

Delivering Justice

Views From Supreme Courts in the
Euro-Med Region on Countering Terrorism



BY MELISSA LEFAS AND JUNKO NOZAWA



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ABOUT THE AUTHORS

MELISSA LEFAS is Director of Criminal Justice and Rule of Law Programs for the Global Center, where she is responsible for overseeing programming and strategic direction for that portfolio. She has spent several years managing Global Center programs throughout East Africa, the Middle East, North Africa, the Sahel, and South Asia with a primary focus on human rights, capacity development, and due process in handling terrorism and related cases.

JUNKO NOZAWA is Legal Analyst for the Global Center, where she is responsible for supporting programming for the Global Center's criminal justice and rule of law work. In the field of international law, she has contributed to the work of the International Criminal Court, International Criminal Tribunal for Rwanda, and regional human rights courts. She holds a BA in international relations from the University of Washington and a JD and LLM through Washington University's Transnational Law Program.

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The views expressed in this report represent the consensus of the participating justices. The authors take full responsibility for the analysis and any errors of fact or interpretation that may exist. The contents of this publication are the sole responsibility of the authors and in no way can be taken to reflect the views of the European Union.

ABOUT THIS REPORT

The Global Center on Cooperative Security, with expert support from the UN Security Council Counter-Terrorism Committee Executive Directorate (CTED), embarked on an 18-month program in the Euro-Med region (Europe, the Middle East, and North Africa). Financed by the European Commission (EC), the program aimed to create a sustainable, nonpolitical forum for supreme court–level and senior judicial officials to discuss, among equals, questions of law arising from terrorism-related cases and to share strategies, frameworks, and good practices for handling these cases. The program was conducted in cooperation with the Institute for Security Studies and the International Institute for Justice and the Rule of Law (IJJ) in Malta.

The forum brought together judicial representatives and justices of the highest courts in participating countries, legal experts from relevant international and regional organizations, and representatives of judicial networks and academies, including

- judges from the courts of cassation of Algeria, Egypt, France, Italy, Jordan, Lebanon, Malta, Morocco, the Netherlands, Spain, and Tunisia and the Special Tribunal for Lebanon;
- UN agencies, such as the UN Office on Drugs and Crime, the Office of the UN High Commissioner for Refugees, and the UN Office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee;
- the EC, the Global Counterterrorism Forum, the International Institute of Higher Studies in Criminal Sciences, and the Organization for Security and Co-operation in Europe; and
- the Association of Francophone Supreme Courts (AHJUCAF), the European Judicial Training Network, the École nationale de la magistrature of France, and the Euro-Arab Judicial Training Network as represented by the Judicial Institute of Jordan, the Algerian National School for the Judiciary, and the Spanish School for the Judiciary.

Over the course of five consultations, justices had the opportunity to build and expand their regional network and increase their knowledge of international law and neighboring countries' legal frameworks for handling terrorism while contributing their views toward international policy efforts led by the United Nations.

The program was inaugurated with a supreme court–level meeting at the IJJ in January 2015 to identify priority areas for examination in subsequent forums. In this manner, the participating justices shaped the agenda and scope of issues to be undertaken. Based on the key themes identified at the launch meeting, a delegation of supreme court justices and experts from the Euro-Med region conducted national study visits in Tunis and Beirut. Hosted by the first presidents of the courts of cassation of Tunisia and Lebanon, the study visits delved into substantive and procedural issues faced by the judges in these countries. The visiting delegation met with judges of the host country's court of cassation, appellate and lower courts, and special courts with jurisdiction over terrorism cases; attorneys general; ministry of justice representatives; and other criminal justice actors. The justices led the forums and candidly examined, critiqued, and compared laws and practices.

At a subsequent regional convention held at the IJJ in December 2015, justices shared reports on the study visits and such key findings as points of convergence or divergence in practice and elaborated recommendations designed to support the highest courts in leading an effort to respond to terrorism in accordance with the rule of law. The recommendations put forward by the justices include good practices, strategies, and approaches and are geared toward their colleagues and foreign policymakers worldwide.

The final component of the program was international in scope and brought together justices from Europe, the Middle East, North Africa, North America, and South Asia. On 10 March 2016, with support from the Global Center, CTED organized an open briefing

of the UN Security Council Counter-Terrorism Committee at UN headquarters and a series of associated side events on the effective adjudication of terrorism cases. The open briefing highlighted the special role of supreme court justices in strengthening state capacities to bring terrorists to justice within the framework of human rights and the rule of law.

The briefing marked the first time that supreme court justices have addressed the UN membership on the topic. The distinguished panelists that participated were First President of the Court of Cassation of Tunisia Khaled Ayari, First President of the Court of Cassation of Lebanon Jean Fahed, AHJUCAF Secretary-General Dominique Loriferne, and Associate Justice of the U.S. Supreme Court Stephen Breyer, as well as justices from seven member states (Afghanistan, Bangladesh, Bhutan, India, Nepal, Pakistan, and Sri Lanka) of the South Asian Association for Regional Cooperation. Speakers also included senior representatives of the International Organisation of la Francophonie and the International Organization for Judicial Training. The UN membership heard the justices' views on how the international community should respond to the threat of terrorism, how this threat is experienced by the courts, and how the United Nations and its member states can better support the judiciary.

This report is organized around the priority issue areas raised by the justices over the course of the program and includes those best practices, challenges, strategies, and illustrative case studies that justices found compelling or worthy of discussion and broader dissemination. It contextualizes the legislative responses to terrorism in the jurisdictions represented and provides commentary on possible resolutions to common challenges based on existing legal standards and jurisprudence articulated at the regional and international levels. Relevant UN soft law and an overview of counterterrorism and human rights jurisprudence from the European Court of Human Rights and the European Court of Justice are included toward that end. The report further describes a series of international and regional initiatives in this domain, drawing conclusions on the value of interjudicial exchanges in supporting the judiciary in its response to the priority issue areas.

The content of this report has not been endorsed by all participating justices, nor do the priority issue areas necessarily reflect the views of the authors or the organization. The omission in this report of other pressing issues or human rights considerations does not mean that they warrant less attention or support by the international community. Instead, this report presents a synthesis of the discussions held over the course of the program.

FOREWORD

As a former judge of France's Supreme Court (Cour de cassation), I am deeply concerned by the challenges faced by the judiciary when adjudicating terrorism-related cases. I believe that international organizations, especially the United Nations, are ideally placed to provide platforms for dialogue on this critical issue among senior judges of various jurisdictions. I also believe that senior judges should be encouraged to become more involved in this area.

That is why, in my current capacity as Executive Director of the UN Security Council Counter-Terrorism Committee Executive Directorate (CTED), I fully support and advocate for initiatives aimed at strengthening the global criminal justice response to terrorism, especially on the part of supreme courts.

The program implemented by the Global Center on Cooperative Security in the Euro-Med region is one such initiative. This report provides a valuable synthesis of the discussions held by the senior judicial officials who participated in the program.

Terrorism cannot be tolerated under any circumstances, nor indeed can impunity for terrorist acts. The possibility that the perpetrators of such acts may escape punishment compounds the grief and distress felt by the survivors of terrorism, the relatives of the victims, and society as a whole. The establishment of an effective criminal justice system capable of bringing terrorists to justice is a core requirement for combating impunity, as stressed by the UN Security Council in Resolution 1373, adopted in 2001 under Chapter VII of the Charter of the United Nations. This requirement was affirmed in 2006 by the UN General Assembly in Pillar IV of the United Nations Global Counter-Terrorism Strategy, which also stresses the essential responsibility of the criminal justice system to protect human rights while countering terrorism. The United Nations has also developed a comprehensive universal legal framework in this area, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the 19 international coun-

terterrorism instruments, which provide definitions of specific offenses related to terrorism.

National judicial authorities thus play a key role in the interpretation of domestic counterterrorism laws and the 19 international instruments. Furthermore, they face multiple challenges in this regard, as they are simultaneously tasked with enforcing the rule of law and protecting human rights, including those of the victims and the accused in terrorism-related crimes, which must encompass the right to a fair trial. Supreme court judges have a particularly challenging task in this regard because they must not only ensure respect for the legality of national laws transposing international norms, but also assess the compliance of domestic laws with international standards and interpret standards applied by international and regional courts.

Resolution 1373 requires all member states to ensure that any person who participates in the financing, planning, preparation, or perpetration of acts of terrorism or in supporting such acts is brought to justice and that, in addition to any other measures taken against them, such acts are established as serious criminal offenses in domestic laws and that the punishment duly reflect the seriousness of such acts. Resolution 2129 recognizes the importance of establishing criminal justice institutions that can effectively prevent and respond to terrorism within a rule of law framework and underlines the importance of strengthening cooperation among member states. It also insists that states work with UN entities and subsidiary bodies with a view toward enhancing individual state capabilities, including by supporting state efforts to develop and implement rule of law-based counterterrorism practices.

Furthermore, the adjudication of counterterrorism cases requires specific skills and expertise. Member states' judicial authorities must constantly develop new ways to deal with the increasing complexity of terrorism cases, which often pose unusual and challenging case management issues. CTED's engagement with member states has revealed the difficult circumstances

under which many senior judicial officials must work, including the risk of losing their lives. Judges often work in isolation and have no network for the exchange of information, opinions, or jurisprudence. This is a very special profession, for which there exist very few training opportunities similar to those available to other professions in the criminal justice system. Moreover, unlike other judicial officials, judges are often poorly supported by international organizations and are rarely given the opportunity to exchange their experiences in the application of counterterrorism laws.

In an effort to enhance cooperation among judges and thus strengthen the global adjudication of terrorism-related cases, CTED has conducted a number of related initiatives in various regions of the world. Based on the information and feedback gathered within the framework of those initiatives, as well as in the context of numerous country assessment visits conducted by CTED on behalf of the Counter-Terrorism Committee, I

believe that there is a need to take this work further through the development of a holistic and sustainable global project to support member states' efforts to bring terrorists to justice.

Lastly, I wish to stress that criminal justice systems are the guardians of international rule of law principles and should be able to exchange views on ways to counter terrorism while maintaining those principles. As reflected in this report, the participants in the Global Center's Euro-Med program agreed on the need to enhance the global response to terrorism by strengthening the capacity of those systems to respond swiftly and effectively to acts of terrorism, including by promoting and facilitating a sustained global dialogue among senior judges. To paraphrase the great French philosopher Charles-Louis de Montesquieu, only through rational dialogue and debate will the voice of justice prevail.

Jean-Paul Laborde

Assistant Secretary-General and Executive Director, CTED

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ACRONYMS AND ABBREVIATIONS

AHJUCAF	Association des Hautes Juridictions de Cassation des pays ayant en partage l'usage du français (Association of Francophone Supreme Courts)
CTED	UN Security Council Counter-Terrorism Committee Executive Directorate
EAJTN	Euro-Arab Judicial Training Network
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJTN	European Judicial Training Network
EU	European Union
Euro-Med	European-Mediterranean
FTF	foreign terrorist fighter
GCTF	Global Counterterrorism Forum
ICCPR	International Covenant on Civil and Political Rights
IJJ	International Institute for Justice and the Rule of Law
MLA	mutual legal assistance
SIT	special investigation technique
UN	United Nations
UNODC	UN Office on Drugs and Crime

INTRODUCTION

Rapidly evolving terrorism threats and the spread of violent extremism destabilize entire regions and pose a serious threat to international peace and security. Today, terrorist organizations control large swaths of land, precipitating vast migrations as some people flee conflict zones while others, mobilized by the causes of these groups, join their ranks, traveling from afar or crossing into neighboring countries. As states and their judiciaries seek to respond to these challenges within national criminal justice systems, they must resist tendencies to respond too heavily with retribution and expedience. Courts are duty bound to pursue the patient commandments of a fair trial. This foundational right implores judicial officials to uphold the principles of legality and the presumption of innocence, ensure due process, and prohibit evidence obtained illegally from impermissibly tainting the proceedings. This responsibility falls more heavily on the judiciary when the countries are enveloped in a climate of fear.

Terrorism and related transnational crimes present inherent challenges in their adjudication. Stemming from their gravity and potential security implications, these cases at their core are complex because they require a careful dissection of due process rights, determinations on which of these rights should be weighed more heavily and which circumstances may create exceptional grounds for their limited abrogation. International human rights law provides some guidance to help navigate these parameters, drawing certain lines more brightly than others; nonderogable rights¹ and peremptory norms in particular have attained primacy in the hierarchy of well-defined norms. The conditions and safeguards for limited derogation, as in times of emergency, must be strictly necessary and proportional to the

exigencies of the situation, invoked only in truly exceptional circumstances, and limited to the duration of the situation. Less cohesively formulated are legal standards for the adjudication of preparatory acts. Judges must grapple with evidentiary standards and assess the probative value of evidence derived from new technologies and social media platforms. In addition, courts must bear the responsibility of adequately accounting for and balancing the rights of the accused, the public interest, and the rights of victims.

Courts of cassation and national supreme courts are charged with overseeing this process, having ultimate appellate jurisdiction. It falls to those highest courts to reflect the character of justice being delivered and to provide a counterweight, when necessary, to the executive and legislative branches of government. Through careful consideration, justices must assess the legality of national laws that may abridge international norms and standards, increasingly engaging in the interpretation of international law, including international humanitarian and human rights law. They are guided by international conventions and the jurisprudence of comparative cases that have been articulated in international, regional, and national foreign courts. Furthermore, justices may leverage their positions outward by expanding the mechanisms and avenues that support effective international cooperation. Inward facing, they may oversee the activities of the judicial academies, help manage the security of their courtroom and staff, and confront the pressures of high-profile cases all while balancing a demanding caseload. Not least of all, they are the designated institutional guardians of the rule of law and human rights.

