will be granted permanent residence or asylum within the accepting country. Undoubtedly Congress could have required the Attorney General to secure assurances from an accepting country with respect to the continued residence of a deportee; but it has not done so.*

The reasons for the differences in approach taken in extradition cases, on the one hand, and deportation and other kinds of removal, on the other, are not hard to seek. For, unlike deportation and immigration removal, extradition may apply to citizens as well as foreigners and it is almost always a reciprocal procedure. Hence states have historically provided much greater procedural protection against extradition, and shown much greater concern over the fate of those liable to be extradited: the democracy that fails to protect its own citizens from mistreatment in some foreign jail would have to answer for that failure at the ballot box[15] in a way that they rarely do in cases of foreigners liable to deportation or removal. The reciprocity of most extradition arrangements provides further reason to ensure higher standards: as the Winslow case showed, the quid pro quo works best when both sides see the bargain as being an equal one.[16]

In cases of deportation and removal, domestic procedural protections have always lagged well behind those in extradition cases. In the UK, for instance, there was not even a system of statutory appeals for deportation until 1973 and, even then, deportation on grounds of national security was excluded specifically from its scope.[17] It is therefore no surprise that the first notable human rights case involving the reliability of assurances would be an extradition one: the 1989 judgment of the European Court of Human Rights (ECtHR) in *Soering v United Kingdom*.[18]

Soering v United Kingdom

Soering was a German national detained in the UK whose extradition was sought by the US to face charges of murder in Virginia, a state with the death penalty. In accordance with the 1870 Extradition Act and the 1972 US-UK Extradition Treaty, the British government made the following request:[19]

> *Because the death penalty has been abolished in Great Britain, the Embassy has been instructed to seek an assurance, in accordance with the terms of ... the Extradition Treaty, that, in the event of Mr Soering being surrendered and being convicted of the crimes for which he has been indicted ... the death penalty, if imposed, will not be carried out. Should it not be possible on constitutional grounds for the United States Government to give such an assurance, the United Kingdom authorities ask that the United States Government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed.*

In response, the District Attorney for the county in Virginia where Soering was to be tried swore an affidavit certifying that the UK government's request will be made known to the judge at the time of sentencing. In addition, the US government itself undertook 'to ensure that the commitment of the appropriate authorities of the Commonwealth of Virginia to make representations on behalf of the United Kingdom would be honoured'.[20] In his complaint to the ECtHR, Soering argued that, if convicted, the assurance received by the British government was inadequate to prevent the application of the death penalty and, consequently, a violation of his right to freedom from torture contrary to Article 3 ECHR (because of the so-called 'death row' phenomenon). The court itself noted that, due to the division of powers between the state and federal governments in the US:[21]

> *in respect of offences against State laws the Federal authorities have no legally binding power to provide, in an appropriate extradition case, an assurance that the death penalty will not be imposed or carried out. In such cases the power rests with the State. If a State does decide to give a promise in relation to the death penalty, the United States Government has the power to give an assurance to the extraditing Government that the State's promise will be honoured.*

However, the state of Virginia had not given such an assurance in Soering's case. Although the British government maintained that the assurance from the US 'at the very least significantly reduce[d] the risk of a capital sentence either being imposed or carried out',[22] it accepted that there was nonetheless 'some risk' which was 'more than merely negligible' that the death penalty would be

imposed.[23] As Lord Justice Lloyd had noted in earlier judicial review proceedings in the High Court, 'the assurance leaves something to be desired'.[24] The ECtHR concluded that:[25]

> *Whatever the position under Virginia law and practice … and notwithstanding the diplomatic context of the extradition relations between the United Kingdom and the United States, objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom* ***eliminates the risk*** *of the death penalty being imposed. In the independent exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action … If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that* ***the applicant faces a real risk*** *of being sentenced to death and hence experiencing the 'death row phenomenon'.*

Hence, the court held, the UK's obligation under Article 3 towards Soering was not limited merely to preventing his ill-treatment in or by the UK.[26] It would breach Soering's rights under Article 3 for the UK to allow his extradition to a third country where he would face a real risk of ill-treatment.[27]

Chahal v United Kingdom

However, it was the extension by the ECtHR of this principle to deportation on national security grounds in *Chahal v United Kingdom* that set the stage for the current debate on assurances against torture. As is well known, the court held that the prohibition on torture under Article 3 ECHR was absolute and, unlike the prohibition in the Refugee Convention,[28] made no exception for suspects who were deemed to pose a risk to national security.[29] The court also found that Mr Chahal faced a 'real risk' of ill-treatment contrary to Article 3 if returned to India, notwithstanding the assurance given by the Indian government that he would not be ill-treated:[30]

> *We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. I have the honour to confirm the above.*

However, the assurances of the Indian authorities failed to assuage the court's concerns:[31]

> *Although the Court does not doubt the good faith of the Indian government in providing the assurances … it would appear that, despite the efforts of that government, the [National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem … Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.*

Youssef v Home Office

However, the assurances' failure to convince the ECtHR in *Soering* and *Chahal* did not discourage the British government in its attempts to deport suspected terrorists consistent with the requirements of Article 3 ECHR. In 1999, the government again sought to negotiate assurances against ill-treatment in respect of the return of four Egyptian men suspected of involvement in terrorism. Details of the negotiations subsequently emerged in the 2004 case of *Youssef v Home Office*,[32] the starting point of which was described as follows:[33]

> *It was appreciated [by the Home Office] from the outset that given the evidence that detainees were routinely tortured by the Egyptian Security Service it would not be possible to remove Mr. Youssef to Egypt unless satisfactory assurances were obtained from the Egyptian Government that he would not be tortured or otherwise physically mistreated if he were sent back.*

The British Embassy in Cairo was instructed to seek written assurances from the Egyptian government that included the suspects being guaranteed the right to legal advice, due process, a fair trial, regular inspection by the British authorities and independent medical personnel while in detention and – of course – a guarantee against any ill-treatment 'whilst in detention'.[34] The Egyptian government politely declined the British request for an assurance relating to prison visits 'on the ground that they would constitute an interference in the scope of the Egyptian judicial system and an infringement of national sovereignty'.[35] The Home Office then wrote to No 10 Downing Street to inform them of the Egyptian response:[36]

> *This letter was read by the Prime Minister who wrote across the top of it "Get them back". He also wrote next to the paragraph that set out the assurances objected to by the Interior Minister "This is a bit much. Why do we need all these things?"*

This was followed by a more formal response from the Prime Minister's Private Secretary to the Home Office:[37]

> *The Prime Minister thinks we are in danger of being excessive in our demands of the Egyptians in return for agreeing to the deportation of the four Islamic Jihad members. He questions why we need all the assurances proposed by FCO and Home Office Legal Advisers. There is no obvious reason why British Officials need to have access to Egyptian nationals held in prison in Egypt, or why the four should have access to a UK–based lawyer. Can we not narrow down the list of assurances we require?*

In light of the resistance to the proposed assurances from both the Egyptian government and No 10 itself, the Home Secretary wrote to the Prime Minister to explain that only the 'strongest possible assurances' would be likely to satisfy SIAC that the suspects would not face a real risk of ill-treatment on their return to Egypt.[38] The Foreign Office later wrote to explain that:[39]

> *In the FCO's view there was no alternative to access by British officials. The [International Committee of the Red Cross] had a permanent presence there but had been refused access to prisoners; it would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved in any process which could in any way be perceived to contribute to, facilitate, or result in the deportation of individuals to Egypt. It was likely that other human rights NGOs would take the same line. FCO had failed to identify any other acceptable impartial third party that could undertake regular visits and the Egyptian Government had not been asked for an assurance that would allow access by a mutually acceptable, impartial third party of international repute because such a third party would be difficult to identify and compared with a specific assurance of access by British officials, an unspecific assurance (access by a party to be identified later) would provide a much weaker argument.*

Blair's frustration with the stalled negotiations became still more evident. He wrote on one Foreign Office letter, 'This isn't good enough. I don't believe we shld [sic] be doing this. Speak to me', and subsequently offered to write to President Mubarek directly to obtain the necessary assurances.[40] Despite advice from both the Foreign Office and Home Office that the matter of assurances should not be pressed, the Prime Minister insisted on one final push:[41]

> *the Prime Minister is not content simply to accept that we have no option but to release the four individuals. He believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts. If the courts rule that the assurances we have are inadequate, then at least it would be the courts, not the government, who would be responsible for releasing the four from detention. The Prime Minister's view is that we should now*

> *revert to the Egyptians to seek just one assurance, namely that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking.*

Following further inquiries, however, the Home Secretary wrote to the Prime Minister to explain his conclusion that even that single assurance would be insufficient to commence deportation proceedings against the four men:[42]

> *You suggested that we should ask the Egyptians for a single assurance on torture. I am not satisfied that an assurance of that sort, even if forthcoming, would be sufficient for me to proceed to issue notices of intention to deport in these cases.*

The four men were released from immigration detention the following day.

