KFOR had the authority to detain under the UNSC Resolution 1244 any individual insofar as it was necessary 'to maintain a safe and secure environment' and to protect KFOR troops.

Mr Saramati complained under Article 5 ECHR alone, and in conjunction with Article 13 of the Convention, about his extra-judicial detention by KFOR between 13 July 2001 and 23 January 2002. He also complained under Article 6 para. 1 that he did not have access to court and about a breach of the respondent States' positive obligation to guarantee the Convention rights of those residing in Kosovo.

Following an analysis of the respective mandates of the KFOR and the UNMIK as defined in UNSC Resolution 1244, the European Court of Human Rights takes the view that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within UNMIK's mandate. It then asks, in the remainder of the decision, whether the action (the allegedly arbitrary detention) and the inaction (the failure to de-mine) complained of can be attributed to the United Nations (paras. 128–43). Having answered in the affirmative to this question as regards both the action of the KFOR (para. 141) and the inaction of the UNMIK (para. 143), the Court then addresses the question whether it is competent, *ratione personae*, to decide on the applications submitted (paras. 144–52).

European Court of Human Rights (GC), *A. and B. Behrami* v. *France* and *R. Saramati v. France, Germany and Norway* (Appl. Nos. 71412/01 and 78166/01), decision (inadmissibility) of 2 May 2007, paras. 144–52:

144. It is therefore the case that the impugned action and inaction are, in principle, attributable to the UN. It is, moreover, clear that the UN has a legal personality separate from that of its member states (*The Reparations case*, I.C.J. Reports 1949) and that that organisation is not a Contracting Party to the Convention.

145. In its *Bosphorus* judgment ([see above, section 4.1.], §§152–153), the Court held that, while a State was not prohibited by the Convention from transferring sovereign power to an international organisation in order to pursue co-operation in certain fields of activity, the State remained responsible under Article 1 of the Convention for all acts and omissions of its organs, regardless of whether they were a consequence of the necessity to comply with international legal obligations, Article 1 making no distinction as to the rule or measure concerned and not excluding any part of a State's 'jurisdiction' from scrutiny under the Convention. The Court went on, however, to hold that where such State action was taken in compliance with international legal obligations flowing from its membership of an international organisation and where the relevant organisation protected fundamental rights in a manner which could be considered at least equivalent to that which the Convention provides, a presumption arose that the State had not departed from the requirements of the Convention. Such presumption could be rebutted, if in the circumstances of a particular case, it was considered that the protection of Convention rights was manifestly deficient: in such a case, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights (*ibid.*, §§155–156).

146. The question arises in the present case whether the Court is competent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN and, more generally,

as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.

147. The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its Preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, ... the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice ... [Article 103 implies that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement; Article 25 of the UN Charter states: 'The Members of the United Nations agree to accept and carry out the decisions of the [UNSC] in accordance with the present Charter', and implies that UN member states' obligations under a UNSC Resolution prevail over obligations arising under any other international agreement: see on these provisions chapter 1, section 4.2., a)].

148. Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force ...

149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

150. The applicants argued that the substantive and procedural protection of fundamental rights provided by KFOR was in any event not 'equivalent' to that under the Convention within the meaning of the Court's *Bosphorus* judgment, with the consequence that the presumption of Convention compliance on the part of the respondent States was rebutted.

151. The Court, however, considers that the circumstances of the present cases are essentially different from those with which the Court was concerned in the *Bosphorus* case. In its judgment in that case, the Court noted that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers (§135 of that judgment). The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, *vis-à-vis* the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence *ratione personae*.

There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international co-operation with which the Court was there concerned and those in the present cases. As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.

152. In these circumstances, the Court concludes that the applicants' complaints must be declared incompatible *ratione personae* with the provisions of the Convention.

2.9. Questions for discussion: the primacy of the UN Charter and UN Security Council Resolutions and the absence of jurisdiction *ratione personae* of the European Court of Human Rights

1. In order to arrive at its first conclusion that the acts or omissions allegedly violating the ECHR rights of the applicants are imputable to the United Nations rather than to the States having contributed troops to the UN, the Court in *Behrami* refers to Article 5 of the draft Articles on the Responsibility of International Organizations as adopted in 2004 during the fifty-sixth session of the ILC. This provision is entitled 'Conduct of Organs or Agents Placed at the Disposal of an International Organization by a State or Another International Organization', and reads: 'The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.' The Court seems to consider that it is rule particularly well suited to address peace-keeping operations of the UN. However, this raises at least two questions. First, is there a risk of abuse in this rule of attribution? Could this rule be used by States in order to circumvent

their human rights obligations? Second, is this provision appropriate in situations where the UN Security Council has merely authorized peace-keeping operations, conducted by certain States who retain authority and control over their troops, and are bound only by the end result prescribed – a solution which States appear to have most often preferred in recent years (see S. Chesterman, *You, the People – the United Nations, Transitional Administration and State-Building* (Oxford University Press, 2004), p. 241)?

2. Having identified the United Nations as the organization to which the acts or omissions complained of are attributable, the Court then asks whether it is competent to 'review the acts of the respondent States carried out on behalf of the UN'. Are the reasons put forward by the European Court of Human Rights for distinguishing *Behrami* from *Bosphorus* on this point relevant and convincing?
3. It has been remarked that the Court in *Behrami* focuses on the question of imputability, rather than on the question of whether the applicants were under the 'jurisdiction' of the defendant States, although this latter route could have led to the same conclusion based on a less contestable reasoning (A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: the *Behrami* and *Saramati* Cases', *Human Rights Law Review* (2008), 159). Do you agree?
4. Recall the discussion in chapter 1, section 4.2. above. Is the solution adopted by the Court in *Behrami* consistent with the position of human rights in the hierarchy of international law, and particularly with the *jus cogens* status of at least a core set of human rights?

PART II

The Substantive Obligations

3

The Typology of States' Obligations and the Obligation to Respect Human Rights

INTRODUCTION

Part II seeks to introduce the substantive content of international human rights. It includes five chapters. Chapters 3, 4 and 5 discuss the three levels of obligations imposed on States: to respect, to protect and to fulfil human rights. Chapter 6 describes under which conditions rights may be derogated from in times of emergency. Chapter 7 examines the non-discrimination requirement, which cuts across the different obligations imposed on States, and is a core principle of human rights law, with a number of different ramifications.

Although this chapter focuses on the obligation of States to respect human rights, it first explores the origins of the distinction between the three levels of States' obligations, since it is on this distinction that chapters 3–5 are based. Section 1 describes the respect /protect/fulfil framework, and it then relates this framework to the '4-As' scheme (availability, accessibility, adequacy and adaptability), which is also widely used in order to clarify the implications for States of ensuring compliance with social and economic rights. While the respect/protect/fulfil framework has its basis in discussions around the normative content of the right to food, and the 4-As scheme originated in work around the right to education, both typologies have been used beyond these rights, although the usefulness of expanding their reach is still debated, particularly as regard civil and political rights.

Sections 2 and 3 examine the obligation to respect human rights, focusing respectively on rights of an 'absolute' character and other rights, which may be subject to certain limitations. Most human rights protected under international or domestic law fall under this second category. Such rights may be restricted, provided three conditions are satisfised: the objectives justifying such restrictions must be legitimate; the restriction must be prescribed by law; and the restriction must not be disproportionate, i.e. it should not go beyond what is necessary for the fulfilment of the said objective. Some rights, however, are of an absolute character. These rights may

not be subjected to restrictions: even if strong and legitimate reasons could be put forward to do so, no limitation to these rights is allowed. Section 2 seeks to illustrate certain of the difficulties posed by this category or rights. Section 3 then examines the regime of rights which may be subject to limitations: it describes in detail the requirements of each of the conditions under which such limitations may be allowed; and it illustrates these requirements by reviewing how the issue of restrictions to religious freedom through vestimentary codes has been approach by various human rights bodies.

1 THE TYPOLOGY OF STATES' OBLIGATIONS

1.1 Obligations to respect, to protect and to fulfil

A major conceptual breakthrough took place in the mid 1980s, when Asbjorn Eide, as the Rapporteur to the then UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, proposed that four 'layers' of State obligations could be discerned, defined as an obligation to respect, an obligation to protect, an obligation to ensure, and an obligation to promote (*The Right to Adequate Food as a Human Right*, Report prepared by Mr A. Eide, E/CN.4/Sub.2/1983/25 (1983)). Later, this was revised to become a tripartite division of the human rights obligations of States, distinguishing between the obligation to respect, to protect, and to fulfil human rights (*The Right to Adequate Food as a Human Right*, Report prepared by Mr A. Eide, E/CN.4/Sub.2/1987/23 (1987)). Simultaneously to Eide, the political philosopher Henry Shue had noted in 1980 that 'there are no distinctions between rights. The useful distinctions are among duties, and there are no one-to-one pairings between kinds of duties and kinds of rights.' Shue offered a distinction between the duty to avoid depriving; the duty to protect people from deprivation by other people; and the duty to provide for the security (or subsistence) of those unable to provide for their own – i.e. the duty to aid the deprived. He thus offered a 'tripartite typology of duties', noting: 'For all its own simplicity, it goes considerably beyond the usual assumption that for every right there is a single correlative duty, and suggests instead that for every basic right – and many other rights as well – there are three types of duties, all of which must be performed if the basic right is to be fully honored but not all of which must necessarily be performed by the same individuals or institutions' (H. Shue, *Basic Rights, Subsistence, Affluence, and US Foreign Policy* (Princeton, N.J.: Princeton University Press, 1980), at p. 52). Shue proposed, more precisely, that States have three sets of duties:

I. To avoid depriving.
II. To protect from deprivation (1) by enforcing duty (I) and (2) by designing institutions that avoid the creation of strong incentives to violate duty (I).
III. To aid the deprived (1) who are one's special responsibility; (2) who are victims or social failures in the performance of duties (I), (II–(1)), and (II–(2)); and (3) who are victims of natural disasters.

These typologies are not precisely interchangeable. As noted by Shue, placing the 'duty of aid' in the list, following an obligation to respect and an obligation to protect, may convey better that we owe a duty to victims of violations:

Henry Shue, 'The Interdependence of Duties', in Philip Alston and Katarina Tomasevski (eds.), *The Right to Food* (The Hague: SIM, Martinus Nijhoff, 1985), pp. 83–95 at p. 86:

What is distinctive about the duty to aid is that it is what is owed to victims – to people whose rights have already been violated. The duty of aid is ... largely a duty of recovery – recovery from failures in the performance of the duties to respect and protect. (This is not true of duty III–(3) in the original typology – it is 'pure' assistance, with no basis in fault or failure, since it is a response to purely natural disasters, of which there are relatively few).

