

**Counter-Terrorism Legislation and Practice:  
A Survey of Selected Countries**

**Introduction**

The events of July 2005 brought into focus the need for this country to properly equip itself against the threat from terrorism. The Government has over the summer been assessing the practical and legislative steps needed to build on the counter terrorism measures already in place. The Government is consulting widely on the measures that are now proposed. This research paper is intended to inform that process, by providing background information on the approaches taken in a selection of other countries.

Different countries, with differing political and legal traditions and systems, recognising the particular threat posed by terrorism, have enacted a variety of measures to counter that threat. Approaches have varied and evolved over time in the face of a changing threat and changing terrorist tactics. This paper is a survey of such measures in a number of democratic countries from Western Europe, North America and Australasia. In compiling the paper our Research Analysts and officials have consulted with independent lawyers and/or national governments. But this paper does not constitute formal legal advice, and should not be taken as such. Rather, it sets out some of the key elements of these countries' legislation and practice. It is illustrative rather than exhaustive. It does not seek to comment on their legislation or to draw conclusions. It focuses on the main provisions of counter-terrorism related law, not on every statute (for example, weapons offences, or laws against identity fraud or money laundering) that may apply in individual terrorist-related investigations. The paper is the start of a consultative process that can be developed and supplemented in the future. It describes the situation in mid-2005, not the plans for further measures that a number of countries have indicated they may introduce.



Secretary of State  
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## AUSTRALIA

1. Australia is a federation of States, each of which has its own constitution, government and laws. The legislative power of the Commonwealth of Australia is held by the federal Parliament which can make laws only on certain matters, including foreign affairs, defence, immigration, taxation, banking, insurance. The States retain legislative powers over local government, roads, hospitals and schools, and matters not specifically listed in the constitution. In cases of conflict in areas where the Commonwealth and States have concurrent powers to make laws, Commonwealth law has priority and the State law is invalid to the extent of the inconsistency.
2. The Australian Criminal Code Act 1995 (the Criminal Code), as amended by the Security Legislation Amendment (Terrorism) Act 2002, defines a terrorist act as:
  - an action or threat of action that causes serious physical harm or death to a person, or endangers a person's life or involves serious risk to public health or safety, serious damage to property or serious interference with essential electronic systems; and
  - the action is done or threat is made with the intention of advancing a political, religious or ideological cause and to coerce or influence by intimidation an Australian or foreign government or intimidate the public or a section of the public.
3. Since 2002, the Australian Government has introduced comprehensive terrorism laws. It is an offence to commit a terrorist act, be a member of a terrorist organisation, provide or receive training connected with terrorist acts, associate with a terrorist organisation, support or plan a terrorist act, and receive funds from or make funds available, to a terrorist organisation. All offences attract substantial penalties, some of them up to life imprisonment.
4. The Criminal Code defines a "terrorist organisation" as an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs) or an organisation that is specified by the regulations. Before an organisation is specified in the Regulations the Attorney-General must be satisfied on reasonable grounds that the organisation is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). Regulations listing terrorist organisations have effect for two years after their commencement.
5. In the event that another country is unable or unwilling to lay appropriate charges, criminal charges can be brought against individuals who committed terrorist offences (as defined by Australian legislation) overseas.
6. If an individual is arrested under suspicion of involvement in terrorism, they can be held for questioning for an initial period of four hours. This period can be increased to 24 hours by application to a magistrate, after which suspects are either charged or released.

7. The Australian Security Intelligence Organisation Act 1979 gives ASIO the power to seek a warrant to question, and in limited circumstances detain, a person who may have information relating to a terrorism offence. ASIO may question a person for up to a total of 24 hours (48 hours if an interpreter is used) and, if permitted by the warrant, the person may be detained for up to 168 hours. Warrants are issued by a federal judge or a Federal Magistrate. A person with judicial experience supervises questioning. Safeguards exist, including a person's right to have a lawyer present, and the right to make a complaint to the Inspector General of Intelligence and Security and to seek a remedy in a federal court at any time.
8. Australian use of "advance passenger processing" means that no one can board a flight to Australia unless already cleared for landing. As such, Australia departs only around 100-200 individuals per year. In recent years Australia has also increased its presence at key international airports and is at the forefront of international research on biometrics technology to detect identity fraud, quarantine technologies to enhance the screening of goods, and more effective disease surveillance systems for preventing bio-terrorism.
9. Australia permits dual nationality. Australian nationality can only be removed if it was fraudulently obtained as a result of either migration fraud or citizenship fraud or if the person is a dual national and is convicted after becoming an Australian citizen of a serious criminal offence committed before their citizenship application was approved.
10. Decisions to cancel or refuse a visa are taken by, or under the authority of, the Minister for Immigration and Multicultural and Indigenous Affairs. This could be on the basis of an assessment of ASIO, or a determination by the Foreign Minister, in which case the visa must be cancelled or refused. The decision may also be based on a range of information provided to the Immigration Department, in which case the decision-maker will have some discretion. If officials take the decision, it is subject to appeal at an appeals tribunal; if the Minister takes the decision there is no appeal to the tribunal. Each decision is subject to judicial review and may be examined by an Ombudsman or, in the case of a security assessment by ASIO, to the Inspector General of Intelligence and Security.
11. In addition, to human rights protections provided for by the Australian constitution, domestic legislation and the case law of the courts, Australia has ratified the International Covenant of Civil and Political Rights 1966 (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 (CAT). When removing individuals, Australia seeks assurances from the government in question where appropriate. If it is unable to obtain such assurances, Australia will not remove the individual.

**Australia proscribes the following groups:**

Abu Sayyaf Group  
Al Qaeda  
Al Qaeda in Iraq  
Ansar al-Islam  
Armed Islamic Group  
Asbat al-Ansar  
Egyptian Islamic Movement  
 Hamas Izz al-Din al-Qassam Brigades  
Hizballah External Security Organisation  
Islamic Army of Aden  
Islamic Movement of Uzbekistan  
Jaish e-Mohammed  
Jamiat ul-Ansar  
Jemaah Islamiyah  
Lashkar i Jhangvi  
Lashkar-e-Tayyiba  
Palestinian Islamic Jihad  
Salafist Group for Call and Combat

## CANADA

12. The federal government has exclusive law-making powers over criminal law and criminal procedure. The provincial governments are given jurisdiction over "the administration of justice" in the provinces, which includes "the constitution, organisation and maintenance" of the courts, both civil and criminal, in the province, as well as civil procedure in those courts. The Constitution Act of 1982 incorporates the Canadian Charter of Rights and Freedoms, a constitutionally entrenched bill of rights which defines the fundamental freedoms and other rights of Canadians. Canadian domestic laws are intended to be interpreted in accordance with Canada's international commitments.
13. The Criminal Code, as amended by the Anti Terrorism Act 2001 (ATA), defines terrorism as an action that takes place either within or outside of Canada which is an offence under the United Nations (UN) Conventions and Protocols; or is committed or threatened for political, religious or ideological purposes and intended to intimidate the public or compel a government to do or refrain from doing an act by killing, seriously harming or endangering a person, causing substantial property damage that is likely to seriously harm people or by interfering with or disrupting an essential service, facility or system. Under the ATA, a terrorist group is defined as an entity that has as one of its purposes or activities the facilitating or carrying out of terrorist activity or that is an entity set out in a list established by regulation. Being on the list does not itself constitute a criminal offence, although it can lead to criminal consequences. Where offences are charged, each of the elements would have to be proved beyond a reasonable doubt. The list supports the application of other provisions in the Act including: terrorism offences; crimes relating to the financing of terrorism; requirements to freeze terrorist property and procedures for the courts to order seizure and forfeiture of that property; and the removal or denial of the charitable status of organisations that engage in or support terrorism.
14. Thirty-eight entities have been proscribed under the various provisions of the Criminal Code. These include organisations such as al-Qa'ida, Hizbullah, Aum Shinri Kyo and Sendero Luminoso. The list continues to be updated. Decisions on listing are made by Ministers in Special Committee. In order to be designated, it must be determined that the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity or knowingly acting on behalf of, at the direction of or in association with such an entity. Canada also implements its international obligations through other domestic measures such as the UN Suppression of Terrorism Regulations.
15. The ATA enacted or amended a number of other federal statutes, including the Security of Information Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, the Charities Registration Act and the National Defence Act. The ATA is complemented by the Public Safety Act 2002 (which enhances the security environment for air travellers) and the Immigration and Refugee Protection Act (IRPA).
16. Those accused of terrorism-related offences have the same substantive and procedural rights as any other criminal accused in Canada, including the

presumption of innocence, equality before the law and trial by an independent and impartial tribunal. The burden of the State to prove its case beyond a reasonable doubt applies to every essential element of a criminal case. The ATA contains provisions that relate to both reconnaissance with conditions and investigative hearings. At an investigative hearing a person is required to answer questions put by the Attorney General even if the answers would incriminate them. However the information or evidence derived from it, may not be used against the person in a criminal proceeding. Persons have the right to have a lawyer available at any stage of the proceedings.