Entrusted with this difficult task and solitary in their decision-making, judges have few means to exchange

1 Article 4 of the International Covenant on Civil and Political Rights (ICCPR) prohibits states-parties from derogating certain rights and freedoms of individuals, which include the prohibition against the arbitrary deprivation of life (article 6); prohibition of torture or cruel, inhuman, or degrading treatment or punishment (article 7); prohibition of slavery (article 8); prohibition of imprisonment due to an inability to fulfill a contractual obligation (article 11); principle of legality in criminal law, i.e., the requirement that criminal liability and punishment is limited to clear and precise provisions in the law that was in force at the time the act or omission took place, except in cases where a later law imposes a lighter penalty (article 15); recognition everywhere as a person before the law (article 16); and freedom of thought, conscience, and religion (article 18). ICCPR, 16 December 1966, 999 U.N.T.S. 14668, at 174–178.

their views on shared problems at the local, national, and regional levels. Although this lack of exchange may be attributable in part to justifiable concerns about preserving their independence, practitioner-level forums serve as platforms for generating new ideas for collaborative problem-solving among other criminal justice actors. Unlike other criminal justice professionals, however, justices have few nonpolitical spaces to reflect on the current state of terrorism-related case law in their respective jurisdictions and to discuss challenges in their adjudication. Such interaction and cooperation is essential in harnessing the potential of the judiciary's leadership and supporting it as an independent institution whose duty is to enforce the rule of law and to act as a check on the powers of the political branches when necessary. The promotion of interjudicial cooperation forms a core component in strengthening the global rule of law in the fight against terrorism.

This report aims to capture the critical perspectives of national supreme court justices that have an increasingly important role on an international stage on which they remain underrepresented. The interjudicial conversations provide such an entry point, presented in this report in the form of priority issues—questions, challenges, and good practices—raised by justices from Europe, the Middle East, and North Africa and culled over the course of an 18-month program.² The report is written to inform international-level policymakers about the views of justices and the importance of including those views in international counterterrorism policy and to apprise justices from the participating regions about available resources by cataloguing the good practices, case studies, and strategies that courts have employed.

2 For more information on the national study visits to Tunis and Beirut that were conducted during this program, see Global Center on Cooperative Security (Global Center), "Global Center Conducts National Study Visit in Tunisia With Supreme Court Justices From Europe, the Middle East, and North Africa," n.d., <http://www.globalcenter.org/events/global-center-conducts-national-study-visit-in-tunisia-with-supreme-court-justices-from-europe-the-middle-east-and-north-africa/>; Global Center, "National Study Visit in Lebanon With Supreme Court Justices From Europe, the Middle East, and North Africa," n.d., <http://www.globalcenter.org/events/global-center-conducts-national-study-visit-in-lebanon-with-supreme-court-justices-from-europe-the-middle-east-and-north-africa/>. For a recording of the open briefing in March 2016 by the UN Security Council Counter-Terrorism Committee Executive Directorate (CTED) on the effective adjudication of terrorism cases, see UN Web TV, "Terrorism, Rule of Law, and the Role of Judges: Upholding Justice," 10 March 2016, <http://webtv.un.org/watch/terrorism-rule-of-law-and-the-role-of-judges-upholding-justice/4796884292001>. For more information, see Global Center, "Global Center's Work Showcased at the UN Open Briefing Featuring Supreme Court Justices," n.d., <http://www.globalcenter.org/events/the-effective-adjudication-of-terrorism-cases/>.

PRIORITY ISSUES IN THE ADJUDICATION OF TERRORISM CASES

Over the course of the meetings and visits, justices considered a number of priority substantive and procedural issues deserving special attention in terrorism-related cases. They included the rights of the parties to the proceedings and the delicate balancing acts that must be performed when national security interests are at stake, such as the balance that must be struck between the timely disposition of cases and the right to a speedy trial, the right of privacy and the need to gather information, and the right to confront one's accuser and the need to protect witnesses. These discussions coalesced around the value of formal and informal international cooperation in helping confront many of the issues that arise in a terrorism case, with such cooperation conducted through interjudicial dialogue and formal mechanisms such as mutual legal assistance (MLA) and extradition agreements.

The challenges fall into four areas: international cooperation, evidentiary challenges, the protection of the rights of parties to the proceedings, and the specialization of judges, caseload management, and security considerations.

International Cooperation

International cooperation is essential for the effective adjudication of terrorism cases. Many of the most serious terrorist attacks in 2015 were organized through complex networks operating across national boundaries. The multijurisdictional nature of terrorism is even more pronounced when considering the potentially diverse nationalities of perpetrators and planners, sources of funding and arms, the site of the attacks, and the many nationalities of victims and witnesses. Although

terrorist organizations can operate across boundaries with relative ease, criminal justice systems are bound by strict jurisdictional limits and rely on mechanisms of international cooperation, which often struggle to keep pace with the challenge.

The international community has stressed the importance of judicial cooperation among various actors in the criminal justice system in addressing transnational terrorism,³ including through international and regional conventions,⁴ MLA and extradition agreements, and other mechanisms for sourcing foreign evidence.

MUTUAL LEGAL ASSISTANCE AND EXTRADITION AGREEMENTS

MLA and extradition agreements between states are the primary formal mechanisms for international criminal justice cooperation. These agreements allow for a diverse range of cross-border criminal justice cooperation, including but not limited to freezing assets; protecting witnesses and victims; securing, arresting, and transferring suspects across jurisdictions; and transferring evidence for use in legal proceedings. In addition to bilateral agreements between states, numerous regional and international conventions on MLA and extradition, terrorism, and transnational crime and a number of UN Security Council resolutions, as well as the 19 universal instruments against terrorism, provide a legal basis for and encourage such cooperation. In 2014 the UN Security Council Counter-Terrorism Committee Executive Directorate (CTED) and the UN Office on Drugs and Crime (UNODC) launched a regional initiative to draw attention to the importance of international cooperation and establishing competent, central

3 In the third report on the implementation of Security Council Resolution 2178 as prepared by CTED and issued in December 2015, states were urged to consider collective action in the longer term to develop additional tools "that can provide for greater, more rapid and more effective international cooperation" on criminal justice responses to cross-border terrorism. UN Security Council, "Letter Dated 15 December 2015 From the Chair of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council," S/2015/975, 29 December 2015, annex (containing report titled *Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters*).

4 For instance, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, adopted in May 2015, forms the foundation for an effective regional approach and provides for the creation of a network of national contact points to facilitate the rapid exchange of information, available at all hours of the day. Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, C.E.T.S. no. 217, 22 October 2015.

authorities to handle MLA and extradition requests in terrorism cases.⁵

In practice, procedural and political obstacles often mar international judicial cooperation and can be particularly acute in terrorism cases. Legal cooperation requires genuine political will and a degree of trust on behalf of the requesting and requested states. Citing frustration around the geopolitical complexities of many terrorism cases, justices emphasized the need to uphold the principle of reciprocity in responding to MLA and extradition requests and to avoid “double standards.” Reciprocity forms the basis of agreements on extradition, extensions of diplomatic privileges and immunities, the mutual recognition and enforcement of foreign judgments, and the impositions of travel restrictions and visa requirements.

Competing state interests, judges argued, can undercut reciprocity in practice. Due to countervailing interests of preventing or disrupting future attacks from occurring on their soil, states may choose to withhold information or evidence requested under MLA agreements to protect national security interests. In the case of Mounir el-Motassadeq, the Federal Supreme Court of Germany famously quashed a conviction on the basis that the United States had refused to share potentially exculpatory evidence. In its decision, the court cautioned that where a foreign state withholds intelligence information in circumstances where its self-interest is at stake, the criminal process is in danger of being manipulated by that foreign state.⁶ Although this tension exists between states, it also exists at the national level between agencies.

On the procedural side, formal cross-border legal cooperation is often mired in complex and bureaucratic

systems that vary from one country to the next and can result in misdirected requests and other obstacles that cause requests for assistance to languish unaddressed. This can result in significant delays in delivering justice and can incentivize the use of extrajudicial cooperation even where formal legal cooperation agreements are in place.⁷

The principle of *aut dedere aut judicare* (extradite or prosecute) is enshrined in international law and referenced in universal counterterrorism conventions, Security Council resolutions,⁸ and the United Nations Global Counter-Terrorism Strategy.⁹ The principle refers to the legal obligation of states to prosecute persons or submit their case for prosecution when individuals have committed serious international crimes and when no other state has requested their extradition. The decision of whether a prosecution will take place remains with the national competent authorities, and the constitutional law and substantive and procedural rules of the country concerned will determine to what extent the prosecution must be pursued.¹⁰

Security Council Resolution 1566 relies on this principle in calling on states to cooperate fully in the fight against terrorism, especially with those states where or against whose citizens terrorist acts are committed “in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.”¹¹

Moreover, states have a duty not to extradite if the accused may face serious violations of their human rights,

5 See CTED, “Concept Note: Regional Conference on Building Effective Central Authorities for International Judicial Cooperation in Terrorism Cases,” 25–27 November 2014 (copy on file with authors); CTED, “Conclusions and Way Forward: Regional Meeting on Building Effective International Cooperation by Central Authorities,” 22–24 January 2014 (copy on file with authors).

6 Bundesgerichtshof [BGH] [Federal Court of Justice], 3 March 2004, StV *Strafverteidiger*, no. 4/2004 (2006). El-Motassadeq was charged with membership in a terrorist organization and accessory to murder in the 9/11 attacks. The German court ordered his early release and quashed his conviction when the United States withheld potentially exculpatory witness testimony or transcripts of statements.

7 For example, following the June 2010 World Cup bombings in Kampala, seven Kenyan nationals were rendered to Uganda without appropriate extradition processes, including appearing before a court. Open Society Foundations, “Counterterrorism and Human Rights Abuses in Kenya and Uganda: The World Cup Bombing and Beyond,” 2013, <https://www.opensocietyfoundations.org/sites/default/files/counterterrorism-human-rights-abuses-kenya-uganda-20130403.pdf>.

8 For example, see UN Security Council, S/RES/1373, 28 September 2001.

9 UN General Assembly, *The United Nations Global Counter-Terrorism Strategy*, A/RES/60/288, 20 September 2006.

10 UNODC, “Frequently Asked Questions on International Law Aspects of Countering Terrorism,” April 2009, pp. 47–48, <http://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf>.

11 UN Security Council, S/RES/1566, 8 October 2004, para. 2.

including torture or inhuman or degrading treatment or punishment in the requesting state.¹² The 1990 UN Model Treaty on Extradition suggests that extradition be precluded where there are substantial grounds to believe that the requesting state will subject the prisoner to discrimination, torture or cruel and inhuman treatment and punishment, or denial of minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights (ICCPR) or that the judgment of the requesting state has been rendered in absentia without the accused having the opportunity to present a defense.¹³ Notably, the European Court of Human Rights (ECtHR) has ruled that the European Convention on Human Rights (ECHR) bars extradition by its signatories to third countries where the accused may face capital punishment.¹⁴ On this basis, an Italian court barred Tunisia's recent extradition request pertaining to the Bardo Museum attack.¹⁵ Several countries have reinstated the death penalty in response to the terrorism threat or have been found to practice or are suspected of practicing torture and are therefore subject to restrictions in requests for extradition to their jurisdiction.¹⁶

Therefore, effective international cooperation hinges on the ability of states to uphold human rights and the rule of law in all stages of criminal proceedings. Basic fair trial guarantees, the proper treatment of suspects, and the maintenance of humane detention conditions support the efficient delivery of justice by ensuring that minimal

guarantees have been observed and will not taint the trial proceedings. The judiciary plays a critical role in safeguarding this process because it must adhere by the standards enumerated in international human rights instruments within the framework of its own legal systems. For example, under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the judiciary must play a role in the systematic review of arrangements for the custody and treatment of persons subjected to any forms of arrest, detention, or imprisonment with a view toward preventing torture.¹⁷ In instances of noncompliance of laws frustrating international cooperation, judges discussed the strategy of requiring specific assurances of requesting states to act or refrain from acting in a manner contrary to the requested state's laws. UNODC recommends assurances of reciprocity in this regard, even if the request is based on a convention.¹⁸ Yet, the Special Rapporteur on torture has consistently expressed concern that diplomatic assurances are not an appropriate safeguard against torture if there are substantial grounds to believe that it would occur.¹⁹ Such assurances are imperfect, not binding, and politically awkward. Moreover, they do not provide for post facto recourse for the victim. Multilateral treaties usually indicate the types of assistance to be provided with regard to the scope and nature of the cooperation, the rights of suspects, and the procedures to follow in the issuance and execution of the requests.²⁰

12 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 24841, art. 5 (hereinafter UN Convention Against Torture); "Charter of Fundamental Rights of the European Union," *Official Journal of the European Communities*, 2000/C 364/01, 18 December 2000, art. 19.

13 UN General Assembly, "Model Treaty on Extradition," A/RES/45/117, 14 December 1990, art. 3. The model treaty includes optional grounds for refusal of an extradition request, including the death penalty. *Ibid.*, art. 4.

14 *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A)(1989) (establishing a violation of the ECHR right against inhuman and degrading treatment to extradite a German national to the United States, where he would face capital murder charges). See Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 2889, art. 3 (hereinafter ECHR).

15 On 28 October 2015, a court in Milan, Italy, denied the extradition request of Tunisian authorities when it held that there was no guarantee that the accused would not face the death penalty if tried in Tunisia. The accused, Abdel Majid Touil, a Moroccan national, was arrested in May 2015 on a Tunisian arrest warrant. Tunisian authorities accused him of providing support to those who executed the Bardo Museum attack in the months prior to his illegal migration to Italy. Separately, a Milanese prosecutor subsequently dropped the investigation of Touil's involvement in the Bardo Museum attack for lack of evidence. Steve Scherer, "Italy Court Refuses to Extradite Tunis Museum Attack Suspect," Reuters, 28 October 2015.

16 See Amnesty International, "Death Sentences and Executions in 2015," n.d., <https://www.amnesty.org/en/latest/research/2016/04/death-sentences-executions-2015/>.

17 UN Convention Against Torture, art. 11.

18 UNODC, *Manual on International Cooperation in Criminal Matters Related to Terrorism*, July 2009, p. 121, https://www.unodc.org/tldb/pdf/Manual_on_Intl_Cooperation_in_Criminal_Matters.pdf.

19 For example, see UN General Assembly, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E. Méndez, A/HRC/25/60, 10 April 2014.