... Think briefly of a different kind of right, say, the right to physical security. Suppose the current situation in a certain region is that landowners always send thugs to beat up sharecroppers who complain about the terms of their tenancy, and it has long been like this in the region. A plausible description, especially if some of the sharecroppers have never enjoyed physical security against beatings, is that their right to physical security needs to be fulfilled or promoted. But another perfectly reasonable description of the situation is that the sharecroppers have been deprived of their physical security and therefore need assistance ... The description in terms of filfillment and promotion suggests that the rest of us would be going beyond duties to respect and to protect if we acted upon duties to fulfill and promote. The rights of some people need to be 'fulfilled' or 'promoted', however, because other people have already failed to perform duties to respect and protect. Rather than going beyond respect and protection, we are having to go back and make up for failures in respect and protection. This is more clearly conveyed by saying that we are assisting the deprived. If our assistance enables them to enjoy adequate food, physical security, or whatever else they have been deprived of, their right will in fact have been fulfilled.

Despite what, according to Shue, might be seen as its weakness – in that the obligation to 'fulfil' does not recognize the rights-holders as people whose rights have been violated in the first place – the tripartite typology of Eide has been adopted, since the early 1990s, in the doctrinal analysis of economic and social rights. The following documents show the development of the typology in the field of economic, social and cultural rights:

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) (adopted by a group of academic experts meeting in Maastricht 22–26 January 1997), para. 6:

Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to *respect*

requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to *protect* requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

Committee on Economic, Social and Cultural Rights, General Comment No. 12, *The Right to Adequate Food* (Art. 11) (E/C.12/1999/5, 12 May 1999), paras. 14–20:

14. The nature of the legal obligations of States parties are set out in .article 2 of the Covenant and has been dealt with in the Committee's General Comment No. 3 (1990). The principal obligation is to take steps to achieve progressively the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.

15. The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.

16. Some measures at these different levels of obligations of States parties are of a more immediate nature, while other measures are more of a long-term character, to achieve progressively the full realization of the right to food.

17. Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from .Article 2.1 of the Covenant, which obliges a State party

to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment No. 3, paragraph 10. A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.

18. Furthermore, any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

19. Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.

20. While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector – national and transnational – should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.

***The Right to Adequate Food and to be Free from Hunger. Updated Study on the Right to Food*, submitted by Mr Asbjørn Eide in accordance with Sub-Commission decision 1998/106 (E/CN.4/Sub.2/1999, 28 June 1999):**

52. My 1987 study was intended as a contribution to the clarification of the nature and levels of State obligations under economic and social rights. Drawing on my earlier work, I introduced an analytical framework under which State obligations can be assessed on three levels: the obligation to respect, the obligation to protect, and the obligation to assist and fulfil human rights. The framework proved very useful, and has since been taken widely into use. In my progress report in 1998 I explained my previously elaborated framework in greater detail, as follows (para. 9):

(a) Since State obligations must be seen in the light of the assumption that human beings, families or wider groups seek to find their own solutions to their needs, States should, at the

primary level, respect the resources owned by the individual, her or his freedom to find a job of preference, to make optimal use of her/his own knowledge and the freedom to take the necessary actions and use the necessary resources – alone or in association with others – to satisfy his or her own needs. The State cannot, however, passively leave it at that. Third parties are likely to interfere negatively with the possibilities that individuals or groups otherwise might have had to solve their own needs;

(b) At a secondary level, therefore, State obligations require active protection against other, more assertive or aggressive subjects – more powerful economic interests, such as protection against fraud, against unethical behaviour in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products. This protective function of the State is widely used and is the most important aspect of State obligations with regard to economic, social and cultural rights, similar to the role of the State as protector of civil and political rights;

(c) At the tertiary level, the State has the obligation to facilitate opportunities by which the rights listed can be enjoyed. It takes many forms, some of which are spelled out in the relevant instruments. For example, with regard to the right to food, the State shall, under the International Covenant (art. 11 (2)), take steps to 'improve measures of production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems'.

(d) At the fourth and final level, the State has the obligation to fulfil the rights of those who otherwise cannot enjoy their economic, social and cultural rights. This fourth level obligation increases in importance with increasing rates of urbanization and the decline of group or family responsibilities. Obligations towards the elderly and disabled, which in traditional agricultural society were taken care of by the family, must increasingly be borne by the State and thus by the national society as a whole.

The following case illustrates how the typology which Shue and Eide developed independently from each other may facilitate the task of judicial or quasi-judicial bodies in adjudicating economic and social rights:

African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, Comm. No. 155/96 (2001) A.H.R.L.R. 60 (ACHPR 2001) (15th Annual Activity Report):

[The Communication alleges that the Military Government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People. The Complainants allege that the Nigerian Government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter of Human and Peoples' Rights. This, the Complainants allege, the Government has done by directly

participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population; by failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage; and by failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations. The African Commission on Human and Peoples' Rights approached the issue following the tripartite typology referred to above:]

44. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights – both civil and political rights and social and economic – generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.

45. At a primary level, the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

46. At a secondary level, the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

47. The last layer of obligation requires the State to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realization of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).

48. Thus States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasizing the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights, for instance, under Article 2(1), stipulates exemplarily that States 'undertake to take steps ... by all appropriate means, including particularly the adoption of legislative measures'. Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties.

The tripartite typology of States' obligations has been widely seen as allowing a concretization of economic, social and cultural rights, and therefore as encouraging their justiciability. The limits to such an approach, however, have also been pointed out, particularly as regards the issue of justiciability (see I. E. Koch, 'Dichotomies, Trichotomies or Waves of Duties?', *Human Rights Law Review*, 5, No. 1 (2005), 81–103; and I. E. Koch, 'The Justiciability of Indivisible Rights', *Nordic Journal of International Law*, 72, No. 1 (2003), 3–39). In addition, attaching distinct legal regimes to the obligation to respect on the one hand – where violations are committed directly by State agents – and the obligation to protect on the other hand – where the direct source of the violation are private persons, and where the responsibility of the State arises only due to its lack of due diligence – may be questionable since the privatization of a number of functions which traditionally have been assumed by the State has blurred the distinction between the core State functions and the market.

It seems clear nevertheless that this typology has facilitated the justiciability of social and economic rights both before international or regional and before national courts (for more on the justiciability of economic and social rights before domestic courts, see chapter 8). Consider again, for instance, the reasoning of the African Commission on Human and Peoples' Rights in the case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, where the rights to housing, to food, and to life are addressed:

African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, Comm. No. 155/96 (2001) A.H.R.L.R. 60 (ACHPR 2001) (15th Annual Activity Report):

[The right to housing]

59. The Complainants also assert that the Military Government of Nigeria massively and systematically violated the right to adequate housing of members of the Ogoni community under Article 14 and implicitly recognised by Articles 16 and 18(1) of the African Charter.

Article 14 of the Charter reads: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

Article 18(1) provides: 'The family shall be the natural unit and basis of society. It shall be protected by the State …'

60. Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.

61. At a very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. [S. Leckie, 'The Right to Housing', in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights* (Leiden: Martinus Nijhoff, 1995)]. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies [*ibid.*]. The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be let alone and to live in peace – whether under a roof or not.

62. The protection of the rights guaranteed in Articles 14, 16 and 18 (1) leads to the same conclusion. As regards the earlier right, and in the case of the Ogoni People, the Government of Nigeria has failed to fulfil these two minimum obligations. The Government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.

63. The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic Social and Cultural Rights which defines this term as 'the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection' [General Comment No.7, *The Right to Adequate Housing* (1997) (Art. 11.1): Forced Evictions]. Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths ... Evictions break up families and increase existing levels of homelessness. [General Comment No. 7, *The Right to Adequate Housing* (1997) (Art. 11.1): Forced Evictions]. In this regard, General Comment No. 4 of the Committee on Economic, Social and Cultural Rights on *The Right to Adequate Housing* (1991) states that 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats' (E/1992/23, annex III. Paragraph 8(a)). The conduct of the Nigerian Government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.

[The right to food]

64. The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22). By its violation of these rights, the Nigerian

Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.

65. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.

66. The Government's treatment of the Ogonis has violated all three minimum duties of the right to food. The Government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian Government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.

[The right to life]

67. The Complainants also allege that the Nigerian Government has violated Article 4 of the Charter which guarantees the inviolability of human beings and everyone's right to life and integrity of the person respected. Given the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has made living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole. The Commission conducted a mission to Nigeria from the 7th–14th March 1997 and witnessed first hand the deplorable situation in Ogoni land including the environmental degradation.

68. The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter.

69. The Commission does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people. The situation of the people of Ogoniland, however, requires, in the view of the Commission, a reconsideration of the Government's attitude to the allegations contained in the instant communication. The intervention of multinational

corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities.

As illustrated by this case, the clarification by the Committee on Economic, Social, and Cultural Rights of the normative content of the ICESCR, in particular through the adoption of General Comments, has been particularly effective in encouraging the adjudication of the social and economic rights enshrined in this instrument. This explanatory task has been greatly facilitated by the adoption by the Committee of the tripartite typology of obligations, and it has been influential beyond the right to food where it has its origin. Consider for instance the paragraphs addressing the 'general legal obligations' of States under Article 13 of the ICESCR, which guarantees the right to education:

Committee on Economic, Social and Cultural Rights, General Comment No. 13, *The Right to Education (Art. 13 of the Covenant)* (twenty-first session, 1999) (UN Doc. E/C.12/1999/10, 8 December 1999)

43. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect.

States parties have immediate obligations in relation to the right to education, such as the 'guarantee' that the right 'will be exercised without discrimination of any kind' (art. 2(2)) and the obligation 'to take steps' (art. 2(1)) towards the full realization of article 13.

Such steps must be 'deliberate, concrete and targeted' towards the full realization of the right to education.

44. The realization of the right to education over time, that is 'progressively', should not be interpreted as depriving States parties' obligations of all meaningful content. Progressive realization means that States parties have a specific and continuing obligation 'to move as expeditiously and effectively as possible' towards the full realization of article 13.

45. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.

46. The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

47. The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to

education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.

48. In this respect, two features of article 13 require emphasis. First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognize, for example, that the 'development of a system of schools at all levels shall be actively pursued' (art. 13(2)(e)). Secondly, given the differential wording of article 13(2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party's obligation to fulfil (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfil (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfil (provide) in relation to article 13 coincides with the law and practice of numerous States parties.

Whether the tripartite typology of States' obligations constitutes a useful tool not only for the implementation of economic and social rights, but also for civil and political rights, remains a matter of debate. In the following excerpts, the authors of the 2003 Draft Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies clearly believe such an extension is both feasible and desirable. Paul Hunt, Manfred Nowak and Siddiq Osmani prepared this document at the request of the Committee on Economic, Social and Cultural Rights, in order to explore and articulate a human rights approach to poverty reduction. As illustrated in the following excerpt, they seek to provide all human rights with a common conceptual framework describing the entailed obligations.

Office of the High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (2005), paras. 47–8:

47. Poverty is so deeply entrenched in many societies that it is unrealistic to hope that even with the best of intentions it can be eliminated in a very short time. Equally, one must accept the reality that in a context of scarce resources it may not be possible to fulfil all human rights immediately. However, the fact that the realization of some human rights is constrained by the scarcity of resources does not relieve States of their international human rights obligations to take reasonable and appropriate steps, to the maximum of available resources, to ensure the realization of rights.