17. In respect of incitement or fomenting terrorism, the Criminal Code contains provisions on incitement to hatred but these have not been used in the counter-terrorism context as yet.
18. The Government of Canada has signed and ratified all 12 UN Conventions and Protocols relating to terrorism and has ratified a number of international human rights treaties, including the ICCPR and the CAT. Furthermore, although Canada is not a signatory to the American Convention on Human Rights (ACHR), Canadian citizens retain a right to file a complaint under the ACHR.
19. Canadian citizens are allowed to acquire a foreign nationality without losing their Canadian citizenship. Canadian citizenship can only be revoked on grounds of misrepresentation, for example, if it was obtained by fraudulent means.
20. Canadian law permits the detention and deportation without any criminal conviction in Canada of non-Canadian citizens based on certain grounds prescribed in the Immigration and Refugee Protection Act (IRPA: Section 77-85), including security, war crimes and organised crime. The ability to detain or deport non-Canadians under a certificate process was first introduced in 1978 as part of Canadian immigration law. Under IRPA, the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration can sign certificates in respect of protected persons and other non-Canadians who pose a security threat. The certificate process is only issued when there is sensitive information, usually provided by the Canadian Security Intelligence Service (CSIS), which needs to be protected for reasons of national security or the safety of any person. Intelligence information must be both reliable and supported by sufficient open-source information.
21. The certificate process authorises the detention of non-citizens pending removal. An initial review of detention must take place within 48 hours, then subsequently every six months. In the case of a non-protected person, detention is mandatory while the reasonableness of the certificate is being determined. In the case of a protected person, the Minister must sign a warrant of arrest and detention of the person named in the certificate. However, they are free to leave Canada at any time. During the Federal Court proceeding, the person named in the certificate, if eligible, may make an application for a 'pre-removal risk assessment' (PRRA) to assess whether they face any risk in the country to which they will be deported. On request, the judge will suspend the proceeding in order for the Minister of Citizenship and Immigration's delegate to make a decision on the PRRA application. The Federal Court judge will then resume the proceedings and will

determine the lawfulness of the PRRA decision together with the reasonableness of the certificate. If a certificate is determined to be reasonable this constitutes a *de facto* removal order. There is no right of appeal to the determination of the judge on the reasonableness of the security certificate or the PRRA.

22. IRPA does not contain any legal provision authorising indefinite administrative detention. Individuals are primarily detained while the Federal Court reviews the reasonableness of the certificate. Where the Federal Court finds the certificate reasonable, the authority to detain continues. However, the individual may apply for release from detention if they are not removed within 120 days after the certificate has been found reasonable.
23. Certificates have been directed at a broad range of subjects including those alleged to be terrorists. In total, 27 certificates have been issued since 1991. Of these 27 certificates, three were quashed by the Federal Court. There are currently six detainees, two of whom have been allowed bail by the Federal Court (one under strict conditions including electronic tagging). Canada would not generally allow an individual to be deported to a country where they might face torture (see case study).

#### **Case Study: *Suresh v Canada***

In *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002, the Supreme Court of Canada reviewed the decision to deport a Sri Lankan refugee (and a member of the LTTE). The Court had to consider whether the provisions in the Immigration Act that allow the Minister to deport individuals who are considered a threat to Canadian security are constitutional and, in particular, whether they violated the principles of fundamental justice set out in the Canadian Charter of Rights and Freedoms. The Supreme Court held:

“We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified...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 Convention Against Torture directly constrains the actions of the Canadian Government, but because the fundamental justice balance under Section 7 of the [Canadian] Charter [of Rights and Freedoms] generally precludes deportation to torture when applied on a case by case basis. We may predict that it will be 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” (para 78).

What amounts to “exceptional circumstances” has not been explored further.



## FRANCE

24. France operates a civil law legal system under which the French Constitution of 4 October 1958 is the founding text. The preamble of the Constitution refers directly and explicitly back to, amongst other things, the Declaration of the Rights of Man and the Citizen of 1789. France is a dualist system, requiring domestic legislation to give effect to international treaties.
25. Acts of terrorism are a criminal offence and are set out in Articles 421-1 et seq. of the Penal Code (as amended in Law 96-647 of 22 July 1996). The offences which constitute acts of terrorism are those which are committed intentionally and undertaken by an individual or collective with the purpose of seriously disturbing the public order through intimidation or terror by means of:
- wilful attacks on life, wilful attacks on the physical integrity of persons, abduction, hijacking of planes or vessels, theft, extortion, destruction, defacement and damage, and also computer offences;
  - the production or keeping or sale or transport of machines, dangerous or explosive devices or substances;
  - the detention, carrying and transport of weapons and ammunition;
  - offences related to the prohibition of the designing, production, keeping, stocking, purchase or sale of biological or toxin-based weapons;
  - financing a terrorist organisation;
  - introduction into the environment of any substance liable to imperil human or animal health or the natural environment with the aim of seriously disturbing public order through intimidation or terror;
  - money laundering or insider trading relating to terrorist activities;
  - being unable to account for resources corresponding to one's lifestyle when habitually in close contact with a person or persons who engage in terrorist activities.
26. In 1986 a section within the Trial Court of Paris of prosecutors and examining magistrates (*juges d'instruction*) was created, which specialises in cases of terrorism. A local prosecutor decides whether a crime committed in his area of responsibility is related to terrorism and if so, refers the case to the special section of the Paris Court. There the examining magistrate conducts an investigation to determine whether there is a case to send to trial. The examining magistrate is empowered to carry out a wide range of acts. These may be delegated to the police authorities where appropriate. The prosecution, suspect and victim/civil parties can request that the examining magistrate carry out particular investigative acts, and can appeal against a refusal to do so. Once the investigation and examination are complete, the examining magistrate decides whether there is enough evidence to send the case for trial. The prosecutor and civil parties can appeal against a decision not to send the case for trial.
27. In practice, the creation of the special counter-terrorism section of the Paris court has led over time to the establishment of a specialised and expert corps of counter-terrorism magistrates. This system also facilitates close working between investigating magistrates and the domestic French intelligence agency, the DST. The latter has a dual role as both intelligence agency and a judicial police force that can be placed under the authority of such a magistrate.

28. France has introduced a number of laws since 1986 including, for example, laws on interception of electronic communications (Law no 91-646 as amended), use of video surveillance (Law no 95-73), biometric checks (Decree no 2005-556) and the introduction of a computerised database holding data files on individuals.
29. In the wake of terrorist attacks in the mid-1990s Law Number 96-647 of 22 July 1996 determined conspiracy to commit terrorist acts to also be a terrorist act. This builds on the codification of broader criminal conspiracy offences (*association de malfaiteurs*). Together they allow for investigating potential terrorist activity through the targeting of logistics networks that support terrorists.
30. Following the attacks of 11 September 2001, the statutory provisions seeking to prevent money laundering were extended to the fight against financing of terrorism. There exist a number of national structures designed to counter money laundering as it relates to terrorist finance. These include the Cell for the repression of serious financial delinquency (OCRGDF), the Cell for treating information and action against clandestine financial networks (TRACFIN) and the Cell for the fight against financing of terrorism (FINATER). The Monetary and Financial Code provides that a Declaration of suspicion must be made whenever funds “may be used for the financing of terrorism”. This obligation lies upon credit establishments, financial institutions, insurers, notaries, real estate agents, avocats (in the context of their advisory activities), *avoués*, auditors, official auctioneers, sellers of works of art, of antiques, and of precious stones, the legal representatives and managers of casinos, and welfare insurance institutions.
31. Under the Criminal Code of Procedure many of the same rules apply to terrorist cases as to other criminal cases. For example the time limits for pre-trial detention for terrorist offences (other than certain conspiracy offences) are the same as for other serious offences: up to 2 years pre-trial detention for crimes punishable by 10 years imprisonment or less and up to 4 years detention for crimes punishable by more than 10 years imprisonment.
32. Exceptions for terrorist offences are made under the Code of Criminal Procedure in relation to initial custody, pre-trial detention for certain conspiracy cases, searches and the limitation period. It is possible, for example, to extend initial custody time limits to those being questioned in relation to a terrorist act. The normal custody period of 48 hours can be extended by two further periods of 24 hours. The extensions must be necessary for the purposes of the enquiries and must be authorised by a judge. The person held in custody may only speak with a lawyer after 72 hours. The lawyer may not make known that such a meeting took place to any third party throughout the duration of the custody. This obligation is not limited to the derogation relating to matters of terrorism and has already given rise to criminal sanctions for lawyers who have breached this provision.
33. From 9 October 2004, under Law *Perben II*, certain types of covert investigative methods in the investigation of organised crime and terrorism are permitted. These include undercover officers, listening devices and controlled deliveries.