20 *Ibid.*, p. 21.

Difficulties in implementing judicial cooperation measures may be compounded by the deterioration or absence of diplomatic relations. For instance, Tunisian judges and investigators encounter great challenges obtaining evidence of its citizens' involvement in terrorist activities in Syria, with whom Tunisia has no diplomatic relations. Many other countries have severed diplomatic relations with Syria as well. Furthermore, most states are not able to conduct on-site missions to conflict zones such as Syria to collect information. For judges in the Euro-Med region, a related challenge is lack of access to evidence located in foreign countries or areas controlled by hostile forces and uncooperative populations. In Lebanon, for example, some refugee camps, which are susceptible to exploitation by terrorist groups, operate outside of governmental control by law or in practice.²¹ As a result, investigations are frustrated.

The judges discussed other bases for cooperation, including diplomatic and executive agreements, letters rogatory, and memorandums of understanding dealing with evidentiary problems. Extraregional bilateral agreements for cooperation in criminal matters are less common, but Morocco and Spain successfully concluded one in January 2016.²² The Spanish Ministry of Foreign Affairs touted this agreement as “a model for the exchange of information and international police and legal cooperation in the face of the terrorist threat,” and top security officials lauded the quality and quantity of the intelligence exchange and joint operations that have been undertaken to dismantle terrorist cells.²³

Judges have spearheaded efforts to bolster international cooperation. The first presidents of the cassation courts of France and Tunisia signed a convention of cooperation in 2015. The initiative was the first of its kind

undertaken between these two courts, a few months after the Charlie Hebdo and Bardo Museum attacks.²⁴ On the occasion of the signing, First President of the Court of Cassation of Tunisia Khaled Ayari remarked, “[O]ur convention of cooperation must invite us to reflect on how to reconcile our national jurisprudence to finally call upon our legislators to incorporate the provisions of international conventions on the fight against terrorism within our national laws eventually leading to consistent legislation enabling better judicial coordination of our efforts to ensure efficiency in the fight against terrorism.”²⁵

Judges play a critical role in facilitating the exchange of evidence through international cooperation mechanisms and in helping to improve such mechanisms. The main obstacles to their implementation will remain political, but the judiciary can play a role in minimizing the procedural challenges by following basic standards of fair trial guarantees, familiarizing themselves with the various existing mechanisms and international regimes of judicial cooperation, and bringing attention to the obstruction created at the political level in the effective adjudication of terrorism cases. A number of resources exist to support legal practitioners. Primary among them is the UNODC “Manual on International Cooperation in Criminal Matters Related to Terrorism,” which compiles tools and methods of cooperation, as well as practical advice in dealing with common obstacles.²⁶

FOREIGN TERRORIST FIGHTERS

As emphasized in the latest global survey of the implementation by member states of Security Council Resolution 1373, foreign terrorist fighters (FTFs) traveling to Iraq, Syria, and other regions to join terrorist organizations pose an acute and growing threat. In the view of many, they increase the intensity, duration, and

21 The 1969 Cairo agreement between the Palestine Liberation Organization and Lebanon provides that Palestinians are solely responsible for the security in the camps where the Lebanese armed forces should be proscribed. This agreement, abrogated by the Lebanese parliament on 21 May 1987, is still applied tacitly, except in the Nahr el-Bared camp.

22 UN Security Council, S/2015/975, 29 December 2015, para. 35.

23 “Spain Presents Cooperation Against Terrorism With Morocco as Model,” *Diplomat*, 13 January 2016, <http://thediplomatspain.com/en/spain-presents-cooperation-against-terrorism-with-morocco-as-model/>.

24 “Coopération entre cours de cassation,” *La France en Tunisie: Ambassade de France à Tunis*, 22 December 2015, <http://www.ambassadefrance-tn.org/Cooperation-entre-cours-de>.

25 For the first president's speech on the occasion of signing the convention of cooperation, see “Discours prononcé par M. Ayari, Premier président de la Cour de cassation tunisienne,” 24 March 2015, <https://www.courdecassation.fr/IMG//Discours%20du%20Premier%20pr%C3%A9sident%20Tunisien.pdf> (translation by authors).

26 UNODC, *Manual on International Cooperation in Criminal Matters Related to Terrorism*.

intractability of existing conflicts; instigate the spread of conflict; and may pose a serious threat to their states of origin and to the states through which they transit. Terrorists and terrorist entities have fused with international criminal networks in states that are crossed by transiting fighters for the purpose of mobilizing material, human, and financial resources to support their operations.²⁷ In addition to crimes committed on and off the battlefield, such as rape, torture, extrajudicial executions, and ethnic cleansing, FTFs reap the benefits of transnational criminal enterprise through kidnapping, extortion, arms trafficking, unlawful natural resource exportation, money laundering, and terrorism financing.

Growing international concerns over the threat posed by FTFs have created a strong impetus for improving regional and international cooperation to support the exchange of information across agencies and judiciaries in the Euro-Med region.²⁸ The emerging risk posed by FTFs has increased the stress on criminal justice systems in the region, creating challenges of jurisdictional limits for crimes committed by nationals abroad, as well as legislative and judicial challenges in aligning national law with Security Council Resolution 2178. This resolution directs member states to adopt domestic criminal legislation to prevent the movement and recruitment of FTFs and to prosecute travel for terrorism or related training purposes, as well as the financing or facilitation of such activities. Some states have amended their terrorism laws to comport with these requirements.²⁹ On a global scale, however, few states have introduced criminal offenses for the prosecution of FTF-related prepara-

tory or accessory acts.³⁰ Lebanon, long accustomed to terrorism, has criminalized preparatory and accessory acts of terrorism since 1958.

By definition, FTF cases contain transborder elements that require cooperation between countries of origin, transit, and destination. Various practical difficulties arise in adjudicating preparatory and constitutive acts of terrorism when the bulk of the evidence may be located outside of a court's territorial jurisdiction. Approximately one-fifth of all foreign fighters departing for Syria have come from Algeria, Egypt, Libya, Mauritania, Morocco, and Tunisia.³¹ Justices indicated that evidence of nonmaterial elements, such as intent, are particularly difficult to prove, especially in the context of suspected foreign fighters who allegedly departed to war zones for terrorism-related purposes and may not have committed or been convicted of a terrorism-related act previously. Judges also discussed issues concerning territorial jurisdiction and judicial cooperation, including the possibility of prosecuting FTFs en route to their country of origin when apprehended in a transit country.

Justices from Lebanon, Morocco, and Tunisia shared their views on existing good practices and obstacles regarding international cooperation in FTF-related cases. Examples of good practices drawn from the Global Counterterrorism Forum (GCTF) Hague-Marrakech Memorandum³² include proactive cooperation at the intelligence gathering stage, the use of liaison judges, amendment of national criminal laws to ensure their coherence with the requirements of international counterterrorism instruments and relevant Security Council

27 UN Security Council, "Letter Dated 18 January 2016 From the Chair of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council," S/2016/49, 20 January 2016 (containing report titled *Global Survey of the Implementation by Member States of Security Council Resolution 1373 (2001)*, para. 14) (hereinafter 2016 implementation survey report on Resolution 1373).

28 For example, see UN Security Council, S/2015/975, 29 December 2016, para. 44 ("Given that challenges relating to foreign terrorist fighters are international by their very nature, Member States should enhance their international cooperation in tackling them.").

29 In 2014 the Jordanian government amended its antiterrorism bill to cope with the growing number of FTFs returning to Jordan from Syria, estimated to be more than 2,000. 2016 implementation survey report on Resolution 1373, para. 64. Tunisia has become the largest source of FTFs heading to join ISIL. Tunisia's new antiterrorism law also contains provisions that criminalize the act of traveling outside Tunisia to commit terrorism offenses. Loi organique n°2015-26 du 7 août 2015, relative à la lutte contre le terrorisme et la répression du blanchiment d'argent [Organic law no. 2015-26 of 7 August 2015 on the fight against terrorism and suppression of money laundering], *Journal Officiel de la République Tunisienne* [J.O.R.T.], 7 August 2015, art. 32, <http://www.legislation.tn/sites/default/files/news/tf2015261.pdf> (hereinafter Tunisian antiterrorism law).

30 2016 implementation survey report on Resolution 1373, para. 19.

31 The Soufan Group, "Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters Into Syria and Iraq," December 2015, http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3.pdf.

32 GCTF, "'Foreign Terrorist Fighters' (FTF) Initiative: The Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon," n.d., https://www.thegctf.org/documents/10162/140201/14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf.

resolutions, and the establishment of direct cooperation channels for financial investigation units. Persistent challenges that the judges identified include

- slow and bureaucratic formal mechanisms of cooperation, including extradition and MLA;
- lack of respect for the reciprocity principle;
- nonharmonized laws;
- factors such as corruption, lack of political will, and double standards;
- difficulties controlling borders and movement of people;³³ and
- limited awareness of the global databases of FTFs.³⁴

In the absence of clear guidelines in the legislature, judges sought international standards and the comparative jurisprudence of neighboring jurisdictions on the treatment of inchoate offenses that commonly arise in FTF cases. The factors impeding the collection of evidence is largely outside the control of the judiciary, and coordination among different agencies would ensure that the relevant judicial actors can access critical evidence, including exculpatory evidence, to fulfill their role as adjudicators. Because of challenges around MLA and extradition issues relating to FTF cases, justices encouraged the transfer of criminal proceedings and the mutual recognition of foreign judgments in criminal matters along with a number of other responses outside of the traditional formal mechanisms. To achieve this level of cooperation, justices acknowledged the need to keep abreast of new developments under international and regional initiatives to stem the flow of FTFs, as well as of available resources at their disposal, and to support their dissemination more broadly to members of the judiciary.

STRENGTHENING INTERNATIONAL GOOD PRACTICE, DIALOGUE, AND EXCHANGE

To overcome some of the challenges of using formal cooperation mechanisms, some of which had become practically obsolete in the context of the rapidly evolving threat, several other means have been developed to lay the foundations for a more efficient, rule of law–based response to terrorism. These include the formulation of nonbinding practices that seek to protect and promote the independence and integrity of the judiciary and the establishment of networks of practitioners who can be called on to exchange experiences and develop personal connections in other jurisdictions.

The GCTF, comprised of 30 states and the European Union, was established to develop, among other things, nonbinding guidance in the form of good practices to assist states in their efforts to implement effective counterterrorism practices in the criminal justice sector. Among its core good practices documents are the Rabat Memorandum, which addresses the role of various actors in the criminal justice system, and the Hague Memorandum, which specifically addresses the role of judges.³⁵ Further engagement and inclusion of senior judicial officials in the work of the GCTF would promote the dissemination and adoption of these good practices. The International Institute for Justice and the Rule of Law in Malta, established with the strong backing of the GCTF as a specialized institute mandated to deliver training to implement rule of law–based criminal justice practices to counter terrorism, increasingly serves as a platform for facilitating interaction and cooperation among judiciaries and judicial officials in its constituent countries, which include states in North Africa and the Middle East.

33 For example, Tunisian judges enumerated difficulties in controlling the movement of Tunisians into Libya in the border regions because merchants commonly traverse them.

34 Interpol, “Foreign Terrorist Fighters,” n.d., <http://www.interpol.int/Crime-areas/Terrorism/Foreign-terrorist-fighters>.

35 GCTF Criminal Justice Sector/Rule of Law Working Group, “The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector,” n.d., <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rabat-Memorandum-ENG.pdf> (hereinafter Rabat Memorandum); GCTF, “The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses,” n.d., <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/The%20Hague%20Memorandum%20-%20ENG.pdf?ver=2016-03-29-134018-493> (hereinafter Hague Memorandum). For a stocktaking of Rabat Memorandum implementation, see Matthew Schwartz et al., “Strengthening the Case: Good Criminal Justice Practices to Counter Terrorism,” Global Center, September 2015, <http://www.globalcenter.org/wp-content/uploads/2015/09/Strengthening-the-case-high-res.pdf>.

Other platforms of exchange available to judges are regional and international judicial networks such as the 50-member Association of Francophone Supreme Courts (known by its French acronym AHJUCAF). Recognizing the role of chief justices and supreme court judges and the urgency of addressing the threat of terrorism within a rule of law framework, the AHJUCAF has consistently lent its support to the efforts of the Euro-Med program and its possible expansion to neighboring regions.

In addition to networking functions, judicial networks can play an important role in assuring high standards among judiciaries and promoting their interests and independence by providing services such as training and seminars to judicial actors. The European Judicial Training Network (EJTN) is a formal network with its own independent institutional structure and secretariat dedicated to strengthening EU judiciaries by complementing the activities of national training institutes. It has begun to deliver training on terrorism-related crimes across Europe through the national training academies of its member states. The EJTN provided a model for the creation of the Euro-Arab Judicial Training Network (EAJTN), whose rotating presidency is now at the Spanish School for the Judiciary. EAJTN activity appears to have dwindled, but increased engagement with this network would serve to establish it as a centralized mechanism for judicial training in the region. Participating judges endorsed the idea that the academies should incorporate international programming to foster exchange and build the capacity of trainers and staff.

National supreme judicial councils also benefit from regional organization. The councils seek to safeguard the independence and integrity of the judiciary and are commonly headed by the chief justice of each supreme court. The International Organisation of la Francophonie supported the establishment of a network among the higher judicial councils for the promotion of the rule of law, the independence of the judiciary, and the

strengthening of judicial ethics.³⁶ First President of the Court of Cassation of Lebanon Jean Fahed is currently spearheading this effort in the Middle East and North Africa region.

Justices expressed the need to improve regional and international cooperation in the Euro-Med region through increasing opportunities to develop formal and informal mechanisms to foster the exchange of information. As an important starting point, justices found value in understanding the legal frameworks and culture of neighboring countries. These networks and the forums for learning and exchange expose judges to the varied ways in which commonly shared challenges are handled.

As the examples illustrate, judges should be supported in their efforts to foster better judicial relations and compile best practices among their neighbors across the region in the form of agreements, judicial networks, and similar platforms. These activities also should be supported to preserve the knowledge cultivated through the relationships fostered and to ensure the continuance of valuable exchanges.