48. All human rights – economic, civil, social, political and cultural – impose negative as well as positive obligations on States, as is captured in the distinction between the duties to respect, protect and fulfil. *The duty to respect* requires the duty-bearer to refrain from interfering with the enjoyment of any human right. *The duty to protect* requires the duty-bearer to take measures to prevent violations of any human right by third parties. *The duty to fulfil* requires the duty-bearer to adopt appropriate legislative, administrative and other measures towards the full realization of human rights. Resource implications of the obligations to *respect* and *protect* are generally less significant than those of implementing the obligations to *fulfil*, for which more proactive and resource-intensive measures may be required. Consequently, resource constraints may not affect a State's ability to respect and protect human rights to the same extent as its ability to fulfil human rights.

3.1. Question for discussion: the typology of duties and the categories of rights

Is the tripartite typology of duties proposed by Eide suitable for all human rights? In particular, what are the advantages and disadvantages of using this typology in order to clarify the obligations of States to guarantee civil and political rights? Does the use of this typology imply the risk of relieving States from their immediate obligation to ensure respect for civil and political rights? Conversely, does it obfuscate the fact that the State can never simply 'abstain' from interfering with a right, since the right cannot exist without State action?

In answering these questions, consider the view expressed by Stephen Holmes and Cass R. Sunstein in *The Cost of Rights. Why Liberty Depends on Taxes* (New York and London: W. W. Norton, 1999), pp. 44 and 48: ' "Where there is a right, there is a remedy" ... This simple point goes a long way toward disclosing the inadequacy of the negative rights/positive rights distinction. What it shows is that all legally enforced rights are necessarily positive rights ... The financing of basic rights through tax revenues helps us see clearly that rights are public goods: taxpayer-funded and government-managed social services designed to improve collective and individual well-being. All rights are positive rights.'

1.2 Availability, accessibility, acceptability, and adaptability

The tripartite distinction between the obligation to respect, to protect and to fulfil is not the only analytical tool which has been used in order to clarify the content of States' obligations, particularly in the field of social and economic rights entailing certain obligations to ensure that individuals have the resources which allow them access to certain social goods such as housing, education, or health services. In its general comment on the right to education as guaranteed under Article 13 of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights states (in para. 6) that:

Committee on Economic, Social and Cultural Rights, General Comment No. 13, *The Right to Education (Art. 13 of the Covenant)* (E/C.12/1999/10) (1999):

6. While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:

(a) Availability – functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;

(b) Accessibility – educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds ...;
Physical accessibility – education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a 'distance learning' programme);
Economic accessibility – education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available 'free to all', States parties are required to progressively introduce free secondary and higher education;

(c) Acceptability – the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13(1) and such minimum educational standards as may be approved by the State (see art. 13(3) and (4));

(d) Adaptability – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

This typology was initially developed by the former UN Special Rapporteur on the Right to Education, Katarina Tomasevski (1998–2004) (see Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights Resolution 1998/33, E/CN.4/1999/49, 13 January 1999, paras. 42–74). But the '4-As' scheme is also derived, in part, from previous general comments of the Committee. In 1991, in its General Comment on *The Right to Adequate Housing*, the Committee already had indicated:

Committee on Economic, Social and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing (Art. 11(1) of the Covenant)* (sixth session, 1991) (E/1992/23):

8. [The] concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute 'adequate housing' for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) Legal security of tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, co-operative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) Affordability. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) Habitability. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing prepared by [the World Health Organization (WHO)] which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(e) Accessibility. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus,

such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) Location. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) Cultural adequacy. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.

3.2. Questions for discussion: the '4-As' typology

1. Is the '4-As' scheme applicable across all social and economic rights listed in the International Covenant on Economic, Social and Cultural Rights? And is it useful beyond those rights, in the area of civil and political rights?
2. How is the '4-As' scheme to be combined with the respect/protect/fulfil framework? If we combine the two frameworks with the matrix below, is the implication that the obligation of the State to respect is also always necessarily subject to progressive realization, since it includes the requirement to ensure that the good or service which the individual should have access to is available in sufficient quantities – for example, schools or hospitals covering all parts of the national territory, or a police force which ensures physical security in all areas?

The '4-As' scheme can be combined with the above differentiation between the obligations of the State to respect, protect and fulfil human rights. Indeed, the '4-As' describe the characteristics of the good or service that the individual right-holder has a right to; the respect/protect/fulfil framework describes the different obligations of the State either not to interfere with the enjoyment of that good or service, or to regulate private actors, or to facilitate access to that good or service by market mechanisms, or in certain cases to provide it. The following matrix expresses both these dimensions combined:

	Availability	Accessibility (non-discrimination, physical and economic accessibility)	Acceptability	Adaptability
Obligation to respect (not to interfere with existing enjoyment) Obligation to protect (to regulate private parties) Obligation to fulfil by facilitating market mechanisms Obligation to fulfil by providing the good or service				

2 RIGHTS OF AN 'ABSOLUTE' CHARACTER

This section discusses the specific regime of rights of an 'absolute' character. Rights which are 'absolute' must be respected at all times, and may not be restricted even for compelling reasons. This is the case, for example, of Article 7 ICCPR, which prohibits torture, or other cruel, inhuman or degrading treatment or punishment, and which allows of no limitation. The cases below illustrate situations where the absolute character of the prohibition met with resistance, in particular in the context of the fight against terrorism.

2.1 The absolute character of the prohibition of torture in 'ticking bomb' situations

It has been repeatedly asserted that '[t]he use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.' (Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe at its 804th meeting (11 July 2002), Guideline IV). Consider, however, the following case (for a commentary, see A. Reichman and T. Kahana, 'Israel and the Recognition of Torture: Domestic and International Aspects', in C. Scott (ed.), *Torture as Tort* (Oxford: Hart Publishing, 2001), pp. 631–58):

Supreme Court of Israel, sitting as the High Court of Justice, *Public Committee Against Torture in Israel* v. *The State of Israel and the General Security Service*, HCJ 5100/94, judgment of 6 September 1999

[In its investigations, the General Security Service (GSS) makes use of methods that include subjecting suspects to moderate physical pressure. The means are employed under the authority of directives. These directives allow for the use of moderate physical pressure if such pressure is immediately necessary to save human life. Petitioners challenge the legality of these methods. In this judgment, the Court holds that the GSS did not have the authority to employ certain methods challenged by the petitioners. The Court also holds that the 'necessity defense', found in the Israeli Penal Law, could not serve *ex ante* to allow GSS investigators to employ such interrogation practices. The Court's decision does not negate the possibility that the 'necessity defense' would be available *post factum* to GSS investigators – either in the choice made by the Attorney General in deciding whether to prosecute, or according to the discretion of the court if criminal charges were brought against them.]

23. It is not necessary for us to engage in an in-depth inquiry into the 'law of interrogation' for the purposes of the petitions before us. These laws vary, depending on the context. For instance, the law of interrogation is different in the context of an investigator's potential criminal liability, and in the context of admitting evidence obtained by questionable means. Here we deal with the 'law of interrogation' as a power of an administrative authority. The 'law of interrogation' by its very nature, is intrinsically linked to the circumstances of each case. This having been said, a number of general principles are nonetheless worth noting.

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation ... Human dignity also includes the dignity of the suspect being interrogated ... This conclusion is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture, 'cruel, inhuman treatment' and 'degrading treatment' ... These prohibitions are 'absolute'. There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can lead to the investigator being held criminally liable ...

Second, a reasonable investigation is likely to cause discomfort. It may result in insufficient sleep. The conditions under which it is conducted risk being unpleasant. Of course, it is possible to conduct an effective investigation without resorting to violence. Within the confines of the law, it is permitted to resort to various sophisticated techniques. Such techniques – accepted in the most progressive of societies – can be effective in achieving their goals. In the end result, the legality of an investigation is deduced from the propriety of its purpose and from its methods. Thus, for instance, sleep deprivation for a prolonged period, or sleep deprivation at night when this is not necessary to the investigation time-wise, may be deemed disproportionate ...

33. We have arrived at the conclusion that GSS personnel who have received permission to conduct interrogations, as per the Criminal Procedure Statute [Testimony], are authorized to do so. This authority – like that of the police investigator – does not include most of the physical means of interrogation in the petition before us. Can the authority to employ these methods be anchored in a legal source beyond the authority to conduct an interrogation? This question was answered by the state in the affirmative. As noted, our law does not contain an explicit

authorization permitting the GSS to employ physical means. An authorization of this nature can, however, in the State's opinion, be obtained in specific cases by virtue of the criminal law defense of 'necessity', as provided in section 34(1) of the Penal Law. The statute provides: 'A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, in response to particular circumstances during a specific time, and absent alternative means for avoiding the harm.'

The State's position is that by virtue of this defense against criminal liability, GSS investigators are authorized to apply physical means – such as shaking – in the appropriate circumstances and in the absence of other alternatives, in order to prevent serious harm to human life or limb. The State maintains that an act committed under conditions of 'necessity' does not constitute a crime. Instead, the State sees such acts as worth committing in order to prevent serious harm to human life or limb. These are actions that society has an interest in encouraging, which should be seen as proper under the circumstances. In this, society is choosing the lesser evil. Not only is it legitimately permitted to engage in fighting terrorism, it is our moral duty to employ the means necessary for this purpose. This duty is particularly incumbent on the State authorities – and, for our purposes, on the GSS investigators – who carry the burden of safeguarding the public peace. As this is the case, there is no obstacle preventing the investigators' superiors from instructing and guiding them as to when the conditions of the 'necessity' defense are fulfilled. This, the State contends, implies the legality of the use of physical means in GSS interrogations.

In the course of their argument, the State presented the 'ticking bomb' argument. A given suspect is arrested by the GSS. He holds information regarding the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the information is obtained, the bomb may be neutralized. If the bomb is not neutralized, scores will be killed and injured. Is a GSS investigator authorized to employ physical means in order to obtain this information? The State answers in the affirmative. The use of physical means should not constitute a criminal offence, and their use should be sanctioned, according to the state, by the 'necessity' defense.

34. We are prepared to assume, although this matter is open to debate, that the 'necessity defense' is available to all, including an investigator, during an interrogation, acting in the capacity of the state ... Likewise, we are prepared to accept – although this matter is equally contentious – that the 'necessity defense' can arise in instances of 'ticking bombs', and that the phrase 'immediate need' in the statute refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or even in a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing it ... In other words, there exists a concrete level of imminent danger of the explosion's occurrence ...

Consequently we are prepared to presume, as was held by the Report of the Commission of Inquiry, that if a GSS investigator – who applied physical interrogation methods for the purpose of saving human life – is criminally indicted, the 'necessity defense' is likely to be open to him in the appropriate circumstances ... A long list of arguments, from the fields of ethics and political science, may be raised in support of and against the use of the 'necessity defense' ... This matter, however, has already been decided under Israeli law. Israeli penal law recognizes the 'necessity defense'.