34. France is party to a wide range of terrorism-related international treaties including the European Convention on the Suppression of Terrorism, the International Convention against Hostage Taking, the International Convention on the Suppression of Terrorist Attacks with Explosives and the International Convention on the Suppression of the Financing of Terrorism. France is also a party to international human rights treaties including the ICCPR and the CAT.
35. Law no. 96/647 of 22 July 1996, brought in to reinforce prevention of terrorism, provides the possibility for removal of French nationality to be pronounced against any person who had acquired such nationality and who has been convicted of an act of terrorism. The removal of nationality is ordered by the administrative authority, in this case the Prime Minister, upon a decree taken after advice of the *Conseil d'Etat*. It can only be ordered if the acts of terrorism have been committed within ten years of acquisition of French nationality or before such acquisition is granted. Such a decision can be challenged by appeal to the *Conseil d'Etat*. Removal of nationality does not constitute a criminal sanction ordered by a Court.
36. Expulsion from French territory is governed by Law no. 45/2658 of 2 November 1945, as subsequently amended. Expulsion of a non-French citizen can take place either in the event of a threat to public order made by that individual or on the grounds of urgent need for the security of the State or public safety. In the event of an expulsion based on a threat to public order the person concerned is informed of their expulsion and appears before the “expulsion commission”, having been given the opportunity to present their comments. Upon advice from this commission, the administrative authority, usually the *Prefect*, takes its decision. The advice and the administrative decision are then communicated to the person in question. In the event of an expulsion based on urgent need, the Interior Minister normally takes the decision. Foreigners who have been granted a long duration residence permit are still liable to expulsion; foreigners who have been given political asylum cannot be thus expelled. The courts may order exclusion from French territory as a sanction against any foreigner found guilty of, amongst other things, terrorism by a French court and the exclusion may be for life or for a period of ten years.

## GERMANY

37. Germany has a written constitution, the *Grundgesetz* (Basic Law). The fundamental rights in the *Grundgesetz*, such as the inviolability of human dignity, cannot be changed even by constitutional amendment. All legislation and executive application of the law can be reviewed by the Federal Constitutional Court for their constitutionality. The Court can overturn decisions by normal courts, annul executive decisions and nullify legislation.
38. There is no legal definition of terrorism; terrorist activity (conspiracy, causing explosions, etc.) is covered by existing laws. In the early 1970s, during the Red Army Faction terrorist campaign, membership of a domestic terrorist organisation was made illegal under German legislation (Article 129(a) of the Criminal Code). The ban now includes membership of, or support for, a foreign terrorist organisation (Art. 129(b)).
39. The Law on Fighting Terrorism came into force on 1 January 2002. It is not a single piece of legislation, but rather the title given to an omnibus package of amendments to pre-existing statutes. These include:
- Increased investigative powers for the police, intelligence and security services, including greater access to personal, financial and immigration data, broader investigative powers and expanded powers to monitor resident extremists;
  - Tougher visa and border control regulations to prevent extremists travelling into Germany, including introduction of bio-metric data for passports and visas;
  - Increased vetting of those in security-sensitive occupations;
  - Greater protection for critical infrastructure.
40. Anyone arrested in Germany must be brought before a judge by the “termination of the day following the arrest”. Usually this is within 24 hours, but can be up to nearly 48 hours. The judge can remand the suspect in custody while the criminal investigation and prosecution are still underway if there are strong grounds to suspect that the person apprehended committed the crime, if there is a risk of flight or if there is danger of interference with witnesses or evidence and the measure is proportionate to the possible sentence. This also applies to those suspected of membership of a terrorist organisation (domestic or foreign). The detention must be reviewed by a judge at the request of the person detained or at intervals each not exceeding six-months. At each stage the prosecuting authorities need to satisfy the judge that the evidence still warrants the suspect’s detention. The stipulations are set out in Art. 112 – 130 of the Code of Criminal Procedure (StPO).
41. Intelligence is admissible as evidence in connection with a defined list of serious crimes, which includes terrorist activities. However, the protection of privacy of mail and telecommunications, as set out in Art. 10 of the Constitution, places limits on interception. These limits are set out in two separate laws: the so-called “Article 10 law” and the code of criminal procedure. The former regulates intercepts by intelligence services, the latter their preconditions and their use in criminal proceedings.

42. Under the Law of Association (*Vereinsgesetz*), the government can ban organisations that promote illegality or undermine the constitution. Religious organisations were exempted from this law, but in one of the first measures introduced after 11 September attacks this “religious privilege” was removed. In the recent past, six organisations and corporations (Hizb-ut-Tahrir, Al Aqsr, Yeni Aqit, Kalifatstaat, E. Xani Presse- und Verlags-GmbH and Yatim Kinderhilfe) have been banned from operating under domestic legislation for promoting extremist views, violence, anti-semitism or sedition. The banning orders cite either written material produced by the groups or speeches by their leaders as evidence of their breach of the law. Membership of the group does not amount to a criminal offence, but all activities, fund-raising, meetings etc. are covered by the ban and may under certain circumstances become a criminal offence. Representative offices are closed and accounts frozen. Those organisations banned under the Law of Association have the right of appeal to the courts. To date, no appeal has been successful.
43. The Residence Law (*Aufenthaltsgesetz*), which came into effect on 1 January 2005, tightens the provisions for expulsion and deportation of foreigners. This Law includes a provision for the exclusion or expulsion of non-German nationals who undermine public safety and order by inciting hate or violence against sections of the population, or by denigrating them. This makes “hate preaching” grounds for expulsion. The law also allows the authorities to prohibit or restrain the political activities of foreigners and expel them if they fail to abide by these restrictions.
44. In German law a distinction is made between expulsion and deportation with regard to terminating the residence of foreigners. Those who are German by birth may qualify for another nationality, but this is not stated in law. Those seeking naturalisation are generally required to renounce their other nationality before they are granted German citizenship. Should they subsequently reclaim their former nationality they would by law forfeit their German citizenship. The constitution states that citizenship can only be withdrawn if the person does not become stateless as a result.
45. Following an expulsion order a foreigner’s residence authorisation lapses and he or she is obliged to leave the country. Deportation involves the actual enforcement of the obligation to leave the country. Under the Residence Law responsibility for exclusion and deportation falls to the *Laender* authorities. Unlike in asylum procedure legislation, in the area of expulsion and deportation full legal process is instituted under the Code of Administrative Procedure. Exclusion or deportation is in some cases suspended whilst the individual exercises their right of appeal. Legal proceedings range from provisional legal protection to principal proceedings before Administrative Courts, Higher Administrative Courts and the Federal Administrative Court right through to appeals brought before the Federal Constitutional Court and the European Court of Human Rights. The individual can also apply to the Committee against Torture and the Human Rights Committee

46. Where expulsion would breach Article 3 of the European Convention of Human Rights (ECHR) or is otherwise not possible due to their family or personal connection to Germany then the individual can be made subject to certain supervision orders (Art. 54 *Aufenthaltsgesetz*), including a ban from using electronic communication and/or a requirement to report regularly to the police.

#### **Case Study: Metin Kaplan**

Metin Kaplan, leader of Kalifatstaat (“Caliphate State”), was sentenced by the competent criminal court in 2000 to four years in prison for inciting members of his group to murder a rival. The administrative court withdrew his refugee status. Kaplan remained in prison after his sentence was completed, pending the execution of an expulsion order. The Cologne court rejected the *Land* authorities’ bid to have him sent back to Turkey, ruling that there was a risk of torture or the risk that testimonies allegedly given by witnesses under torture would be used. Kaplan was released on 27 May 2003 and continued to live in Cologne under a supervision order while the *Land* government appealed.

The Interior Minister sought to overcome concerns that Kaplan risked torture in Turkey by seeking formal assurances from Ankara that Kaplan would receive a fair trial and would not be mistreated in detention. The diplomatic assurances that were obtained were presented to the court, which agreed to take them into account.

In October 2004 the higher administrative court ruled that Kaplan could await the appeal against expulsion outside the country. The administrative court stated that there was no concrete risk of torture in Turkey. That judgement was confirmed by the Federal Administrative Court (BVerwG) after the deportation of Kaplan. He was immediately re-arrested and flown to Istanbul, where he has since been found guilty of treason.

## GREECE

47. The Greek legal system is a civil law system. Greece is a dualist system requiring domestic legislation to give effect to international treaties. In domestic law Constitutional provisions prevail over any other provision of law.
48. Law 3251/2004 was introduced in July 2004 and amended the first anti-terrorist law, Law 2928/2001. Under Law 3251/2004 terrorism is defined as: an act committed in such a way or to such an extent or under such circumstances that it could seriously damage a country or an international organisation, and is aimed at inducing fear among the population or forcing illegally any public authority or international organisation to proceed to any act or to refrain from proceeding to it or to seriously harm or destroy the fundamental constitutional, political or economic structure of a country or an international organisation. The law cites 22 types of offences considered as terrorist acts when committed under the above criteria. These include murder, serious bodily injury, abduction, offences linked to the possession of explosives or chemical substances, food adulteration, water poisoning etc. Acts that aim at establishing a democratic regime or at defending or restoring such a regime as well as acts committed in the exercise of fundamental civil, political or any other rights provided for by the Constitution or the ECHR are deemed not to be terrorist acts.
49. Law 2928/2001 states that persons who set up or join structured criminal organisations with continuous activity, whose aim is to commit a serious crime set out in that law, were liable to terms of imprisonment of ten years or more, depending on the circumstances. Association with a terrorist group is punishable if it takes the form of facilitating its actions in any practical way. Simple ethical or psychological support is not punishable provided those who have offered it do not seek any economic or material gain. However, Article 47 of the Criminal Code provides for the punishment as accessory, at a reduced sentence, of anyone intentionally providing aid to a person before or during the perpetration of an unlawful act committed by that person.
50. Law 2928/2001 also introduced a number of provisions enabling the authorities, subject to specified judicial scrutiny, to infiltrate a terrorist group, control transport and communications, record terrorist activities by all technical means, cross-check data of a personal nature and check activities of their accounts at financial institutions. The law also allows for DNA testing where well-founded suspicions about a person's involvement in a terrorism-related crime exist. It also provides for protection of witnesses or other persons and for measures of leniency for criminals (including terrorists) who co-operate with the authorities.
51. Other key legislative changes introduced by Law 3251/2004 include:
- the leader of a terrorist group is now punishable by at least 10 years' imprisonment;
  - acts of terrorism may be committed by a single individual;
  - some preparatory acts are punishable by at least 10 years imprisonment;
  - the threat to commit an act of terrorism is an offence punishable by two years imprisonment;