Evidentiary Challenges

In the adjudication of terrorism cases, justices identified a number of priority evidentiary challenges related to (1) the use of special investigation techniques (SITs), (2) obtainment of evidence in a state of emergency, (3) electronic evidence, and (4) preparatory offenses.

USE OF SPECIAL INVESTIGATION TECHNIQUES

In the prevention and adjudication of terrorist acts, judges in the region recognized the importance of SITs, or techniques applied by competent authorities in the context of criminal investigations “for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons”³⁷ and often requiring judicial authorization due to the implications for the rights of the defendant.

36 For more information, see Organisation Internationale de la Francophonie, <http://www.francophonie.org/L-OIF-soutient-la-creation-du.html> (accessed 8 September 2016).

37 Council of Europe, “Recommendation Rec(2005)10 of the Committee of Ministers on ‘Special Investigation Techniques’ in Relation to Serious Crimes Including Acts of Terrorism,” 20 April 2005, ch. 1, http://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/Rec_2005_10.pdf.

Because of the secretive and at times deceptive nature of the tactics employed, evidence obtained through SITs pose specific challenges to privacy and due process rights. The modalities for the use of such techniques by security services should be clearly, precisely, and exhaustively defined in the law and jurisprudence to ensure their conformity with rule of law principles and human rights safeguards. The judiciary is generally tasked with safeguarding those rights by authorizing, overseeing, and reviewing the application of intrusive investigative methods. During periods of fear and public disturbance such as those engendered by terrorist acts or other forms of intercommunal violence, justice and security actors come under increasing political and public pressure to exercise sweeping powers to address the threat. Under these circumstances, judges often come under great pressure to approve the use of SITs expeditiously, even exigently. SITs thus bring into sharp focus the extent to which courts are willing to weigh those considerations against the public's right to privacy and the right of the accused to examine the evidence against them.

Justices firmly held that, as a function of their independence and even in the most strenuous of climates, a judge must uphold the rights of those charged with committing even the most heinous acts. In France and Lebanon, judicial authorization is typically required for the collection of information using SITs and the admissibility into evidence where the method of collection violates the right to privacy or other fundamental rights.

The deployment of SITs must be proportionate to the aim pursued: the more intrusive the measure, the more restrictive the review and the greater the regulations in place.³⁸ The Special Tribunal for Lebanon conducts a similar balancing test to weigh the right to privacy against the legitimate interests and security of the state.³⁹

The ECtHR has dealt with several cases on the issue of SITs for the purposes of judicial investigations into crimes. The ECHR explicitly provides for the right to privacy and respect for one's private and family life, their home, and correspondence.⁴⁰ Any interference by a public authority with the exercise of this right is prohibited and can be considered legitimate only if it is done in accordance with the law, is necessary in a democratic society, and serves a legitimate purpose, which includes national security, public safety, or the prevention of crime, among other interests.⁴¹ Arbitrary intrusions are thus prohibited, and the exception must be narrowly interpreted.⁴² The ECtHR has generally interpreted interferences with this right and has specifically held that the interception of telephone conversations for the purpose of judicial investigations into a crime amounts to "an interference by a public authority" with respect to an individual's rights under ECHR article 8.⁴³

One of the basic principles of the right to a fair trial is that the parties in a criminal case have the opportunity to examine the evidence supporting the allegations.⁴⁴ When the information obtained is classified or derived

38 For example, see Code de procédure pénale [Criminal Procedure Code], art. 76, https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=F9CBA9EFA2E4FC5ED4F3ABB3D46AA329.tpdila19v_2?idArticle=LEGIARTI000022470061&cidTexte=LEGITEXT000006071154&dateTexte=20161014 (France). For an analysis and summary, see Council of Europe Committee of Experts on Terrorism, "Profiles on Counter-Terrorist Capacity: France," September 2013, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680641029>.

39 The Appeals Chamber of the Special Tribunal for Lebanon has used the principle of proportionality in its analysis on whether the UN International Independence Investigation Commission and the prosecutor could legally request and obtain call data records from Lebanese telecommunications companies without domestic or international judicial authorization. The appeals chamber found that the absence of judicial control did not violate the standards to the right to privacy established under international human rights law, consequently concluding that the call data records were admissible evidence. The Prosecutor v. Ayyash et al.: Decision on Appeal by Counsel for Mr. Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records, STL-11-01/T/AC/AR126.9, 28 July 2015, http://www.stl-tsl.org/en/appeals-chambers-decision-on-the-legality-of-the-transfer-of-call-data-records/download/6354_836360a0b6ecab50d635cef80a5abd19.

40 ECHR, art. 8, para. 1.

41 *Ibid.*, para. 2.

42 See *Klass and Others v. Germany*, app. no. 5029/71, 2 Eur. H.R. Rep. 214, para. 42 (1980).

43 For example, see *Huvig v. France*, app. no. 11105/84, 12 Eur. H.R. Rep. 528 (1990) (telephone tapping ordered by investigative judges); *Klass and Others v. Germany* (secret surveillance of mail, post, and telecommunications under German law); *Rotaru v. Romania*, 2000-V Eur. Ct. H.R. 109 (2000); *Leander v. Sweden*, app. no. 9248/81, 9 Eur. H.R. Rep. 433 (1997) (storing of information in a secret governmental register).

44 ECHR, art. 6; ICCPR, art. 14.

from intelligence sources and methods, however, evidence may not be disclosed in its complete form due to prevailing national security interests.⁴⁵ Judges discussed the manner in which intelligence from security services and information obtained through military intervention are presented in court, agreeing this was a troubling issue for all jurisdictions that struggle to protect confidential sources while upholding the rights of the defendant. Emphasis was placed on interagency cooperation between law enforcement, including the police and the investigative judges; security services; and the military. Where the disclosure of evidence may jeopardize the source or methods of gathering information, judges and prosecutors must often look to other sources of evidence.

SITs that employ deception and not just secrecy in the collection of information, such as through the use of undercover agents and informants, were noted to be particularly challenging. Such tactics may raise the affirmative defense of entrapment as an obstacle to prosecution. Nonetheless, the use of informants, or cooperators, in uncovering or preventing criminal plots was generally considered to be an effective tool in the fight against terrorism. The Italian judiciary has had ample experience with the use of informants in its adjudication of organized crime cases, which gave rise to a legal framework refined over several decades to encompass terrorism today (box 1).

Like all states involved in the Euro-Med project, Tunisia currently makes extensive use of undercover agents, informants, and surveillance mechanisms in response to the terrorism threat. Recent amendments to the Antiterrorism Law of Tunisia contain provisions relating to the use of undercover agents and the wide protection they are afforded. The identity of officials or agents of the judicial police who obtain information through infiltration tactics may not be revealed under any reason; any disclosure of the identity of informants is punishable by six to 10 years of imprisonment and a fine of

15,000 dinars.⁴⁶ The intentional disclosure or threat of disclosure of information relating to the interception, infiltration, audiovisual surveillance, or data that has been collected is punishable by imprisonment.⁴⁷ Moreover, undercover agents are absolved of criminal liability for acts undertaken in good faith in carrying out their operation.⁴⁸ The competent authority who oversees the undercover operation discloses evidence to the prosecutor or the investigating judge, and only the final report is attached to the case file.⁴⁹ The accused and the public are thus deprived from accessing the contents of the file or the details of the investigation, which may contain information critical to the accused's defense, in violation of the right to a fair trial.

Justices noted that they increasingly look to regional and international human rights courts for direction and guidance on the appropriate balance that must be struck among competing interests of necessity and proportionality. They also found value in seeing how other jurisdictions have made use of SITs, and laws were adapted to meet the needs of the investigation in terrorism and related cases. In this regard, justices agreed that efforts to disseminate best practices at regional and international levels should be supported.

OBTAINMENT OF EVIDENCE IN A STATE OF EMERGENCY

During a state of emergency, certain measures that would not be permitted under preliminary criminal investigations may become permissible: where the balance of power favors the executive, the use of investigatory techniques by law enforcement officials and intelligence agencies becomes expanded and certain civil rights curtailed in favor of prevailing national security interests. International human rights law states that some derogation may be undertaken during exceptional circumstances where the existence of an official public emergency “threatens the life of the nation.”⁵⁰ In these circumstances, derogations must be strictly

45 See Hague Memorandum, p. 9.

46 Tunisian antiterrorism law, art. 58. The punishment is increased for disclosure that leads to the injury or death of informants.

47 *Ibid.*, art. 62.

48 *Ibid.*, art. 59.

49 *Ibid.*, art. 60.

50 ICCPR, art. 4(1); ECHR, art. 15(1).

Box 1. Drawing Lessons From the Mafia Trials in Italy

During the 1980s and into the 1990s, the Sicilian Mafia gained notoriety for its ability to exert power through bribes and the use of force on all branches of government, including law enforcement and the judiciary. Most infamous were consecutive attacks in 1992 on the directors of prosecutions and head of the special anti-Mafia investigative squad, which led the prosecution of the Maxi trial, wherein 474 Mafia members were charged and 360 convicted of serious crimes.^a Over this period, the criminal code was amended to expand offenses relating to terrorism and make the criminal justice response to terrorist activity more repressive^b while introducing innovative measures, including reductions of sentences and in some instances exemption from punishment, for active collaboration of repenting offenders—“collaborators of justice.”^c In so doing, the state made clear its intention to encourage disassociation of offenders from criminal enterprises through “reward” legislation (*legislazione premiale*). For example, reduced penalties were offered for active repentance where the accused dissociated from the criminal group and took action to prevent further consequences of criminal activity or provide decisive evidence to judicial and police authorities to find or arrest accomplices.^d Penalty reductions were also considered when the individual charged or sentenced with a terrorism crime abandoned the terrorist organization.^e Exemption from punishment was extended to

those who voluntarily prevented the commission of the crime and who gave “decisive evidence for the precise reconstruction of the fact and the location of possible accomplices”^f or where the accused, charged with an offense relating to membership to a criminal organization (*reati associative*), withdrew association or dissolved the terrorist group.^g Penalty reductions, although appealing to many, were insufficient to encourage collaboration where threats to life were made in retaliation by the criminal enterprises. Thus, legislators began to extend protections, including by arranging changes of identity, relocation services, and support to reintegrate them into society.^h Over time, reward legislation was also safeguarded against abuse; benefits were dismissed and judgments withdrawn when false, deceptive, or incomplete statements were found to have been provided.ⁱ In such a situation, the court may have imposed a more severe penalty in the nature of the punishment or the term of the penalty. Certain amendments were made to ensure the proper management and transparency of the system. For instance, an accused had a maximum of six months to provide investigators with all relevant information from the moment the repentant declared a willingness to cooperate.^j Benefits were extended only after proper evaluation of the information as being important and not previously published.^k

a On 23 May 1992, Magistrate Giovanni Falcone was killed in a bomb attack, along with his wife and three police bodyguards. Less than two months later, his replacement, Judge Paolo Borsellino, was killed along with five bodyguards by a car bomb remotely detonated. Wolfgang Aichtner, “Obituary: Paolo Borsellino,” *Independent* (London), 20 July 1992, <http://www.independent.co.uk/news/people/obituary-paolo-borsellino-1534572.html>.

b For example, article 1 of law no. 15 from 1980 provides for an increase in punishment for certain terrorism offenses. Legge 6 febbraio 1980, n. 15, *Gazzetta Ufficiale della Repubblica Italiana* (G.U.), 7 February 1980, n. 37.

c See generally *ibid.* See Council of Europe Committee of Experts on Terrorism, “Profiles on Counter-Terrorist Capacity: Italy,” November 2008, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680641012>.

d L. n. 15/1980, art. 4.

e Legge 21 febbraio 1987, n. 34, G.U., 21 February 1987, n. 43.

f L. n. 15/1980, art. 5.

g Legge 29 maggio 1982, n. 304, G.U., 28 June 1982, n. 149.

h Decreto Legislativo 9 ottobre 1990, n. 309, G.U., 31 October 1990, n. 255; Decreto Legislativo 29 marzo 1993, n. 119, G.U., 24 April 1993, n. 95; Decreto Legislativo, 24 novembre 1994, n. 687, G.U., 17 December 1994, n. 294.

i L. n. 304/1982.

j Legge 13 febbraio 2001, n. 45, G.U., 10 March 2001, n. 58.

k *Ibid.* See Global Counterterrorism Forum Criminal Justice Sector/Rule of Law Working Group, “The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector,” n.d., good practices 1 and 5, <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rabat-Memorandum-ENG.pdf>.

necessary and proportional to the exigencies of the situation and limited to the duration of this situation. In a few instances, ECtHR case law has characterized the threat from terrorism as an emergency threatening the life of the nation within the meaning of article 15 of the ECHR.⁵¹ Other jurisdictions have held that terrorism incidences, in and of themselves, do not create an exceptional circumstance. For instance, the Jordanian government did not declare a state of emergency after coordinated suicide bombing attacks at three Amman hotels. The declaration of a state of emergency does not give carte blanche for the evisceration of rights. In alignment with the ICCPR, the ECHR contains provisions enumerating nonderogable rights and regulates their enforcement.⁵² Under international law, states have a duty to provide notification or officially proclaim the existence of a public emergency, its time frame, and conditions prior to the application of derogation measures.⁵³ This last requirement is considered “essential for the maintenance of the principles of legality and rule of law at times when they are most needed.”⁵⁴ The procedural regulations seek to ensure that the state of emergency does not become a permanent fixture across the law of the land and requires periodic assessment.

A state of emergency had been declared in Tunisia at various times in 2015 following the Bardo Museum attack in March, the Sousse attacks in June, and the Tunis bus attack in November. In the aftermath of the November 2015 terrorist attacks in Paris, France declared a state of emergency and, following ECHR notification procedures, notified the secretary-general of the

Council of Europe of its intent to derogate from certain ECHR provisions (box 2).