35. Indeed, we are prepared to accept that, in the appropriate circumstances, GSS investigators may avail themselves of the 'necessity defense' if criminally indicted. This, however, is not the issue before this Court. We are not dealing with the criminal liability of a GSS investigator who employed physical interrogation methods under circumstances of 'necessity'. Nor are we addressing the issue of the admissibility or probative value of evidence obtained as a result of a GSS investigator's application of physical means against a suspect. We are dealing with a different question. The question before us is whether it is possible, *ex ante*, to establish permanent directives setting out the physical interrogation means that may be used under conditions of 'necessity'. Moreover, we must decide whether the 'necessity defense' can constitute a basis for the authority of a GSS investigator to investigate, in the performance of his duty. According to the State, it is possible to imply from the 'necessity defense' – available *post factum* to an investigator indicted of a criminal offence – the *ex ante* legal authorization to allow the investigator to use physical interrogation methods. Is this position correct?

36. In the Court's opinion, the authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the 'necessity defense'. The 'necessity defense' does not constitute a source of authority, which would allow GSS investigators to make use physical means during the course of interrogations. The reasoning underlying our position is anchored in the nature of the 'necessity defense'. The defense deals with cases involving an individual reacting to a given set of facts. It is an improvised reaction to an unpredictable event ... Thus, the very nature of the defense does not allow it to serve as the source of authorization. Authorization of administrative authority is based on establishing general, forward looking criteria, as noted by Professor Enker: 'Necessity is an after-the-fact judgment based on a narrow set of considerations in which we are concerned with the immediate consequences, not far-reaching and long-range consequences, on the basis of a clearly established order of priorities of both means and ultimate values ... The defense of necessity does not define a code of primary normative behavior. Necessity is certainly not a basis for establishing a broad detailed code of behavior such as how one should go about conducting intelligence interrogations in security matters, when one may or may not use force, how much force may be used and the like' (see A. Enker, 'The Use of Physical Force in Interrogations and the Necessity Defense' in *Israel and International Human Rights Law: The Issue of Torture* 61, 62 (1995)).

In a similar vein, Kremnitzer and Segev [M. Kremnitzer and R. Segev, 'The Petition of Force in the Course of GSS Interrogations – a Lesser Evil?', *Mishpat U'Memshal*, 4 (1989), 667 at 707] note: 'The basic rationale underlying the necessity defense is the impossibility of establishing accurate rules of behavior in advance, appropriate in concrete emergency situations, whose circumstances are varied and unexpected. From this it follows, that the necessity defense is not well suited for the regulation of a general situation, the circumstances of which are known and may repeat themselves. In such cases, there is no reason for not setting out the rules of behavior in advance, in order that their content be determined in a thought out and well-planned manner, which would allow them to apply in a uniform manner to all'.

The 'necessity defense' has the effect of allowing one who acts under the circumstances of 'necessity' to escape criminal liability. The 'necessity defense' does not possess any additional normative value. It can not authorize the use of physical means to allow investigators to

execute their duties in circumstances of necessity. The very fact that a particular act does not constitute a criminal act – due to the 'necessity defense' – does not in itself authorize the act and the concomitant infringement of human rights. The rule of law, both as a formal and as a substantive principle, requires that an infringement of human rights be prescribed by statute. The lifting of criminal responsibility does not imply authorization to infringe a human right. It shall be noted that the Commission of Inquiry did not conclude that the 'necessity defense' is the source of authority for employing physical means by GSS investigators during the course of their interrogations. All that the Commission of Inquiry determined was that, if an investigator finds himself in a situation of 'necessity', forcing him to choose the 'lesser evil' – harming the suspect for the purpose of saving human lives – the 'necessity defense' shall be available to him. Indeed, the Commission of Inquiry noted that, 'the law itself must ensure a proper framework governing the actions of the security service with respect to the interrogation of hostile terrorist activities and the related problems particular to it'. *Ibid.* at 328.

37. In other words, general directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not in defenses to criminal liability. The principle of 'necessity' cannot serve as a basis of authority ... If the State wishes to enable GSS investigators to utilize physical means in interrogations, it must enact legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. This release would not flow from the 'necessity defense', but rather from the 'justification' defense. This defense is provided for in section 34(13) of the Penal Law, which states: 'A person shall not bear criminal liability for an act committed in one of the following cases: (1) He was obliged or authorized by law to commit it.'

This 'justification' defense to criminal liability is rooted in an area outside the criminal law. This 'external' law serves as a defense to criminal liability. This defense does not rest upon 'necessity', which is 'internal' to the Penal Law itself. Thus, for instance, where the question of when an officer is authorized to apply deadly force in the course of detention arises, the answer is found in the laws of detention, which is external to the Penal Law. If a man is killed as a result of this application of force, the 'justification' defense will likely come into play ... The 'necessity' defense cannot constitute the basis for rules regarding an interrogation. It cannot constitute a source of authority on which the individual investigator can rely on for the purpose of applying physical means in an investigation. The power to enact rules and to act according to them requires legislative authorization. In such legislation, the legislature, if it so desires, may express its views on the social, ethical and political problems of authorizing the use of physical means in an interrogation. Naturally, such considerations did not come before the legislature when the 'necessity' defense was enacted ... The 'necessity' defense is not the appropriate place for laying out these considerations ...

Granting GSS investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the suspect's dignity and liberty, raises basic questions of law and society, of ethics and policy, and of the rule of law and security. These questions and the corresponding answers must be determined by the legislative branch ...

38. We conclude, therefore, that, according to the existing state of the law, neither the government nor the heads of the security services have the authority to establish directives regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general rules which can be inferred from the very concept of

an interrogation itself. Similarly, the individual GSS investigator – like any police officer – does not possess the authority to employ physical means that infringe a suspect's liberty during the interrogation, unless these means are inherent to the very essence of an interrogation and are both fair and reasonable.

An investigator who employs these methods exceeds his authority. His responsibility shall be fixed according to law. His potential criminal liability shall be examined in the context of the 'necessity defense'. Provided the conditions of the defense are met by the circumstances of the case, the investigator may find refuge under its wings. Just as the existence of the 'necessity defense' does not bestow authority, the lack of authority does not negate the applicability of the necessity defense or of other defenses from criminal liability. The Attorney General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from 'necessity'. A statutory provision is necessary to authorize the use of physical means during the course of an interrogation, beyond what is permitted by the ordinary 'law of investigation', and in order to provide the individual GSS investigator with the authority to employ these methods. The 'necessity defense' cannot serve as a basis for such authority.

2.2 The absolute character of the prohibition of torture in the context of deportation proceedings

(a) The principle

Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, provides that '1. No 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. 2. For the purpose of determining whether there are such grounds, the competent 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.' As we have seen in chapter 2 (section 3.1.), a similar absolute prohibition is imposed under Article 3 of the European Convention on Human Rights and under Article 7 of the International Covenant on Civil and Political Rights. Although this norm has only been affirmed in international human rights since the 1980s, its roots are in fact older, and they are already present, in part, in Articles 32 and 33 of the Geneva Convention on the Status of Refugees, of 28 July 1951. Article 32 allows the expulsion of a refugee on grounds of national security or public order. Article 33 provides: '1. No Contracting State shall expel or return 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. 2. The benefit of the present provision 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.'

The following case restates the principle of the absolute prohibition of refoulement in international human rights law, in terms that go beyond the protection provided for under the Geneva Convention:

European Court of Human Rights, *Chahal and others* v. *United Kingdom*, judgment of 15 November 1996:

[The first applicant, Karamjit Singh Chahal, is an Indian citizen who entered the United Kingdom illegally in 1971 in search of employment. In 1974 he applied to the Home Office to regularize his stay and on 10 December 1974 was granted indefinite leave to remain under the terms of an amnesty for illegal entrants who arrived before 1 January 1973. In early 1984, upon returning to India, he was arrested by the Punjab police. He was taken into detention and held for twenty-one days, during which time he was, he contended, kept handcuffed in insanitary conditions, beaten to unconsciousness, electrocuted on various parts of his body and subjected to a mock execution. He was subsequently released without charge. On his return to the United Kingdom he engaged in political activities within the Sikh community. In October 1985 he was detained under the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA) on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister, Mr Rajiv Gandhi, during an official visit to the United Kingdom. He was released for lack of evidence. He was subsequently interrogated and arrested on a number of occasions, in connection with his political activities in the United Kingdom. Finally, on 14 August 1990 the Home Secretary (Mr Hurd) decided that Mr Chahal ought to be deported because his continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism. On 16 August 1990 he was therefore placed into detention for the purposes of deportation in Bedford Prison. Mr Chahal claimed, however, that if returned to India he had a well-founded fear of persecution within the terms of the United Nations 1951 Convention on the Status of Refugees. He applied for asylum. The request was refused in March 1991. As to the risks of ill-treatment in India, the Home Secretary did not consider that Mr Chahal's experiences in India in 1984 had any continued relevance, since that had been a time of particularly high tension in Punjab.

The asylum refusal was quashed by the High Court on 2 December 1991 and referred back to the Home Secretary. The Court found that the reasoning behind it was inadequate, principally because the Home Secretary had neglected to explain whether he believed the evidence provided by NGOs relating to the situation in Punjab and, if not, the reasons for such disbelief. A fresh decision to refuse asylum was adopted in June 1992. The Home Secretary (Mr Clarke) considered that the breakdown of law and order in Punjab was due to the activities of Sikh terrorists and was not evidence of persecution within the terms of the 1951 Convention. Furthermore, relying upon Articles 32 and 33 of that Convention, he expressed the view that, even if Mr Chahal were at risk of persecution, he would not be entitled to the protection of the 1951 Convention because of the threat he posed to national security.

An appeal before the Court of Appeal was dismissed on 22 October 1993 (*R.* v. *Secretary of State for the Home Department, ex parte Chahal* [1994] *Immigration Appeal Reports* 107). The Court held that the combined effect of the 1951 Convention and the Immigration Rules was to require the Home Secretary to weigh the threat to Mr Chahal's life or freedom if he were deported against the danger to national security if he were permitted to stay. In the words of

Lord Justice Nolan: 'The proposition that, in deciding whether the deportation of an individual would be in the public good, the Secretary of State should wholly ignore the fact that the individual has established a well-founded fear of persecution in the country to which he is to be sent seems to me to be surprising and unacceptable. Of course there may very well be occasions when the individual poses such a threat to this country and its inhabitants that considerations of his personal safety and well-being become virtually irrelevant. Nonetheless one would expect that the Secretary of State would balance the risks to this country against the risks to the individual, albeit that the scales might properly be weighted in favour of the former.' In the view of the Court of Appeal, the Home Secretary did take into account the evidence that the applicant might be persecuted and it was not possible for the court to judge whether his decision to deport was irrational or perverse because it did not have access to the evidence relating to the national security risk posed by Mr Chahal. In the absence of evidence of irrationality or perversity, it was impossible under English law to set aside the Home Secretary's decision. Leave to appeal from that decision was denied.