Mamatkulov v Turkey

In 2005, the Grand Chamber of the ECtHR held in the case of *Mamatkulov v Turkey* that the deportation of two suspects from Turkey to Uzbekistan did not violate their rights under Article 3 ECHR.[43] Among other things, it was noted that the Turkish government had received the following assurances from the Uzbek authorities:[44]

> *The applicants' property will not be liable to general confiscation, and the applicants will not be subjected to acts of torture or sentenced to capital punishment. The Republic of Uzbekistan is a party to the United Nations Convention against Torture and accepts and reaffirms its obligation to comply with the requirements of the provisions of that Convention as regards both Turkey and the international community as a whole.*

In a dissenting opinion, however, Judges Bratza, Bonello and Hedigan were strongly critical of the weight given to the assurances by the majority:[45]

> *an assurance, even one given in good faith, that an individual will not be subjected to ill-treatment is not of itself a sufficient safeguard where doubts exist as to its effective implementation (see, for example,* Chahal*, cited above, p. 1861, § 105). The weight to be attached to assurances emanating from a receiving State must in every case depend on the situation prevailing in that State at the material time. The evidence as to the treatment of political dissidents in Uzbekistan at the time of the applicants' surrender is such, in our view, as to give rise to serious doubts as to the effectiveness of the assurances in providing the applicants with an adequate guarantee of safety.*

> *The same applies to the majority's reliance on the fact that Uzbekistan was a party to the Convention against Torture. In this regard we note, in particular, the finding of Amnesty International that Uzbekistan had failed to implement its treaty obligations under that convention and that, despite those obligations, widespread allegations of ill-treatment and torture of members of opposition parties and movements continued to be made at the date of the applicants' arrest and surrender.*

Agiza v Sweden

If *Youssef* illustrates the problems involved in negotiating assurances against torture, the 2005 case of *Agiza v Sweden* before the UN Committee Against Torture shows the problems involved in their operation.[46] Agiza was an Egyptian national whom the Swedish authorities sought to deport. Prior to his deportation, Swedish officials met with Egyptian government representatives in Cairo:[47]

> *the purpose of the visit was to determine the possibility, without violating Sweden's international obligations, including those arising under the Convention, of returning the complainant and his family to Egypt. After careful consideration of the option to obtain assurances from the Egyptian authorities with respect to future treatment, the [Swedish] government concluded it was both possible and meaningful to inquire whether guarantees could be obtained to the effect that the complainant and his family would be treated in accordance with international law upon return to Egypt. Without such guarantees, return to Egypt would not be an alternative. On 13 December 2002, requisite guarantees were provided.*

Less than a week later, Agiza was deported to Cairo. Although he was visited by Swedish authorities approximately once a month, the Committee noted that:[48]

> *the visits were short, took place in a prison which is not the one where the complainant was actually detained, were not conducted in private and without the presence of any medical practitioners or experts.*

Following reports of his torture received from other visitors, the Swedish Ambassador visited Agiza in prison in March 2003:[49]

> *The complainant allegedly stated for the first time that he had been subjected to torture. In response to the question as to why he had not mentioned this before, he allegedly responded, 'It does no longer matter what I say, I will nevertheless be treated the same way'.*

Following the meeting, the Swedish government requested that the Egyptian authorities arrange an independent and impartial inquiry into the allegations. For its part, the Egyptian government denied the allegations and 'gave no direct answer' to the Swedish request for an independent investigation.[50] Taking a different line from a 2003 decision in which it had found assurances to be adequate and noting the recent judgment of the ECtHR in *Mamatkulov*,[51] the Committee held that the Swedish government's deportation using assurances amounted to a breach of the prohibition against refoulement contrary to Article 3 of the Torture Convention:[52]

> *at the outset that it was known, or should have been known, to the [Swedish] authorities … that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.*

The procurement of assurances from Egypt, the Committee held, 'which … provided no mechanism for their *enforcement*, did not suffice to protect against this manifest risk'.[53]

Saadi v Italy

In February 2008, the Grand Chamber of the ECtHR held that Italy's proposed deportation of Saadi, a Tunisian national, would breach Article 3 ECHR,[54] notwithstanding the assurances of the Tunisian authorities:[55]

> *that they are prepared to accept the transfer to Tunisia of Tunisians imprisoned abroad once their identity has been confirmed, in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes.*

And that:[56]

> *The Minister of Foreign Affairs hereby confirms that the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions.*

The case was notable because it was one in which the UK government had intervened to invite the Grand Chamber to reverse its earlier decision in *Chahal*, arguing that 'because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures'.[57] Instead, the UK urged, the ECtHR should allow the risk of ill-treatment under Article 3 ECHR to be balanced against the threat to national

security posed by a suspect.[58] The Grand Chamber, for its part, rejected the UK submissions on the correct approach to Article 3, labelling it as 'misconceived'.[59] In respect of the assurances received from Tunisia, the court noted that they did no more than restate Tunisia's obligations under domestic and international law:[60]

> *the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.*

The court then identified the correct approach to be taken to assurances under Article 3:[61]

> *even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see* Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.*

The court's approach, then, is not that assurances against ill-treatment can never be relevant. Indeed, it would be surprising if it held otherwise. Determining the risk of ill-treatment in any particular case is, after all, a question of fact, not law, and it can hardly be said that an assurance from one government to another is factually irrelevant to the question of how a suspect will be treated. The key point that emerges from the Strasbourg jurisprudence is that the mere fact of an assurance is no answer to the court's inquiry as to risk. An assurance is merely one element among many to be weighed in the balance, and the weight to be given to an assurance will always depend on the particular circumstances of each case. Most of all, an assurance can only be considered 'sufficient' if, in the language of *Soering*, it 'eliminates' the real risk that a suspect would be ill-treated.

Ismoilov v Russia

In April 2008, in the case of *Ismoilov v Russia,* the ECtHR reconsidered the use of assurances from Uzbekistan. In *Ismoilov*, the Russian authorities had agreed to Uzbekistan's request to extradite twelve Uzbek refugees on the basis of assurances from its First Deputy Prosecutor General that the refugees would

receive humane treatment and a fair trial if returned.[62] By contrast, the ECtHR held that returning the refugees would violate Article 3 ECHR as they faced a real risk of torture or ill-treatment, notwithstanding the assurances received from the Uzbek government:[63]

> *In its judgment in the* Chahal *case the Court cautioned against reliance on diplomatic assurances against torture from a State where torture is endemic or persistent (see* Chahal*, cited above, § 105). In the recent case of* Saadi v. Italy *the Court also found that diplomatic assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention (see* Saadi*, cited above, §§ 147 and 148). Given that the practice of torture in Uzbekistan is described by reputable international experts as systematic … the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment.*

Memoranda of Understanding

Although heralded as a 'new approach' by Tony Blair following the 7/7 bombings, the *Youssef* case showed that negotiation of assurances had been part of the government's strategy to facilitate deportations for some time. Eight months before Blair's 'rules of the game' speech, the Home Secretary told Parliament:[64]

> *we have been trying for some time to address the problems posed by individuals whose deportation could fall foul of our international obligations by seeking memorandums of understanding with their countries of origin. We are currently focusing our attention on certain key middle-eastern and north African countries. I am determined to progress this with energy. My noble Friend Baroness Symons of Vernham Dean visited the region last week. She had positive discussions with a number of countries, on which we are now seeking to build.*

The Jordanian MOU was the first to be concluded, and provides the template for all subsequent MOUs against ill-treatment negotiated by the British government. In addition to setting out the understanding that both governments 'will comply with their human rights obligations under international law regarding a person returned under this arrangement', it also provided eight 'further specific' assurances. However, six of the eight 'specific' assurances do no more than restate Jordan's existing obligations under the Torture Convention and the International Covenant on Civil and Political Rights, namely the right of those returned to due process, a fair trial, and religious freedom. The prohibition

against ill-treatment is not referred to directly but instead expressed in terms of a positive obligation on Jordan to provide the detainee:

> *adequate accommodation, nourishment, and medical treatment, and [to] be treated in a humane and proper manner, in accordance with internationally accepted standards.*

Of the eight so-called 'specific' assurances, therefore, only two can really be said to contain anything novel. These are as follows:

> *If the returned person is arrested, detained or imprisoned within 3 years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by the UK and Jordanian authorities. Such visits will be permitted at least once a fortnight, and whether or not the returned person has been convicted, and will include the opportunity for private interviews with the returned person. The nominated body will give a report of its visits to the authorities of the sending state.*

And:

> *Except where the returned person is arrested, detained or imprisoned, the receiving state will not impede, limit, restrict or otherwise prevent access by a returned person to the consular posts of the sending state during normal working hours. However, the receiving state is not obliged to facilitate such access by providing transport free of charge or at discounted rates.*

The substance of the MOU, then, is an assurance of regular visits while in detention from an 'independent body nominated jointly by the UK and Jordanian authorities' and to allow access to the UK consulate while not detained. The MOU makes no provision for adjudication, enforcement or sanction for breach of any kind. The only other relevant provision is that either state may withdraw from the arrangement by giving six months notice but is obliged to continue to apply the terms of the arrangement to any person returned under its provisions. Again, there is no provision for what may happen if this requirement is also breached.

