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Amicus Curiae Submission

United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Ben Saul

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Case number: Black case number Por Dor 8/2567

Petitioner: Public Prosecutor
Foreign Affairs Office,
Office of Attorney General

Respondent: Mr Y Quynh Bdap

Date: 12 August 2024

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I. Introduction

1. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has the honour to provide this amicus curiae submission in this case. It aims to provide independent, expert opinion to constructively assist the Criminal Court in this case. This submission is written in English and translated into Thai.

2. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism was established by Human Rights Council resolution 2005/80. Mr. Saul was appointed by the Human Rights Council to this mandate and took up his functions on 1 November 2023. The mandate of the Special Rapporteur is to promote and ensure the protection of human rights and fundamental freedoms by recommending rights-compliant counter-terrorism legislation and policies.[1]

3. As Mandate Holder, Mr. Saul[2] is part of "[t]he system of Special Procedures" that "is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social".[3] He is an independent human rights expert selected for his "(a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity".[4] He "undertake[s] to uphold independence, efficiency, competence and integrity through probity, impartiality, honesty and good faith" and not receive financial gain.[5]

4. In the performance of his mandate, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms is accorded certain privileges and immunities as an expert on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly on 13 February 1946, to which Thailand is a party since 30 March 1956. This application is submitted voluntarily without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

5. Authorization for the position and views expressed as a Special Rapporteur, in full accordance with the independence afforded to his mandate, was neither sought nor given by the United Nations, the United Nations Human Rights Council, the Office of the United Nations High Commissioner for Human Rights, or any of the officials associated with those bodies.

6. This submission addresses three legal issues: (a) the definition of a "terrorist act" under international law; (b) the designation of organizations as "terrorist" under international law; and (c) the scope of the principle of *non-refoulement* under international law, including in relation to terrorist acts. It does not address the facts of the present case, on which the Special Rapporteur discloses that he has separately communicated with the authorities of Thailand (see THA 6/2024) and Vietnam (see VNM 4/2024).

[1] https://www.ohchr.org/en/special-procedures/sr-terrorism/about-mandate-special-rapporteur-terrorism.
[2] https://www.ohchr.org/en/special-procedures/sr-terrorism/mr-ben-saul.
[3] https://www.ohchr.org/en/hrbodies/sp/pages/introduction.aspx.
[4] UN Human Rights Council resolution 5/1 (2007), annex, para. 39.
[5] UN Human Rights Council, Code of Conduct for Special Procedures Mandate Holders, article 3(e) and (i)-(j).

II. The Definition of a "Terrorist Act" under International Law

7. There is no binding legal definition of "terrorism" or "terrorist act" in international law. Instead, numerous international counter-terrorism conventions and protocols[6] require states parties to criminalize particular methods commonly regarded as terrorist in nature, without providing any general definition of terrorism. These include acts such as offences against the safety of international civilian aviation and maritime safety, attacks on diplomats, hostage taking, endangering nuclear safety, and bombings. Article 2 of the Association of Southeast Asian Nations Convention to Counter Terrorism 2007, which entered into force for Thailand on 27 May 2011,[7] defines its terrorist criminal offences by reference to "any of the offences within the scope of and as defined in any of the treaties listed", namely many of the aforementioned treaties.[8]

8. In binding resolution 1373 (2001), the United Nations Security Council required all Member States to ensure that "terrorist acts are established as serious criminal offences in domestic laws" and that "any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice".[9] The resolution does not define "terrorist acts".

9. The United Nations Security Council recommended a "best practice", non-binding general definition of terrorist acts in paragraph 3 of resolution 1566 (2004):

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature….

10. While resolution 1566 is non-binding, it was aimed to influence national implementation of resolution 1373 (2001) and successive binding resolutions. The specific intent elements of resolution 1566 – to "intimidate a population or compel a government or an international organization to do or to abstain from doing any act" – are drawn from the International

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[6] See list at https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml.
[7] https://treaties.un.org/Pages/showDetails.aspx?objid=08000002804c9a11.
[8] a. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; b. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971; c. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973; d. International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979; e. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 26 October 1979; f. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on 24 February 1988; g. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988; h. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; i. International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997; j. International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999; k. International Convention for the Suppression of Acts of Nuclear Terrorism, adopted in New York on 13 April 2005; I. Amendment to the Convention on the Physical Protection of Nuclear Material, done at Vienna on 8 July 2005; m. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at London on 14 October 2005; and n. Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at London on 14 October 2005.
[9] Para. 2(e).

Convention for the Suppression of the Financing of Terrorism 1999, adopted by the United Nations General Assembly, and described by the United Nations Special Tribunal for Lebanon as the "the UN's clearest definition of terrorism".[10] These elements have also been agreed in the United Nations Draft Comprehensive Terrorism Convention, under negotiation through the General Assembly since 2001, and are reflected in many national laws.

11. Since 2005 the mandate of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has consistently endorsed resolution 1566 as the basis for human rights-respecting definitions of terrorism in national law.[11]

12. Resolution 1566 defines terrorism by reference to three essential elements:

    (a) criminal acts intended to cause death or serious injury, or hostage taking;

    (b) an additional, specific intention to:

        (i) provoke a state of terror in the general public or a group of people or particular people;

        (ii) intimidate a population; or

        (iii) compel a government or an international organization to do or to abstain from doing any act; and

    (c) such acts are offences under an international counter-terrorism instrument.

13. Resolution 1566 limits the *actus reus* (physical conduct) of terrorism to criminal acts that also qualify as offences under international counter-terrorism instruments. This means that certain methods of terrorist violence are not covered by resolution 1566 where they do not constitute an existing treaty offence, such as attacks on civilians using common weapons such as guns or knives or perpetrated by motor vehicles. Accordingly, the "model definition" of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recognizes that terrorist acts can also include other "serious crimes" under national law which cause death or serious personal injury, accompanied by a specific intent element. The model definition is as follows:

    Terrorism means an action or attempted action where:

    1. The action:

        (a) Constituted the intentional taking of hostages; or

        (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or

        (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and

    2. The action is done or attempted with the intention of:

        (a) Provoking a state of terror in the general public or a segment of it; or

        (b) Compelling a Government or international organization to do or abstain from doing something; and

    3. The action corresponds to:

[10] *Prosecutor v Ayyash et al* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) Special Tribunal for Lebanon, Appeals Chamber STL-11-01/I (16 February 2011), para. 88.
[11] A/HRC/16/51, para. 26. See also E/CN.4/2006/98, paras. 26-50.