The excerpts below relate to the claim that by deporting Mr Chahal to India, the United Kingdom would be committing a breach of Article 3 of the European Convention on Human Rights.]

75. The Court notes that the deportation order against the first applicant was made on the ground that his continued presence in the United Kingdom was unconducive to the public good for reasons of national security, including the fight against terrorism. The parties differed as to whether, and if so to what extent, the fact that the applicant might represent a danger to the security of the United Kingdom affected that State's obligations under Article 3.

76. Although the Government's primary contention was that no real risk of ill-treatment had been established, they also emphasised that the reason for the intended deportation was national security. In this connection they submitted, first, that the guarantees afforded by Article 3 were not absolute in cases where a Contracting State proposed to remove an individual from its territory. Instead, in such cases, which required an uncertain prediction of future events in the receiving State, various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there was an implied limitation to Article 3 entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. The Government based this submission in the first place on the possibility of implied limitations as recognised in the Court's case law, particularly paragraphs 88 and 89 of its above-mentioned *Soering* judgment [see chapter 2, section 3.1.] In support, they furthermore referred to the principle under international law that the right of an alien to asylum is subject to qualifications, as is provided for, *inter alia*, by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.

In the alternative, the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3. This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community. This was the case

here: it was at least open to substantial doubt whether the alleged risk of ill-treatment would materialise; consequently, the fact that Mr Chahal constituted a serious threat to the security of the United Kingdom justified his deportation.

77. The applicant denied that he represented any threat to the national security of the United Kingdom, and contended that, in any case, national security considerations could not justify exposing an individual to the risk of ill-treatment abroad any more than they could justify administering torture to him directly.

78. The Commission ... rejected the Government's arguments. It ... expressed the opinion that the guarantees afforded by Article 3 were absolute in character, admitting of no exception.

At the hearing before the Court, the Commission's Delegate suggested that the passages in the Court's *Soering* judgment upon which the Government relied (see paragraph 76 above) might be taken as authority for the view that, in a case where there were serious doubts as to the likelihood of a person being subjected to treatment or punishment contrary to Article 3, the benefit of that doubt could be given to the deporting State whose national interests were threatened by his continued presence. However, the national interests of the State could not be invoked to override the interests of the individual where substantial grounds had been shown for believing that he would be subjected to ill-treatment if expelled.

79. Article 3 enshrines one of the most fundamental values of democratic society ... The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation (see the *Ireland* v. *United Kingdom* judgment of 18 January 1978, Series A No. 25, p. 65, para. 163, and also the *Tomasi* v. *France* judgment of 27 August 1992, Series A No. 241-A, p. 42, para. 115).

80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion (see the above-mentioned *Vilvarajah and others* judgment, p. 34, para. 103). In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees ...

81. Paragraph 88 of the Court's above-mentioned *Soering* judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged.

82. It follows from the above that it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt bona fide, allegations about the first applicant's terrorist activities and the threat posed by him to national security.

[Applying these principles to the circumstances of the case, the Court arrives at the conclusion that, taking into account in particular 'the attested involvement of the Punjab police in killings and abductions outside their State and the allegations of serious human rights violations which continue to be levelled at members of the Indian security forces elsewhere', there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he is returned to India (paras. 83–107 of the judgment). This part of the judgment was adopted by twelve votes to seven.]

Joint partly dissenting opinion, by judges Gölcüklü, Matscher, Sir John Freeland, Mr Baka, Mifsud Bonnici, Gotchev and Levits:

We agree with the majority that national security considerations could not be invoked to justify ill-treatment at the hands of a Contracting State within its own jurisdiction, and that in that sense the protection afforded by Article 3 is absolute in character. But in our view the situation is different where, as in the present case, only the extra-territorial (or indirect) application of the Article is at stake. There, a Contracting State which is contemplating the removal of someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter State would indeed eventuate, the threat to national security may weigh heavily in the balance. Correspondingly, the greater the risk of ill-treatment, the less weight should be accorded to the security threat.

3.3. Questions for discussion: the scope of the absolute prohibition of torture

1. If the presence of Chahal truly represents a threat to the national security of the United Kingdom should he be allowed to remain on the national territory, then could it be said that the *Chahal* judgment in fact does not recognize the absolute character of the right to life (see on this situation the scope of the obligation to protect, chapter 4)?
2. Is the opinion expressed by the seven judges who filed a joint dissenting opinion in *Chahal* in fact contradicting the reasoning followed by the majority? If there is a difference of opinion between the majority and the dissenting opinion, then where exactly does it lie?
3. What similarities and differences exist between the question of *refoulement* and a 'ticking-bomb' scenario, such as the one explored in the preceding section? Does it matter whether the risk of ill-treatment is uncertain in one case, and certain in the other?
4. Does it matter whether the risk of ill-treatment is merely foreseeable in one case (*refoulement*), while it is intended in another case (torture inflicted in a 'ticking-bomb' situation)? Does this make any difference? Western ethics has traditionally distinguished the two. In this ethical tradition, 'it is permissible to allow a bad consequence to result from one's actions, even if it is foreseen as certain to follow, provided certain conditions are satisfied. Those conditions are identified by the principle of "double effect". According to this ethical principle, it is permissible to produce a bad consequence if: (1) the act one is engaged in is not itself bad; (2) the bad consequence is not a means to the good consequence; (3) the bad consequence is foreseen but

not intended; and (4) there is a sufficiently serious reason for allowing the bad consequence to occur' (J. Keown, *Euthanasia, Ethics and Public Policy. An Argument against Legalisation* (Cambridge University Press, 2002), p. 20 (reference omitted)). Can this argument be transposed here?

The absolute character of the prohibition imposed in *Chahal* has been recently questioned by certain States parties to the Convention, particularly where other, equally absolute rights, were seen by these States to compete with the protection from torture or ill-treatment. In the case of *Ramzy* v. *Netherlands* (Appl. No. 25424/05), the Governments of Lithuania, Portugal, Slovakia and the United Kingdom, were given leave to intervene in support of the Dutch Government's position, as is possible under Article 36 para. 3 ECHR. As summarized in the admissibility decision adopted by the Court in this case, these Governments argue that the principle stated in the *Chahal* case – according to which 'in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent State to justify expulsion' – was causing difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures, 'due to its rigidity':

European Court of Human Rights (3rd sect.), *Ramzy* v. *Netherlands* (Appl. No. 25424/05), admissibility decision of 28 May 2008, paras. 126–30:

126. The Governments observed in that connection that whilst Contracting States could obtain diplomatic assurances that an applicant would not be subjected to treatment contrary to the Convention, the Court had held in the above-mentioned *Chahal* case that Article 3 required examination of whether such assurances would achieve sufficient practical protection. As had been shown by the opinions of the majority and the minority of the Court in that case, identical assurances could be interpreted differently. Furthermore, it was unlikely that any State other than the one of which the applicant was a national would be prepared to receive into its territory a person suspected of terrorist activities. In addition, the possibility of having recourse to criminal sanctions against the suspect did not provide sufficient protection for the community. The individual concerned might not commit any offence (or else, before a terrorist attack, only minor ones) and it could prove difficult to establish his involvement in terrorism beyond reasonable doubt, since it was frequently impossible to use confidential sources or information supplied by intelligence services. Other measures, such as detention pending expulsion, placing the suspect under surveillance or restricting his freedom of movement provided only partial protection.

127. Terrorism seriously endangered the right to life, which was the necessary precondition for enjoyment of all other fundamental rights. According to a well-established principle of international law, States could use immigration legislation to protect themselves from external threats to their national security. The Convention did not guarantee the right to political asylum.

This was governed by the 1951 Convention relating to the Status of Refugees, which explicitly provided that there was no entitlement to asylum where there was a risk for national security or where the asylum seeker had been responsible for acts contrary to the principles of the United Nations. Moreover, Article 5 §1(f) of the Convention authorised the arrest of a person 'against whom action is being taken with a view to deportation ...', and thus recognised the right of States to deport aliens.

128. It was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 of the Convention was absolute. However, in the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the authorities of another State. The signatory State was then bound by a positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of implied positive obligations the Court had accepted that the applicant's rights must be weighed against the interests of the community as a whole.

129. In expulsion cases the degree of risk in the receiving country depended on a speculative assessment. The level required to accept the existence of the risk was relatively low and difficult to apply consistently. Moreover, Article 3 of the Convention prohibited not only extremely serious forms of treatment, such as torture, but also conduct covered by the relatively general concept of 'degrading treatment'. And the nature of the threat presented by an individual to the signatory State also varied significantly.

130. In the light of the foregoing considerations, the intervening Governments argued that, 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. In the first place, the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment. That would make it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2. Secondly, national-security considerations had to influence the standard of proof required of the applicant. In other words, if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In particular, the individual concerned had to prove that it was 'more likely than not' that he would be subjected to treatment prohibited by Article 3. That interpretation was compatible with the wording of Article 3 of the United Nations Convention against Torture, which had been based on the case law of the Court itself, and took account of the fact that in expulsion cases it was necessary to assess a possible future risk.

In the case of *Nassim Saadi* v. *Italy*, the United Kingdom Government also joined as an intervening third party, formulating essentially the same argument against the principle established by the *Chahal* case. On 28 February 2008, the Grand Chamber of the European Court of Human Rights delivered its judgment in that case. It held unanimously that if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the European Convention on Human Rights (prohibition of torture and inhuman or degrading treatment). The judgment reaffirms

the absolute nature of the prohibition of deportation where there is a 'substantial risk' of torture or ill-treatment being committed, refusing to weigh the risk that a person might be subjected to ill-treatment against his dangerousness to the community if not sent back.

European Court of Human Rights (GC), *Saadi* v. *Italy* (Appl. No. 37201/06), judgment of 28 February 2008, paras. 137–40:

137. The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence ... It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.

138. Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole ... Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule ... It must therefore reaffirm the principle ... that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees ... Moreover, that conclusion is in line with points IV and XII of the guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism ...

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. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

140. With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment ..., the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard,

protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is 'more likely than not'. On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3.

This position appears not to be shared by all supreme courts. The Supreme Court of Canada for instance has adopted the following view:

Supreme Court of Canada, *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3, 2002 SCC 1

[The appellant is a Convention refugee from Sri Lanka who has applied for landed immigrant status. In 1995, the Canadian Government detained him and commenced deportation proceedings on security grounds, based on the opinion of the Canadian Security Intelligence Service that he was a member and fund-raiser of the Liberation Tigers of Tamil Eelam, an organization alleged to be engaged in terrorist activity in Sri Lanka. The Federal Court, Trial Division upheld as reasonable the deportation certificate under s. 40.1 of the Immigration Act and, following a deportation hearing, an adjudicator held that the appellant should be deported. The Minister of Citizenship and Immigration, after notifying the appellant that she was considering issuing an opinion declaring him to be a danger to the security of Canada under s. 53(1)(b) of the Act, issued such an opinion on the basis of an immigration officer's memorandum and concluded that he should be deported. Although the appellant had presented written submissions and documentary evidence to the Minister, he had not been provided with a copy of the immigration officer's memorandum, nor was he provided with an opportunity to respond to it orally or in writing. The appellant applied for judicial review, alleging that: (1) the Minister's decision was unreasonable; (2) the procedures under the Act were unfair; and (3) the Act infringed ss. 7, 2(b) and (d) of the Canadian Charter of Rights and Freedoms. The application for judicial review was dismissed on all grounds. The Federal Court of Appeal upheld that decision.