- terrorists convicted to terms of life imprisonment must serve at least 25 years of their term before having the right to ask for release;
  - the statute of limitations for acts of terrorism is extended by Law 3251 from 20 to 30 years, but only regarding terrorism-related offences punishable by life imprisonment.
52. Under law 2265/1994, jurisdiction over organised crime and terrorist activity was assigned to a special Judicial Council headed by a Special Prosecutor. The Special Prosecutor has nation-wide jurisdiction and handles cases of terrorism on his own or in collaboration with other prosecutors at local level, supervises police preliminary investigations with special emphasis on coordinating the anti-terrorist service in the field of investigation and exchange of information whenever more than one police departments are involved, monitors the investigation procedure and checks the evidence collected. The Special Prosecutor may liaise with any other government authority for information and for collecting evidence.
53. A particular branch of the police force, the Directorate for Special Violent Crimes (DAEV), is responsible for terrorism. An arrest is possible only when a person is caught *in flagrante delicto* or under a specially and fully justified warrant or bill issued by a Judicial Council. However, following the issuing of an arrest warrant by the competent public prosecutor, arrests can be made by all civil and military authorities throughout the country.
54. Arrested persons must be brought before the public prosecutor within 24 hours of their arrest who then refers those arrested to the examining magistrate. Examining magistrates do not specialise in terrorist crimes; they deal with the full gamut of crimes.
55. Arrested persons are held, pending trial, until the public prosecutor or any other competent authority, decides to issue a warrant of temporary imprisonment or a warrant of release. Arrested persons may appeal against decisions ordering their temporary imprisonment to the Council of the Court of Misdemeanours within five days. The five days are not counted from the day of arrest but from the day on which the warrant was issued. If an appeal is rejected arrested persons may be held for a period of up to 12 months and, under extraordinary circumstances, 18 months. 'Extraordinary circumstances' are considered to be 'established' if the Council of the Court of Appeals issues a specifically reasoned decision on the subject.
56. Regarding criminal procedure, the main investigation of terrorism-related crimes is conducted under the supervision of the Council of Judges of Appeal. Following the conclusion of the main investigation, the file is forwarded to the Appeal Prosecutor who submits it together with his recommendation to the Council of Judges of Appeal. Similarly, terrorism-related trials are conducted by a Court of Appeal, i.e. a three-member senior court for the hearing of felonies, whose members are Judges of Appeal. As in other felony cases there is no jury.
57. Greece is a signatory to the ECHR, the ICCPR and the CAT.



58. Where an individual holds dual nationality their Greek citizenship can be revoked on grounds of national security/national interest. The state authorities are responsible for determining what amounts to 'national security' or 'the national interest'. This provision is rarely used. If such a decision is taken it affects only the person concerned and does not extend to family members.
59. Deportation of non-Greek citizens is permitted if they have been convicted of a freedom-depriving sentence of at least one year or, irrespective of the severity of the sentence, if they have committed crimes against the form of government, treason, crimes regarding drugs, legalisation of income from illegal activities and a number of other offences. Competent authorities may suspend deportation when this is dictated by *force majeure*, humanitarian considerations or when some other exceptional reasons exist regarding the individual's or his/her family's life or health.

#### **Case Study: The November 17 trial**

The effectiveness of counter-terrorism legislation was tested during the investigation and subsequent trial of 19 alleged November 17 (N17) terrorists arrested in the summer of 2002. The trial took place from March to December 2003 and was the first to be conducted under the new legislation. Of the 19 defendants, 15 were convicted of a number of crimes, including creating and participating in a criminal (terrorist) organisation, murder, bodily injury, robbery, explosions, possession of explosives etc. Alexandros Giotopoulos, the alleged leader of N17, was sentenced to 21 terms of life imprisonment plus a further 25 years imprisonment for committing more than 200 terrorist offences. Another leading member, Costas Koufontinas, was sentenced to 13 terms of life imprisonment plus 25 years. All of those convicted received the maximum sentence for their respective offences.

Many also had their enjoyment of certain civil rights suspended. The suspension could result in the loss of (or inability to acquire) elected, public or other communal office or the loss of any rank or position in the armed forces. Amongst other things the suspension would mean that the individual would not be able to act as a member of a jury or be employed as an expert by public authorities. Those who were sentenced to life imprisonment received suspension of their civil rights for life (subject to a right of appeal or an application to have the suspension withdrawn after 5 years).

## ITALY

60. Italian law is rooted in the 1948 Constitution. Legislation is decided upon by Parliament and the Senate and formally promulgated by the President and may be subject to constitutional scrutiny by the Constitutional Court. Legislative provisions found by the Constitutional Court to be incompatible with the Constitution are repealed and must be amended.
61. The definition of terrorism in Article 270 *bis* of the Italian Penal Code has been widened by Law 155/2005, which came into force on 2 August 2005, and includes promoting, constituting, organising, managing or financing organisations which intend to carry out violent activities, or assisting any individual (excluding a close relative) who participates in such organisations. It also includes enrolling or training individuals to carry out violent activities if, in view of their nature or context, such activities might cause grave harm to a country or international organisation, and are intended to intimidate the population or to constrain the powers of the state or international organisations to carry out or not carry out any activity, or to destabilise or destroy fundamental political, constitutional, economic and social structures of a country or of an international organisation. This includes foreign states and international organisations or institutions. This definition is in addition to other acts defined as terrorism or as carried out for terrorist purposes in international conventions or laws to which Italy is bound.
62. Law 438 of 15 December 2001, on Urgent Measures Against International Terrorism, extended the provisions of Art. 270 of the Penal Code to cover international terrorism. Art. 270 *bis* provides for a term of imprisonment of between 7 to 15 years for individuals found to promote, constitute, organise, lead or finance organisations which promote violence for terrorist ends or to upset the democratic order. It also provides for imprisonment of 5 to 10 years for individuals who associate with such organisations. Art. 270 *tris* provides for imprisonment for up to 4 years for those harbouring or assisting terrorists, with the exception of close relatives.
63. Law 438/2001 and Law 155/2005 give the police and other investigating authorities increased powers to pursue terrorists. These permit, for example, the authorities to make use of false identities or receipt of money or drugs, subject to safeguards. They also allow the interception of communications by law enforcement agencies where necessary to gain information for the prevention of terrorism. The maximum period of interception permitted by the Procurator is 40 days, which may then be extended for further 20-day periods. There must be clear justification of the need, and the information so acquired can be used only for investigative purposes, not in criminal proceedings.
64. Law 155/2005 strengthened the provisions in Law 438/2001. Notably, Art. 2 of the Law enables the discretionary granting of one-year renewable (and also rescindable) residence permits, or full residence permits, to illegal foreigners who collaborate with the authorities. The existing law pertaining to Italian residence permits for foreign nationals was updated to provide for compulsory electronic cards containing information on the individual.

65. The Law gives the Interior Minister new powers to control the movement and sale of certain types of detonator and explosive. Those who unlawfully instruct in the use of explosives or other dangerous substances, including over the internet, may be imprisoned for 1 to 6 years. The Minister is also empowered to make licensing or training of pilots subject to the prior authorisation of the Chief of Police for six months to two years while the latter verifies that there are no contra-indications for public or state security.
66. New provisions for identification of individuals include authorisation to take samples of saliva or hair for DNA testing without consent in cases of suspected terrorism, with the caveat that the dignity of the individual must be respected. Suspects may also be held for up to 24 hours without access to a lawyer to enable identification to be verified. Those using false documents may be imprisoned for 1 to 4 years, longer if they help others to use false documents.
67. Law 438/2001 made the confiscation of assets of convicted terrorists obligatory when the assets were destined for use in the commission of crimes or were the profit, product, price or work of crime.
68. Italy does not maintain a separate national list of terrorists or terrorist organisations, but enforces the EU and UN lists.
69. Provisions originally developed in the context of legislation dealing with illegal immigration allow for the expulsion of foreign nationals under Italian law. Italy permits dual nationality and once a non-Italian has acquired Italian citizenship it can only be revoked where the individual accepts public or military service for a foreign State against the express wish of the Italian authorities or bears arms against Italy.
70. Expulsions of non-Italian nationals have been expanded to encompass terrorism-related grounds. Legislative Decree 286/1998 as amended by Law 189/2002, Law 271/2004 and by Law 155/2005, specify how expulsions can be carried out. There are three sets of circumstances under which administrative expulsions are possible.
71. First, the Interior Minister may order the expulsion of a foreign national - whether resident in Italy or not – on the grounds of a threat to public order or State security or where there are good reasons to believe that the continued presence of such foreign national may in any way facilitate terrorist activities or organisations, including of an international nature. The Prime Minister and the Minister of Foreign Affairs must be informed prior to the expulsion. This expulsion order prohibits the expelled person from re-entering Italy for at least five years, and usually for ten years. In general, such expulsions are permitted when there is information to show that an individual is a threat to national security but the evidence is not considered sufficient for prosecution. Individuals have been expelled from Italy by the Interior Minister following investigations into certain Islamist groups and reported attendance at training or combat courses.
72. This type of expulsion may be appealed only to the Regional Administrative Court of Lazio or, if based on Law 155/2005, to the local Regional Administrative