(a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or

(b) All elements of a serious crime defined by national law.

14. Many states have added a further specific intent element to their national definitions of terrorism – a requirement that the act should further a political, ideological, or religious purpose.[12] This is *additional to* the act intimidating a population or compelling a government. Such element beneficially narrows the scope of definitions and helps to make them more precise.[13] In this context it is notable that the United Nations General Assembly's Declaration on Measures to Eliminate International Terrorism 1994 describes terrorism as involving "political purposes".[14]

15. International "best practice" definitions of terrorism also contain two "exclusion clauses" to narrow their scope. First, six international counter-terrorism conventions, and a number of instruments of regional organizations, exclude the "activities of armed forces during armed conflict, as those terms are understood under international humanitarian law, which are governed by that law".[15] This exclusion properly ensures that all violence in armed conflict is instead regulated by the special field of international law which was designed precisely to address the circumstances of armed conflict, and does not interfere in that law or undermine its rules and purposes.

16. Secondly, one regional organization excludes from its definition of terrorism "[t]he provision of humanitarian activities by impartial humanitarian organisations recognised by international law".[16] This exclusion is international "best practice" because it ensures that terrorist offences do not impermissibly criminalize activities protected under international humanitarian law, including humanitarian relief and medical care.

17. Thirdly, it is "best practice" to exclude from definitions of terrorism acts of advocacy, protest, dissent or industrial action where they do not cause death or serious injury.[17] This ensures that terrorist offences do not unjustifiably criminalize acts committed in the context the exercise of the rights to freedom of expression, assembly, association and political participation in a democracy society.

18. International law does not prohibit national definitions of terrorism that vary from the above "best practices", including resolution 1566. There is, however, no international obligation arising under Security Council resolutions, such as resolution 1373, to cooperate where another state's terrorism definition is wider than that in resolution 1566. International cooperation is only mandatory in relation to conduct that properly falls within the

[12] Counter-Terrorism Executive Directorate, "Analytical Brief: A Commentary on the Codification of the Terrorism Offence" (2024), 16.
[13] Ibid; A/HRC/16/51, para. 27.
[14] A/RES/49/60 (1994), annexed Declaration, para. 3 ("Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them").
[15] Terrorist Bombings Convention 1997, art. 19(2); Nuclear Terrorism Convention 2005, art. 4(2); Nuclear Material Convention 1979 (as amended by the Amendment 2005), art. 2(4)(b); Hague Convention 1970 (as amended by the Beijing Protocol 2010), art. 3 *bis*; Rome Convention 1988 (as amended by the Protocol 2005), art. 2 *bis* (2); Beijing Convention 2010, art. 6(2). Separately, the Terrorist Financing Convention 1999, art. 2(1)(b), prohibits the financing of terrorist acts against "a civilian, or… any other person not taking an active part in the hostilities in a situation of armed conflict", but not acts against fighters.
[16] Recital 38.
[17] See also Counter-Terrorism Executive Directorate, "Analytical Brief: A Commentary on the Codification of the Terrorism Offence" (2024), 17.

international consensus definition of terrorism, as outlined in resolution 1566, the Special Rapporteur's model definition, and the exclusion clauses set out in the present submission.

19. All national definitions of terrorism must comply with the requirements of international human rights law. In particular, the principle of legality under article 15(1) of the International Covenant on Civil and Political Rights 1966 ("ICCPR"), being an element of the prohibition on retrospective punishment, requires that criminal laws must be sufficiently precise so that it is clear what types of conduct constitute a crime and what would be the legal consequences of committing such an offence, so as to avoid overly broad or arbitrary application,[18] or the impermissible targeting of civil society on political or other unjustified grounds.[19] Definitions that are vague, imprecise, uncertain or over-broad are not compatible with the principle of legality. The Special Rapporteur has frequently documented how vague national definitions of terrorism are prone to abuse,[20] including to criminalize the legitimate exercise of freedoms of expression, association, assembly, and political participation, including by civil society, human rights defenders, minorities, indigenous peoples, journalists and political activists.

III. Designation of Organizations as "Terrorist"

20. International law does not generally require states to designate organizations as "terrorist". The Security Council has itself listed certain organizations as associated with Al Qaeda or Islamic State in the Levant (ISIL) under its counter-terrorism sanctions regime.[21] Member States of the United Nations are required to nationally implement those sanctions, including an assets freeze, arms embargo, and travel ban. This regime does not require states to criminalize associations by individuals with these groups. It also does not require Member States to independently list other "terrorist" groups not identified by the Security Council.

21. Security Council resolutions do require Member States to freeze assets, and prevent terrorist financing, in relation to "entities" owned or controlled by individuals involved in terrorist acts.[22] While the resolutions do not strictly require it, some Member States have independently created national lists of "terrorist" groups, beyond Al Qaeda and ISIL, to facilitate fulfilling their duty to suppress terrorist financing of terrorist groups. In doing so, such states generally apply their national law definitions of terrorism.

22. Separately, some states have also independently listed certain organizations for other purposes, such as imposing travel bans, or criminalizing certain forms of association with the group, such as participation, membership, leadership, training, recruitment, support and so on. Again, such designations are typically based on national definitions of terrorism. Designations are often made by executive authorities rather than by a court.