MOUs were subsequently concluded with Lebanon and Libya. The Libyan MOU included additional assurances against trial in absentia and the death penalty but both were otherwise virtually identical to those contained in the Jordanian MOU. The only differences of substance between the two later MOUs and the Jordanian MOU was the scope of the remit given to the monitoring body and the provision of medical examinations: under the Jordanian MOU, the

monitoring body was responsible only for visiting the suspect while detained; under the Libyan and Lebanese MOUs, the monitoring body is responsible for supervising *all* the assurances. The Jordanian MOU also makes no provision for medical inspection, whereas both the more recent MOUs do.

In the case of Algeria, negotiations on an MOU collapsed on the sticking point of post-return monitoring. The failure to agree a memorandum was explained by SIAC in the following terms:[65]

> *The Algerian stance on ill-treatment had always been that they objected to repeating, in generic form, commitments which they had entered into in the Convention against Torture and in the International Convention on Civil and Political Rights. But they had no difficulty in committing themselves to treating those returned fully in accord with those obligations. A general reiteration was seen as casting doubt on whether they would abide by commitments which they had already entered into, whereas an individual assurance was seen as applying to an individual the general obligation already undertaken. Their history, that is their colonial past, made them very sensitive about that. No open assurance was more explicit than that given in the December 2005 answers, which said that Y had the right to "respect… for his human dignity" in all circumstances. Representatives of the [Algerian Security Service] and other relevant Ministries had been present at all the talks and had accepted the commitments.*

Following this, the British government relied upon an exchange of letters and notes verbale between Tony Blair and President Bouteflika of Algeria, together with the general terms of the 2005 Algerian Charter for Peace and National Reconciliation, as providing the necessary assurance against ill-treatment of any suspects returned. In other words, it did no more than restate Algeria's existing obligations under domestic and international law. As with the MOUs concluded with Jordan, Libya and Lebanon, it offered no mechanism for enforcement nor justiciable rights of any kind.

The approach of UK courts to assurances against torture

The record of the UK courts on the use of assurances has, thus far, been a decidedly mixed one. In the cases of Algeria and Jordan, the House of Lords upheld the decisions of SIAC that assurances could safely be relied upon to mitigate the risk of torture. The Libyan MOU was, by contrast, beyond the pale even for SIAC and the judgment was upheld by the Court of Appeal.

In case of *RB*, SIAC conceded Algeria's well-established reputation for using torture against detainees, noting that:[66]

> *it would be naïve to conclude that no person suspected of terrorist activity, in particular foreign terrorist activity, is at risk of torture or ill-treatment at the hands of Algerian security forces, in particular the DRS [département du Renseignement et de la Sécurité].*

Indeed, the Foreign Office's own Special Representative for Deportation with Assurances gave evidence which SIAC summarised as follows:[67]

> *Mr Layden is a realist. He acknowledges that torture still exists, but is getting less. He accepts that the civil authorities do not control the DRS (they report direct to the President as Minister of Defence). He has never seen any report of any prosecution of a DRS official for torture or ill-treatment. He bluntly acknowledged that he was not saying that there would not be a risk of ill-treatment if the United Kingdom Government had not made the special arrangements which it had. However his unshakable view was that the assurances given by the Algerian authorities in the case of BB eliminated any real risk that he would be subjected to torture or ill-treatment.*

SIAC therefore identified four criteria that would have to be satisfied in order for it to be satisfied on the issue of safety on return:[68]

> *i) the terms of the assurances had to be such that, if they were fulfilled, the person returned would not be subjected to treatment contrary to Article 3;*
> *ii) the assurances had to be given in good faith;*
> *iii) there had to be a sound objective basis for believing that the assurances would be fulfilled;*
> *iv) fulfilment of the assurances had to be capable of being verified.*

SIAC held that all four criteria were met in RB's case. In particular, it accepted the Foreign Office evidence that Algeria sought to be 'accepted by the international community as a normally-functioning civil society' and that it was 'barely conceivable, let alone likely, that the Algerian Government would put [its UK ties] at risk by reneging on solemn assurances'.[69] In relation to the fourth condition, it held that, despite Algeria's refusal to allow post-return monitoring, the fact that NGOs like Amnesty International were able to gain access to detainees in certain cases meant that there would be sufficient verification:[70]

> *Verification, however, need not only be achieved by official means. Amnesty International and other non-governmental agencies, who object to reliance on assurances as a matter of principle, can be relied upon to find out if they are breached and publicise that fact. The fact that Amnesty was able to and did speak to both I and V on their release demonstrates the effectiveness of non-official verification.* ***It is, of course, true that a detainee could be***

> ***tortured by the chiffon method, and refuse to say anything about it afterwards; but such an event could occur even under a monitoring regime.*** *However, in neither case is it realistic to suppose that breaches by the Algerian authorities, or the turning of a blind eye by Central Government to wholesale breaches at lower levels, could occur without the fact of breaches becoming known.*

SIAC's conclusions were much the same in respect of the Jordanian MOU. As with Algeria, the Foreign Office's own country expert did not contest the many reports that the Jordanian authorities – and especially its key security agency, the GID – frequently tortured suspects in custody.[71] This included a report prepared by the Foreign Office itself in 2005, which recounted a number of the key allegations recorded by bodies such as the US State Department and the UN Committee Against Torture.[72] SIAC nonetheless accepted the Foreign Office's contention that the MOU would be honoured in Abu Qatada's case, notwithstanding the general risk of torture. Among other things, it concluded that Qatada's high public profile would itself act as a check:[73]

> *If he were to be tortured or ill-treated, there probably would be a considerable outcry in Jordan, regardless of any MOU. The likely inflaming of Palestinian and extremist or anti-Western feelings would be destabilising for the government. The Jordanian Government would be well aware of that potential risk and, in its own interests, would take steps to ensure that that did not happen.*

As with Algeria, SIAC found that Jordan's concern for its own international reputation would lead it to ensure the MOU was honoured:[74]

> *the MOU and arrangements are supported at the highest levels and the King's political power and prestige are behind it. It can reasonably be taken that instructions specific to how this Appellant should be treated would be given to the GID which would be known to the GID to have high level and specific interest. The GID would know that the UK Government had a specific interest in how this individual was treated. There would be an awareness that those instructions would be more likely to be followed through, that breaches would be punished and that a climate of impunity which might prevail otherwise would not apply here. This would be a real deterrent to abuses by GID officers. It would not be some general sop to public or world opinion. The Jordanian Government would have a specific interest in not being seen by the UK Government or the public in Jordan in this case as having breached its word, given to a country with which it has long enjoyed very good relations.*

In particular, SIAC held that the monitor appointed under the MOU – the Adalleh Centre, a Jordanian NGO – would provide an additional check against any ill-treatment of Abu Qatada by the Jordanian authorities.[75]

When SIAC came to consider the Libyan MOU, the government followed the same approach as before: admit the general risk of torture but deny the specific risk. Hence, the Foreign Office's Special Representative for Deportation with Assurances was candid about the Libyan regime's use of torture:[76]

> *Mr Layden agreed that Libya had a sorry record on torture and stated that if this had not been the case, the United Kingdom government would not have needed to secure the assurances that have been secured about the treatment of Libyan terrorist suspects detained in the UK. In his evidence, he agreed that the sequence of reporting from respectable and reputable NGOs was so consistent that one that simply could not ignore it and, as a consequence, he accepted that but for assurances there was a real risk of torture of the political opponents of Colonel Qadhafi and the regime.*

Nonetheless, the Foreign Office representative maintained that it was 'well nigh unthinkable' that Libya would jeopardise its relationship with the UK and desire for international acceptance generally by breaching the MOU.[77] On this occasion, however, SIAC was – with much apparent reluctance – unable to accept that the threat of international opprobrium and the promise of 'independent' monitoring by the Gadaffi Foundation (an NGO run by Saif Gadaffi, the son of Colonel Gadaffi) would be enough to deter Libya from breaching the MOU. As the Foreign Office Representative himself acknowledged:[78]

> *In a conflict between Colonel Qadhafi and what Saif thought was necessary for the MOU to be observed, the father's word would be decisive.*

SIAC found that the Gadaffi Foundation 'was no more independent of the regime than Saif himself and he is not independent'.[79] Noting several times Colonel Gadaffi's 'mercurial personality',[80] SIAC concluded that the 'unpredictability' of his actions meant that, even with the MOU in place, a real risk that those returned would at some point be tortured could not be ruled out.[81] Among other things, it noted the 'willingness of the regime to endure international opprobrium and diplomatic pressure',[82] which may be a polite way of saying that the man who had once been called 'the Mad Dog of the Middle East' by President Reagan was probably prepared to weather whatever diplomatic ill-will might proceed from a breach of the MOU.