The states of emergency in Tunisia and France, extended again in June and July 2016, respectively, have resulted in thousands of searches without judicial warrant and nighttime raids that have been criticized for discriminatory targeting by law enforcement.⁵⁵ First President of the Court of Cassation of France Bertrand Louvel has voiced concern that the judiciary was deliberately circumvented in the provisions of the emergency law. “Why is justice so avoided?” he lamented in a speech delivered before an audience that included the president of the National Assembly and the minister of justice. Spokespersons of the Union of Magistrates echoed those concerns and firmly placed the judiciary as a guarantor of freedoms who alone has the authority to define the scope and extent of individual freedoms.⁵⁶ In January 2016, a UN expert panel recommended the adoption of judicial controls over antiterrorism measures to guarantee the rule of law and prevent arbitrary procedures.⁵⁷

The concerns of the French judiciary were shared by the participating justices. They questioned whether article 14-1 of the 1955 act, which provides for the jurisdiction of the administrative judge, conflicts with article 111-5(8) of the criminal code, which gives the criminal courts the power to review the legality of an administrative act underlying the proceedings, notwithstanding the fundamental jurisdiction of the administrative authority. The 1955 act must further be viewed in light of other laws that have curtailed the powers of the judiciary,

51 For example, see *Lawless v. Ireland* (No. 3) 1 Eur. H.R. Rep. 15 (1961) (concerning low-level Irish Republican Army terrorist activity in Ireland and Northern Ireland); *A. and Others v. The United Kingdom*, 2009-II Eur. Ct. H.R. 137 (referring to the 9/11 attacks and the threat of international terrorism).

52 ECHR, art. 15; ICCPR, art. 4.

53 ICCPR, art. 4; ECHR, art. 15(3).

54 UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2.

55 See Amnesty International, “Tunisia: Sweeping Crackdown Signals Abuse of Emergency Measures,” 2 December 2015, <https://www.amnesty.org/en/latest/news/2015/12/tunisia-sweeping-crackdown-signals-abuse-of-emergency-measures/>; Human Rights Watch, “France: Abuses Under State of Emergency,” 3 February 2016, <https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>.

56 Jean-Baptiste Jacquin, “Lois antiterroristes: le cri d’alarme des juges,” *Le Monde*, 15 January 2016, http://www.lemonde.fr/police-justice/article/2016/01/15/lois-antiterroristes-le-cri-d-alar-me-des-juges_4847953_1653578.html#yTUIlXzZV4WWWwI9.99.

57 The panel of UN experts comprised David Kaye, Special Rapporteur on freedom of opinion and expression; Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association; Michel Forst, Special Rapporteur on the situation of human rights defenders; Ben Emmerson, Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism; and Joseph Cannataci, Special Rapporteur on the right to privacy. Office of the UN High Commissioner for Human Rights, “UN Rights Experts Urge France to Protect Fundamental Freedoms While Countering Terrorism,” 19 January 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16966&LangID=E>.

Box 2. State of Emergency Under the French Constitution

The French Constitution provides that, in times of crisis, “extraordinary powers” may be afforded to the president, who may suspend regular procedures following consultation with the Constitutional Council.^a Embedded in these powers is the motivation to provide the public authorities “in the shortest possible time, with the means to carry out their duties.”^b The Act of 3 April 1955 governs the procedures by which the Council of Ministers may proclaim a 12-day state of emergency, after which the parliament must vote on a new law extending the emergency.^c As currently applied in France, the state of emergency expands the powers of the security services and the police to act without a priori judicial oversight. They include the power to place under house arrest any person when there are “serious reasons to think their behavior constitutes a threat to security or the public order”;^d to curtail the freedom of association by extending the scope by which groups or associations that participate in, facilitate, or incite acts detrimental to the public order may be dissolved;^e and to

conduct warrantless searches and raids in daytime or nighttime, block certain websites, and copy data from any system found during a search.^f

Nonetheless, certain limitations apply. The creation of internment camps is strictly prohibited under the emergency law, as is total censorship of the press (the Ministry of Interior may still approve interception measures for incitement or the glorification of terrorism). Moreover, administrative judges, as opposed to military judges, maintain their jurisdiction during a state of emergency.^g In the first five days following the November 2015 attacks, approximately 413 administrative searches led to 63 arrests and the seizure of 72 weapons. One hundred eighteen persons were placed under house arrest during this same period.^h As of 5 February 2016, these measures have led to 3,320 raids and 571 legal proceedings, the vast majority of which relate to weapons and drug trafficking charges.ⁱ

a La Constitution [France], art. 16. Article 36 regulates the “state of siege,” or martial law (*état de siège*).

b *Ibid.*, art. 16.

c Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence [Law no. 55-385 of 3 April 1955 regarding the state of emergency], <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000006953350> (hereinafter French state of emergency law). On 8 February 2015, the National Assembly introduced amendments to the constitution declaring and extending emergency powers, requiring approval by the National Assembly for a state of emergency longer than 12 days or an extension beyond four months. “French MPs Back State of Emergency Powers in Constitution,” BBC News, 9 February 2016, http://www.bbc.com/news/world-europe-35531887?utm_source=Sailthru&utm_medium=email&utm_campaign=New%20Campaign&utm_term=%2AMideast%20Brief.

d French state of emergency law, art. 6.

e *Ibid.*, art. 6-1.

f *Ibid.*, art. 11.

g Gildas Barbier, final report of the final regional convention, “Supporting Senior Judicial Officials in Leading a Criminal Justice Response to Terrorism: Europe, Middle East, and North Africa” project, 16–17 December 2015 (copy on file with authors).

h *Ibid.*

i Assemblée Nationale, Mesures administratives prises en application de la loi n° 55-385 du 3 avril 1955 depuis le 14 novembre 2015 (au 18 juillet 2016).

namely the surveillance law of 24 July 2015, which allows the government to secretly monitor communications of suspected terrorists without prior judicial authorization, as well as make metadata collected through internet service providers available to intelligence organizations.⁵⁸

Judges can play a meaningful role upholding the rule of law in the face of legislative or executive resistance before such measures lead to systematic abuses by actively defending their independence and entrenching their role as guardians of individual rights. As these examples suggest, in the limited and exceptional circumstances

58 Loi n° 2015-912 du 24 juillet 2015 relative au renseignement [Law No. 2015-912 of 24 July 2015, concerning intelligence information], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], 26 July 2015, p. 12735.

when derogations are permitted under states of emergency, they run the risk of continuing unabated into the future, particularly when the threat of terrorism has no foreseeable end, unlike the cessation of interstate hostilities. The role of the judge as guardian of individual rights becomes magnified under these circumstances, shaped by conflicts emerging from modern circumstances in an increasingly complex global environment.

ELECTRONIC EVIDENCE

A related consideration faced by judges in all regions is the handling of electronic and digital evidence in the courtroom, the use of which has greatly expanded with the spread of information and communications technology around the world. Individuals increasingly communicate through e-mail, instant messaging, and social media platforms. In-person communications may otherwise be captured and recorded by law enforcement agents and all manner of public and private recording equipment. Like any other modern organization, terrorist groups and individuals make use of communications and information technology for purposes of recruitment, financing, and intelligence gathering, among other uses.

The use of many information technology platforms leaves a digital footprint: user and activity information that may be contained in browser histories, word processing documents, ATM transaction logs, audio and video files, and other data or metadata stored in digital formats. Electronic and digital information thus tends to be more voluminous and more easily modified and duplicated, posing evidentiary challenges as to the authenticity and relevance of the evidence before judges and investigators. In addition, contemporary forms of encryption and anonymity permit internet users to protect the confidentiali-

ty and integrity of their content against third-party access or manipulation and to conceal their identities.

With the evolving threat posed by FTFs,⁵⁹ law enforcement and judicial officials have experienced a large increase in demand for cooperation in gathering digital data and evidence from the internet. UN Security Council Resolution 2178 accordingly calls on states to act cooperatively to prevent and counter terrorist exploitation of technology, communications, and resources to incite support for acts of terrorism, while respecting human rights and fundamental freedoms and complying with other international legal obligations. There have been various iterations at the international level that underline the importance of cooperative action by states to intensify and accelerate the exchange of information. Resolution 1373 explicitly mentions the use of information and communications technology by terrorist groups, as does the preamble of Resolution 1624.

In addition to the pressing need for international cooperation on these issues, participating judges highlighted several key challenges: (1) the probative value of such evidence, (2) insufficient technological literacy of criminal justice officers, and (3) the excessive reliance on expert testimony that ensued. In a rapidly changing technological environment, judges need additional training to build their literacy on the conversion of information into evidence and the factors that may render such information inadmissible or unreliable. These challenges extend to investigators and prosecutors handling the evidence and those entrusted with its assessment. There was consensus on the need to offer on-going, specialized training programs for judges handling terrorism cases, which would ideally include a module on technological issues.

59 As underlined by CTED,

40. The rapid technological advances of the past decade have created an environment in which individuals are able to freely interact and instantaneously share their views with their counterparts worldwide. This new capacity to communicate directly with a global audience in a multidirectional manner has freed terrorist organizations from their reliance on traditional media as the primary channel for conveying their messages to their followers and the wider world.

41. [The Islamic State of Iraq and the Levant] has leveraged the vast reach of [information and communications technology] to propagate its ideology, publicize its movements/accomplishments, raise its funds, and coordinate its operations. It has utilized social media tools to develop highly successful recruitment campaigns that have attracted more than 30,000 foreign terrorist fighters from over 100 States.

PREPARATORY OFFENSES

Preparatory offenses increasingly feature in antiterrorism laws to more effectively respond to the threat posed by FTFs. The criminalization of preparatory acts strikes at the heart of counterterrorism efforts, which is to prevent acts of terrorism from occurring and to reduce the risk of future attacks. Inchoate offenses of preparation and conspiracy are not subject to the prohibition against double jeopardy because they constitute separate offenses whose criminalization is motivated by this deterrent function. Under preparatory acts, the scope of criminal offenses is broadened because they do not need to be tied to a completed crime, its attempt, or a conspiracy (*association de malfaiteurs*).

Resolution 2178 defines FTFs as individuals who travel or attempt to travel to a state other than their states of residence or nationality for the purpose of the perpetration, planning, or preparation of or participation in acts of terrorism or the provision or receipt of terrorist training, including in connection with an armed conflict. The act of preparation is thus distinguished from that of perpetrating, planning, participating, providing, or receiving terrorist training. Although overlap may exist, it is left to the implementing state to enact the provisions in legislation and for judges applying the law to draw the line between the different acts. Read in this context, Resolution 2178 calls on member states to criminalize preparatory acts connected to traveling abroad for terrorism purposes.⁶⁰ Preparatory acts therefore include a broad range of actions, including the facilitation of FTF travel and transit through a state's territory for the purpose of committing acts of terrorism in other states.⁶¹

Many legal complexities are confronting judges because preparatory offenses appear more frequently in antiterrorism laws in response to FTFs.⁶² Important doctrinal questions relate to the definition of preparatory acts,

where left undefined in the law (for instance, as distinguished from the initiation of the commission of a crime or its attempt); the scope or sufficient threshold of a preparatory act, which can be extravagantly broad if left unrestricted; the causal link to the underlying offense; and the mode of culpability or degree of intent that necessarily attaches to an inchoate offense. Justices particularly struggled with the element of proving the terroristic intent of persons who travel to conflict zones but have not been involved in an act of terrorism. Tunisia, a major point of transit for FTFs in the region, in particular cited jurisdictional and evidentiary challenges in the adjudication of preparatory acts: is the mere presence of a foreign national on Tunisian territory and the knowledge that one may commit acts of terrorism abroad sufficient to constitute a preparatory terrorism offense?

Difficulties are compounded when legislators draft the definition of acts of terrorism and their preparatory acts overly broad. Egypt's Law 95 of 2015 for Confronting Terrorism does not narrow the purview of the definition of terrorism that appears in the penal code and broadly defines an act of terrorism as

any use of force, violence, threat, or intimidation domestically or abroad for the purpose of disturbing public order, or endangering the safety, interests, or security of the community; harming individuals and terrorizing them; jeopardizing their lives, freedoms, public or private rights, or security, or other freedoms and rights...; harm[ing] national unity, social peace, or national security or damag[ing] the environment, natural resources, antiquities, money, buildings, or public or private properties or occup[ying] or seiz[ing] them; prevent[ing] or imped[ing] public authorities, agencies or judicial bodies, government offices or local units.⁶³

60 Jan Eliasson, statement before the Counter-Terrorism Committee on new initiatives to address the FTF challenge, New York, 19 June 2015, http://www.un.org/en/sc/ctc/docs/2015/dsg_remarks_ctc_open_briefing_19_june_2015.pdf.

61 UN Security Council, S/PV.7316, 19 November 2014, p. 6 (comments of Raimonda Murmokaitė related to threats to international peace and security caused by acts of terrorism).

62 Countries such as France had previously detained individuals with the charge of conspiracy in relation to terrorism while evidence was being gathered against them. Dana Priest, "Help From France Key in Covert Operation," *Washington Post*, 3 July 2005. The introduction of penalties for preparatory acts in 2014 thus broadens the list of offenses with which individuals may be charged. Loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme [Law no. 2014-1353 of 13 November 2014 strengthening provisions in the fight against terrorism], J.O., 14 November 2014, p. 19162 (art. 6).

63 For an unofficial translation, see Industry Arabic, "Anti-Terrorism Law - Section One: Substantive Provisions," 15 August 2015, art. 2, http://ekladata.com/zr_WrAGHBxFAQwzD-KxxhCoNAXkM.pdf.

The law also increases the number of offenses punishable by death to include attacks on the security of the state and the provision of weapons or information to terrorist groups. Under such a definition, acts of terrorism could encompass acts of civil disobedience. In a 2015 report to the UN General Assembly, the working group on the use of mercenaries to violate human rights warned that states “have adopted measures that disproportionately restrict freedom of movement and the right to nationality, due process and the presumption of innocence, and that unnecessarily expand powers for emergency surveillance, arrest, detention, search and seizure.”⁶⁴ Although some states have laws that are clearly overly broad, others endeavor to strike a narrower definition. In Lebanon, provisions in the criminal code are used to prosecute crimes of terrorism, defined as “all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents.”⁶⁵ The code criminalizes conspiracy, namely, the existence of an agreement between two or more persons to commit the above criminal offense.⁶⁶

Rights of the Parties to the Proceedings

The role of the judge in safeguarding human rights is especially tested when the wave of public opinion and, at times, the executive branch are against the accused, as may frequently be the case in terrorism trials. The accused must be presumed innocent until proven guilty, and judges must take an active role to effectuate this principle in practice by ensuring that the trial is conducted fairly. A fair trial means, inter alia, that the accused is afforded the means to prepare an adequate defense, understands the language of the proceedings, and has the opportunity to ensure that the evidence admitted was obtained lawfully and to confront the evidence against him.