23. International law neither requires nor prohibits the unilateral designation of organizations as "terrorist" beyond the groups listed by the Security Council as associated with Al Qaeda or ISIL, including for criminal law purposes. However, when states choose to independently list terrorist groups, they must comply with international human rights law. Specifically, the following "best practices" have been identified by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism:[23]

> (a) There must be reasonable grounds to believe, based on credible evidence, that the entity is intentionally and knowingly carrying out, participating in or

[18] United Nations Human Rights Committee, General Comment No. 35 (2014), para. 22.
[19] A/70/371, para. 46.
[20] A/HRC/16/51, para. 26. See also E/CN.4/2006/98, paras. 26-50.
[21] https://main.un.org/securitycouncil/en/sanctions/1267/aq_sanctions_list.
[22] Resolution 1373 (2001), para. 1(c)-(d) and successive resolutions.
[23] A/HRC/16/51, para. 35.

facilitating a terrorist act, and is committed to and capable of continuing to carry out terrorist acts;

(b) The applicable definition of a terrorist act must be limited to conduct that is genuinely terrorist in nature and consistent with international standards on the definition,[24] including the principle of legality and respect for human rights;

(c) Where a listing is based on statement by the group purporting to incite terrorism, the law on incitement must: be precisely prescribed by law and avoid vague terms; be based on a precise underlying definition of terrorism; be strictly necessary and proportionate to counter-terrorism; and include both an intent to incite terrorism and an objective risk that it will be committed).[25] To the extent that the designations are related to alleged incitement of ethnic division, the law should satisfy the six-part test on hate speech inciting violence in the Rabat Plan of Action, referring to context; speaker; intent; content or form; extent of the speech; and likelihood of harm occurring, including imminence.[26]

(d) The designation must satisfy international legal requirements of due process and judicial safeguards, namely that:

(i) A listed organization must be promptly informed of the listing and its factual grounds, the consequences of such listing and the applicable procedural rights;

(ii) There must be a right to apply for de-listing and a right of judicial review;

(iii) There must be a right to re-apply for de-listing removal in the event of a material change of circumstances or the emergence of relevant new evidence;

(iv) There must be automatic periodic review of the listing to determine whether reasonable grounds remain for entities to be listed;

(v) Listings must lapse automatically after 12 months unless renewed afresh;

(vi) Any restriction of human rights and freedoms resulting from the listing must be strictly necessary and proportionate in pursuit of a legitimate security aim and non-discriminatory.

(vii) Compensation must be available for wrongful listing.

24. The Special Rapporteur has frequently documented the abuse of laws to list organizations as terrorist in order to impermissibly interfere in and supress protected rights under international law, including freedoms of thought, conscience and religion (ICCPR, article 18); expression, assembly and association (Universal Declaration of Human Rights 1948 (UDHR), articles 19 and 20; ICCPR, articles 19, 21 and 22; and ASEAN Human Rights Declaration 2012, articles 23, 24 and 32); the right to take part in public affairs (ICCPR, article 25(a)); and freedom from discrimination on the basis of race, language, religion, national or social origin, or political opinion (UDHR, article 2; ICCPR and International Covenant on Economic, Social and Cultural Rights 1966 ("ICESCR"), common article 2(1); ASEAN Human Rights Declaration, articles 3 and 9). In addition, the consequential criminal prosecution of individuals associated with organizations which are not genuinely terrorist in nature would violate the right to liberty (ICCPR, article 9).

[24] Including Security Council resolution 1566 (2004), the model definition of the Special Rapporteur, and the afore-mentioned exclusion clauses.
[25] A/HRC/16/51, para. 35.
[26] A/HRC/22/17/Add.4.

25. To the extent that an organization is advocating for the cultural or religious rights of a group, the listing may infringe on the right of ethnic, religious or linguistic minorities to enjoy their own culture (ICCPR, article 27) and the right to take part in cultural life (ICESCR, article 15(1) (a); ASEAN Human Rights Declaration, article 32). To the extent that an organization is advocating for the rights of indigenous peoples, a listing may violate the right of self-determination of the peoples to freely determine their political status and to freely pursue their economic, social and cultural development within the sovereignty of the state (ICCPR and ICESCR, common article 1(1)).

26. Organizations must also not be listed as terrorist for engaging in speech or activities in defence of human rights, including advocacy at the United Nations. Human Rights Council resolutions 12/2, 24/24, 36/21, 42/28, 48/15 and 54/24 reaffirm the right of everyone, individually or in association with others, to unhindered access to and communication with international bodies, in particular the United Nations, its representatives and mechanisms in the field of human rights; and the resolutions urge states to refrain from all acts of intimidation or reprisals and to take all appropriate measures to prevent the occurrence of such acts.

IV. *Non-refoulement* under International Law

27. The principle of *non-refoulement* arises under both international refugee law and international human rights law. It prohibits return of a person to another state where there are substantial grounds for believing that they would be at risk of specified harm there. While there are certain exceptions to *non-refoulement* under refugee law, under international human rights law *non-refoulement* is absolute and permits no exceptions.

A. International Refugee Law

28. Customary international refugee law and the Convention Relating to the Status of Refugees ("Refugee Convention") 1951 and its Protocol 1967 prohibit states parties from expelling or returning (*refoulement*) a person to persecution, as reflected in article 33(1) of the Refugee Convention:[27]

> No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

29. *Non-refoulement* applies to any form of forcible removal, including deportation, expulsion, extradition, informal transfer ("rendition"), and non-admission at the border.[28]

30. A refugee is defined in article 1A(2) of the Refugee Convention as a person who,

> … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it.

[27] Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*: Opinion", UNHCR Global Consultations on International Protection (20 June 2001), para. 223.

[28] A/62/263, para. 49; UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1976 Protocol, 26 January 2007, para. 7. See also UNHCR, Note on Diplomatic Assurances and International Refugee Protection, August 2006, at www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164.

31. A person is a refugee if they meet the international definition and accordingly in principle such status does not depend on formal recognition as a refugee by a state authority. A determination that a person is a refugee, taken by national authorities or the United Nations High Commissioner for Refugees, may declare or confirm the person's refugee status, and thereby unlock benefits in national law, but does not create the international status.

32. The legal standard of a "well-founded fear" of persecution means that a person must show that his or subjective fear of persecution is based upon objective facts which make the fear reasonable under the circumstances, but does not require that he or she would be more likely than not become the victim of persecution.[29] In domestic law the standard has been variously expressed as a "reasonable chance",[30] "real chance"[31] or a "reasonable possibility",[32] or less than a 50 per cent chance and even a 10 per cent chance.[33]

33. In most cases, conduct amounting to persecution will also constitute cruel, inhuman or degrading treatment or punishment,[34] thus also attracting the *non-refoulement* protections under article 7 of the ICCPR. However, the latter protection may be broader than that available under the Refugee Convention where, for instance, there is no link to a Convention ground, or where a person is excluded from refugee protection under articles 1D-F of the Refugee Convention.