Courts. The Administrative Court's decision is subject to two further appeals to the Council of State and, only on points of law, to the Court of Cassation. The appeal is non-suspensive and the expulsion order is immediately enforceable. Furthermore, under Law 155/2005, if the information based on which the expulsion was ordered derives from secret investigations or involves state secrets, the information may be withheld for two years thus, effectively, suspending the appeal process for that period. Both of these provisions will expire automatically on 31 December 2007.

73. Second, a *Prefect* can expel a foreign national not complying with the conditions under which they were permitted to stay in Italy (for example an expired visa, working illegally).
74. Third, a *Prefect* can expel a foreign national if he habitually engages in criminal activity; lives wholly or in part from the proceeds of crime; behaves in a way that offends or puts at risk the moral or physical wellbeing of young people, public health or the public peace; or belongs to a mafia type organisation. Since 2 August 2005 a *Prefect* may also expel a foreign national if he is operating in a group or alone to carry out criminal acts aimed at subverting the democratic order of the state.
75. Appeals against an expulsion order made by the *Prefect* may be made only to the Justice of the Peace (*Giudice di Pace*). Such appeals have no suspensive effect on the expulsion and can also be lodged through Italian consulates overseas. However, under Law 286/1998, as amended by Law 271/2004, the enforcement of such expulsion orders must be made through escort orders to the frontier, adopted by the local Chief of Police, which are subject to prior judicial review by the Justice of the Peace through a judicial ratification process (*convalida*). Thus, within 48 hours of the adoption of the escort order the judge must be informed and a hearing in the presence of the subject of the escort order and their legal representative must be held. The judge then ratifies or annuls the order within 48 hours of the hearing. The Constitutional Court has stated in its decision 105 of 10 April 2001 that: "...it is the very force of the constitutional principle set out in Art. 13 which imposes interpretation of the control demanded of the judge of the '*convalida*' in its widest sense: a control which cannot stop at the boundaries of the expulsion proceedings, but which must involve the motives which have induced the administration to adopt that peculiar executive modality of the expulsion – the escort to the frontier – which is the immediate cause of the limitation of the personal freedom of the foreign national..." (unofficial translation). The judge's decision is appealable by both the individual and the State, but only to the Court of Cassation on points of law. Such an appeal is non-suspensive.
76. The new law 155/2005 states that expulsions ordered for reasons of public order and security, or involvement with terrorist activity, should be carried out immediately. The Interior Minister's ability to rapidly expel individuals has been demonstrated in several cases in August and September 2005.

77. The 1998 legislation provides explicit protection against expulsion in circumstances where the individual may be persecuted for reasons of gender, language, citizenship, religion, political opinions or social conditions, or where they may risk being extradited to another country where such protection from persecution may not exist. This reflects guarantees set out in Art. 3 of the Italian Constitution. The Constitution also guarantees to all individuals, citizens or foreign nationals, the inviolable rights of man (Art. 2), and that the legal condition of foreign nationals is to be governed by the law, in compliance with international rules and treaties (Art. 10).
78. The Italians are signatory to the ICCPR and the CAT and allow individual petitions to their respective human rights monitoring body for both instruments.

## NORWAY

79. Norway's 1814 Constitution and 1902 Penal Code form the basis of relevant domestic counter-terrorism law. Norway has a dualist system, whereby after the ratification of international treaties further legislation is required to give effect to them in domestic law.
80. In June 2002 Norway amended the Penal Code with a view to establishing effective legislative measures against acts of terrorism and the financing of such acts. The amended section 147a now defines terrorism as a criminal act committed with the intention of:
- seriously disrupting a function of vital importance to society, such as legislative, executive or judicial authority, power supply, safe supply of food or water, the bank or monetary system or emergency medical services or disease control;
  - seriously intimidating a population; or
  - unduly compelling public authorities or an intergovernmental organisation to perform, tolerate or abstain from performing any act of crucial importance for the country or organisation, or for another country or another intergovernmental organisation.
81. The amended Penal Code sets out that terrorist acts are criminal and are punishable by a term of imprisonment not exceeding 21 years and imposes a maximum sentence of 12 years imprisonment for those who intend to commit acts of terrorism, co-conspirators and accomplices. The Penal Code also makes it a serious criminal offence, punishable by up to 10 years imprisonment, to directly or indirectly finance terrorist acts or make funds available for such financing. Once again, accomplices are liable to severe penalty.
82. Norway follows the EU lead on the proscription of terrorist entities, although each new addition / subtraction is assessed on a case-by-case basis by the Ministry of Foreign Affairs in close consultation with the Justice Ministry and other relevant authorities.
83. On 5 August 2005 new laws on police methods to prevent serious organised crime and terrorism came into force. These include provisions for police surveillance (including electronic and technical measures) of individuals if there are good grounds for believing a particularly serious crime is being prepared (including a terrorist act). A court must approve any such surveillance; the hearings are closed and a security-cleared defence lawyer will be appointed. The defence lawyers are not informed of their client's name or names.
84. A suspect can be detained for a maximum of 48 hours. If the authorities have reasonable grounds to suspect a criminal act has been carried out, or has been attempted, the judge can grant further periods of detention (usually in blocks of weeks) for further investigation to be pursued. Although the detention is not confined to a finite period of time, there are a number of requirements for detention, including a requirement for proportionality, which effectively limits the time someone may be kept in detention. A suspect can appeal to the regular courts of appeal.

85. Norway is a party to all 12 UN Conventions and Protocols relating to terrorism. The Penal Code requires that the Norwegian authorities immediately freeze any assets or funds belonging to any person or entity suspected of such acts, as set out in UN Resolution 1373. Fulfilment of the other relevant requirements of the 1999 Convention for the Suppression of the Financing of Terrorism is also provided for under Norwegian law.
86. Norway can deport foreign nationals. Dual nationality is possible in Norway but any citizenship achieved in this way can be revoked on national security grounds. However this has happened only rarely and is a slow legal process.
87. The Norwegian authorities cannot send foreign nationals to an area where they are in danger of being persecuted on account of their race, religion, nationality, membership of a particular social group or on account of their political views. This is regulated in the 24 June 1988 No. 64 Act concerning the entry of foreign nationals into the Kingdom of Norway and their presence in the realm (“Immigration Act”). The Act also states that no-one can be sent to a country where they risk being sent on to a country where they will face persecution on the above grounds. Furthermore, the authorities may not expel anyone who is in considerable danger of losing his life or being made to suffer inhuman treatment. This means that foreign nationals may also be protected against being returned to an area where there is a civil war or other violent conflicts. In principle, poverty or other social hardships will not be sufficient grounds to avoid expulsion. However, such factors may be important in connection with the evaluation of whether or not expulsion is disproportionately severe.
88. This approach is also dictated by the various international conventions to which Norway is party. According to Art. 110C of the Constitution, “[i]t is the responsibility of the authorities of the State to respect and ensure human rights. Specific provisions for the implementation of treaties hereof shall be determined by law”. Norway has enacted 21 May 1999 No. 30 Human Rights Act to make the ECHR and the ICCPR, as well as other conventions, directly enforceable into Norwegian law. The CAT is not covered by this act, but transformed into national law on different relevant areas of the Norwegian legislation.
89. Exceptions may be made from the protection provisions described above if the Minister of Local Government and Regional Development determines that an individual is considered by the Norwegian authorities to be a danger to national security, or if someone has been convicted by a final judgement of a particularly serious crime and is therefore a danger to society. The same applies if an individual has been found guilty of a serious crime outside Norway before they enter Norway.

### **Case study: Mullah Krekar**

Mullah Krekar (aka Najmuddin Faraj Ahmad) is the former head of the Northern Iraq-based Ansar al-Islam terrorist organisation. He was granted political asylum and awarded a Norwegian residence permit in November 1991 on the grounds that his life was in danger in his native Iraq. However, in 2002 he returned to Northern Iraq allegedly acting again with the Ansar al-Islam thus breaching the conditions of his asylum and residency. In September 2002 he was arrested in the Netherlands on his return from Iraq and, on his release in January 2003, sent back to Oslo. In February 2003 the Norwegian Government decided to deport Krekar and he was arrested a second time in March when they revoked his residency permit and travel / asylum documents.