These rights are consistently challenged when national security interests are at stake, such as in the disclosure of sensitive information, but also when considerations of the rights of third parties come into play, such as with the use of protective measures for witnesses. Many of the rights discussed herein touch on the rights of the parties to the proceedings, which include victims, witnesses, and the public at large.

THE RIGHT OF THE ACCUSED TO LEGAL REPRESENTATION

The international community has long criticized the erosion of defendants’ basic rights in counterterrorism laws. To the extent that the Strategy embodies the principles that provide normative guidance to states’ practices, Pillar IV of the Strategy anchors the need to respect human rights and the rule of law as the fundamental basis of any counterterrorism effort. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has emphasized in the specific context of prosecuting terrorism suspects that the fundamental principle of the right to a fair trial may not be subject to derogation. Any derogation of a defendant’s rights must not circumvent the protection of nonderogable rights, in line with the UN Human Rights Committee’s general comment on ICCPR article 14.⁶⁷ Justices agreed on the critical importance of ensuring that adequate safeguards for the rights of the accused enshrined in international legal instruments, including, inter alia, the right to legal counsel, the right to appeal, the legal parameters of trials in absentia, and *non-refoulement* safeguards. The right to legal representation in criminal proceedings forms an integral component of the right to a fair trial.⁶⁸ This right seeks to ensure not only that the accused has access to defense counsel, but that the latter has access to the case being arrayed against the accused and the time and access required to prepare a reasonably

64 UN General Assembly, “Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination: Note by the Secretary-General,” A/70/330, 19 August 2015 (containing the report of the working group).

65 Special Tribunal for Lebanon, “Selected Articles of the Lebanese Criminal Code,” 21 October 2015, art. 314, http://www.stl-tsl.org/index.php?option=com_k2&id=6789_1e323263e3cc2258f4a26af60cbd79e6&lang=en&task=download&view=item (official English translation).

66 *Ibid.*, art. 315.

67 UN Human Rights Committee, *General Comment No. 32; Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32, 23 August 2007.

68 ICCPR, art. 14(3)(d); ECHR, art. 6(3)(c); “Charter of Fundamental Rights of the European Union,” art. 47; American Convention on Human Rights: “Pact of San José, Costa Rica,” 22 November 1969, 1144 U.N.T.S. 17955, art. 8(2)(d); African Charter on Human and Peoples’ Rights, 27 June 1981, 1520 U.N.T.S. 26363, art. 7(1)(c).

effective defense, as well as measures to ensure that the prosecutor fully disclose all the necessary elements of the case so that a defense may be fairly mounted.⁶⁹

For legal assistance to be effective and not illusory, states must provide assistance to indigent defendants during all stages of the proceedings.⁷⁰ This right is recognized broadly under international law and the domestic laws of the countries the justices represent, but practical obstacles particular to representing those charged with terrorism-related offenses abound. They include a shortage of attorneys, insufficient funding for legal aid services, inadequate incentives for private defense counsel, and teeming caseloads. Different practices exist regarding when the right to legal representation attaches prior to the trial stage. Instructively, the ECtHR has held that the right to a fair trial was violated when a suspect was denied access to a lawyer immediately following their arrest.⁷¹ The French Court of Cassation in 2010 held that all suspects are entitled to counsel during any interrogation or court proceeding and that to do otherwise would violate the person's fundamental right to a fair trial as enshrined in ECHR article 6.⁷² At a minimum, persons placed under arrest also have the right to be informed of the reasons for the arrest and any charge against them.⁷³ They must therefore be able to participate in the criminal proceedings in a language they understand, and an interpreter must be appointed to give full effect to the right to legal representation.

In Lebanon, the accused is notified of their right to remain silent and to secure counsel when the charge sheet is read. With foreign defendants, as is often the case with FTFs, an interpreter is guaranteed, and judges

contact relevant embassies involved to secure proper interpretation services. A large number of accused lack the means to retain a lawyer when brought before a military tribunal, however, and the army coordinates with the Syndicate of Lawyers to provide legal representation.⁷⁴ This was still deemed to be an inadequate solution by judges, given the large caseload, with single cases often implicating numerous defendants. Furthermore, certain cases require a level of legal specialization by lawyers that cannot be assured. Judges described the conundrum where the defendant refuses to be represented by counsel or where counsel drops the case because they find it impossible to defend the most hardened of accused.⁷⁵ This was particularly troubling to judges in the context of Lebanon's Roumieh prison, where detainees gained control of the prison premises and individuals refused to appear in court. This situation compelled the High Court of Justice to postpone hearings as it was unable to judge them in absentia,⁷⁶ and the cases had to be divided so as not to delay the proceedings unduly. Tensions culminated in January 2015, when the Ministry of Interior had to stage a military intervention to reestablish order in the prison and force the detained individuals to appear before the court.

The justices believed that unavailable or inadequately skilled counsel created significant delays and challenges for trial judges. In these circumstances, the judge has a heightened responsibility to diligently ensure that the defendant's rights are upheld. Concern around the abuse of these rights was noted to occur during the precharge and pretrial phases when the right to counsel may be limited.

69 ICCPR, art. 14(3).

70 *Ibid.*, art. 14(3)(d); ECHR, art. 6(3)(c); "Charter of Fundamental Rights of the European Union," art. 47; American Convention on Human Rights, art. 8(2)(e).

71 John Murray v. The United Kingdom, app. no. 18731/91, 22 Eur. H.R. Rep. 29 (1996).

72 Cour de Cassation (France), "Arrêt n. 5700 du 19 octobre 2010 (10-82.306) - Cour de cassation - Chambre criminelle [Judgment no. 5700 of 19 October 2010 (10-82306) - Supreme Court - Criminal]," n.d., http://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/57400_19_17829.html.

73 ICCPR, art. 9.

74 Investigating judges of the military tribunal also cited instances where the accused refuses representation at times because they do not recognize the authority of the court.

75 A judge recounted the following line of questioning to convey this point: Judge: "Why do you kill?" Defendant: "My emir says to." Judge: "What will you do if you are released from custody?" Defendant: "I will serve as a suicide bomber. You wear your uniform; I wear mine: a bomb vest."

76 Lebanon permits trials in absentia where the defendant is not in state custody, provided adequate notice has been given. Lebanese Code of Criminal Procedure, art. 165 ("If [the accused] is neither present nor represented by a lawyer, he shall be tried *in absentia*") (italics in original); *ibid.*, art. 166 ("If a defendant who is in custody has been notified of the time of the hearing and fails to appear without a lawful excuse, he shall be tried *in absentia*") (italics in original). For a draft official English translation of the code alongside the original Arabic, see Special Tribunal for Lebanon, "Lebanese Code of Criminal Procedure," 16 January 2014, <http://www.stl-tsl.org/en/STL-Documents/Library/Relevant-law-and-case-law/Applicable-Lebanese-Law/340-lebanese-code-of-criminal-procedure>.

PRECHARGE AND PRETRIAL DETENTION PRACTICES

Many states across the regions extend precharge detention periods (*garde à vue*) in terrorism cases because investigations are lengthier and often more complex. For instance, Lebanese law allows for an unlimited period of pretrial detention for terrorism offenses.⁷⁷ Detention in Tunisia may not exceed three days and may only be extended once with written order of the prosecutor-general.⁷⁸ The law, however, allows judicial police officers to detain individuals accused of a terrorism offense for a period not exceeding five days.⁷⁹ The law provides that the prosecutor-general may decide in writing to extend the precharge detention period for an additional five days, twice renewable.⁸⁰ The prosecutor must provide the reasoning for the decision, including all factual and legal grounds that justify the detention totaling a maximum of 15 days. Because the right to counsel is guaranteed from arraignment onward, detention may be incommunicado this entire period.

The prolonged incommunicado detention of terrorism suspects is not an uncommon practice, although wide variance in the permissible length and conditions exist. In Morocco, the 2003 Law to Combat Terror (Bill 03.03) increased the permissible length of time a detainee can be held in precharge detention prior to being brought before the investigative judge from 48 hours to up to eight days by written submission of the prosecutor.⁸¹ The accused may be denied access to counsel by authorities during the initial 48 hours of detention.⁸² Police are under no obligation to provide access to a lawyer if no request for a lawyer is made.⁸³ More strin-

gently, under Egypt's 2015 counterterrorism law, suspects may only contact their relatives and consult with a lawyer if doing so does not prejudice "the interests of the evidence gathering."⁸⁴ In Lebanon, the period of pretrial custody may not exceed six months for persons accused of felonies entailing terrorism offenses and other serious crimes, which may be renewed once "on the basis of a reasoned decision."⁸⁵

On her mission to Tunisia in December 2014, the UN Special Rapporteur on the independence of judges and lawyers voiced concerns about the use of incommunicado detention practices in Tunisia, noting that the excessive period of police custody combined with the lack of access to legal counsel may create circumstances for ill treatment.⁸⁶ Such practices, the Special Rapporteur noted, "run counter to the right to a fair hearing, the right to defense and the right to have access to legal counsel, and open a serious gap between the law and the guarantees enshrined in the Constitution."⁸⁷ The risk of abuse created under the antiterrorism law is thus increased by the long period of incommunicado precharge detention it permits, during which time detainees do not have access to family members or legal counsel. In this regard, the Organization for Security and Co-operation in Europe has noted a correlation between denial of access to legal counsel, incommunicado detention, and the risk of torture.⁸⁸

Justices indicated that a focus on improved case management techniques, in particular at the level of the investigative judge, would allow for cases to proceed or be dismissed for lack of evidence. Overseeing the functionality

77 Lebanese Code of Criminal Procedure, art. 108. This article was amended in 2001.

78 Le Code de Procédure Penale [Code of Criminal Procedure], art. 13bis, <http://www.wipo.int/edocs/lexdocs/laws/fr/tn/tn032fr.pdf> (Tunisia).

79 Tunisian antiterrorism law, art. 39.

80 *Ibid.*, art. 41.

81 *Royaume du Maroc* [Official Bulletin of the Kingdom of Morocco], no. 5112 (29 May 2003).

82 *Ibid.*, arts. 66, 80.

83 Human Rights Watch, "Morocco: 'Stop Looking for Your Son,'" 25 October 2010, app. 4, <https://www.hrw.org/news/2010/10/25/morocco-end-abuses-counterterrorism-arrests>.

84 Human Rights Watch, "Egypt: Counterterrorism Law Erodes Basic Rights," 19 August 2015, <https://www.hrw.org/news/2015/08/19/egypt-counterterrorism-law-erodes-basic-rights>.

85 Lebanese Code of Criminal Procedure, art. 108 (as amended by the Act of 26 June 2010). In contrast, the maximum period of detention for misdemeanors is two months, renewable once "where urgently necessary." *Ibid.*

86 UN General Assembly, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on Her Mission to Tunisia*, A/HRC/29/26/Add.3, 26 May 2015, para. 59.

87 *Ibid.*

88 Organization for Security and Co-operation in Europe, *Countering Terrorism, Protecting Human Rights: A Manual*, 2008, p. 126, <http://www.osce.org/odihr/29103?download=true>.

of legal processes to challenge the conditions and treatment of accused persons while in police custody serves as a self-check on the criminal justice system. Threat, intimidation, and violent and nonviolent coercion of the parties to the criminal process, including the accused and witnesses, erodes the criminal justice system, whether committed by the government or individuals.

With respect to all fair trial rights, justices agreed that the use of interlocutory appeals, even if deferred, allowed for an appropriate balance between the need to ensure speedy adjudication of terrorism cases and the need to resolve procedural matters promptly in order to prevent the annulment of the entire trial. In addition, allowing for interlocutory appeals in appropriate circumstances strengthens the entire judicial system in the creation of unified case law and judicial strategies in terrorism cases.

PROTECTIVE MEASURES FOR WITNESSES

One of the most important rights afforded the witness is the ability to give testimony free of threat or coercion and in a favorable climate. Witness testimony is central to mounting a case, and irreparable harm is caused in the execution of justice when witnesses are threatened or intimidated. Justices lamented the weakness or absence of witness protection laws in their jurisdictions, surmising that incongruous attention is given to the accused as compared to witnesses and victims. In this regard, good practice 1 of the Rabat Memorandum addresses the need to protect other actors in judicial proceedings involving counterterrorism, including victims, witnesses, informants, undercover agents, juries, investigators, prosecutors, defense counsel, and judges.

States have a responsibility to take appropriate measures within their means to provide effective protection and

assistance to witnesses and victims of crime, especially when their cooperation in an investigation and prosecution may place them at risk of serious harm.⁸⁹ Some states have established procedures for the physical protection of victims and witnesses and adopting evidentiary rules to permit witness testimony to be given in a manner that ensures their safety. The measures may include the use of a live video link during the trial, the taking of pretrial statements as an alternative to in-court testimony, and other mechanisms to conceal their identity by masking visual and audio cues, such as through the use of a screen.

The adoption of protective measures for the testimony of witnesses often come into conflict with the rights of the defendant, including the right to due process. Under international human rights law, accused persons have the right to examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as prosecution witnesses.⁹⁰ This guarantee is a quintessential application of the equality of arms principle, which grants the defense the same legal powers as those available to the prosecution. The unqualified use of protective measures affects the defense's ability to examine the witness under the same conditions, creating an imbalance in the scales of equality and fairness.