Following an unsuccessful challenge to the Court of Appeal, the government opted not to pursue deportations under the Libyan MOU. SIAC's findings in

respect of Jordan and Algeria, by contrast, were the subject of appeals to the House of Lords. Under the 1997 Act, of course, an appeal against SIAC is limited to questions of law, not fact.[83] A key issue in the appeals, therefore, was whether the court's duty under section 6 of the Human Rights Act 1998 to prevent breaches of Convention rights, including Article 3 ECHR, required the Lords to themselves determine the 'real risk' issue by giving anxious scrutiny to the reasoning of SIAC at first instance, or whether the Lords' task was limited to traditional principles of judicial review. The Law Lords unanimously adopted the latter view, confining themselves only to the question of whether SIAC's reasoning at first instance was irrational, ie one no reasonable person could have come to. Accordingly, as Lord Phillips held in respect of Algeria:[84]

> *SIAC gave consideration to the reasons why Algeria was not prepared to agree to monitoring and concluded that this was not indicative of bad faith and that there were alternative ways of ascertaining whether there was compliance with the assurances. These conclusions were not irrational.*

In the case of the Jordanian MOU, Lord Phillips similarly concluded:[85]

> *SIAC considered in depth the way that Mr Othman was likely to be treated before his trial, during the trial process and after it. The conclusion reached was that there were not substantial grounds for believing that there was a real risk that Mr Othman would be subjected to inhuman treatment. The MOU was not critical to this conclusion. SIAC commented that the political realities in Jordan and the bilateral diplomatic relationship mattered more than the terminology of the assurances. The former matters, and the fact that Mr Othman would have a high public profile, were the most significant factors in SIAC's assessment of article 3 risk. Study of SIAC's lengthy and detailed reasoning discloses no irrationality.*

The flaws of assurances against torture

In his judgment in *RB and U (Algeria)*, Lord Hope offered the following observation, one that bears setting out at length:[86]

> *Most people in Britain, I suspect, would be astonished at the amount of care, time and trouble that has been devoted to the question whether it will be safe for the aliens to be returned to their own countries … Why hesitate, people may ask. Surely the sooner they are got rid of the better. On their own heads be it if their extremist views expose them to the risk of ill-treatment when they get home.*
>
> *That however is not the way the rule of law works. The lesson of history is that depriving people of its protection because of their beliefs or behaviour,*

> *however obnoxious, leads to the disintegration of society. A democracy cannot survive in such an atmosphere, as events in Europe in the 1930s so powerfully demonstrated. It was to eradicate this evil that the European Convention on Human Rights, following the example of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948, was prepared for the Governments of European countries to enter into. The most important word in this document appears in article 1, and it is repeated time and time again in the following articles. It is the word "everyone". The rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone. No one, however dangerous, however disgusting, however despicable, is excluded. Those who have no respect for the rule of law – even those who would seek to destroy it – are in the same position as everyone else.*
>
> *The paradox that this system produces is that, from time to time, much time and effort has to be given to the protection of those who may seem to be the least deserving. Indeed it is just because their cases are so unattractive that the law must be especially vigilant to ensure that the standards to which everyone is entitled are adhered to. The rights that the aliens invoke in this case were designed to enshrine values that are essential components of any modern democratic society: the right not to be tortured or subjected to inhuman or degrading treatment, the right to liberty and the right to a fair trial. There is no room for discrimination here. Their protection must be given to everyone. It would be so easy, if it were otherwise, for minority groups of all kinds to be persecuted by the majority. We must not allow this to happen. Feelings of the kind that the aliens' beliefs and conduct give rise to must be resisted for however long it takes to ensure that they have this protection.*

As correct and as laudable as Lord Hope's observation is, it seems ironic – to say the very least – that it is swiftly followed by his conclusion that the right not to be tortured did not oblige the House of Lords to give any more scrutiny to the actual risk of torture on return than the ordinary principles of appellate review would otherwise require. However much the amount of 'care, time and trouble' may have gone into determining the risk of torture by others, it can hardly be said that the Law Lords' own judgment in *RB* is marked by any 'special vigilance'.

Still, if the judgment of the House of Lords in *RB* is distinguished by the Law Lords' profound reluctance to scrutinise the evidence at hand, that is nothing compared to the facile reasoning of SIAC at first instance. A superficial consideration of SIAC's judgments might lead one to conclude that its rejection of the Libyan MOU was proof of the overall reasonableness of its approach.

Nothing could be further from the truth. The fact that even SIAC found a promise from Colonel Gadaffi too weak an assurance against torture is proof only that its members are not entirely bereft of reason, not that their judgment is therefore to be commended.

The starting point is, of course, that assurances against torture are only relevant in circumstances where the state has already established a reputation for using torture. As the UN Special Rapporteur Against Torture pointed out in 2005:[87]

> *The fact that such assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subjected to torture or ill treatment upon arrival in the receiving country.*

The seriousness of this risk is not merely something to be reduced by assurances, however. It goes to the very credibility of the assurances themselves. For Algeria, Jordan and Libya are all countries that have signed and ratified the UN Convention Against Torture – a more formal and solemn international instrument than any memoranda between states – and yet each is acknowledged by the Foreign Office to be regularly in breach of it. The factual backdrop for assessing assurances is, therefore, not simply the fact that Algeria et al have used torture, but that they have continued to do so for many years in breach of their international obligations, and in the face of international opprobrium for having done so. The significance of Algeria, Jordan and Libya giving assurances against torture must be measured against the fact that they have already done so, and breached those assurances on many occasions. It is therefore hardly 'unthinkable' that Algeria or Jordan would breach their assurances not to ill-treat suspects because of the international outcry that would result: their repeated breaches of their promises under the Torture Convention make it all too easy to imagine. However obvious this might seem, it is a consideration that SIAC gave little weight to. In the Abu Qatada case, for instance, it expressed puzzlement as to the UN Special Rapporteur's criticisms:[88]

> *For our part, we have some difficulty in seeing why … [the UN Special Rapporteur against Torture] … regards it as being unclear why a bilateral agreement in the form of an MOU would be adhered to, where a multilateral human rights agreement with reporting arrangements has been breached. The answer here as set out above is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed. The failure of those who regard these arrangements as unenforceable, in some asserted but not altogether realistic comparison with international human rights agreements, is a failure to see them in their specific political and diplomatic context, a context which will vary from country to country.*

SIAC's failure to have regard to the long history of broken promises by Algeria et al is all the more striking, given how little the assurances themselves are directed to the issue at hand (especially in the case of Algeria whose assurance was limited to promising that 'human dignity will be respected under all circumstances'). Before SIAC, the Foreign Office bluntly admitted the use of torture by Jordan, Algeria and Libya but this candour is nowhere reflected in the assurances received. One might have thought that, at the very least, an assurance against torture would include the word 'torture' or at least advert to the prohibition against inhuman or degrading treatment and punishment. The Grand Chamber in *Saadi* was of course correct to note that assurances that merely restate existing domestic and international obligations add nothing. But there is a patent air of unreality in assurances that do not even acknowledge the *existence* of those obligations, still less the very harm that they are designed to address and prevent. As Lord Bingham noted:[89]

> *a country that promises not to torture anybody we have detained, is most unlikely to admit they ever have tortured anybody. So it is like an alcoholic saying, I'm a reformed alcoholic without ever admitting their alcoholism.*

This air of unreality extends to SIAC's so-called 'rigorous scrutiny' of the facts at first instance.[90] First, SIAC showed little awareness of the substantial difficulties involved in *detecting* torture and ill-treatment, focusing almost completely on treatment involving direct violence against the person and ignoring or excluding the possibility of 'non-physical' techniques such as sensory deprivation and sensory bombardment, solitary confinement, humiliating treatment, threats and intimidation.[91] Added to this is the obvious point that detection depends to a large extent on the co-operation of the individual detainee who is entirely in the hands of the state responsible for his treatment. A detainee who has been the victim of ill-treatment may therefore refuse to report it to outside visitors for fear of reprisals, either against him or family members.

In *Agiza*'s case, for instance, the allegation of torture by the Egyptian authorities only came to light when – in his words – it 'no longer matter[ed] what [he] said' to the Swedish officials who visited him every month. The Jordanian MOU makes provision for fortnightly visits from the Adaleh Centre but no provision for medical examination, raising serious doubts about the Centre's ability to detect physical – let alone psychological – ill-treatment. In the Algerian cases, of course, there was not even the assurance of monitoring – SIAC instead concluded that the British Embassy would be able to 'maintain contact' with any detainee and NGOs such as Amnesty International 'can be relied upon to find out if [assurances] are breached and publicise that fact'.[92] In *RB*, SIAC did concede that at least one method of torture might not leave physical marks:[93]

> *It is, of course, true that a detainee could be tortured by the chiffon method, and refuse to say anything about it afterwards but such an event could occur even under a monitoring regime.*

But the fact that non-detection would occur even with a monitoring regime is only an argument that shows the inadequacy of monitoring regimes in general: it is hardly an argument that supports sending a suspect back to a country without one.

Secondly, SIAC failed to appreciate problems surrounding the *deniability* of torture, especially 'non-physical' techniques. Denial is, after all, the default position in such cases. In *Agiza,* for instance, the allegation of torture was immediately denied by the Egyptian authorities. And, despite the wealth of evidence available, Algeria, Jordan and Libya have never admitted using torture.[94] There is, of course, a genuine problem for a state that has previously used torture, in that even if it is telling the truth in a particular case it is unlikely to be believed. But this does not mean that such states deserve, as SIAC gave them, the benefit of the doubt. Indeed, the potential for false allegations of torture undermines one of SIAC's key conclusions concerning the return of Abu Qatada:[95]

> *If he were to be tortured or ill-treated, there probably would be a considerable outcry in Jordan, regardless of any MOU. The likely inflaming of Palestinian and extremist or anti-Western feelings would be destabilising for the government. The Jordanian Government would be well aware of that potential risk and, in its own interests, would take steps to ensure that that did not happen.*

But, as SIAC also concluded, 'a serious publicised allegation, true or not, could be as de-stabilising as proof that the allegation was correct'.[96] In other words, an allegation would be destabilising whether it was true or false and – in the case of a false allegation – the legitimate denial of the Jordan government would carry as little weight as their previous false denials. So SIAC's conclusion that the authorities would have reason to protect Abu Qatada because of his high-profile holds no water. On the contrary, they have nothing to lose from torturing him because (i) such torture – especially 'non-physical' methods – would be difficult to detect (especially given the MOU's lack of any provision for independent medical inspection) and (ii) any denials on their part would be unlikely to be believed in any event.