In the following judgment, the Supreme Court concludes that the appeal should be allowed, and that the appellant is entitled to a new deportation hearing. However, it also takes the view that, while deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by s. 7 of the Charter, in determining whether this deprivation is in accordance with the principles of fundamental justice, Canada's interest in combating terrorism must be balanced against the refugee's interest in not being deported to torture. Section 7 of the Charter provides that 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' Section 1 of the Charter states: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.]

1 In this appeal we hold that Suresh is entitled to a new deportation hearing under the Immigration Act, R.S.C. 1985, c. I–2. Suresh came to Canada from Sri Lanka in 1990. He was recognized as a Convention refugee in 1991 and applied for landed immigrant status. In 1995 the government detained him and started proceedings to deport him to Sri Lanka on grounds he was a member and fundraiser for the Liberation Tigers of Tamil Eelam (LTTE), an organization alleged to engage in terrorist activity in Sri Lanka. Suresh challenged the order for his deportation on various grounds of substance and procedure. In these reasons we examine the Immigration Act and the Canadian Charter of Rights and Freedoms, and find that deportation to face torture is generally unconstitutional and that some of the procedures followed in Suresh's case did not meet the required constitutional standards. We therefore conclude that Suresh is entitled to a new hearing.

2 The appeal requires us to consider a number of issues: the standard to be applied in reviewing a ministerial decision to deport; whether the Charter precludes deportation to a country where the refugee faces torture or death; whether deportation on the basis of mere membership in an alleged terrorist organization unjustifiably infringes the Charter rights of free expression and free association; whether 'terrorism' and 'danger to the security of Canada' are unconstitutionally vague; and whether the deportation scheme contains adequate procedural safeguards to ensure that refugees are not expelled to a risk of torture or death.

3 The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.

4 On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society – liberty, the rule of law, and the principles of fundamental justice – values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.

5 We conclude that to deport a refugee to face a substantial risk of torture would generally violate s. 7 of the Charter. The Minister of Citizenship and Immigration must exercise her discretion to deport under the Immigration Act accordingly. Properly applied, the legislation conforms to the Charter. We reject the arguments that the terms 'danger to the security of Canada' and 'terrorism' are unconstitutionally vague and that ss. 19 and 53(1)(b) of the Act violate the Charter guarantees of free expression and free association, and conclude that the Act's impugned procedures, properly followed, are constitutional. We believe these findings leave ample scope to Parliament to adopt new laws and devise new approaches to the pressing problem of terrorism.

6 Applying these conclusions, we find that the appellant Suresh made a prima facie case showing a substantial risk of torture if deported to Sri Lanka, and that his hearing did not provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death. This means that the case must be remanded to the Minister for reconsideration. The immediate result is that Suresh will remain in Canada until his new hearing is complete. Parliament's scheme read in light of the Canadian Constitution requires no less ...

42 Suresh opposes his deportation to Sri Lanka on the ground, among others, that on return he faces a substantial risk of torture ...

43 Section 53 of the Immigration Act permits deportation 'to a country where the person's life or freedom would be threatened'. The question is whether such deportation violates s. 7 of the Charter. Torture is defined in Article 1 of the CAT as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials ...

44 Section 7 of the Charter guarantees '[e]veryone ... the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. It is conceded that 'everyone' includes refugees and that deportation to torture may deprive a refugee of liberty, security and perhaps life. The only question is whether this deprivation is in accordance with the principles of fundamental justice. If it is not, s. 7 is violated and, barring justification of the violation under s. 1 of the Charter, deportation to torture is unconstitutional.

45 The principles of fundamental justice are to be found in 'the basic tenets of our legal system' [*United States* v. *Burns* [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 70]. 'They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system': *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, at p. 503. The relevant principles of fundamental justice are determined by a contextual approach that 'takes into account the nature of the decision to be made' [*Kindler* v. *Canada (Minister of Justice*) [1991] 2 S.C.R. 779], at p. 848, per McLachlin J. (as she then was). The approach is essentially one of balancing. As we said in *Burns*, '[i]t is inherent in the ... balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance' (para. 65). Deportation to torture, for example, requires us to consider a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada. In contexts in which the most significant considerations are general ones, it is likely that the balance will be struck the same way in most cases. It would be impossible to say in advance, however, that the balance will necessarily be struck the same way in every case.

46 The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada's international obligations and values as expressed in '[t]he various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms': *Burns*, at paras. 79–81 ...

47 Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat. In the past, we have held that some responses are so extreme that they are *per se* disproportionate to any legitimate government interest: see *Burns*, *supra*. We must ask whether deporting a refugee to torture would be such a response.

48 With these thoughts in mind, we turn to the question of whether the government may, consistent with the principles of fundamental justice, expel a suspected terrorist to face torture

elsewhere: first from the Canadian perspective; then from the perspective of the international norms that inform s. 7.

(i) The Canadian Perspective

49 The inquiry at this stage is whether, viewed from a Canadian perspective, returning a refugee to the risk of torture because of security concerns violates the principles of fundamental justice where the deportation is effected for reasons of national security. A variety of phrases have been used to describe conduct that would violate fundamental justice. The most frequent is conduct that would ' "shoc[k]" the Canadian conscience' (see *Kindler*, *supra*, at p. 852, and *Burns*, *supra*, at para. 60). Without resorting to opinion polls, which may vary with the mood of the moment, is the conduct fundamentally unacceptable to our notions of fair practice and justice?

50 It can be confidently stated that Canadians do not accept torture as fair or compatible with justice. Torture finds no condonation in our Criminal Code; indeed the Code prohibits it (see, for example, s. 269.1). The Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture. Our courts ensure that confessions cannot be obtained by threats or force. The last vestiges of the death penalty were abolished in 1998 and Canada has not executed anyone since 1962: see An Act to amend the National Defence Act and to make consequential amendments to other Acts, S.C. 1998, c. 35. In *Burns*, the then Minister of Justice, in his decision on the order to extradite the respondents Burns and Rafay, emphasized that 'in Canada, Parliament has decided that capital punishment is not an appropriate penalty for crimes committed here, and I am firmly committed to that position' (para. 76). While we would hesitate to draw a direct equation between government policy or public opinion at any particular moment and the principles of fundamental justice, the fact that successive governments and Parliaments have refused to inflict torture and the death penalty surely reflects a fundamental Canadian belief about the appropriate limits of a criminal justice system.

51 When Canada adopted the Charter in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. A punishment is cruel and unusual if it 'is so excessive as to outrage standards of decency': see *R.* v. *Smith* [1987] 1 S.C.R. 1045, at pp. 1072–73, per Lamer J. (as he then was). It must be so inherently repugnant that it could never be an appropriate punishment, however egregious the offence. Torture falls into this category. The prospect of torture induces fear and its consequences may be devastating, irreversible, indeed, fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end the denial of a person's humanity; this end is outside the legitimate domain of a criminal justice system: see, generally, E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985), at pp. 27–59. Torture is an instrument of terror and not of justice. As Lamer J. stated in *Smith*, *supra*, at pp. 1073–74, 'some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment'. As such, torture is seen in Canada as fundamentally unjust.

52 We may thus conclude that Canadians reject government-sanctioned torture in the domestic context. However, this appeal focuses on the prospect of Canada expelling a person to face torture in another country. This raises the question whether s. 7 is implicated at all. On one theory, our inquiry need be concerned only with the Minister's act of deporting and not with the possible consequences that the expelled refugee may face upon arriving in the destination country. If our s. 7 analysis is confined to what occurs on Canadian soil as a necessary and

immediate result of the Minister's decision, torture does not enter the picture. If, on the other hand, our analysis must take into account what may happen to the refugee in the destination country, we surely cannot ignore the possibility of grievous consequences such as torture and death, if a risk of those consequences is established.

53 We discussed this issue at some length in *Burns*. In that case, the United States sought the extradition of two Canadian citizens to face aggravated first degree murder charges in the state of Washington. The respondents Burns and Rafay contested the extradition on the grounds that the Minister of Justice had not sought assurances that the death penalty would not be imposed. We rejected the respondents' argument that extradition in such circumstances would violate their s. 12 right not to be subjected to cruel and unusual treatment or punishment, finding that the nexus between the extradition order and the mere possibility of capital punishment was too remote to engage s. 12. We agreed, however, with the respondents' argument under s. 7, writing that '[s]ection 7 is concerned not only with the act of extraditing, but also the *potential* consequences of the act of extradition' (para. 60 (emphasis in original)). We cited, in particular, *Canada* v. *Schmidt* [1987] 1 S.C.R. 500, at p. 522, in which La Forest J. recognized that 'in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances'. In that case, La Forest J. referred specifically to the possibility that a country seeking extradition might torture the accused on return.

54 While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in *Burns* should not apply with equal force here. In *Burns*, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than *refoulement*. Rather, the governing principle was a general one – namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.

55 We therefore disagree with the Federal Court of Appeal's suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an 'involuntary intermediary' (para. 120). Without Canada's action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question, as there is in this case, of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.

56 While this Court has never directly addressed the issue of whether deportation to torture would be inconsistent with fundamental justice, we have indicated on several occasions that extraditing a person to face torture would be inconsistent with fundamental justice ...

58 Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend

not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state's genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere.

(ii) The International Perspective

59 We have examined the argument that from the perspective of Canadian law to deport a Convention refugee to torture violates the principles of fundamental justice. However, that does not end the inquiry. The provisions of the Immigration Act dealing with deportation must be considered in their international context ... Similarly, the principles of fundamental justice expressed in s. 7 of the Charter and the limits on rights that may be justified under s. 1 of the Charter cannot be considered in isolation from the international norms which they reflect. A complete understanding of the Act and the Charter requires consideration of the international perspective.

60 International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations qua obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.

61 It has been submitted by the intervener, Amnesty International, that the absolute prohibition on torture is a peremptory norm of customary international law, or *jus cogens* ...

62 In the case at bar, there are three compelling indicia that the prohibition of torture is a peremptory norm. First, there is the great number of multilateral instruments that explicitly prohibit torture ...

63 Second, Amnesty International submitted that no state has ever legalized torture or admitted to its deliberate practice and that governments accused of practising torture regularly deny their involvement, placing responsibility on individual state agents or groups outside the government's control. Therefore, it argues that the weight of these domestic practices is further evidence of a universal acceptance of the prohibition on torture ...