Apart from the residency offences he was also charged with incitement to commit terrorist attacks against US troops in Iraq, and with the formation of a private militia in Northern Iraq. Krekar faced a separate extradition request from Jordan on drugs charges. The Norwegian courts found insufficient evidence to support any of these charges and released him in April, despite a police appeal. However, the Government continued to collect information in support of a retrial. In June and October 2003 the formation of a militia charge and incitement charge respectively were officially dropped against Krekar through lack of admissible evidence. In November the Norwegian courts rejected the Jordanian extradition request.

In January 2004 Krekar was re-arrested a third time and charged with the criminal offence (as opposed to the previous asylum and terrorism offences) of attempted murder in Northern Iraq (in the spring of 2002). He was released from custody six weeks later though the authorities continued to withhold his travel documents. In June 2004 this criminal case was dropped and Krekar now only faces the deportation order against him based on his illegal return to Northern Iraq in 2002 whilst claiming refugee status in Norway. This case continued in July 2005 with key officials testifying that he also represented a threat to national security due to his influence over religious fundamentalists. No decision has yet been reached.



## SPAIN

90. Spain has a civil law system based on the Napoleonic Code. The basis of the Spanish legal order is the Constitution of 1978. Spain has a monist legal system and the Constitution provides that validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Art. 10(2) stipulates that “provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements therein ratified by Spain.” The Constitutional Court can strike down laws inconsistent with the Constitution and hear appeals if constitutional rights are breached. These include the right to freedom, procedural guarantees governing detention, right to a fair trial, prohibition on torture and the death penalty. Citizens who claim that their rights under detention have been breached may also take their case to the People’s Advocate (*Defensor del Pueblo*).
91. Spain does not have specific anti-terrorism laws. The general approach is to treat terrorism as an aggravated form of crime. Terrorism-related offences are set out in the Penal Code and procedural provisions in the Law of Criminal Procedure. The Penal Code states that an act constitutes a terrorist offence where the purpose of the act is to subvert the constitutional order or to effect serious disturbances of public order.
92. After the 11 March 2004 terrorist attacks in Madrid, legislative changes largely focussed on greater controls on the use and transportation of explosives. Since the attacks, the crime of conspiracy to commit acts of terror has been used to charge suspects whose planning was disrupted before an attack could be carried out. Offences of financing terrorism and glorifying terrorism (Penal Code, Art 571-580) have also been used to disrupt terrorist support networks.
93. In terrorist and organised crime cases, there are a number of adaptations of normal procedures. In the first instance all cases are heard at the National High Court (*Audiencia Nacional*) and the investigating magistrate is an officer of that Court. The High Court has special security features, the staff are experienced in terrorist cases and the Court has developed detailed jurisprudence (particularly on ETA cases).
94. In terrorist cases, the judge may order that suspects be held incommunicado if they have grounds to believe that knowledge of the suspect’s detention would prejudice the investigation. This involves a limitation of detainees’ rights in two ways: relatives may not be informed of the detention, and legal assistance is provided by a duty solicitor, not a lawyer of their own choice. All other rights, including *habeas corpus*, continue to apply. The initial incommunicado order is valid for 72 hours following arrest. It can be prolonged for a further two days upon the authority of the investigating magistrate. After this period the investigating magistrate must decide whether to commence criminal proceedings. If so, the investigative magistrate may order preventive detention, at which point the suspect is transferred from police custody to judicial custody (prison). At this point, he may extend the incommunicado period by five days, exceptionally followed by a final period of three days. Thus, it is possible for a person against

whom criminal proceedings have begun to be held incommunicado for up to 13 days.

95. While the detainee is held incommunicado in police custody, he may be questioned in the presence of the duty solicitor (not a lawyer of his own choosing), who is called in immediately on arrest. The lawyer may advise their client on procedural matters, but may not consult privately with the suspect. A forensic doctor examines the detainee to ensure that they are not physically mistreated and sends a report to the judge. Within the incommunicado period of detention, the suspect is transferred to the judge at the National High Court who has three days in which to hold a judicial interrogation. If the judge thinks there is a case for prosecution, criminal proceedings begin and the suspect is transferred to judicial custody; if not, the detainee is released. The judge must issue a reasoned judgement justifying his decision to begin criminal proceedings and any extension of the incommunicado period. Once in judicial custody, the detainee has the right to be seen by a second court-appointed forensic doctor and continued legal assistance. He may only have access to a lawyer of his own choosing once the incommunicado period has ended.
96. When a person has been charged and held in judicial custody, the period of preventative detention may last two years if the penalty for the offence is imprisonment of three years or more. Where circumstances exist that mean that the matter may not be tried within two years, the court may order one extension of up to a further two years. If the defendant is convicted and the sentence is under appeal, the period of custody may be extended for up to half of the sentence imposed. In practice, therefore, investigating magistrates have up to four years during which they can keep a terrorist suspect in detention and prepare the case for trial, although the defendant must be tried within the four year period.
97. Where an offence is committed that has a terrorist purpose then this will be considered an aggravating feature by the court when it imposes a sentence. However, there are some specific penalties in the Criminal Code that relate to terrorism, including:
  - promoting or directing armed gangs or terrorist organisations: eight to fourteen years imprisonment;
  - membership of an armed gang or terrorist organisation: six to twelve years imprisonment;
  - terrorist murder: twenty to thirty years;
  - the effective maximum prison sentence for a person convicted of two or more terrorist offences is now 40 years.
98. Spain follows the EU common lists for proscribed organisations.
99. Spain is a signatory to the ICCPR, the CAT, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Council of Europe Convention on the Prevention of Terrorism.
100. Spain permits dual nationality and it is not possible to revoke Spanish nationality from a citizen who is thought to present a threat to national security.

101. The Spanish Aliens Act 4/2000 Art. 57 (read with Arts. 53 and 54) provides for deportation of a non-Spanish national when that person has participated in activities prejudicial to the external security of the state, foreign relations or in activities contrary to “public order” specified in the Protection of Public Safety Law 1/1992 Art 23. These activities specified are: possession of explosives and arms when not amounting to a criminal offence, failure to keep arms and explosives safely, unauthorised public meetings and demonstrations, refusal to disperse at such meetings, unauthorised public entertainments, performing actions which could provoke public disorder, permitting consumption of drugs in premises open to the public, failure to observe speed boat restrictions, provision of false materials to obtain identity documents where not otherwise criminal, obstruction of searches and controls provided for by law, creating public disorder or damage where not otherwise criminalised, running a business without the required license, repeat offending (albeit of a minor nature).
102. The appropriate authority, generally Police competent for immigration matters, may seek deportation orders. The decision to grant the order is made by a senior government official in the region where the individual was taken into custody (*Delegado* or *Subdelegado del Gobierno*), acting under the authority of the Minister of the Interior. The subject has the right to comment on the draft deportation order and submit documents refuting the grounds on which it is based. He has the right to assistance from a legal adviser and an interpreter. Once finalised, the order may be appealed, either by a request for reconsideration by the administrative authority that issued it, i.e. the regional government official, or through the courts.
103. Deportations may be authorised under one of two procedures: the ordinary or fast-track procedure. The latter may be applied to foreign nationals accused of having participated in activities contrary to Spanish national security or public order as set out in Art. 54, 1(a) of the Aliens Act. The fast track significantly reduces the duration of proceedings and determines that any appeal is non-suspensive. The only way to suspend a fast-track deportation is for the deportee to claim asylum. The asylum authorities may refuse to consider an asylum claim if it is judged manifestly unfounded, including if they judge it was entered only as a delaying tactic.
104. The ordinary procedure (*Reglamento* 2393/04, Arts. 122-129) is used for less serious immigration breaches. A report is drawn up containing details of the person, breach, proposed sanction and preventative measures to be taken. The foreign national has 15 days to reply and propose a defence. There is a further period of between 10 and 30 days to conduct any enquiries which the immigration officer deems appropriate. A draft order is then drawn up to which the foreign national has 15 days to reply. There need not be a hearing when all issues have effectively been covered in writing. The senior official who is to decide the issue may seek further information from the parties, which have seven days to raise any matters they consider relevant. Enquiries on such matters must be completed within 14 days, and the ruling made within a further 10 days. If the senior official considers that the breach is more serious than previously thought, he can notify the foreign national who has fifteen days in which to comment. There is provision for appeal by judicial review.