Exclusion from Refugee Status

34. Article 1F of the Refugee Convention excludes certain persons from refugee status, such that *non-refoulement* under refugee law does not apply (although human rights law may separately prohibit *refoulement*, discussed below, preventing the person's removal from the state). There are three specific exclusion clauses under article 1F:

    (a) Under article 1F(a), exclusion is required where there are serious reasons for considering that a person has committed a crime against peace, war crime, or crime against humanity.[35] This could include where these are committed by terrorist organizations or other violent non-state actors.

    (b) Under article 1F(b), refugee status cannot be granted to a person if there are "serious reasons" for considering that "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".[36] A crime may be considered "serious" where it is punishable by a "very grave" penalty,[37] as for murder, rape, armed robbery, torture, hijacking, or other violent acts. Article 1F(b) only applies to "non-political" offences, which potentially excludes its application to certain national security crimes – for instance, treason, espionage, subversion and rebellion. A crime will be regarded as "non-political" when "other motives (such as personal reasons or gain)" predominate.[38]

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[29] UN High Commissioner for Refugees ("UNHCR"), "UNHCR Intervention before the Supreme Court of the United States in *Immigration and Naturalization Service v Cardoza-Fonseca*", No. 85-782 (14 July 1986).
[30] *Immigration and Naturalization Service v Cardoza-Fonseca*, 480 US 421 (1987) (US Supreme Court).
[31] *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (High Court of Australia).
[32] *Canada v Johan* [1993] FCJ No. 130 (QL) (Federal Court of Canada).
[33] *Immigration and Naturalization Service v Cardoza-Fonseca* (1987), above.
[34] UNHCR, "Note on International Protection", A/AC.96/898 (25 May 1998), para. 6.
[35] See generally Jelena Pejic, "Article 1F(a): The Notion of International Crimes' (2000) 12 International Journal of Refugee Law 11; Matthew Zagor, 'Persecutor or Persecuted? Exclusion under Article 1F(A) and 1F(B) of the Refugee Convention" (2000) 23 UNSW Law Journal 164.
[36] See generally Walter Kälin and Jörg Künzli, "Article 1F(b): Freedom Fighters, Terrorists and the Notion of Serious Political Crimes" (2000) 12 International Journal of Refugee Law 46.
[37] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR 2011), para. 155.
[38] UNHCR, *Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (HCR/GIP/03/05, 4 September 2003), para. 15.

Even where an act is politically motivated, however, it may still be treated as non-political if: there is no clear link between the crime and its political objective; the act is disproportionate to its objective;[39] the methods used are atrocious or indiscriminate;[40] or the political objective is inconsistent with human rights.[41] Such tests would cover much genuinely terrorist violence and thus exclude perpetrators from refugee protection.[42] Article 1F(b) does not, however, automatically exclude all "terrorists" from protection. An assessment must always be made of the contribution made, and its severity, by the individual.[43] Overbroad national terrorism offences may criminalize conduct that is not genuinely terrorist and is not sufficiently serious to come within article 1F(b). In addition, since terrorist offences cover even proportionate violence targeted against state authorities which do not harm civilians, such offences could still quality as "political" crimes.

(c) Under article 1(F)(c), refugee status cannot be granted to a person if there are "serious reasons" for considering that "he has been guilty of acts contrary to the purposes and principles of the United Nations".[44] This is interpreted restrictively to only be "triggered in extreme circumstances by [international] activity which attacks the very basis of the international community's coexistence".[45] Examples include threats to international security, or serious and sustained violations of human rights by state or de facto state authorities.[46] Security Council resolutions have also deemed terrorist acts to threaten international security,[47] although exclusion will depend on the gravity of the act and the person's individual contribution to it.[48] Mere participation in combat[49] is not sufficient; nor is mere membership in a violent state or non-state group;[50] nor acts of lesser gravity such as providing logistical support (such as false passports)[51] or non-military support (including medical care)[52] to a terrorist group.

35. Like UNHCR, the Special Rapporteur has previously cautioned against overly broad interpretations of the exclusion clauses and emphasized that the exclusion clauses should be applied in a restrictive and scrupulous manner.[53] In the absence of a universally agreed definition of terrorist acts, some States have included in their national counter-terrorism legislation a broad range of acts which do not, in terms of severity, purpose or aim, reach the

[39] Ibid.
[40] UNHCR, *Handbook*, above, para. 152.
[41] UNHCR, *Background Note on the Application of the Exclusion Clauses* (UNHCR 2003), para. 43.
[42] UNHCR, *Guidelines*, above, paras. 15 and 26; UNHCR, *Background Note*, above, para. 81. For example, where a violent Islamist political organization in Algeria indiscriminately killed civilians at an airport: *T v Secretary of State for the Home Department* [1996] 2 All ER 865 (UK House of Lords).
[43] UNHCR, *Guidelines*, above, para. 26; UNHCR, *Background Note*, ibid, paras. 81-82 (low level terrorist financing) and 85-86 (hijacking to escape persecution).
[44] See generally Edward Kwakwa, "Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations" (2000) 12 International Journal of Refugee Law 79.
[45] UNHCR, *Guidelines*, above, para. 17.
[46] Ibid. See also *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 (Supreme Court of Canada); UNHCR Background Note, above, para. 59.
[47] Security Council resolution 1373 (2001), para. 5; resolution 1269 (1999), para. 3; resolution 1377 (2001), annexed Declaration; and resolution 1624 (2005), preamble.
[48] UNHCR, *Background Note*, above, para. 49; see also UNHCR, *Guidelines*, above, para. 17; UNHCR, *Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion under Article 1F of the 1951 Convention Relating to the Status of Refugees* (UNHCR 2005), paras. 3-4.
[49] *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] Imm AR 674 (UK).
[50] CNDA, MZ, No 10004811, 5 April 2012 (French National Court of Asylum) (concerning Iranian state authorities); Conseil du Contentieux des Etranger, 13 Janvier 2011, Nr 54.335 (Belgium) (involving a Moroccan terrorist organization); *Bundesrepublik Deutschland v B and D*, Joined Cases C-57/09 and C-101/09, Grand Chamber of the Court of Justice of the European Union (CJEU), 9 November 2010 (PKK in Turkey); UNHCR Background Note, above, paras. 60 and 62 (but UNHCR suggests that voluntary membership of violent extremist groups, including listed terrorist organizations, may give rise to a rebuttable presumption that the person has contributed to the group's violence; see also UNHCR, *Guidelines*, above, para. 26).
[51] CCE, arrêt no 96933, 12 February 2013 (Belgium).
[52] *MH (Syria) v Secretary of State for the Home Department* [2009] EWCA Civ 226 (UK).
[53] A/62/263, para. 66.