64 Last, a number of international authorities state that the prohibition on torture is an established peremptory norm ...

65 Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from. With this in mind, we now turn to the interpretation of the conflicting instruments at issue in this case.

66 Deportation to torture is prohibited by both the ICCPR, which Canada ratified in 1976, and the CAT [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment], which Canada ratified in 1987 ... While the provisions of the ICCPR do not themselves specifically address the permissibility of a state's expelling a person to face torture

elsewhere, General Comment 20 to the ICCPR makes clear that Article 7 is intended to cover that scenario, explaining that '... States parties must not expose individuals to the danger of torture ... upon return to another country by way of their extradition, expulsion or *refoulement*' (para. 9) ...

69 Robertson J.A., however, held that the CAT's clear proscription of deportation to torture must defer to Article 33(2) of the Refugee Convention, which permits a country to return (*refouler*) a refugee who is a danger to the country's security ...

70 Article 33 of the Refugee Convention appears on its face to stand in opposition to the categorical rejection of deportation to torture in the CAT. Robertson J.A., faced with this apparent contradiction, attempted to read the two conventions in a way that minimized the contradiction, holding that the anti-deportation provisions of the CAT were not binding, but derogable.

71 We are not convinced that the contradiction can be resolved in this way. It is not apparent to us that the clear prohibitions on torture in the CAT were intended to be derogable. First, the absence of an express prohibition against derogation in Article 3 of the CAT together with the 'without prejudice' language of Article 16 do not seem to permit derogation. Nor does it follow from the assertion in Article 2(2) of CAT that '[n]o exceptional circumstances ... may be invoked as a justification of torture', that the absence of such a clause in the Article 3 *refoulement* provision permits acts leading to torture in exceptional circumstances. Moreover, the history of Article 16 of the CAT suggests that it was intended to leave the door open to other legal instruments providing greater protection, not to serve as the means for reducing protection. During the deliberations of the Working Group that drafted the CAT, Article 16 was characterized as a 'saving clause affirming the continued validity of other instruments prohibiting punishments or cruel, inhuman, or degrading treatment': Convention against Torture, *travaux préparatoires*, UN Doc. E/CN.4/1408, at p. 66. This undermines the suggestion that Article 16 can be used as a means of narrowing the scope of protection that the CAT was intended to provide.

72 In our view, the prohibition in the ICCPR and the CAT on returning a refugee to face a risk of torture reflects the prevailing international norm. Article 33 of the Refugee Convention protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the Refugee Convention itself expresses a 'profound concern for refugees' and its principal purpose is to 'assure refugees the widest possible exercise of ... fundamental rights and freedoms' (Preamble). This negates the suggestion that the provisions of the Refugee Convention should be used to deny rights that other legal instruments make universally available to everyone.

73 Recognition of the dominant status of the CAT in international law is consistent with the position taken by the UN Committee against Torture, which has applied Article 3(1) even to individuals who have terrorist associations. (The CAT provides for the creation of a Committee against Torture to monitor compliance with the treaty: see CAT, Part II, Articles 17–24.) More particularly, the Committee against Torture has advised that Canada should '[c]omply fully with article 3(1) ... whether or not the individual is a serious criminal or security risk': see Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Canada, UN Doc. CAT/C/XXV/Concl.4, at para. 6(a).

74 Finally, we note that the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combatting terrorism and

protecting national security: H.C. 6536/95, *Hat'm Abu Zayda* v. *Israel General Security Service*, 38 I.L.M. 1471 (1999); *Secretary of State for the Home Department* v. *Rehman* [2001] 3 W.L.R. 877, at para. 54, per Lord Hoffmann.

75 We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the Charter.

(iii) Application to Section 53(1)(b) of the Immigration Act

76 The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the Charter. To paraphrase Lord Hoffmann in *Rehman*, *supra*, at para. 54, states must find some other way of ensuring national security.

77 The Minister is obliged to exercise the discretion conferred upon her by the Immigration Act in accordance with the Constitution. This requires the Minister to balance the relevant factors in the case before her. As stated in *Rehman*, *supra*, at para. 56, per Lord Hoffmann: 'The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.'

Similarly, Lord Slynn of Hadley stated, at para. 16: 'Whether there is ... a real possibility [of an adverse effect on the United Kingdom even if it is not direct or immediate] is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to th[e] individual if a deportation order is made.'

In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the Charter. It follows that insofar as the Immigration Act leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.

78 We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1. (A violation of s. 7 will be saved by s. 1 'only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like': see *Re B.C. Motor Vehicle Act*, *supra*, at p. 518; and *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)* [1999] 3 S.C.R. 46, at para. 99.) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as

the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.

79 In these circumstances, s. 53(1)(b) does not violate s. 7 of the Charter. What is at issue is not the legislation, but the Minister's obligation to exercise the discretion s. 53 confers in a constitutional manner.

Predictably, this decision led to strong reactions from the UN human rights treaty bodies. The Human Rights Committee expressed its concern about Canada's policy according to which 'in exceptional circumstances, persons can be deported to a country where they would face the risk of torture or cruel, inhuman or degrading treatment', a position which the Committee said 'amounts to a grave breach' of Article 7 of the International Covenant on Civil and Political Rights:

Human Rights Committee, Concluding Observations: Canada (UN Doc. CCPR/C/CAN/CO/5, 20 April 2006), para. 15:

The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law.

(b) Diplomatic assurances

In recent years, one contentious issue in this area has been the tendency of States to rely on assurances given by States of return about the treatment which the persons removed will receive, in order to effectuate removals in circumstances which otherwise – in the absence of such 'diplomatic assurances' – would not be acceptable (on diplomatic assurances, see generally G. Noll, 'Diplomatic Assurances and the Silence of Human Rights Law', *Melbourne Journal of International Law*, 7 (2006), 104; M. Jones, 'Lies, Damned Lies and Diplomatic Assurances: the Misuse of Diplomatic Assurances in Removal Proceedings', *European Journal of Migration and Law*, 8 (2006), 9; or, by the UN Special Rapporteur against torture, M. Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment', *Netherlands Quarterly of Human Rights*, 23 (2005), 674).

The human rights bodies or independent experts generally take the view that such 'diplomatic assurances' cannot be a substitute for a verification, on a case-to-case basis, that the person returned will not be subjected to a real risk of torture, to other forms of inhuman or degrading treatment or punishment or to the death penalty, and that the

security of that person will not be threatened. For instance, on 20 May 2005 the UN Committee against Torture (CAT) ruled that Sweden had violated the unconditional ban on torture in public international law by expelling a terrorism suspect, Ahmed Agiza, to Egypt. The Swedish Government had based its decision to proceed with the expulsion in December 2001 on a so-called 'diplomatic assurances' of fair treatment from the Egyptian authorities upon his return. The Committee nevertheless came to the conclusion that Sweden had violated Article 3 of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. In the view of CAT, the applicant had credibly alleged that he would be under a risk of torture after his forcible return to Egypt. The Committee stressed that assurances of the kind that has been given to the Swedish authorities could not protect Agiza from the risk of torture he faced upon return: 'the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk' (CAT/C/34/D/233/2003, 20 May 2005, p. 34). The Committee against Torture also pointed out that it 'should have been known, to the State party's authorities at the time of the complainant's removal 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'. This position is shared by the UN Special Rapporteur on the question of torture, who summarizes his position as follows:

Report of the Special Rapporteur on the question of torture, Manfred Nowak, submitted to the sixty-second session of the Commission on Human Rights, E/CN.4/2006/6 23 December 2005, para. 31:

(a) The principle of non-refoulement (CAT, art. 3; ECHR, art. 3; International Covenant on Civil and Political Rights (ICCPR), art. 7) is an absolute obligation deriving from the absolute and non-derogable nature of the prohibition of torture;

(b) Diplomatic assurances are sought from countries with a proven record of systematic torture, i.e. the very fact that such diplomatic assurances are sought is an acknowledgement that the requested State, in the opinion of the requesting State, is practising torture. In most cases, those individuals in relation to whom diplomatic assurances are being sought belong to a high-risk group ('Islamic fundamentalists');

(c) It is often the case that the requesting and the requested States are parties to CAT, ICCPR and other treaties absolutely prohibiting torture. Rather than using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations, requesting States, by means of diplomatic assurances, seek only an exception from the practice of torture for a few individuals, which leads to double standards *vis-à-vis* other detainees in those countries;

(d) Diplomatic assurances are not legally binding. It is therefore unclear why States that violate binding obligations under treaty and customary international law should comply with non-binding assurances. Another important question in this regard is whether the authority providing such diplomatic assurances has the power to enforce them *vis-à-vis* its own security forces;

(e) Post-return monitoring mechanisms are no guarantee against torture – even the best monitoring mechanisms (e.g. ICRC and CPT) are not 'watertight' safeguards against torture;
(f) The individual concerned has no recourse if assurances are violated;
(g) In most cases, diplomatic assurances do not contain any sanctions in case they are violated, i.e. there is no accountability of the requested or requesting State, and therefore the perpetrators of torture are not brought to justice;
(h) Both States have a common interest in denying that returned persons were subjected to torture. Therefore, where States have identified independent organizations to undertake monitoring functions under the agreement, these interests may translate into undue political pressure upon these monitoring bodies, particularly where one is funded by the sending and/or receiving State.

In the following case, however, the House of Lords upholds earlier rulings of the Special Immigration Appeals Commission (SIAC), an immigration court that hears appeals against national security deportations. The judgment allows the Government to deport two Algerians and a Jordanian national, Omar Othman (known as Abu Qatada), in reliance on 'diplomatic assurances' against torture from the Governments of Algeria and Jordan respectively. On the issue of diplomatic assurances, the leading opinion (by Lord Phillips of Worth Matravers) states the following:

House of Lords (United Kingdom), *R.B. and U. (Algeria)* **v.** ***Secretary of State for the Home Department*** **and** ***Secretary of State for the Home Department*** **v.** ***O.O. (Jordan)*** **[2009] UKHL 10 (on appeal from [2007] EWCA Civ 808 and [2008] EWCA Civ 290):**

107. The Secretary of State accepted that neither Algeria, in the case of RB and U, nor Jordan, in the case of Mr Othman, was a country to which the appellants could safely have been returned had the United Kingdom not received assurances from the respective Governments as to the way in which they would be treated. In the case of RB and U SIAC held that, having particular regard to the assurances that had been given, the individual appellants would not face a real risk of treatment of a kind covered by article 3 (I shall refer to this hereafter as inhuman treatment) if returned to his own country. Before the Court of Appeal RB and U sought to challenge this finding, but the court held that it had no jurisdiction to reconsider it as the finding was one of fact, not law. Nonetheless the Court of Appeal considered the merits of the challenge and expressed the view that the criticism of SIAC's decision was unfounded.