Thirdly, there is a glaring disparity between the weight that SIAC gave to *verification* procedures, on the one hand, and the absence of *enforcement* procedures, on the other. In determining whether assurances could remove

a real risk of torture, SIAC placed considerable weight on the possibility of verification of assurances by an independent monitor (cf Mitting J's fourth criterion that 'fulfilment of assurances had to be capable of being verified'). Even the denuded Algerian assurance, SIAC reasoned, was capable of being verified by NGOs such as Amnesty International who had been able to secure access in respect of previous returnees.[97] By contrast, SIAC gave no weight to the lack of any mechanism for *enforcing* any of the assurances, other than the diplomatic consequences that would follow from a breach being discovered. For the assurances themselves make no mention of enforcement of any kind, still less of any remedy for the detainee who is discovered to be a victim of torture. One would think that this lack of any provision for enforcement went directly to the question of the reliability of assurances. We would not say, for instance, that a contract under ordinary law which did not contain any sanction for breach or remedies would be one that could safely be relied upon in any serious matter. Still less would we take seriously a criminal law that did not provide any punishment for its breach. And yet the absence of any formal provision for enforcement of the assurances drew no adverse comment or note of concern from SIAC:[98]

> *whilst it is true that there are no specific sanctions for breaches, and the MOU is certainly not legally enforceable, there are sound reasons why Jordan would comply and seek to avoid breaches. The MOU would be an important factor in the way in which Jordan conducted itself.*

SIAC instead accepted the Foreign Office's evidence that the Algerian and Jordanian governments set great store in their relations with the UK and would not breach their assurance for fear of jeopardising those relations and, as the Foreign Office expert described it, their own sense of honour:[99]

> *[The Jordanian authorities] … were men of honour and … [the Foreign Office expert] … did not believe that they would lightly not implement the commitment they had given or turn a blind eye whilst others did not implement it.*

Of course, the desire to maintain good relations would equally count as an additional reason why Jordan and Algeria would wish to *conceal* any breach that did occur and deny any breach that was detected. SIAC considered the argument that both the UK and Jordan 'would have an incentive not to explore the existence of any breaches' but concluded that:[100]

> *The incentives which are present for both parties to the MOU would bite when an allegation was made and not just when the breach was proved. Take the desire of the UK to return Islamist extremists to Middle East and*

> *North African countries: that process would be inhibited by any failure to provide proper answers to well-founded allegations of a breach and if there were allegations that the Centre had been prevented from fulfilling its functions, that would be a very serious matter.*

This does not, however, answer the point for it continues on the assumption that the processes of detection and monitoring will work effectively to bring torture to light, when both parties have an interest in non-detection. More generally, it is difficult to reconcile SIAC's conclusions about the importance of diplomatic ties with any appreciable reality. The mere fact that the governments of Jordan and Algeria are sensitive about protecting their reputations on the international stage proves nothing – all governments are jealous of slights to their dignity and it is often the governments with the worst reputations that are the most protective of them. There can be no better illustration of this than that, even in the midst of the Final Solution, there were still SS officers worried that breach of an assurance to the Slovakian government would 'seriously injure the … prestige of Germany abroad'. It may indeed be true that the Jordanians who negotiated the MOU with Britain think themselves 'men of honour' but that honour counts for little when one considers the methods of their General Intelligence Department. SIAC's conclusion that the receiving states' fear of damage to their reputation would be sufficient to protect detainees from torture is not only irrational in the public law sense: it actively beggars belief.

Equally fatuous is SIAC's finding that the UK government would be vigilant in ensuring that the assurances were honoured by Algeria and Jordan, including the threat of cutting ties, loss of economic co-operation, etc, in the event that breaches were discovered. For if it were true that the UK was prepared to use its diplomatic weight to prevent the use of torture by both countries, it surely has been a course of action that has been open to it on a unilateral basis for many a year. The UK does not appear hitherto to have threatened either Algeria or Jordan with negative consequences for their many breaches of the Torture Convention, so why is it credible to think that it will do so in the context of bilateral memoranda? On the contrary, the weight of recent evidence suggests that the human rights and rule of law concerns of the UK government are all too easily subordinated to its other foreign interests. In the *Corner House* case, for instance, the Prime Minister and the Attorney General each made clear that the importance of UK co-operation with Saudi Arabia on national security matters took precedence over a criminal investigation into corruption and bribery claims.[101] And in the *Binyam Mohamed* case currently before the High Court, the importance of US intelligence-sharing has been cited as grounds for refusing to disclose evidence showing potential complicity by UK officials in the torture of a British resident in an interrogation in Pakistan.[102] SIAC accepted the Foreign Office's evidence that Jordan is 'a valued partner in the Middle East' whose

relations include 'defence and security cooperation'.[103] SIAC similarly accepted that 'there are significant and strengthening mutual ties between Algeria and the United Kingdom' including 'the exchange of security and counter-terrorism information'.[104] Even if the UK were diligent in monitoring compliance with the assurances, it is not difficult to imagine a similar threat from either Algeria or Jordan to withdraw co-operation on counter-terrorism matters in the event that a breach were discovered.

Conclusion

The fate of the Algerian returnees and Abu Qatada is almost certain to be decided by the ECtHR: interim measures under rule 39 have already been issued in the latter's case. One can predict with equal certainty that the Strasbourg court will not be as credulous as SIAC or as complacent as the House of Lords were on the issue of safety on return. The point is not that an assurance against ill-treatment from a foreign government is never a relevant consideration in determining whether a person will face a real risk of ill-treatment contrary to Article 3 ECHR on return. After all, Article 3 ECHR covers a much broader range of treatment than torture at the hands of the state, and it would be unusual if – for example – one could not place some weight on an assurance from another EU country, in the knowledge that the framework of the EU and the Council of Europe as well as domestic law would provide a degree of security. The point is that an assurance from a country such as Algeria or Jordan can never be credible, for promises against torture from a government that tortures its own citizens are worth nothing. It is, as Aeschylus reminds us, not the promise that makes us believe the man, but the man the promise.

But the failure of the courts to properly scrutinise the use of assurances against torture is only one part of the story. The ultimate responsibility lies with the UK government in its dishonourable pursuit of assurances in the first place. After all, post-return monitoring seems a fine idea until one remembers that Eichmann was willing to consider it too. Indeed, one might have thought that that example would be reason enough for the British government to choose a different path. But to solicit such promises under the fresh guise of protecting human rights is an even more discreditable sham, one that does nothing to protect detainees in the receiving state and serves only to cheapen Britain's own reputation in the international fight against torture.

Eric Metcalfe is Director of Human Rights Policy at JUSTICE.

Notes

1 Director of human rights policy, JUSTICE. I am grateful to Julia Hall of Human Rights Watch, our co-intervenor in *RB & U (Algeria)*, n3 below, and Lord Pannick QC, Helen Mountfield, Tom Hickman and Herbert Smith LLP who acted for both organisations in the intervention, for much of the material that formed the basis of this article.

2 Fragment 385, trans MH Morgan (1895).

3 *RB & U (Algeria) and OO (Jordan)v Secretary of State for the Home Department* [2009] UKHL 10. JUSTICE and Human Rights Watch were joint interveners in the appeal.

4 Prime Minister's press conference, 5 August 2005.

5 See the discussion of *Yousef v Home Office* below.

6 Other countries understood to be the subject of negotiations were Egypt, Morocco, Tunisia and Saudi Arabia.

7 Written statement of Lord West, *Hansard*, 20 January 2009, col WS161.

8 'Winslow's extradition; His released again opposed by the British government', *New York Times*, 13 May 1876.

9 Section 10 of the 1870 Act provides: '*In the case of a fugitive criminal accused of an extraditional crime, if . . . such evidence is produced as . . . would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged'*.

10 Article 10 of the 1842 Treaty, better known as the Webster-Ashburton Treaty, was the first formal extradition treaty concluded by the US. The treaty is better known for its settlement of a number of boundary issues between the US and British North America and the suppression of the slave trade.

11 See T Wu, 'Treaties Domains' [2007] 93 *Virginia Law Review* pp572-649 at pp624-625.

12 Testimony of SS-Hauptsturmfuehrer Dieter Wisliceny to the International Military Tribunal at Nuremberg, 3 January 1946.

13 Article 11. See also eg Article 9 of the 1981 Inter-American Convention on Extradition: *'The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced'.*

14 *United States ex rel Tie Sing Eng v Murff,* 165 F.Supp. 633 at 634 (SDNY 1958). See also *Chong Chak v Murff,* 159 F. Supp. 484 (SDNY 1958).