A common protective measure is the use of anonymous testimony, wherein any identifying information of the testifying witness is not disclosed to the defendant. In the practice of many jurisdictions, including France and the Netherlands,⁹¹ courts may order that a witness give evidence anonymously in order to protect their

89 United Nations Convention Against Transnational Organized Crime, 2225 U.N.T.S. 39574, 15 November 2000, arts. 24, 25.

90 ICCPR, art. 14(3)(e); ECHR, art. 6(3)(d); African Commission on Human and Peoples' Rights, "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa," DOC/OS(XXX)247, n.d., art. (N)(6)(f), http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf.

91 In France, the witness may be allowed by the judge to testify anonymously if "the hearing is likely to seriously endanger the life or physical integrity this person, family members or relatives." Code de procédure pénale [Code of Criminal Procedure], art. 706-58, https://www.legifrance.gouv.fr/affichCode.do?sessionId=BB678D98CB9FA76CBBE69AFA32A9F97Atpdila19v_2?idSectionTA=LEGISCTA000006138133&cidTexte=LEGITEXT000006071154&dateTexte=20161015. In the Netherlands, in cases where witnesses have well-founded reasons to fear that they or their relatives could run a high risk to their life, health, or safety or a dissolution of their family unit, the status of an anonymous witness can be granted by the judge. Limited anonymity may be granted before the court in cases in which a witness's deposition may have a negative impact on their personal or professional life or in case of persons that have anonymously given information to the police. For an unofficial translation of the relevant articles in the Dutch Code of Criminal Procedure, see "Code of Criminal Procedure," art. 190, http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf.

safety and in consideration of other public interests. The Tunisian antiterrorism law affords judges broad discretion to admit the testimony of anonymous witnesses into evidence.⁹² The same provisions that authorize enhanced protective measures for informants are extended to testifying witnesses. They provide that, “in case of danger” and “where circumstances so require,” any information that may lead to the identification of witnesses shall be kept in separate classified reports (*procès-verbaux*) retained on file with the attorney general of Tunis.⁹³ Notably absent from these provisions is any procedure regarding the access, if any, and procedures for access of the accused or their attorney to the evidence in the redacted form. The law thus gives judges wide discretion to accept as evidence the statements of anonymous witnesses, with the only criterion lying in the exigency of the circumstances and without the challenge of the witness’s possible bias and credibility mounted by the defense.

The use of anonymous witnesses thus poses particular problems in the assessment of credibility, especially because great weight is placed on the value of eyewitness testimony. Justices discussed the detrimental effect of false testimony on the execution of justice, leading to the risk of wrongful convictions, as well as delays and misdirected investigations.⁹⁴ Although they affirmed the critical importance of assessing the credibility of witness testimony, judges disagreed on the value of penalizing false testimony, as in Egypt and Lebanon,⁹⁵ because witnesses often struggle to provide consistent testimony, especially when they may suffer from psychological trauma.

The ECtHR has provided some guidance on the appropriate balance that must be struck on the use of anonymous witnesses and the limits of their use for evidential purposes in criminal trials. As a transnational court of

last resort, the court’s assessment is not generally concerned with judging the evidence before the national courts but whether the proceedings as a whole, including the way in which evidence was taken, are fair.⁹⁶ From that position, the court has held that a conviction may not be based solely or decisively on untested, anonymous witness statements.⁹⁷ Where they are used, the state must take extreme care and have other measures in place to balance the fairness of the trial.

THE RIGHTS OF VICTIMS OF TERRORISM

In addition to serving as important witnesses to the acts in question, victims of terrorism often require individualized attention because they may have undergone trauma or have other conditions that warrant special considerations in the courtroom. Although there is a clear overlap between the needs of terrorism victims and victims of other human rights violations, they do not constitute a homogenous group. Terrorism victims include individuals who have endured abuse from terrorism financing acts as well, such as human trafficking or extortion. Judges have noted that a subset of individuals being charged for terrorism offenses in their countries have been juveniles. The unique needs of those children require special consideration as authors and victims of crime.

The harm exerted by acts of terrorism on the impacted populace profoundly affects society and extends beyond the direct victims of physical violence. The UN General Assembly adopted principles for victims of gross human rights violations, which state that victims comprise individuals who have suffered harm individually or collectively, including physical, mental, or economic harm. The term is further extended to include immediate family members or dependents of the direct victim and individuals who have suffered harm in intervening to assist victims in distress.⁹⁸

92 Tunisian antiterrorism law, arts. 71, 75.

93 *Ibid.*, art. 75.

94 Justices from Lebanon cited a witness who provided the identities of attackers in a case pertaining to the murder of three judges and a prosecutor in a June 1999 attack on a court in Sidon. Later, it was revealed that the witness was bribed by unknown entities to mislead investigators to obtain a passport in order to travel to France. The Special Tribunal for Lebanon faced similar setbacks in its judicial proceedings when they were delayed due to false testimonies.

95 Egypt’s antiterrorism law criminalizes the provision of false, misleading, or fabricated information by detention of 6 months to 3 years, a fine between 1,000 and 3,000 dinars, or both. Industry Arabic, “Anti-Terrorism Law - Section One,” art. 6.

96 See *Doorsoon v. the Netherlands*, 1996-II Eur. Ct. H.R. 14, para. 67.

97 *Ibid.*, para. 76.

98 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006, annex para. 8.

Victims may help provide critical evidence as witnesses. By lending their voice to the proceedings, they can contribute to counter extremist narratives and recruitment efforts and bolster the legitimacy of the criminal justice system. Some jurisdictions have implemented measures that encourage the participation of victims. In Algeria, victims may be heard during the trial, not just at the sentencing stage, and may initiate criminal proceedings.⁹⁹ Moreover, legal aid is automatically extended to terrorism victims and their dependents.¹⁰⁰

Article 6 of the ICCPR enshrines the inherent right to life, and states have an affirmative duty to prevent, investigate, and prosecute crimes as components of the right to life in accordance with the law (box 3).¹⁰¹

The profile of victims of mass casualty attacks is often more expansive than those of other violent crimes. Many jurisdictions have special provisions protecting their rights, including the right to compensation. An emerging area of law, justices discussed various models in use in the Euro-Med region. For instance, the Tunisian Victim Compensation Fund affords victims free care in public health institutions and provides medical assistance to support the physical and psychological rehabilitation of the victim.¹⁰² This fund moreover provides social services to assist in their reintegration into society,¹⁰³ subject to the specific needs of the victim. In France, the state provides compensation for crime victims under the General Compensation Scheme and for terrorism victims according to a special 1986 compensation scheme, amended in 1990. The scheme guarantees compensation to victims of a terrorist attack on French

soil, including foreign nationals and undocumented people. The scheme extends to French nationals abroad, except those who are exercising a professional duty protected by their function, as is the case with military and police. The fund is supplemented through repayments by offenders with eligible assets from proceeds of property or financing sanctions imposed on terrorists whose assets were frozen or property confiscated.¹⁰⁴

The justices paid close attention to the issues surrounding juvenile defendants and their sometimes dual status as victim and accused. In many countries, a minor will be found to have criminal responsibility at the age of 13. Drawn to the narratives of radical ideologies that promote a new framework or way of life away from the perceived injustices and moral corruption of the state, diminished economic opportunities, and other frustrations that stew an insecure future, young people are particularly vulnerable to recruitment into terrorist organizations or engagement in their activities. Young people may express their frustration in acts of violence and are otherwise vulnerable to coercion and the influence of extremist groups.¹⁰⁵ In Lebanon, accused minors are automatically assigned counsel and have the right to an “assistant.” This was deemed a novel approach that justices thought worthy of consideration in their jurisdictions.

Specialization of Judges, Caseload Management, and Security Considerations

Whether an accused is charged with a crime codified in an antiterrorism law or by use of more common charges such as murder, the legal framework that lays out which

99 Criminal Procedure Code of Algeria, arts. 69 bis, 72, 74, and 353.

100 Loi n° 09-02 du 29 Safar 1430 correspondant au 25 février 2009 modifiant et complétant l'ordonnance n° 71-57 du 5 août 1971 relative à l'assistance judiciaire [Law no. 09-02 of 29 Safar 1430 corresponding to 25 February 2009 amending and supplementing ordinance no. 71-57 of 5 August 1971 on legal aid], *Journal Officiel de la République Algérienne Démocratique et Populaire*, no. 15 (8 March 2009), art. 4, <http://www.joradp.dz/FTP/jo-francais/2009/F2009015.pdf> (modifying article 28 of the original decree).

101 UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Ben Emmerson: Framework Principles for Securing the Human Rights of Victims of Terrorism*, A/HRC/20/14, 4 June 2012, para. 13.

102 Tunisian antiterrorism law, art. 79.

103 Ibid.

104 Loi no. 2001-1062 du 15 novembre 2001 relative à la sécurité quotidienne [Law no. 2001-1062 of 15 November 2001 on community safety], J.O., 16 November 2001, p. 18215 (easing restrictions on identity checks in the fight against terrorism, establishing the offense of terrorism financing, and providing for the confiscation of property as punishment for persons found guilty of acts of terrorism); Code pénal [Criminal Code], art. 422-7, https://www.legifrance.gouv.fr/affichCode.do?jsessionid=D6F5E61D21BEDEBFFCE4ED5948168C42.tpdila19v_2?idSectionTA=LEGISCTA000006149846&cidTexte=LEGITEXT000006070719&dateTexte=20161015 (France) (using proceeds of asset freezing and confiscation to supplement fund).

105 See Organisation for Economic Co-operation and Development, “Reducing the Involvement of Youth in Armed Violence: Programming Note,” May 2011, p. 18, <http://www.oecd.org/dac/governance-peace/conflictfragilityandresilience/docs/47942093.pdf>.

Box 3. The Rights of Victims of Gross Violations of Human Rights Under International Law and in Europe

Under international law, victims of gross violations of international human rights have the right to seek and obtain effective remedies, which may take the form of (1) restitution; (2) compensation; (3) rehabilitation, which includes medical, legal, and social services; and (4) satisfaction and guarantees of non-repetition, or the right to truth.^a

UN Security Council Resolution 1566 considers the possibility of establishing an international fund to compensate terrorism victims and their families.^b A support portal has been created to highlight their importance and to direct victims to support resources.^c In Europe, similar initiatives have been enacted in recognition of the rights of victims of gross violations of human rights, terrorism victims specifically. The Council of Europe adopted the European Convention on the Compensation of Victims of

Violent Crimes in 1983, which consolidates common principles governing the compensation of victims of crime and calls for the establishment of a victims' compensation fund when the offender has not been identified or is unable to pay the victim.^d The Council of Europe also has spearheaded efforts to recognize the rights specific to terrorism victims in its adoption in 2005 of the Guidelines on the Protection of Victims of Terrorist Acts, which aims to address the needs and concerns of terrorism victims "in identifying the means to be implemented to help them and to protect their fundamental rights while excluding any form of arbitrariness, as well as any discriminatory or racist treatment."^e Various European countries have accordingly enacted legislation that provides for state-funded financial support to victims of violent crimes.^f

- a UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006, annex para. 18.
- b UN Security Council, S/RES/1566, 8 October 2004, para. 10.
- c See UN Victims of Terrorism Support Portal, "Solidarity With Victims of Terrorism," n.d., <http://www.un.org/victimsofterrorism/en> (accessed 8 September 2016).
- d European Convention on the Compensation of Victims of Violent Crimes, 1525 U.N.T.S. 26456, 24 November 1983, preamble.
- e Committee of Ministers, Council of Europe, "Guidelines on the Protection of Victims of Terrorist Acts," CM/Del/Dec(2005)917/4.2/appendix2E, 7 March 2005, preamble.
- f Several examples include Belgium's 1985 Victims Assistance Act and Compensation Scheme for Victims of Violent Crimes, Denmark's 1985 Compensation Act From the State for Victims of Crimes as amended, France's 1991 General Compensation Scheme, Germany's 1985 Victims Compensation Act, and the Netherlands' 1975 Dutch State Compensation Scheme.

judges have jurisdiction over certain crimes has a direct impact on the experience of the judge hearing the case, the resources available to them, and their safety. Countries in the Euro-Med region have experimented with different approaches to ensure the safety of judges hearing terrorism cases. Furthermore, case management techniques proved influential in the effective and efficient delivery of justice.

SPECIALIZED JUDGES AND TRIBUNALS

Good practice 1 of the Hague Memorandum advises states to concentrate efforts on identifying, assigning, and training a cadre of judges to adjudicate terror-

ism-related and other national security offenses. Although justices agreed that most basic criminal justice measures are often insufficient and ineffective to initiate proceedings linked to acts of terrorism, some warned against the use of special or exceptional procedures in this area. There was a consensus regarding the need to offer on-going and specialized training programs for the handling of terrorism cases.

Several states in the Euro-Med region have recognized the utility of maintaining a permanent bench of experienced judges trying terrorism cases. Tunisia's approach was illustrative in this regard. A judicial counterterrorism

pole, established to deal specifically with matters of terrorism, was inaugurated on 16 December 2014.¹⁰⁶ Military courts are no longer competent to adjudicate such cases.¹⁰⁷ Judges, prosecutors, and specialized assistants have been appointed through a judicial pole established within the Tunis Court of Appeal to deal specifically with matters of terrorism.¹⁰⁸ The judicial pole consists of two representatives of the public ministry, investigative judges, judges of the indictment division, and judges of the criminal and correctional chambers for first instance and appeals.¹⁰⁹ The judges are selected according to their level of training and experience in matters relating to terrorism.¹¹⁰

Other countries, such as Algeria, France, Jordan, and Lebanon, have established very different systems of specialized terrorism courts. Although special courts may provide the benefits of centralized training of specialized judges, standardized procedures for handling intelligence, and added courtroom security measures by design, they also present challenges related to due process and the independence of the judiciary. In Jordan, the State Security Court has replaced military courts and has jurisdiction to try specific offenses threatening the security of the state, which include high treason, espionage, terrorism, drug trafficking, and currency counterfeiting. The court is composed of military and civilian judges, appointed by the prime minister. Cases before the State Security Court in Jordan may be appealed to the High Court of Justice. Jordan's State Security Court has faced criticism for not being fully independent from the executive, a concern that has been heightened in recent years following the amendment of the 2006 antiterrorism law to encompass nonviolent acts and speech that are deemed disruptive to Jordan's foreign relations.¹¹¹

In Lebanon, justices felt that the current court structure was sufficient to handle terrorism cases and that the existing legal framework should be supported and strengthened. Nonetheless, several visiting judges took issue with the application of due process protections and adherence to the rule of law in the current system and the independence of the military tribunal. Judges are appointed to the tribunal by the Judicial Superior Council and the Ministry of Defense. Although 12 of the 19 judges are civilian, seven are officers with a legal education and a rank of captain or higher nominated by the Defense Ministry.¹¹² The system is also critiqued because the High Court of Justice is a first instance court that does not allow for appeal. Although the collective experience of the sitting judges is valuable and commonly raised as a justification, justices generally found this to be insufficient to deny the defendant the right to appeal.¹¹³ At this time, the Lebanese parliament is debating a bill to amend the law on the military tribunals in order to reinforce the role of civilian judges, the rights of civilian parties, and due process guarantees.