threshold of objectively being considered terrorist acts, or the threshold required for exclusion from refugee status. Such broad definitions have in many instances been used to suppress legitimate activities which fall within the ambit of international protected freedoms of opinion, expression or association.[54]

The Exception to Non-Refoulement

36. Under article 33(2) of the Refugee Convention, *non-refoulement* "may not… 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 judgement of a particularly serious crime, constitutes a danger to the community of that country". The exception to *non-refoulement* thus applies to a refugee who may nonetheless be deprived of protection because he or she poses a verifiable future risk to the country of asylum.[55]

37. Because of the grave consequence of article 33(2), namely return to persecution, it must be stringently interpreted. Article 33(2) imposes a high threshold of very serious danger, rather than lesser threats, and which target either national security or the "community" (namely, the safety and well-being of the population as a whole, not ordinary criminal activities).[56] Acts which could come within its scope include those endangering the constitution, government, territorial integrity, independence, or the external peace of a country;[57] as well as espionage, sabotage, and genuinely terrorist acts targeting civilians.[58] The alternative threshold, of threats to the community, must be substantiated by a criminal conviction as well as evidence that the person presents an ongoing risk. Due process and standard of proof safeguards also apply.[59]

Expulsion of a Lawfully Resident Refugee

38. Article 32 of the Refugee Convention provides for the expulsion of a refugee lawfully present in a state's territory only "on grounds of national security or public order" (article 32(1)). The main difference between the provisions is that article 32 is not an exception to *non-refoulement* and only permits expulsion to a state where the person is *not* at risk. The threshold for article 32 is comparable to that under the first limb of article 33(2), discussed above, and could extend to serious terrorist threats against the state of refuge. It would not, however, extend to ordinary criminal activities which lack any security dimension.[60] The drafting record indicates that it should be restrictively interpreted, such that a refugee should only be expelled as a last resort and as the only practicable means of protecting the state's legitimate security interests.[61]

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[54] Ibid.

[55] UNHCR, "Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective", Rev. 1 (UNHCR 29 November 2001), para. 22.

[56] Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Non-refoulement*: Opinion" in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), 87, at paras. 169 and 192.

[57] Atle Grahl-Madsen, *Commentary on the Refugee Convention: Articles 2–11, 13–37* (republished by UNHCR 1997), commentary to article 33, at (8).

[58] Lauterpacht and Bethlehem, above, para. 171.

[59] UNHCR, "Addressing Security", above, para. 21; Lauterpacht and Bethlehem, above, para. 168.

[60] Ulrike Davy, "Article 32" in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011), 1277, 1310.

[61] UNHCR, *Note on Expulsion of Refugees* (EC/SCP/3, 24 August 1977), para. 4; UNHCR, *The Scope of International Protection in Mass Influx* (EC/1995/SCP/CRP.3, 2 June 1995), para. 8.

B. International Human Rights Law

39. Under international human rights law, *non-refoulement* is well established in relation to the risks of return to arbitrary deprivation of life or life without dignity, torture or cruel, inhuman or degrading treatment or punishment, and flagrant denial of justice. *Non-refoulement* can also apply in principle to other serious violations of human rights, including arbitrary deprivation of liberty and denial of political freedoms, although there have been few cases thus far decided on those grounds. The following sections consider the various grounds in turn. The protection of *non-refoulement* applies to every person, not just refugees. *Non-refoulement* to torture or cruel, inhuman or degrading treatment or punishment is absolute and admits no exceptions, giving wider protection than refugee law in this respect.

40. **Arbitrary deprivation of life, or life without dignity**. The duty to respect and ensure respect for the right to life under article 6 of the ICCPR requires states parties to refrain from deporting, extraditing or transferring individuals to countries where there are substantial grounds for believing that a real risk exists to their right to life.[62] This could include risks of summary execution or extrajudicial killing, including unexplained death in custody; and the death penalty where imposed for crimes that are not "the most serious". Relevant to the assessment are the intent of the authorities of the receiving state, their pattern of conduct in similar cases, and the availability of credible and effective assurances about their intentions.[63] It further prohibits the removal of a person where there is a real risk to the right of individuals to enjoy a "life with dignity" and to be free from acts or omissions that would cause their unnatural or premature death, including as a result of reasonably foreseeable threats and life-threatening situations.[64]

41. **Torture.**[65] Article 3(1) of the Convention against Torture requires that "[n]o State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". Torture is defined in article 1 of the Convention against Torture.[66] The prohibition in article 3 is absolute and non-derogable and applies irrespective of a person's conduct,[67] including serious criminal conduct. The prohibition applies to all modes of returning a person to another state, including extradition.[68]

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[62] UN Human Rights Committee, General Comment No. 36 (2019), para. 30.
[63] Ibid.
[64] *Teitiota v New Zealand*, UNHRC Communication No. 2728/2016 (24 October 2019), para. 9.4. See also UNHRC, General comment No. 36 (2018), para. 3; *Portillo Cáceres et al v Paraguay*, UNHRC, CCPR/C/126/D/2751/2016, para. 7.3; *Toussaint v Canada*, UNHRC, CCPR/C/123/D/2348/2014, para. 11.3.
[65] Convention against Torture, article 3 and ICCPR, article 7.
[66] "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."
[67] UN Human Rights Committee, General Comment No. 20 (1992), para. 3; *Tapia Paez v Sweden*, UNCAT Communication No. 39/1996 (28 April 1997), para. 14.5; *Aemi v Switzerland*, UNCAT Communication No. 34/1995 (9 May 1997), para. 9.8. Under the similar European Convention on Human Rights see *Soering v UK* (1989) 11 EHRR 439, para. 88; *Ireland v UK*, App. No. 5310/71 (18 January 1978), para. 163; *Chahal v UK*, App. No. 22414/93 (15 November 1996), para. 79; *Selmouni v France* [GC], App. No. 25803/94 (28 July 1999), para. 95, *Al-Adsani v UK* [GC], App. No. 35763/97 (21 November 2001), para. 59; *Shamayev and Others v Georgia and Russia*, App. No. 36378/02 (12 April 2005), para. 335; *Indelicato v Italy*, App. No. 31143/96 (18 October 2001), para. 30; *Ramirez Sanchez v France* [GC], App. No. 59450/00 (4 July 2006), paras. 115-116; *Saadi v UK* [GC], App. No. 13229/03 (29 January 2008), para. 127.
[68] *Chipana v Venezuela*, UNCAT Communication No. 110/1998 (10 November 1998), para. 6.2; *GK v Switzerland*, UNCAT Communication No. 219/2002 (7 May 2003), paras. 6.4–6.5.