15 Indeed, this presumably explains why several states provide a constitutional bar against their citizens being extradited.

16 Cf the continuing public outcry in Britain over the 2003 UK-US Extradition Treaty which requires the British government to show probable cause when requesting the extradition of US suspects but does not require the US government to show a prima facie case when requesting the extradition of UK suspects. See eg, 'US-UK extradition deal attacked', BBC News website, 14 February 2008; 'Ian Norris wins appeal against US extradition', *Daily Telegraph*, 14 March 2008.

17 As the Home Secretary told Parliament in 1971:*'Whether an individual's presence in this country is a danger to this country is not a legal decision. It is not a justiciable issue or a matter of law; it is a matter of judgment. Judgment should be exercised by the Government, subject to the House of Commons, and not by a tribunal which is not under the control of the House'* (*Hansard*, HC Debates, 15 June 1971, col 392).

18 11 EHRR 439.

19 Ibid, para 15.

20 Ibid, para 20.

21 Ibid, para 69.

22 Ibid, para 93.

23 Ibid.

24 Ibid, para 22.

25 Ibid, para 98. Emphasis added.

26 Ibid, paras 90-91.
27 Ibid, para 111.
28 1951 Convention on the Status of Refugees, article 32(1): *'[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order'.* Article 33(2) provides: *'[t]he benefit of the …* [obligation of non-refoulement] *… may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.*
29 (1996) 23 EHRR 413, paras 79-82.
30 Ibid, para 37.
31 Ibid, para 105.
32 [2004] EWHC 1884.
33 Ibid, para 6.
34 Ibid, para 13.
35 Ibid, para 14.
36 Ibid, para 15.
37 Ibid, para 18.
38 Ibid, para 23.
39 Ibid, para 26.
40 Ibid, para 29.
41 Ibid, para 38.
42 Ibid, para 51.
43 (2005) 41 EHRR 494.
44 Ibid, para 28. A further assurance from the Uzbek Ministry of Foreign Affairs maintained that *'The assurances given by the Public Prosecutor of the Republic of Uzbekistan concerning Mr Mamatkulov and Mr Askarov comply with Uzbekistan's obligations under the [UN Convention Against Torture]'*.
45 Ibid, para 10 of dissenting judgment.
46 CAT/C/34/D/233/2003, 20 May 2005.
47 Ibid, para 4.12.
48 Ibid, para 3.4.
49 Ibid, para 2.10.
50 Ibid, para 11.3.
51 Ibid, para 13.5. Cf *Attia v. Sweden*, Case No 199/2002, Decision adopted on 17 November 2003.
52 Ibid, para 13.4.
53 Ibid. Emphasis added.
54 *Saadi v Italy,* application no 37201/06, judgment 28 February 2008.
55 Ibid, para 54.
56 Ibid, para 55.
57 Ibid, para 117. This followed an earlier intervention by the UK in the case of *Ramzy v Netherlands*, which has yet to be heard.
58 Ibid, paras 117-123: *'in cases concerning the threat created by international terrorism, the approach followed by the Court in the* Chahal *case (which did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the Convention) had to be altered and clarified'.*
59 Ibid, para 139: *'The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return'.*
60 Ibid, para 147.
61 Ibid, para 148.
62 Application 2947/06, 24 April 2008, at para 34.

63 Ibid, para 127.
64 *Hansard*, HC Debates, 26 January 2005, col 307.
65 *Y v Secretary of State for the Home Department* (SC/36/2005, 24 August 2006), para 256 per Ouseley J.
66 *BB v Secretary of State for the Home Department* (SC/39/2005, 5 December 2006), para 9. Note that *BB* was subsequently retitled *RB*.
67 Ibid, para 11.
68 Ibid, para 5.
69 Ibid, para 18.
70 Ibid, para 21. Emphasis added.
71 *Omar Othman* (aka *Abu Qatada) v Secretary of State for the Home Department* (SC/15/2005, 26 February 2007), paras 129-153.
72 Ibid, paras 139-145.
73 Ibid, para 356.
74 Ibid, para 362.
75 Ibid.
76 *DD and AS v Secretary of State for the Home Department* (SC/42 and 50/2005, 27 April 2007), para 145.
77 Ibid, para 275.
78 Ibid, para 284.
79 Ibid, para 330.
80 Ibid, paras 187, 290, 310, 346 and 347.
81 Ibid, para 371.
82 Ibid, para 351.
83 7 Special Immigration Appeals Commission Act 1997.
84 *RB & U*, n3 above, para 124.
85 Ibid, para 126.
86 Ibid, paras 209-211.
87 ''Diplomatic assurances' not an adequate safeguard for deportees UN Special Rapporteur Against Torture warns', United Nations press release, 23 August 2005.
88 *Omar Othman (aka Abu Qatada)*, n71 above, para 508.
89 New Zealand press interview, 8 December 2008, see www.scoop.co.nz.
90 See eg *RB & U*, n3 above, para 66.
91 See eg M Basoglu, M Livanou, C Crnobari, 'Torture vs Other Cruel, Inhuman and Degrading Treatment – Is the Distinction Real or Apparent?', (2007) 3 *Archives of General Psychiatry* 64: *'In conclusion, aggressive interrogation techniques or detention procedures involving deprivation of basic needs, exposure to aversive environmental conditions, forced stress positions, hooding or blindfolding, isolation, restriction of movement, forced nudity, threats, humiliating treatment, and other psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects'*. See also the discussion of the psychological effects of isolation, sensory bombardment/deprivation and witnessing torture of others in the report of Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*, June 2008.
92 *BB*, n66 above, at para 21.
93 Ibid.
94 Indeed, such governments go further, accusing their accusers of making false allegations - see eg the US State Department Report on Jordan for 2005: *'Government officials denied many allegations of detainee abuse, pointing out that many defendants claimed abuse in order to shift the focus away from their crimes. During the year, defendants in nearly every case before the State Security Court alleged that they were tortured while in custody'* (para 128).
95 *Omar Othman (aka Abu Qatada)*, n71 above, para 356.
96 Ibid.
97 *BB*, n66 above, para 19.
98 Ibid, para 507.

99 Ibid, para 285.
100 Ibid, para 504.
101 *R (Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60.
102 See eg *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2009] EWHC 152 (Admin).
103 *Omar Othman (aka Abu Qatada)*, n71 above, para 277.
104 *BB*, n66 above, para 18(ii).

Book reviews

Crime, Social Control and Human Rights: From moral panics to states of denial Essays in honour of Stanley Cohen

David Downes, Paul Rock, Christine Chinkin and Conor Gearty (eds)
Willan Publishing, 2007
472pp £65.00

This collection of some thirty essays honours Stanley Cohen, whose work over four decades continues to occupy a definitive position in the fields of criminology, sociology and human rights, and in doing so draws together the writing of many prominent scholars and practitioners in these fields today. Cohen's life's work has had a lasting influence around the world and its timeless quality invites commentators to revisit concepts he formulated, applying them to contemporary issues. Cohen was interested in his earlier work in the passive indifference of society towards human rights violations, and in particular the way in which moral panics lead to these abuses. He also looked at the problematic nature of social control. This book attempts to link together human rights, moral panics, and states of denial in order to examine how different social institutions, such as the penal system, courts and governments, have intensified social control while demonstrating a tendency to 'under-react' to human rights violations. In Cohen's opinion, understanding why this occurs is the most fundamental problem in criminology and sociology today and, from the subject matter addressed by the contributors to this book, this appears to be a pertinent question still.

The authors contributing to this publication, each of whom has been influenced by some aspect of Cohen's work, have written essays that follow chronologically his three seminal books – Folk Devils and Moral Panics, Visions of Social Control and States of Denial. Following a foreword by Noam Chomsky and a brief introduction by the editors that considers the properties that make Cohen's work so influential, the essays are separated into six parts.

The opening part of the book examines Cohen's life and the impact it has had upon his work. Growing up in a divided South Africa, Cohen saw numerous violations of human rights and many corresponding states of denial, as Adam Kuper recounts. The section also contains essays on the experience of exile in foreign places by Richard Sennett, the troubling ethical relationship between researchers and those who form the subject of their research by Howard Becker, and a recent interview with Laurie Taylor.

The second part is then dedicated to gradations of social control and in doing so refers to Cohen's famous concept of 'moral panic'. Malcolm Feeley and Jonathan Simon consider how moral panics become institutionalised at the state level, citing the AMBER Alert System in the United States as an example. Michael Welch charts the move from over- to under-reaction and from panic to denial, outlining Cohen's observation that while over-reaction to social problems as exemplified in a moral panic more often than not leads to a raft of punitive solutions, this is accompanied by a disturbing

under-reaction that conceals and denies knowledge of human rights violations. Jock Young grapples with the concept in late modern, media-saturated worlds, while Harvey Molotch considers the degradations of healthcare systems and Andrew Rutherford applies the concept to the hyper-legislation in the UK in recent years that has led to the arguably tighter grip of social control, in particular with regard to the punishment of sex offenders.

Furthering this theme is a discussion in the third part of the book of extremities of control. Sharon Shalev investigates the human rights violations of 'supermax' prisons - the high security prisons in the United States that aim to hold prisoners in strict and prolonged separation. David Garland uses the example of capital punishment, and David Kretzmer studies the use of torture in Israel.