105. The procedures for *fast track* deportations are set out in *Reglamento 2393/04*. In fast track cases the police arrest the subject and initiate deportation proceedings by applying to the administrative authority (the regional government officer). The foreign national must be brought before a court if he is to be remanded for longer than 72 hours. The judge may order his detention in an internment centre pending deportation for up to 40 days. The individual is legally represented both at the internment hearing and when the administrative procedures are followed. He has 48 hours to comment on the draft notice. If he comments, the investigator decides whether the comments have substance and if so arranges for enquiries to be held within three days. An investigator's decision to proceed is notified to the deportee who has 48 hours to prepare any documents he wishes to rely on. The competent authority, generally a senior government officer in the region, then decides on the basis of the papers whether or not to approve the deportation. Since deportation is classified as an administrative sanction, the only role for the judicial authorities is to decide whether there are grounds for internment. Judicial review of an administrative deportation is possible, following an appeal by the deportee. The appeal does not in itself have suspensive effect and should normally be lodged at the Spanish consulate in the country to which the individual is returned.
106. However, deportation proceedings can be suspended if the detainee claims asylum, since the latter procedure takes precedence over deportation. As a result, if asylum is claimed deportation proceedings must stop until a decision is taken as to the admissibility of the claim. If the claim is judged unfounded, deportation continues. Spanish law does not allow the deportation or extradition of an individual who would face the death penalty in his country of origin.
107. Spanish courts have addressed ECHR Art. 3 issues in the context of extradition, asylum and deportation cases, although not of fast-track deportations. Art. 3 issues are often addressed by reference to Art. 15 of the Spanish Constitution, which states: "Everyone has the right to life and to physical and moral integrity, and under no circumstances may be subjected to torture or to inhuman or degrading punishment or treatment. The death penalty is hereby abolished, except as provided for by military criminal law in times of war". Several extradition cases have reached the Constitutional Court, which draws on the ECHR and domestic jurisprudence. One recent case concerned a Kurd who successfully appealed against an order for extradition to Turkey on the grounds of likely ill-treatment (STC 32/2003). From this and other cases, the principles that guide a Spanish court are:
- the applicant must provide *specific* material which shows a risk to himself, not generic assertions;
  - courts should bear in mind that an applicant's ability to provide information is often limited by his being away from his country of origin;
  - the applicant's arguments cannot be refuted by the sole fact that his country is a signatory to a human rights instrument;
  - being a signatory may be sufficient to reject generic but not specific allegations of possible torture;
  - Courts have a duty to consider the material presented by the applicant and to make reasonable enquiries based upon it;

- Substantial grounds for believing that there is a risk of torture is sufficient to bar extradition, as Spain is bound by Art. 3 of the CAT;
  - Certain assurances may be considered sufficient (e.g. no death penalty, limits to the concept of life imprisonment). However, a simple assurance that torture would not take place is insufficient.
108. Similar principles apply to cases where criminals sentenced to less than 6 years imprisonment are ordered to be deported under Art. 89 of the Criminal Code, and in asylum cases. The courts may take into account information provided by Spanish Embassies overseas and the Interministerial Asylum Commission when deciding on the dangers of persecution in a particular country.

## SWEDEN

109. Sweden has a civil law system. The Swedish Constitution requires that all domestic law is in conformity with the ECHR. Otherwise, Sweden is a dualist legal system and requires domestic legislation to give effect to international treaties.
110. The 2003 Act on Criminal Responsibility for Terrorist Offences states that a list of offences under Swedish law including murder, manslaughter, gross assault, kidnapping, the spreading of poison or contagious substances amount to a terrorist offence where the act in question might seriously damage a state or an intergovernmental organisation and the intent of the act is to:
- seriously intimidate a population or a group of population;
  - unduly compel a public authority or an intergovernmental organisation to perform an act or abstain from acting;
  - seriously destabilise or destroy fundamental political, constitutional, economic or social structures in a state or in an intergovernmental organisation.
- If it is not possible to prove special intent, regular criminal law in the Penal Code is applicable. Any attempt, preparation or conspiracy to commit a terrorist offence or failure to disclose such an offence is also deemed an offence under this Act.
111. The 2002 Act on Criminal Responsibility for the Financing of Particularly Serious Crimes implements the International Convention for the Suppression of the Financing of Terrorism and establishes the criminal responsibility of anyone who collects, provides or receives funds or other assets with the intention that they should be used or in the knowledge that they are to be used in order to commit particularly serious crime
112. Dual nationality is permitted in Sweden and Swedish citizenship cannot be removed. Under the Aliens Act (1989:529) the police or the Migration Board (depending on the length of time an individual has been in the country) may issue an expulsion order against a non-Swedish national. The police may refuse an alien entry within three months of arrival in Sweden if, for example, it transpires that he - on entry - either avoids supplying the police authority with particulars requested, or deliberately supplies the police authority with incorrect particulars which have a bearing on his right of entry to Sweden, or deliberately suppresses any such circumstance. It is usually the Migration Board that has the power to refuse entry and the Board always decides on expulsions. An individual can appeal against a police decision on expulsion to the Migration Board. A decision from the Migration Board can be appealed to the Aliens Appeals, though it should be noted that this Board will be replaced by court proceedings at administrative Courts from 31 March 2006.
113. In asylum cases only the Migration Board or the Aliens Appeals Board (or the Government in specific cases where the Government takes the place of either Board) may issue an expulsion order, never the police.

114. When the Migration Board has rejected an application for asylum and residence permit and issued an expulsion order in an asylum case, the decision must gain legal force before it can be executed. Except where the ground for asylum is manifestly ill-founded, the Aliens Appeals Board must hear an appeal before the expulsion order can be executed. A decision gains legal force when it is not appealed against (within three weeks) or when the Aliens Appeals Board has decided the appeal case. If the Migration Board has decided that an application is manifestly ill-founded and that the expulsion order therefore should be executed immediately, the Aliens Appeals Board must (without delay) decide whether to suspend the execution order or not when the appeal arrives.
115. The Migration Board or the Aliens Appeal Board can refer a case to the Government to decide whether to issue an expulsion order. The Act Concerning Special Control of Aliens allows the Government or National Police Board to raise the question of expulsion of their own accord (when the procedures set out below will apply). The referring authority must issue a non-binding opinion of the case matter. The individual will not necessarily have access to all relevant information in the documentation where it is withheld for reasons of national security. The Government's decision in these cases cannot be appealed, but those who are expelled can apply for a residence permit again.
116. Where the individual cannot be dealt with under the provisions of the Aliens Act then he may be considered under the Act Concerning Special Control in respect of Aliens (1991:572). This Act allows for the expulsion of an alien where it is necessary for reasons of national security or if, in light of the individual's previous activities or circumstances, it is feared that he will commit, aid, abet or otherwise conspire to commit an offence under the Criminal Responsibility for Terrorist Offences Act.
117. The question of expulsion according to the Act Concerning Special Control in respect of Aliens can be raised by the National Police Board (Security Services) or by the Government on its own initiative.
118. Unless the case is particularly urgent, an opinion shall be obtained from the Migration Board and a hearing of the case shall be held at a city or district court before the Government makes a deportation order. The court has investigative duties and the individual as the right to plead his case. The Government can also request an opinion from the court hearing the case. That opinion, however, is not binding on the Government.
119. The court's opinion may be based on documents or other information, which may not be distributed to the parties. Thus, the Government's decision may also be based on information not distributed to the parties. The reason for this exception from the parties being provided with all information upon which the decision is based, is that secrecy may be necessary for reasons of national security or to the activity of the National Police Board or for protecting an informant.
120. The Government's decision in these cases cannot be appealed but those who are expelled can apply to the Government to have the decision reviewed.

121. Expulsion orders according to the Act Concerning Special Control in respect of Aliens are always combined with re-entry bans for an indefinite or a limited period. Until the expulsion order is issued or executed the alien may be taken into detention or be subjected to surveillance if this is considered adequate. A decision to hold the alien in detention until the expulsion order is issued is taken by the Minister of Justice. That decision may be appealed to the Supreme Administrative Court, which has occurred a few times.
122. Under the Swedish Constitution no law can be adopted which contravenes the ECHR and any expulsion order will not be enforced where there is a risk that the individual will face the death penalty or torture or where the individual has a well-founded fear of persecution in the country to which he would be returned. Sweden is party to the ICCPR and the CAT, and has recognized the competence of the Human Rights Committee and the Committee Against Torture to receive and consider communications from individuals.
123. If the circumstances mean that the Government is unable to return an individual under the Act Concerning Special Control in respect of Aliens then it has the power to require the individual to report regularly to a police station. In certain circumstances the Government may also authorise searches of the individual or his home or work or authorise interception of communications, but any such authorisations must be for a limited time and are subject to judicial oversight.

#### **Case Study: Ahmed Agiza**

On 18 December 2001 the Swedish Government refused the asylum application of Ahmed Agiza on the grounds that he posed a serious security threat to the State. Agiza was expelled to Egypt on board a US government-leased aircraft. Upon arrival, Agiza was detained by Egyptian authorities to serve a sentence for his conviction in absentia for, among other crimes, murder and terrorist activities.

The Swedish Government's decision of 18 December 2001 relied on certain assurances given by the Egyptians that Agiza would not be subject to the death penalty, torture or ill-treatment, and that he would receive a fair trial. The Swedish and Egyptian authorities also agreed to a post-return monitoring mechanism involving regular visits to the men in prison by Swedish diplomats.

A complaint was submitted to the UN Committee against Torture alleging that Sweden had breached its obligations under article 3 of the Convention against Torture by returning Agiza to Egypt. On 24 May 2005 the Committee upheld the complaint on substantive and procedural grounds. The Swedish Government responded to this Decision on 18 August 2005. It maintains its intention to rely upon governmental assurances in future cases of this kind, though subject to stricter safeguards.