42. Decision-makers must take into account all relevant considerations including the existence in the state of a consistent pattern of gross, flagrant or mass violations of human rights.[69] These relevantly include: widespread use of torture and impunity of its perpetrators; harassment and violence against minority groups; widespread use of sentencing and imprisonment of persons exercising fundamental freedoms arbitrary detention; inadequate safeguards in detention, excessive use of force by state officials; unfair trial; inhuman detention conditions; reprisals against the person or their family; enforced disappearance; extrajudicial killings; and the availability of the death penalty.[70]

43. The standard of proof ("substantial grounds for believing") in article 3 means a "foreseeable, personal, present and real risk" of torture.[71] Further, the "risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable".[72] The focus is also on the actual, not formal, conditions in the destination state; mere ratification of the CAT is insufficient to guarantee freedom from torture.[73] Indications of personal risk may include: (a) ethnic background; (b) political affiliation or political activities; (c) arrest and/or detention without guarantee of a fair treatment and trial; (d) sentence in absentia; (e) previous torture; (f) incommunicado, arbitrary or illegal detention; (g) clandestine escape from the country of origin following threats of torture; (h) religious affiliation; (i) violations of the right to freedom of thought, conscience and religion, including related to the prohibition of conversion to a religion that is different from the religion proclaimed as state religion and where such a conversion is prohibited and punished in law and in practice.[74] Also relevant is whether the foreign state has clearly prohibited torture by law, established adequate penalties and ended impunity by prosecuting and punishing state officials.[75]

44. **Cruel inhuman or degrading treatment or punishment.**[76] Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 7 is interpreted to prohibit *refoulement*[77] and applies to all forms of return, including extradition or expulsion.[78] The prohibition on *refoulement* is part of customary international law.[79] It absolute and allows no exceptions.[80] The prohibition on return under article 7 of the ICCPR is wider than that under article 3 of the Convention against Torture because it protects not only against return to torture but also other ill-

[69] Convention against Torture, art. 3(2).
[70] Committee against Torture, General Comment No. 4 (2017), paras. 29 and 43.
[71] Committee against Torture, General Comment No. 4 (2017), para. 45. See also *EA v Switzerland*, UNCAT Communication No. 28/1995 (10 November 1997), para. 11.5; *X, Y and Z v Sweden*, UNCAT Communication No. 61/1996 (6 May 1998), para. 11.5; *IAO v Sweden*, UNCAT Communication No. 65/1997 (6 May 1998), para. 14.5; *KN v Switzerland*, UNCAT Communication No. 94/1997 (19 May 1998), para. 10.5; *ALN v Switzerland*, UNCAT Communication No. 90/1997 (19 May 1998), para. 8.7; *JUA v Switzerland*, UNCAT Communication No. 100/1997 (10 November 1998), para. 6.6; *SMR and MMR v Sweden*, UNCAT Communication No. 103/1998 (5 May 1999), para. 9.7; *MBB v Sweden*, UNCAT Communication No. 104/1998 (5 May 1999), para. 6.8; *KT v Switzerland*, UNCAT Communication No. 118/1998 (19 November 1999), para. 6.5; *NM v Switzerland*, UNCAT Communication No. 116/1998 (9 May 2000), para. 6.7; *SC v Denmark*, UNCAT Communication No. 143/1999 (10 May 2000), para. 6.6; *HAD v Switzerland*, UNCAT Communication No. 126/1999 (10 May 2000), para. 4.10; *US v Finland*, UNCAT Communication No. 197/2002 (1 May 2003), para. 7.8; *MSH v Sweden*, UNCAT Communication No. 235/2003 (14 December 2005), para. 6.4; *Zare v Sweden*, UNCAT Communication No. 256/2004 (7 May 2006), para. 9.3.
[72] UNCAT, General Comment No. 1 (1998), para. 6; *EA v Switzerland* (1997), above, paras. 11.3–11.4.
[73] *Korban v Sweden, UNCAT Communication No. 88/1997 (16 November 1998)*.
[74] Committee against Torture, General Comment No. 4 (2017), para. 45.
[75] Ibid, para. 48.
[76] ICCPR, article 7.
[77] UNHRC, General Comment No. 20 (1992), para. 9.
[78] HRC GC 20 (1992), para. 9. See also ILC Draft Articles on the Expulsion of Aliens, Draft Article 24.
[79] Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*: Opinion", UNHCR Global Consultations on International Protection (20 June 2001), para. 223.
[80] UN Human Rights Committee, General Comment No. 20 (1992), para. 3. See also footnote 69 above.

treatment and does not require the act or omission to be carried out by, or with the acquiescence of, a public official.