The fourth part revisits Cohen's 1985 publication Visions of Social Control. Here the essays range from detailing current patterns of crime control (including, in an essay by Thomas Blomberg and Carter Hay, the use of electronic monitoring for non-violent criminals in Florida) to an examination of the rise of the privatised military for maintaining order, by Tim Newburn. Robert Cohen considers the ethics of migration and the security controls before and after the terrorist attacks of 9/11.

In part five, the contributions are related to Cohen's more recent work on denial and rights in States of Denial (2001). The authors address the ways in which people avoid responsibility, either consciously or unconsciously. It includes chapters by Nicola Lacey on denial and criminal responsibility; Claire Moon who addresses the politics of acknowledgement; and other contributors who apply a rights perspective to regions such as the Mediterranean, Cambodia, Israel and South Africa, considering in particular how human rights are denied in the judicial systems of these countries.

The authors in the closing part of this publication consider the way ahead and what criminology as a discipline can contribute in leading the way towards reparation of the human rights violations so far described. Beginning with an account of Albie Sachs's journey from being detained under the Ninety Day Law as a member of the ANC to becoming a Justice in the Constitutional Court of South Africa, the essays go on to address restorative justice, criminology as vocation, and the promise of human rights, among other topics. This concluding part follows Cohen's footsteps in making the examination of human rights a priority, and effectively urges change within the field of criminology to achieve this end.

This book is essential reading for any practitioner or student of sociology or criminology, as well as those interested in human rights issues. The extent of human rights violations across the world cannot be denied, and one accomplishment of this publication is that it invites readers to consider the interesting potential for the use of a criminology paradigm to address such global social problems.

Many of the discussions in the book are even more relevant for readers today than they were at the date of publication. For example, Ron Dudai describes the value in applying transitional justice and truth-seeking mechanisms to areas torn by conflict.

In particular, he argues that without each side of the Israel-Palestine conflict addressing past human rights violations and recognising the denials of responsibility that took place, a lasting reconciliation is not possible. His analysis, which builds upon Cohen's support in the 1990s of the application of transitional justice (a lonely position to take at the time), is worth a revisit in light of the recent unrest and atrocities in the region. Similarly, the chapter by Steven Lukes that deals with the harms created by the global economic market and outlines the inequalities brought on by the global economy is particularly topical in the current economic climate.

While knowledge, or at least familiarity, with the work of Stanley Cohen is necessary for a full appreciation of some of the essays, the book is still accessible for other readers. For those with a more developed interest however, this work is an excellent exhibition of current academic thinking on the crucial intellectual project started by Cohen which inspires new ideas and further study.

Each of the authors addresses a particular aspect of Cohen's multi-faceted project, the result being a thought-provoking collection of essays which is a fitting tribute to a man widely celebrated as an innovator in the field of criminology. The stated aim of the collection is to 'build on and reflect some of his many-sided contributions'. Cohen has set the bar for a fresh and unique way of thinking about these problems and indeed the contributors seek to expand upon his concepts, projecting them onto current situations and thus ensuring that his ideas continue to inform debate. In times where human rights discourse has infiltrated all areas of public life and there is a growing awareness of rights violations, it is becoming increasingly important for academics and practioners from all fields to engage in the issues and seek to propose solutions. As Ron Dudai points out in his chapter on conflict in the Middle East, '[l]awyers may dominate the human rights field, but the role of social scientists is crucial.' If this publication can succeed in encouraging those in the fields of criminology and sociology to reflect the gravity of human rights abuses in their work, then it represents not only an interesting compilation but a valuable extension of the important work of Stanley Cohen.

Hayley Smith, research assistant, JUSTICE

The Oxford Handbook of Criminology (Fourth edition)

Mike Maguire, Rod Morgan and Robert Reiner (eds)
Oxford University Press, March 2007
1216pp £36.99

The Oxford Handbook of Criminology is acknowledged as the leading text in its field, providing a state of the art survey of all key issues in criminology. This fourth edition, with a modern content, thorough update and new chapters, has a clear format and offers an authoritative comprehensive single volume text. It covers a wide range of major issues and represents a diverse array of viewpoints in criminological discourse.

The book is separated into the following sections: the history and theory of criminology; social constructions of crime; dimensions of crime; forms of crime and reactions to crime. It covers research and policy developments and their relationship to race, gender, youth, culture and political economy. This is done through essays on 32 major topics, divided into manageable parts and written by 35 British scholars including the most respected writers in criminology, from the editors McGuire, Morgan and Reiner to Clive Hollin, Lorraine Gelsthrope, Nicola Lacey and David Downes.

Contributors refer to relevant theory and recent research, pointing to policy developments and highlighting important aspects of the current debate. Reiner writes on the plethora of material confirming that crime of all kinds is linked to inequality, relative deprivation and unemployment: issues pertinent to the current economic climate. In addition to the inclusion of developments generally, there is a new chapter on imprisonment and the changing penal system.

One of the most useful aspects of the handbook, in addition to the excellent material, is the fact that each author references their chapter throughout, as opposed to using an extensive referencing list at the end of the book. Thus their essays finish with a short guide to further reading and a comprehensive bibliography. The fourth edition is complemented by a comprehensive online section with extra chapters that is almost a sufficient resource in itself. It includes chapters by Jock Young, David Garland and Ken Pease. The online resource centre is geared towards students and lecturers alike with dedicated sections respectively. These include: a test bank of questions enabling lecturers to test their students' progress and understanding; web links to key criminological resources allowing students to research the subject further; notes on the contributors; and an editor's introduction to the fourth edition.

As an update on the field, the fourth edition contains changes which have in the main been positively received. However, one criticism that has been levied is the co-authorship of the gender and crime chapter by Lorraine Gelsthorpe and Frances Heidensohn, who previously wrote separate chapters on feminism and criminology and gender and crime, respectively, in the third edition. Despite the new chapter being of excellent quality there is understandably a loss of detail, on feminist criminology in particular.

The handbook has hugely positive and glowing reviews by students,

practitioners and academics alike, who cannot recommend it enough. Whilst not exactly a 'general interest' book, it is an invaluable and essential resource. The unbeatable content is highly relevant, accessible and straight to the point. It is value for money because of the sheer quality of its content and contribution.

Camilla Graham Wood, human rights intern with JUSTICE, winter 2009

Blackstone's Criminal Practice 2009

Rt Hon Lord Justice Hooper, David Ormerod (eds)

Oxford University Press, 2008

3648pp £185.00

Blackstone's Criminal Practice continues to offer the criminal practitioner an authoritative single-volume reference useful for both Crown and magistrates' court practice. In addition to its highly-regarded editors and existing team of contributors – including the Director of Public Prosecutions Keir Starmer QC and experts from the judiciary, both sides of the legal profession and academia – new contributors to the 2009 edition include JUSTICE Council member Anand Doobay of Peters and Peters (providing advice on recent developments in European criminal law); and Maya Sikand of Garden Court (writing on closure orders, serious crime prevention orders and public order and related offences).

The text is sensibly organised into six main sections: criminal law (general legal principles); offences; road traffic offences (separating out this section is of particular use to practitioners in the magistrates court); procedure; sentencing; and evidence. These are followed by a number of appendices which set out relevant codes, guidelines etc including, inter alia, codes of practice under the Police and Criminal Evidence Act 1984; the Criminal Procedure Rules 2005; and Sentencing Guidelines Council guidelines (quick reference to these is particularly useful both in conference and for both prosecutors and defence representatives at sentencing hearings).

There is a comprehensive tables section including a table of international treaties and conventions and a table of European legislation, both of which will be of increasing importance to criminal practice in the years to come. European Court of Human Rights and Privy Council cases are not tabulated separately but appear in the single large table of cases. The 'instruments' tables (statutes; statutory instruments; practice directions; codes of conduct; guidelines; protocols; circulars; international treaties and conventions; and European legislation) helpfully underline paragraph references where relevant material is reproduced.

The 2009 edition covers new legislation such as the Serious Crime Act 2007; Criminal Justice and Immigration Act 2008; Mental Health Act 2007; UK Borders Act 2007; Criminal Evidence (Witness Anonymity) Act 2008; Counter-Terrorism Act 2008; and Corporate Manslaughter and Corporate Homicide Act 2007. In addition, the coverage of the Fraud Act 2006 offences has been expanded. There is a free online monthly update to the 2009 edition, and also a free quarterly newsletter regarding new developments in criminal law and sentencing – the *Blackstone's Criminal Practice Bulletin*. Two cumulative paper supplements are available with the 2009 edition.

Blackstone's Criminal Practice 2009 maintains the high standards, practical focus, and clarity of presentation of previous editions. It is an indispensable resource for all those working with and on the criminal law.

Sally Ireland, Senior Legal Officer (Criminal Justice), JUSTICE

Human Rights in the Commonwealth: A Status Report

Edited by Dr Purna Sen, research by Jade Cochran

Commonwealth Secretariat, 2008

84pp £10.00

The Commonwealth Secretariat has published a status report on human rights in the commonwealth. By way of introduction, the Head of Human Rights at the Secretariat, Dr Purna Sen, describes the publication as showing how committed the organisation is to human rights in a celebration of its recent successes.