## UNITED STATES OF AMERICA

124. The US federal system allocates a relatively high level of local autonomy to each of the fifty states. While each state has its own unique legal system, the judicial branch of government up to the US Supreme Court is the ultimate arbiter. All international treaties must be ratified by Congress, but duly ratified treaties are equal to enacted federal statutes. The US Constitution and the Bill of Rights guarantee a host of inalienable rights, including human rights.
125. The primary domestic legislation is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, known as the USA PATRIOT Act 2001. This Act defines “terrorism” as activities that:
- involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
  - appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.

These activities qualify as international or domestic terrorism according to whether they occur primarily outside or within the territorial jurisdiction of the US.

126. The Act defines “terrorist organisation” as a group designated under the Immigration and Nationality Act or by the Secretary of State as a group of two or more individuals, whether related or not, which engages in terrorist-related activities (this includes providing material support to terrorists or soliciting funds for terrorist organisations).
127. The US has several mechanisms whereby it can designate terrorists or terrorist organisations. All have severe legal implications in terms of blocking property, restricting access to support or funds, or providing grounds for blocking entry to the US or in some circumstances for deportation.
128. Designating Foreign Terrorist Organisations (FTO) under Section 219 of the Immigration and Nationality Act (as amended by the 1996 Anti-Terrorism and Effective Death Penalty Act) makes it unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide material support or resources to a designated FTO. Representatives and members of a designated FTO, if they are not US citizens, are inadmissible to and, in certain circumstances, removable from the United States. Any U.S. financial institution that becomes aware that it has possession of or control over funds in which a designated FTO or its agent has an interest must retain possession of or control over the funds and report this to the Federal government.
129. Section 411 of the USA PATRIOT Act allows for the placing of organisations on the Terrorism Exclusion List (TEL). Non-US citizens providing support to or

associated with TEL-designated organisations may be found “inadmissible” to the U.S. and therefore may be prevented from entering or in some circumstances deported. This may result from: membership in a TEL-designated organisation; use of the individual’s position of prominence within any country to persuade others to support an organisation on the TEL list; solicitation of funds, other things of value, or membership for an organisation on the TEL list; affording material support to an organisation on the TEL list.

130. Executive Order 13224, signed in by President George W Bush on September 23 2001, effectively declared a state of national emergency. All property and interests in property of designated individuals or entities that are in the US or that come within the US or within the possession or control of US persons are blocked. Any transaction or dealing by US persons or within the US in property or interests in property blocked is prohibited.
131. Any transaction by any US person or within the US that attempts to violate any of the prohibitions in the Order is prohibited. Any conspiracy formed to violate any of the prohibitions is also prohibited. In addition, under the Intelligence Reform and Terrorism Prevention Act of 2004, aliens involved in or inciting genocide, torture or extrajudicial killing are inadmissible and deportable.
132. The USA PATRIOT Act was particularly significant in broadening the scope of existing surveillance powers to apply to the full range of terrorism-related crimes, including chemical-weapons offences, the use of weapons of mass destruction, killing Americans abroad and terrorism financing. The Act also provides federal agents with more powers to investigate suspected terrorists.
133. The USA PATRIOT Act updated the US Penal Code in regards to terrorism and set new penalties on those who commit and support terrorist operations, both at home and abroad.
134. Further, it is worth noting that the First Amendment does not protect free speech where it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action (*Brandenburg v Ohio Supreme Court* 1969, reaffirmed in *NAACP v. Claiborne Hardware Co* 1982).
135. In addition, the USA PATRIOT Act gives the Attorney General the power to detain foreigners suspected of terrorism and delineates the process by which detentions are to be reviewed. Under the Immigration and Nationality Act Sec 340 and 349, US citizenship can be revoked on a number of grounds, including where within five years of naturalisation the citizen joins or becomes affiliated to an organisation which at the time of naturalisation would have precluded them from naturalisation. Additionally, it could be possible for citizenship to be revoked if an individual enters or serves in the armed forces of a foreign state which is engaged in hostilities against the US, or commits an act of treason if, by doing so, they intended to expatriate themselves.
136. Where the Attorney General exercises his power to detain foreigners suspected of terrorism, the USA PATRIOT Act requires him to have reasonable grounds to believe that the individual has or will commit espionage or sabotage; attempt to

overthrow the government; has or will commit terrorist acts; or is otherwise engaged in activities that threaten national security. Following detention the Attorney General must place the individual in removal proceedings or level criminal charges within 7 days of commencement of detention. In situations where deportation within the reasonably foreseeable future is unlikely, the individuals may be detained for additional periods of up to six months only if their release will threaten the national security of the US or the safety of the community or any other person. The Attorney General is required to review the initial certification every six months. Each individual has the right to request a review every six months and is permitted to present evidence in support of the request. If the individual in question is finally determined not to be removable, on the above grounds, they must be released.

137. US law covering the issue of deportation falls under US Code Title 8 – Aliens and Nationality. Any individual who has engaged, is engaged, or at any time after admission engages in any terrorist activity or who is a member of a terrorist organisation can be deported on national security grounds. These provisions include planning and reconnaissance for a terrorist attack, terrorist financing and recruitment.
138. The process of deportation begins with a Notice to Appear (NTA) being issued by the Bureau of Immigration and Customs Enforcement, served to the individual in question, and filed with one of the 53 Immigration Courts nation-wide. Immigration judges can consider a wider set of evidence than is admissible in a federal court. If the judge determines that the information in the NTA is correct and that the individual can be deported, they are given the opportunity to apply for any form of relief from deportation, such as voluntary removal, asylum, or a stay of deportation.
139. If the individual is eligible for a form of relief and decides to apply for it, an individual hearing date is scheduled. If the individual is not eligible, deportation will be ordered and there is a period of 30 days from the date of the decision in which the individual can appeal the decision to the Board of Immigration Appeals (BIA). If the BIA decides against the individual in question, they have the option of appealing to the appropriate U.S. Court of Appeals. The immigration service has the opportunity to appeal an unfavourable individual hearing decision, but may not appeal an unfavourable decision by the BIA. An appellate court decision can be appealed to the U.S. Supreme Court by either the individual or the immigration service. Once deported, an individual may lose the right to ever return to the United States, even as a visitor.
140. The US does not as a matter of course obtain assurances against torture or the death penalty. In the comparatively few cases in which assurances are sought, they are arranged by direct negotiation with the relevant country through the US Department of State. The assurance must come from an official which the US believes has the authority to honour that promise. One ground for discretionary relief available to individuals is ‘withholding a removal’, in which an immigration judge rules that the US cannot remove the individual in question to a specific country, but can send them to a third country (if the US can find a country willing to accept them). Such a ruling is rare, and to be granted this relief the individual

would have to prove that return to the country would place them in danger e.g. torture. This relief would cover cases where the individual's fear of persecution is real but does not fall within grounds covered by the 1951 Convention Relating to the Status of Refugees

141. The US has ratified a number of UN Human Rights treaties including the ICCPR and the CAT.

## Glossary

### 12 UN Convention and Protocols on Terrorism

The major multilateral Conventions and Protocols related to states' responsibilities for combating terrorism. They are:

- Convention on Offences and Certain Other Acts Committed on Board Aircraft;
- Convention for the Suppression of Unlawful Seizure of Aircraft;
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons;
- International Convention Against the Taking of Hostages;
- Convention on the Physical Protection of Nuclear Material;
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation;
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf;
- Convention on the Marking of Plastic Explosives for the Purpose of Detection;
- International Convention for the Suppression of Terrorist Bombing;
- International Convention for the Suppression of the Financing of Terrorism.

### Article 3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

"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.

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".

### Article 3 European Convention on Human Rights

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

### Civil Law

Used broadly to denote a codified system of law as distinct from the case law based common law system.

### Committee Against Torture

Established by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee is the body of independent experts that monitors implementation of the Convention by State Parties.

**Deportation**

The taking of an individual in question from the country from which he is deported to either the country of his nationality or to some other country willing to accept him. This paper uses the term interchangeably with “expulsion” or “removal” except where those terms have specific meaning set out explicitly in the body of the text.

**Dualist**

The legal system in which international law and domestic law are essentially two different systems of law. In other words, international law is only directly applicable within a State where it is given effect by a domestic statute.

**Examining/Investigating Magistrate**

Generally judges in civil law systems involved in the investigation or initial proceedings of a case. But the terms are specific to each country and must be considered in context.

**Expulsion**

See “Deportation”.

**Human Rights Committee**

The Human Rights Committee is the body of independent experts that monitors implementation of the International Convention for Civil and Political Rights by its State Parties.

**Individual petition**

Where a State recognises the right of an individual under the Optional Protocol to the ICCPR (subject to the considerations set out there) to complain to the Human Rights Committee of a breach of their rights set out in the ICCPR.

**Monist**

The legal system in which both international law and domestic law form part of the legal order. In other words, legislation is not required to give effect to a State’s international obligations in the domestic sphere.

**Non-Suspensive Appeal**

Where an appeal against an order does not suspend the effect of that order. In cases of deportation, therefore, appeals may have to be lodged from outside of the country from which the individual is being deported.

**Removal**

See “Deportation”.