45. The United Nations Human Rights Committee has found that the following treatment may, depending on the circumstances, violate article 7: aggressive interrogation techniques;[81] a severe violation of liberty, such as prolonged arbitrary detention,[82] enforced disappearance or incommunicado detention;[83] return of a refugee to a country of origin where persecution has not ceased;[84] protracted deprivation of food and drink in detention;[85] prolonged solitary confinement;[86] serious violations of the minimum humane conditions of detention;[87] humiliating or arbitrary practices in detention;[88] and unjustified interference in the family.[89] Extradition to face a sentence of life imprisonment without possibility of early release could also violate articles 7 and 10 of the ICCPR.[90] Racial discrimination can also constitute degrading treatment.[91] Subjection to a seriously disproportionate sentence could also violate article 7.[92]

46. The standard under article 7 "whether a necessary and foreseeable consequence of the deportation would be a *real risk* of torture [or other prohibited ill-treatment] in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture".[93] Attention is accordingly required "to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen".[94]

47. **Enforced disappearance**. Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance 2006, ratified by Thailand on 14 May 2024, establishes that no state party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.[95] For the purpose of determining if there are such grounds, the authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights (article 16 (2)). Enforced disappearances

[81] UNHRC, Concluding Observations: Israel (18 August 1998), paras. 19–20 (handcuffing, hooding, shaking, and sleep deprivation are violations); see also UNCAT, Concluding Observations: Israel (12 June 1994), para. 168.
[82] UNHRC, General Comment No. 35, para. 57.
[83] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), 164.
[84] *C v Australia*, UNHRC Communication No. 900/1999 (28 October 2002),para. 8.5.
[85] *Tshisekedi v Zaire*, UNHRC Communication No. 242/1987 (2 November 1989), para. 13; *Mika Miha v Equatorial Guinea*, UNHRC Communication No. 414/1990 (8 July 1994), para. 6.4; *Mukong v Cameroon*, UNHRC Communication No. 458/1991 (21 July 1994), para. 9.4.
[86] UNHRC, General Comment No. 20 (1992), paras. 4–6.
[87] *Buffo Carballal v Uruguay*, UNHRC Communication No. 33/1978 (27 March 1981); *Massioti v Uruguay*, UNHRC Communication No. 25/1978 (26 July 1982); *Marais v Madagascar*, UNHRC Communication No. 49/1979 (24 March 1983); *Wight v Madagascar*, UNHRC Communication No. 115/1982 (1 April 1985).
[88] *Conteris v Uruguay*, UNHRC Communication No. 139/1983 (30 March 1984); *Arzuaga Gilboa v Uruguay*, UNHRC Communication No. 147/1983 (1 November 1985); *Gilboa Francis v Jamaica*, UNHRC Communication No. 320/1988, para. 12.4 (24 March 1993); *Thomas v Jamaica*, UNHRC Communication No. 321/1988, para. 9.2 (19 October 1993); *Young v Jamaica*, UNHRC Communication No. 615/1995, para. 5.2 (4 November 1997).
[89] *Canepa v Canada*, UNHRC Communication No. 558/1993 (3 April 1997), para. 11.2.
[90] *Weiss v Austria*, UNHRC Communication No. 1086/2002 (3 April 2003), para. 9.4.
[91] *East African Asians v UK* (1973) 3 EHRR 76, paras. 189, 195.
[92] *Altun v Germany* (1983) 36 DR 209 (European Commission on Human Rights), paras. 5.77, 8.12.
[93] *Pillai v Canada*, UNHRC Communication No. 1763/2008 (9 May 2011), Individual Opinion by members Keller, Motoc, Neuman, O'Flaherty and Rodley (concurring), 22.
[94] Ibid.
[95] See also the Declaration on the Protection of All Persons from Enforced Disappearance 1992 and A/HRC/36/39/Add.2.

like other forces of incommunicado detention, would likely also violate the prohibition on return to torture or cruel, inhuman or degrading treatment.[96]

48. **Serious violations of other human rights or fundamental freedoms**. The United Nations Human Rights Committee has accepted that *non-refoulement* could apply, in principle, to a violation of any ICCPR right, as stated in *ARJ v Australia*: "If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant".[97] In this regard, jurisprudence has indicated particular concern in relation to risks of return to face:

    (a) **Flagrant denial of justice / fair trial**[98] contrary to article 14 of the ICCPR, such as the admission of evidence obtained by torture,[99] reprisals against witnesses or concerns about the independence and impartiality of the judiciary,[100] pre-trial detention without judicial review, or systematic refusal of access to a lawyer.[101] This concern is commonly expressed in extradition treaties and national laws. Article 3(f) of the UN Model Treaty on Extradition mandates the refusal of extradition if the person requested "has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14". Section 7(1) of the Model Law on Extradition (2004) contains a similar fair trial guarantee, along with safeguards against return to trial by an "extraordinary or ad hoc court or tribunal",[102] or where the person has been tried in absentia without sufficient notice of the trial, the opportunity to arrange defence or a retrial.[103] There is further safeguard against return to double jeopardy (*ne bis in idem*).[104]

    (b) **Flagrant denial of the right to liberty**,[105] which could include where detention in the destination state is not authorized by law or is otherwise arbitrary. Detention could be arbitrary where criminal charges purporting to justify arrest, pre-trial detention or a sentence of imprisonment do not meet the requirements of international law, including because they are too vague or uncertain to satisfy the principle of legality under article 15 of the ICCPR,

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[96] *El-Megreisi v Libya Arab Jamahiriya*, UNHRC Communication No. 440/1990 (1994), paras. 2.2 and 5.4; *Rafael Mojica v Dominican Republic*, UNHRC Communication No. 449/1991 (1994), para. 5.7; *Tshishimbi v Zaire*, UNHRC Communication, CCPR/C/53/D/542/1993 (25 March 1996), para. 5.5,

[97] *ARJ v Australia*, UNHRC Communication No. 692/1996 (28 July 1997), para. 6.9; see also *Esposito v Spain* (2007), UNHRC Communication No. 1359/2005 (20 March 2007), para. 7.5. In relation to the European Convention on Human Rights, see *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26, para. 24.

[98] ICCPR, article 14. Under the European Convention on Human Rights, see *Othman (Abu Qatada) v UK*, App. No. 8139/09 (17 January 2012), paras. 258-262; *Soering v UK* (1989) 11 EHRR 439, para. 113; *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, para. 110; *Einhorn v France*, App. No. 71555/01 (16 October 2001), para. 32; *Razaghi v Sweden*, App. No. 64599/01 (11 March 2003); *Tomic v UK*, App. No. 17837/03 (14 October 2003); *Ocalan v Turkey*, App. No. 46221/99 (12 March 2003), paras. 199–21; *Mamatkulov and Askarov v Turkey* [GC], App. Nos. 46827/99 and 46951/99 (4 February 2005), paras. 90 and 91; *Al Saadoon and Mufdhi*, para. 149; *Bader and Kanbor v Sweden*, App. No. 13284/04 (8 November 2005), para. 47; *Al-Moayad v. Germany*, App. No. 35865/03 (20 February 2007), paras. 100 and 102; *Ahorugeze v Sweden*, App. No. 37075/09 (27 October 2011), paras. 113-116; *Yefimova v Russia*, App. No. 39786/09 (19 February 2013), para. 218.