108. The picture in relation to Mr Othman is more complex. The assurances in his case, which were contained in a Memorandum of Understanding (MOU) covered all human rights but dealt specifically with treatment if detained, promptness of judicial process and fairness of any trial. SIAC's judgment extends to some 130 pages in length. SIAC referred repeatedly to the influence of the MOU and found this significant, but it does not seem that this was critical to reducing the risk of inhuman treatment to an acceptable level, for SIAC expressed the following conclusion in relation to the effectiveness of the MOU:

'It is in this context that we examine the effect of the MOU and the monitoring provisions. First, the conclusions which we have reached about the treatment which the Appellant would experience on return, and the lack of a real risk of a breach of Article 3 at that stage, are reinforced by their existence. We expect the MOU to have some influence on the way in which the legal procedures pre-trial are carried out. The MOU and monitoring reinforce our conclusions about other risks, although we have not relied on them as the crucial components which make what would otherwise be a real risk of a breach of Article 3 into something less.'

109. Mr Othman sought to challenge before the Court of Appeal the reliance that SIAC had placed on the assurances given by Jordan that he would not be subjected to inhuman treatment. The court followed the decision in *RB and U* in holding that SIAC's decision was not open to attack as a matter of principle and also summarily dismissed the suggestion that SIAC's decision was irrational.

110. Before the House counsel for RB and U submitted that it was irrational and unlawful for SIAC to rely on assurances for two independent reasons: first because Algeria had not been prepared to agree to independent monitoring of the manner in which the appellants would be treated; secondly because, on their true construction, the assurances did not promise that the appellants would not be subjected to inhuman treatment. Counsel for Mr Othman submitted that, as a matter of principle, assurances could not be relied upon where there was a pattern of human rights violations in the receiving State coupled with a culture of impunity for the State agents in the security service and the persons who perpetrated these violations. It was further submitted that in all the circumstances SIAC's reliance on the assurances that had been given was irrational.

111. These submissions were supported by all three interveners [three non-governmental organizations, Justice, Human Rights Watch, and Liberty, intervened in support of the appellants]. They advanced a further argument of principle. They submitted that once it was accepted that there was a continuing risk of inhuman treatment in a country, assurances could not be relied upon unless their effect was to remove all risk of ill-treatment. I propose to deal at the outset with the submissions that there are principles of law that govern whether reliance can be placed on assurances in relation to safety on return.

112. The starting point is *Chahal*. In that case the ECtHR referred to the relevant test for ascertaining whether expulsion will violate article 3, namely whether there are substantial grounds for believing that the person in question, if expelled, will face a real risk of being subjected to treatment contrary to article 3. In contending that there was no such risk the United Kingdom had relied on the fact that they had sought and received assurances from the Indian Government. The court referred to the fact that despite the efforts of the Government and the courts the violation of human rights by the security forces remained prevalent and commented that it was not persuaded that the assurances 'would provide Mr Chahal with an adequate guarantee of safety'. The court did not specify what it meant by an 'adequate guarantee'. Counsel for the appellants equated the phrase to an absolute guarantee. Counsel for the Secretary of State submitted that it was enough if the guarantee removed the substantial grounds that might otherwise exist for believing that there was a real risk of inhuman treatment. In *Mamatkulov* v. *Turkey* (2005) 41 EHRR 494 [see Box 1.3., chapter 1] the ECtHR was not satisfied that Turkey had violated article 3 in permitting the extradition of the applicant to Uzbekistan and, in reaching that conclusion, had regard to the fact that the Government of Uzbekistan had given assurances

against ill-treatment. In this case the existence of assurances was treated by the court as part of the matrix that had to be considered when deciding whether there were substantial grounds for believing in the existence of a real risk of inhuman treatment. The ECtHR applied a similar approach in *Shamayev* v. *Georgia and Russia* (application 36378/02 judgment of 12 April 2005) [see below in this section] as did the United Nations Committee Against Torture in *Hanan Attia* v. *Sweden* (17 November 2003, Communication No. 199/2002).

113. Counsel for RB and U relied on *Saadi* v. *Italy* [see above in this section, a], where at para 129 the ECtHR spoke of the requirement of the deporting Government to 'dispel any doubts' about the safety of the deportee. They also referred to two recent claims against Russia where the court spoke of the need for diplomatic assurances 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' – *Ismoilov and others* v. *Russia* (application no 2947/06) paragraph 127 and *Ryabikin* v. *Russia* (application no 8320/04) paragraph 119.

114. I do not consider that these decisions establish a principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon. It is obvious that if a State seeks to rely on assurances that are given by a country with a record for disregarding fundamental human rights it will need to show that there is good reason to treat the assurances as providing a reliable guarantee that the deportee will not be subjected to such treatment. If, however, after consideration of all the relevant circumstances of which assurances form part, there are no substantial grounds for believing that a deportee will be at real risk of inhuman treatment, there will be no basis for holding that deportation will violate article 3.

115. That said, there is an abundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by State agents is endemic. This comes close to the 'Catch 22' proposition that if you need to ask for assurances you cannot rely on them. If a State is unwilling or unable to comply with the obligations of international law in relation to the avoidance and prevention of inhuman treatment, how can it be trusted to be willing or able to give effect to an undertaking that an individual deportee will not be subject to such treatment?

116. Much of the material to which I have referred is summarised in the decision of de Montigny J, sitting in the Federal Court of Canada, in *Sing* v. *Canada (Minister of Citizenship and Immigration)* 2007 FC 361. He referred to the joint report of Amnesty International, Human Rights Watch and the International Commission of Jurists of December 2 2005; Tribunal Record, vol 1, pages 179–223, which stated that diplomatic assurances were not an effective safeguard against torture, and to the report to the UN General Assembly of September 1 2004 of the UN Special Rapporteur on Torture (UN Document A/59/324). The latter urged the importance of verification of assurances, including effective monitoring, something that is particularly difficult as a person in detention may be understandably reluctant to complain to a monitor of torture or inhuman treatment. These are matters that counsel for the appellants urged before your Lordships.

117. *Sing* was a claim for judicial review and, when considering the standard of review, Montigny J remarked that the evaluation of the reliability of a diplomatic assurance was a question of fact reviewable on the standard of patent unreasonableness. He referred to the

following passage in the judgment of the Supreme Court in *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at paragraph 39:

'As mentioned earlier, whether there is a substantial risk of torture if Suresh is deported is a threshold question. The threshold question here is in large part a fact-driven inquiry. It requires consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. It may also involve a reassessment of the refugee's initial claim and a determination of whether a third country is willing to accept the refugee. Such issues are largely outside the realm of expertise of reviewing courts and possess a negligible legal dimension.'

This passage expresses my reaction to the suggestion that SIAC's conclusions in relation to assurances give rise to issues of law. The only ground upon which those conclusions can be attacked on an appeal restricted to questions of law is irrationality.

Was SIAC's decision in relation to RB and U irrational?

118. In considering this question it is right to bear in mind the material to which I have referred that emphasises the reasons why assurances are unlikely to be reliable. With article 3 rights in issue SIAC could be expected to scrutinise with great care the Secretary of State's contention that assurances from the Algerian Government sufficed to remove the substantial grounds that would otherwise exist for believing that the appellants would be at real risk of inhuman treatment if sent back to Algeria. It is also right, however, to bear in mind the following comments of Baroness Hale in relation to an appeal on questions of law from an expert Tribunal – in that case the Asylum and Immigration Tribunal – in *AH (Sudan)* v. *Secretary of State for the Home Department (UNHCR intervening)* [2007] UKHL 49; [2008] 1 AC 678:

'This is an expert tribunal charged with administering a complex area of law in challenging circumstances. [T]he ordinary courts should approach appeals from [such expert tribunals] with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke* v. *Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.'

119. That passage was cited by the Court of Appeal when rejecting an appeal by the Secretary of State from the decision of SIAC in *AS and DD (Libya)* v. *Secretary of State for the Home Department (Liberty intervening)* [2008] EWCA Civ 289. SIAC had allowed appeals by AS and DD against deportation to Libya for reasons of national security. The ground of appeal that succeeded was that there were substantial grounds for believing that they faced a real risk of inhuman treatment if sent back to Libya. The Secretary of State had sought, unsuccessfully, to rely upon assurances in a memorandum of understanding concluded between the United Kingdom and Libya. A witness, whose experience and integrity SIAC commended, had

given evidence that it was 'well nigh unthinkable' that Libya would break that undertaking. Notwithstanding this SIAC concluded that the memorandum of understanding was not sufficiently reliable. Applying the approach of the ECtHR in *Saadi* the Court of Appeal held that:

'Consistently with that approach, it was for SIAC to examine whether the assurances given by Libya, in their practical application, were a sufficient guarantee that the respondents would be protected against torture. The weight to be given to the assurances depended upon the facts of this particular case. It can thus be seen that the exercise upon which SIAC was embarking was an investigation of fact, leading to a conclusion of fact. In our judgment, if SIAC made any error (and we do not divine one), it was an error of fact and not an error of law.'

120. In *AS and DD* SIAC applied with care the test originally laid down in Chahal. Are RB and U correct to contend that the results that SIAC reached in their cases were irrational? The weight to be attached to assurances was a question that different divisions of SIAC had to consider four times in relation to Algeria, once in respect of *Y*, once in respect of *RB*, once in respect of *G* and once in respect of *U*. The later decisions built on the earlier ones and in the final case of *U* SIAC had regard to the experience of four Algerians who had been repatriated to Algeria.

121. When considering RB and U's appeals the Court of Appeal considered the individual attacks that had been made on SIAC's findings of fact and found them without merit. I have none the less considered SIAC's decisions to see whether, having regard to the obligation on the Secretary of State to show good reason for treating Algeria's assurances as reliable, SIAC's conclusions are irrational.

122. The foundation of SIAC's decisions in relation to RB and U is to be found in their judgment, delivered by Ouseley J, in the case of *Y* on 24 August 2006 (Appeal No. SC/36/2005). This judgment extended to 416 paragraphs and it dealt in detail with the obtaining of assurances by the British Government. The context in which these were obtained was the desire of the Government to establish a means of returning terrorist suspects to their countries of origin without violation of the requirements of Article 3 of the Convention. In the case of Algeria this led to negotiations at the highest level, including discussions between the Prime Minister and President Bouteflika of Algeria. These negotiations ultimately resulted in assurances being given in relation to Y and also the assurances given in respect of RB and U that I set out earlier in this opinion. As I have already observed, the phrase 'diplomatic assurances' does not accurately reflect assurances obtained in such circumstances. That phrase more adequately describes routine assurances offered as a matter of course by State authorities seeking extradition, such as those considered by the ECtHR in *Ismoilov and Ryabikin*.

123. I have described earlier in this opinion the consideration given by SIAC to the reliance that could be placed on the Algerian assurances. This had particular regard to the general conditions in Algeria at the time that the assurances were given, the attitude of the Algerian authorities to the observance of human rights, the degree of control exercised by the Algerian authorities over the DRS, the internal security service, and the manner in which the performance of the assurances could be verified. SIAC paid careful regard to all relevant matters and applied to them the proper test of whether they amounted to substantial grounds for believing that RB and U would be at real risk of inhuman treatment if returned to Algeria.

124. 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