Commonwealth Secretary-General Kamalesh Sharma best expresses what the publication actually does in the foreword. 'This book presents a brief country-by-country summary of where [the Commonwealth] stand[s].' The report does not detail human rights practices throughout the Commonwealth, or legislation aimed at protecting human rights and promoting civil liberties in each country, but it summarises the position in the Commonwealth on:

- core international human rights treaties;
- signed and ratified instruments;
- reservations entered;
- human rights organisations in each country;
- the death penalty status; and
- participation in recent human rights initiatives.

If one is in search of a publication describing in detail the human rights situation in the Commonwealth following observation and inquiry, then this report may not be the best first point of reference. However,

one is equipped with a general overview (supported by bar charts and summaries) of what Commonwealth countries have done in relation to specific treaties, annexed with a copy of the Universal Declaration of Human Rights.

Kymn Butcher, policy intern at JUSTICE, winter 2009

Policing and the Legacy of Lawrence

Nathan Hall, John Grieve and Stephen P Savage (eds)
Willan Publishing, 2009
320pp £22.00

In Policing and the Legacy of Lawrence, the authors contribute their perspectives on the process of police reform that took place after the 1993 murder of Stephen Lawrence, a 19-year-old black man killed in London by a group of white attackers. The book marks the ten year anniversary of the landmark report by Sir William Macpherson, the *Stephen Lawrence Inquiry Report*, which not only scrutinised the actions of the police in responding to this particular crime but looked also at the institutional culture of the Metropolitan Police Service (MPS) and the extent to which the botched response to the Stephen Lawrence murder was a collective failure indicative of institutional racism within.

The tragedy of Stephen Lawrence's death exposed numerous deficiencies within the MPS, and also held up a mirror to the society in which the crime was committed: a young man killed in an unprovoked racist attack; the lack of first aid by responding officers at the scene; the failure of police to properly investigate the crime and track down the killers; the lack of sensitivity shown to the victim's family; the way in which Lawrence's race led police to form assumptions about the victim's culpability for the attack. The contributors to Policing and the Legacy of Lawrence were involved in shaping the policy response that would inform the Stephen Lawrence Inquiry and the subsequent reforms in the MPS.

One of the changes that followed the publication of the inquiry was the

establishment of the Independent Advisory Group (IAG) to advise the MPS on critical incidents and on policy issues, with a particular focus on issues affecting minority groups. The IAG also assists Community Safety Units, which were established within the MPS to focus on engagement with minority communities and detection of hate crimes. Another role of the IAG is to improve training of Family Liaison Officers, whose treatment of the Lawrence family had been strongly criticised in the inquiry.

Some of the changes implemented in the wake of the Stephen Lawrence Inquiry fall under the category of 'practical cop things to do', as detailed by John Grieve, a former MPS detective whose long career included service as head of the Anti-Terrorist Squad and Director of the Racial and Violent Crime Task Force. One adaptation was the 'golden hour' concept, appropriated from emergency medical practice, to stress the importance of actions by the police in the first hour after an incident, and to reinforce the responsibilities of individual officers and the steps they need to follow after an incident.

One of the most controversial elements of the *Stephen Lawrence Inquiry Report* was its finding of institutional racism within the MPS. The 1981 Scarman report, issued after the Brixton disorder, had rejected the term, locating any racist tendencies in a few 'bad apples'. For many rank-and-file officers and those in leadership positions alike, the term 'institutional racism' was problematic because it seemed to paint the members of the MPS as racists. In fact, Macpherson did not conclude that any of the apples were bad, per se, but that institutional racism could be perceived 'in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.' Several contributors comment on the scuffle over the term's inclusion in the report, noting that the language of the report, when sufficiently parsed, was not a damning indictment of the members of the police service — though even the most enlightened officer might have had concerns that the front page tabloid headlines were unlikely to replicate Macpherson's fine calibrations of language.

Bill Griffiths spent 38 years with the MPS, mostly as a detective, and now holds the post of Director of Leadership. His essay describes the opening of the inquest into Stephen Lawrence's murder as a turning point, a personal and professional awakening that made him aware of the shortcomings of the MPS and the way that race was a pervasive if unspoken actor in its functioning. He marks a progression, from the MPS being 'unconsciously incompetent' with regard to its shortcomings, to being aware of them, then consciously striving to correct them and ultimately internalising those changes. The improvements that have been made include enhanced training programs for senior investigative officers, training in emergency life support for frontline officers and their supervisors, improvements to the system of recording and accessing intelligence data, input from independent advisors, and initiatives to improve community relations and cultural sensitivity. Whilst acknowledging that it is an ongoing process, Griffiths asserts that 'these changes are now so "unconsciously competent" that they have become embedded in the DNA of the Met.'

Whether a random sample of London residents would produce the term 'unconsciously competent' in describing their police service is not entirely clear. And some might quibble with the characterisation by Macpherson of racism within the MPS as an institutional phenomenon that is 'unwitting' and ignorant in the less pejorative sense. The recent reports of the disproportionate use of stop-and-search and mobile fingerprint scanners on minority citizens show that the intersection between race and policing remains a complicated one. The 2005 killing of Jean Charles de Menezes by police in Stockwell tube station is not taken up by Policing and the Legacy of Lawrence, despite the importance of that event in assessing progress in the areas of critical incident response and accountability, particularly where race is an element.

Doreen Lawrence, the mother of Stephen Lawrence, contributes a foreword to the book. In it she notes a recent trend toward focusing more on 'diversity' than race. Mrs Lawrence writes:

> *The question we should ask before we change to diversity is this: have we fully addressed the issues of race? Another question is this: do the police service think they have achieved their goals of addressing racism in the force? And if so, do they think they could be accused of institutional racism again?*

These are the key questions, and the book would be stronger and more relevant for keeping those questions in the foreground. Instead, much of the book is a recap of a policy battle, a battle largely won by advisers and academics who, through a mixture of co-operation and imposition, managed to see enacted a number of changes at the MPS. As a document of that important process, the book succeeds, reflecting many of the contributions that brought those reforms about. But to judge the effectiveness of those changes would require the inclusion of other voices, who could report on the way these policies and programmes have filtered down to the rank-and-file and are being experienced at the retail level. That is the ongoing, and constantly redefined, legacy of Lawrence.

Matt Doherty, intern with JUSTICE from Boston College Law School, spring 2009

JUSTICE briefings and submissions

1 November 2008 – 31 March 2009

Available at www.justice.org.uk

1. Response to the Human Genetics Commission consultation, *The forensic use of DNA and the National DNA database*, November 2008;
2. Response to the Home Office consultation, *PACE Review: Government proposals in response to the review of the Police and Criminal Evidence Act 1984*, December 2008;
3. Briefing on the Policing and Crime Bill for second reading in the House of Commons, January 2009;
4. Briefing on the Coroners and Justice Bill for second reading in the House of Commons, January 2009;
5. JUSTICE Student Human Rights Network electronic bulletin, New Year 2009;
6. Suggested amendments to Part 2 of the Policing and Crime Bill, dealing with the law on prostitution, for committee stage in the House of Commons, February 2009;
7. Response to the Ministry of Justice consultation paper, *The Award of Costs from Central Funds in Criminal Cases*, February 2009;
8. Response to the Ministry of Justice consultation paper, *Crown Court means testing*, February 2009;
9. Suggested amendments to Part 1 of the Coroners and Justice Bill for committee stage in the House of Commons, February 2009;
10. Suggested amendments to Part 2 of the Coroners and Justice Bill for committee stage in the House of Commons, February 2009;
11. Briefing on the Borders, Citizenship and Immigration Bill for second reading in the House of Lords, February 2009;
12. Submission to the Joint Committee on Human Rights inquiry, *Ending Impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law*, by JUSTICE, REDRESS, FIDH, Amnesty International, Human Rights Watch and Hickman and Rose solicitors, February 2009;
13. Suggested amendments to Part 3 of the Coroners and Justice Bill for committee stage in the House of Commons, February 2009;
14. Submission to the House of Lords Constitution Committee inquiry into *Emergency Legislation*, February 2009;

15. Suggested amendments to the government amendments to the Policing and Crime Bill relating to 'injunctions against gang-related violence' for committee stage in the House of Commons, February 2009;
16. Briefing on Part 5 of the Coroners and Justice Bill, relating to mutual recognition of convictions across the EU, for committee stage in the House of Commons, February 2009;
17. Briefing on Part 5 of the Policing and Crime Bill relating to amendments to the Extradition Act for committee stage in the House of Commons, February 2009;
18. Briefing for House of Commons renewal debate on the Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2009, February 2009;
19. Joint JUSTICE, Inquest and Liberty Briefing on Clauses 11-13 of the Coroners and Justice Bill on secret inquests for report stage in the House of Commons, March 2009;
20. JUSTICE briefing and suggested amendments for the Coroners and Justice Bill for report stage in the House of Commons, March 2009;
21. Response of the Standing Committee for Youth Justice, of which JUSTICE is a member, to the Sentencing Advisory Panel's consultation paper on *Principles of Sentencing for Youths*. JUSTICE has endorsed this response, March 2009.

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