[99] *Othman v UK*, App. No. 8139/09, ECtHR Judgment (9 May 2012), para. 267.

[100] *Brown and Others v Government of Rwanda* [2009] EWHC 770 (Admin) (High Court of England and Wales).

[101] *Al-Moayad*, § 101.

[102] UNODC, Model Law on Extradition (2004), section 7(3). See also Inter-American Convention on Extradition, article 4(3).

[103] UNODC, Model Law on Extradition (2004), section 7(2).

[104] UNODC, Model Law on Extradition (2004), section 8; see similarly European Convention on Extradition, articles 8–9.

[105] A possibility raised in *Tomic v UK* (2003), above, para. 3; *G.T. v Australia*, CCPR/C/61/D/706/1996 (4 December 1997), para. 8.7; Report of the Working Group on Arbitrary Detention, A/HRC/4/40 (9 January 2007), para. 49; *Othman v UK*, above, paras. 231-233; *El-Masri v Macedonia* (2013) 57 EHRR 25; *Abu Zubaydah v Lithuania*, App. No. 46454/11 (31 May 2018), paras. 657-658; *Al Nashiri v Romania*, App. No. 33234/12 (31 May 2018), paras. 691-692.

criminalize internationally protected rights and freedoms, such as freedoms of expression, association, assembly, religion, and political participation; or the sentence of imprisonment is excessive and disproportionate.

(c) **Flagrant denial of political freedoms**,[106] such as freedoms of thought, conscience and religion (ICCPR, article 18), opinion and expression (article 19), assembly (article 21), or association (article 22).

(d) **Discrimination**. Many extradition and mutual assistance treaties, including relating to terrorism,[107] contain a "non-discrimination" clause permitting the refusal of international legal cooperation if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Diplomatic Assurances

49. Diplomatic assurances are sometimes given by the destination state to address concerns about the human rights risks posed upon return, particularly in relation to the death penalty, torture or cruel, inhuman or degrading treatment or punishment, and fair trial. Since diplomatic assurances are typically political promises, rather than enforceable legal safeguards, they must be approached with great caution.

50. In the case of refugees, assurances given by the state of origin cannot be lawfully relied upon, because the state of refuge has already determined that a person is a refugee. According to UNHCR, "it would be fundamentally inconsistent with the protection afforded by the 1951 Convention for the sending state to look to the very agent of persecution for assurance that the refugee will be well-treated upon *refoulement*".[108]

51. In relation to risks of torture or cruel, inhuman or degrading treatment or punishment, the United Nations Human Rights Committee has found that the return of a person to a state where there is a known, real risk of torture violated article 3 of the Convention against Torture because there was no mechanism for monitoring the enforcement of the diplomatic assurances,[109] to ensure that they are reliable.[110] Jurisprudence further suggests that assurances should not be relied upon where they are given by states which systematically violate the Convention against Torture.[111] There is particular difficulty in monitoring assurances against torture.[112] Assurances should be meaningful and verifiable, with effective monitoring that is prompt, regular and includes private interviews.[113]

The Right to Family Life

52. Article 17(1) of the ICCPR protects against arbitrary or unlawful interference in the family; article 23(1) protects the family; and article 24(1) protects children. In some expulsion cases, the United Nations Human Rights Committee has found that the expulsion of one or more

[106] A possibility in *Z and T v UK*, App. No. 27034/05, ECtHR Judgment (28 February 2006), 7; *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26.
[107] E.g. Terrorist Financing Convention 1999, art. 15.
[108] UNHCR, "Note on Diplomatic Assurances and International Refugee Protection" (Geneva, 2006), para. 30.
[109] *Agiza v Sweden*, UNHRC Communication No. 233/2003 (20 May 2005), para. 13.4; *Alzery v Sweden*, UNHRC Communication No. 1416/2006 (25 October 2006) paras. 11.3-11.5.
[110] UNHCR, "Note on Diplomatic Assurances and International Refugee Protection" (Geneva, 2006), para. 20.
[111] UNCAT, Concluding Observations: United States of America (25 July 2006), para. 21.
[112] *Suresh v Canada (Minister of Citizenship and Immigration*) [2002] 1 SCR 3 (Supreme Court of Canada), para. 124.
[113] Special Rapporteur on Torture, "Report of 1 September 2004", above, para. 42.

family members, resulting in family separation, would constitute an unjustified interference in the family, contrary to articles 17 and/or 23.[114] The issue is not one of *refoulement* to violations in the other country, but of the violation of family rights by the state choosing to separate the family members as a result of a removal decision. Interference in the family may occur where close family members are separated and "substantial changes to long-settled family life would follow".[115] Separation may be arbitrary and unjustifiable where the hardship it imposes on the family outweighs the justification for removing a family member.[116] In cases involving children, under article 24 of the ICCPR the "best interests of the child" shall also be a primary consideration in all decisions affecting a child.[117]

Respectfully submitted,

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At Sydney, Australia

12 August 2024

[114] See, for example, *Winata v Australia*, UNHRC Communication No. 930/2000 (26 July 2001), para. 7.1; *Madafferi v Australia*, UNHRC Communication No. 1011/2001 (26 August 2004), para. 9.7. In Europe see *F v United Kingdom*, App. No. 17341/03 (22 June 2004); *Üner v The Netherlands* [GC], App. No. 46410/99 (5 July 2005); *Abu Zubaydah v Lithuania*, App. No. 46454/11 (31 May 2018), para. 665; *Al Nashiri v Romania*, App. No. 33234/12 (31 May 2018), paras. 698-699.
[115] *Winata v Australia* (2001), ibid, para. 7.2.
[116] *Winata v Australia* (2001), ibid; *Madaferri v Australia* (2004), above, para. 9.8; *Byahuranga v Denmark*, UNHRC Communication No. 1222/2003 (9 December 2004), para. 11.7.
[117] *Bakhtiyari v Australia* (2003), UNHRC Communication No. 1069/2002 (29 October 2003), para. 9.7.