CASE MANAGEMENT

With increasing international concerns over the threat posed by FTFs, the proliferation of antiterrorism laws, and the persistent regional instability resulting from neighboring conflict, there has been an increasing number of terrorism-related cases over the last several years in the Euro-Med region. Judges have coped with the caseload by applying different case management strategies and techniques. In Italy, for instance, a fast track procedure to trial was used in post-9/11 cases whereby a limited amount of evidence is provided in exchange for a reduced sentence if convictions are secured.¹¹⁴

106 Tunisian antiterrorism law, art. 40.

107 Under article 110 of the Tunisian constitution, no special procedures that may prejudice the principles of fair trial or special courts may be established. Military courts are competent to deal with military crimes.

108 Tunisian antiterrorism law, arts. 40–41.

109 *Ibid.*

110 *Ibid.*

111 Human Rights Watch, "Jordan: End Protester Trials in State Security Courts," 30 November 2012, <https://www.hrw.org/news/2012/11/30/jordan-end-protester-trials-state-security-courts>; Amnesty International, "Jordan," n.d., <https://www.amnesty.org/en/countries/middle-east-and-north-africa/jordan/> (accessed 8 September 2016).

112 Lebanese Military Code of Justice, art. 12.

113 Lebanon has ratified the ICCPR, which protects the right of appeal. ICCPR, art. 14(5).

114 Nicole Winfield, "Terror Suspects Go on Trial in Italy," Associated Press, 5 February 2002.

The military tribunal in Lebanon has been handling a large number of terrorism-related cases over the last few years, attributable to the Syrian crisis that began in 2011. In 2012, 27 cases reached final judgment; in 2014 the number grew exponentially to 310. In 2015, 438 cases were heard. Unlike countries dealing with lone wolf actors or co-conspirators that are relatively few in number, Lebanon has handled a number of “mega-processes.” These processes involve charging large numbers of accused for a single act, such as in the Nahr el-Bared case (box 4).¹¹⁵

Interlocutory appeals, which allow parties to appeal a ruling by a trial court before all claims are resolved, can be used as an effective case management technique. As interlocutory appeals interrupt the course of the litigation and may contribute to delay, their use is often narrowly circumscribed by law and employed at the discretion of judges. To ensure the speedy adjudication of cases, resolve procedural matters promptly, and prevent the annulment of the entire trial, the authorization of interlocutory appeals under acceptable circumstances was considered to be an effective tool in avoiding mistrials and legitimizing criminal procedure. Interlocutory appeals offer the benefit of strengthening the entire judicial system in the creation of unified jurisprudence in terrorism cases.

Judges commented on the need to strike a balance not only between competing claims, but also between the realization of short-term goals, such as having a quick and effective investigation and maintaining the public order, and long-term goals of ensuring procedural fairness. Failure to address this balance poses problems for the efficient management of the case and prevents accused persons from being adequately informed of the proceedings in the case against them in contravention of their fair trial rights. Ensuring that the justice process embodies rule of law principles strengthens the legitimacy and credibility not only of the proceedings but of the

justice sector as a whole. This legitimacy and credibility is critical for judges that bear the responsibility of adjudicating terrorism-related cases and the public and political pressures that come along with that responsibility.

SECURITY IN THE COURTHOUSE AND FOR JUDGES AND THEIR FAMILIES

In conflict-affected contexts or where criminal groups regularly engage in violence against state authorities, criminal justice practitioners and their families are frequently targets of attack and retribution. The security of the judiciary and the courts is essential for maintaining the integrity and independence of the judiciary. Uninhibited access to secure, safe courts promotes a sense of confidence in government and is an important measure of a government’s public legitimacy. Across Europe, the Middle East, and North Africa, judges and their families have suffered from threats, harassment, intimidation, and the loss of life.¹¹⁶ In some cases, the judiciary is specifically targeted by militants.¹¹⁷

Safety and security are necessary for judges to carry out their functions independently without undue influence from the risk or threat of violence against themselves or others in the performance of their duty. Nevertheless, most judges recognize that some risks are inherent to their work and the importance of performing their role impartially regardless of the threat or protections available. Increased security is important to protect the physical person but also the profession by protecting the freedom of conscience of the judges while establishing immunity to corruption and undue influence.

Justices felt that those sitting in the first instance tribunals are particularly vulnerable to the threat of violence. Investigating and trial judges who had confronted terrorism suspects commented on the particular personality of individuals who appear without any sign of remorse or apprehension in front of judges. An illustrative example was shared by an investigative judge who handled a defiant detainee suspected to be the wife of

115 The indictment of 458 people of various nationalities listed acts ranging from intentional homicide and attempted intentional homicide to destruction of public goods and possession of weapons of war without authorization. Jean Fahed, email correspondence with authors, 14 September 2016.

116 For example, see Mohammed Zaatari, “Sidon’s 4 Slain Judges Remembered,” *Daily Star*, 7 June 2011, p. 3 (courtroom storming resulting in the murder of four criminal court judges attending to a trial on 8 June 1999 in Sidon, Lebanon).

117 In Egypt, three judges were killed only two hours after the Cairo criminal court sentenced former President Mohamed Morsi to death. Yara Bayoumy and Haitham Ahmed, “Egypt’s Judges New Frontline in Battle Against Militancy,” *Reuters*, 20 May 2015.

Box 4. The Case of Nahr el-Bared in Lebanon

The 2007 Lebanese armed conflict began between Fatah al-Islam and the Lebanese Armed Forces in Nahr al-Bared, the largest Palestinian refugee camp established by the UN Relief and Works Agency for Palestine Refugees in the Near East. The conflict lasted several months, destroyed large swaths of the camp, displaced approximately 30,000 Palestinian refugees, and resulted in death and injury to civilians and military service persons, with a death toll of 172 from the army alone.

The Public Prosecutor at the Court of Cassation brought charges against 573 suspects, 277 of whom were placed in pretrial detention, and referred the case to the Court of Justice in 2007. Of the 573 persons held under investigation, the investigative judge charged 450 people and dropped the charges against 123 persons for reasons ranging from *lis pendens* to the insufficiency of evidence to death. In addition, the judge issued arrest warrants against 80 persons in absentia. Of the 277 persons held in detention, the judge kept 84 in detention, released 127, and dismissed the cases of 62 individuals. Four of the 277 had escaped from prison.

In the end, the court

- sentenced 49 defendants (46 in absentia) to death;
- gave 316 defendants sentences ranging from two months in prison to penal labor for life;
- acquitted 24 (15 in absentia, seven who were not in custody, and two who were held in detention for fewer than 15 months from the date of judgment); and

- dropped the charges against 61.

After 22 months of weekly hearings before the Court of Justice, the last judgment in the case of Nahr el-Bared was delivered on 4 March 2016.

After the investigations, the court divided the proceedings in a judgment dated 7 June 2013 into 30 cases to expedite the process. Problems arose when the detainees wrested control of certain sections of the Roumieh prison and refused to appear in court. Because the accused persons were detained but would not appear in court and the trial could not proceed in absentia, the remaining cases were divided further into 54 cases to allow the hearings to continue with those accused who did appear in court.

Judges also encountered administrative hurdles as the process moved forward. In particular, the overpoliticization of the cases was considered obstructive to their adjudication. Judges also noted that the lack of funding for the courts was a major factor impeding, deliberately or not, the delivery of justice. For instance, the charging documents alone spanned several hundred pages, for which the court had insufficient funds for printing. The judges had to print the necessary paperwork at their personal expense for the defendants.^a The court also had difficulty reaching some of the defendants to inform them of trial dates and communicate other important information because access to information regarding where they lived or had taken refuge was not always permitted to judicial authorities.

^a Jean Fahed, email correspondence with authors, 14 September 2016.

Islamic State of Iraq and the Levant leader Abu Bakr al-Baghdadi. Compounded by the complexities of the case and security considerations, the lack of cooperation from accused individuals frequently encountered in terrorism cases added to the pressures on investigative judges in particular. The regular rotation across different types of cases is an administrative risk reduction measure that offers an extra layer of security to judges and their families. Although rotation and similar measures can reduce a judge's risk of being targeted for violence, they may undermine efforts to foster specialization in handling and adjudicating specific types of criminal cases and developing a familiarity with the networks and culture of terrorist cells.

Judges discussed ways in which security could be enhanced inside courtrooms, particularly in the trans-

portation and treatment of prisoners in high-profile or national security cases. This risk is exacerbated in cases involving many accused, such as the case of Nahr el-Bared. To avoid transporting the defendants to and from the High Court of Justice located in Beirut, the case was heard in a repurposed room adjoining the Roumieh prison. Although this reduced the risk of an ambush on convoys transporting prisoners, it raised the risk to the judges who had to travel from Beirut to Roumieh to hear cases every Friday for several consecutive months. Justices agreed that relocating the court to the prison in order to minimize security vulnerabilities was a useful technique. Where possible, measures should be taken to reduce the risks to judges, including varying the times and routes to and from the prison.

CONCLUSION AND RECOMMENDATIONS

The primary role of judges is to deliver justice. In effectuating this abstract imperative, they are to consult the relevant laws while upholding the fundamental rights and liberties enshrined in the constitution and international instruments. As final arbiters, justices seated at the highest courts of law are often the last line of defense of the rule of law and human rights, especially when the executive and legislative branches favor national security over these individual safeguards. Sweeping legislative responses to terrorism lend themselves especially well to abuse where the conflict is framed with no definite end in sight against an antithetically positioned enemy or a nebulous threat, such as a “war on terror.” Faced with corresponding measures that have no clear expiry, the judiciary is duty bound to stop the laws from falling silent. To preserve its independence, it must hold steadfast to the cornerstones of its foundation: uphold the rule of law and defend fundamental rights and liberties. In so doing, the judicial branch provides a critical counterweight to the powers of the executive and legislative branches; and if the primacy of the rule of law is to endure, the principle of separation of powers is one that must prevail even in exigent circumstances that terrorism may pose.

By virtue of their position and experience, justices seated at the highest court have the potential to lead the criminal judicial response at societal, institutional, and international levels. At the societal level, justices should set the moral compass of the judiciary and the criminal justice system more broadly by establishing the judiciary as an accountable, ethical, independent, transparent body free from the corrosive power of corruption and political interest. At the institutional level, those seated at the highest courts of law symbolize the judicial branch and must vigorously protect its independence and integrity at home and abroad. In their administrative capacity, they oftentimes oversee the activities of training academies and the discipline of judges. The role of supreme court justices in leading efforts to combat terrorism also extends to active engagement with

the international community. The stresses on justice systems in a globalized world, no longer limited to those within the confines of national borders, require entire national systems to harmonize their legal frameworks around a cohesive and cooperative response.

Judicial forums such as the one created by the Euro-Med program are crucial platforms for confronting these challenges. They can promote legal cooperation across a range of issues confronting national judiciaries, from the handling of foreign evidence to the interpretation of laws and the exchange of good practices and procedures for the prosecution, defense, and adjudication of transnational crimes. As platforms for information sharing, such networks can keep justices abreast of developments in the evolving global legal landscape but also allow for the views and voices of these justices to be heard in international forums. It is also clear that justices cannot do this work alone. The objectives to be fulfilled by a society ruled by law must be assisted by institutions, policymakers, and members of the public who ultimately must agree to follow just laws and provide support to those entrusted with their delivery.

The following recommendations are geared toward policymakers at the international level, states that are committed to supporting these initiatives, and justices from the participating regions.

- 1. Support the continuation of formal and informal regional and cross-regional forums and exchange programs led by senior judicial officials to discuss challenges and good practices related to handling terrorism cases.** Such platforms help judges foster a better appreciation of jurisprudential cultures in neighboring countries and afford them the opportunity to draw from the experiences of their similarly positioned counterparts who have grappled with familiar difficulties under similar or more exigent circumstances. The comparative exercise also helps instruct justices on the application of international instruments and standards in a domestic context,

discuss the jurisprudence in emerging areas of law, and coalesce around the role that justices play within the broader system of criminal justice in their countries.

2. **Deepen support for the judiciary through institutional development of judicial academies, training, and technical assistance programming delivered in coordination with national academies.** Assistance should be tailored to each jurisdiction and focus on priority areas identified in training needs assessments conducted in cooperation with national training providers.
3. **Expand opportunities for senior judicial officials to address policymakers on terrorism-related matters at international and regional levels, for example, the United Nations, GCTF, and EU.** Direct input from those judges who sit at the helm of the judiciary can provide instructive and actionable guidance to policymakers and legislators on the specific support required to allow the criminal justice system to address the evolving challenges of terrorism, such as codifying crimes relating to the actions of FTFs.
4. **Encourage judicial participation in existing networks for judges, including the AHJUCAF, EAJTN, and the network for national supreme judicial councils, to support knowledge sharing across countries.** The activities of these networks should be widened to include trainings responsive to the needs of the judiciary in upholding the rule of law and human rights in terrorism cases, for example, on how various jurisdictions uphold civil liberties when using SITs.
5. **Increase the awareness, familiarity, and application of the plethora of legal instruments, tools, and good practices developed by international bodies such as UNODC and the GCTF among all legal practitioners but in particular senior judicial officials.** Senior officials are positioned to facilitate the dissemination of these tools, often through national and regional academies, to those criminal justice practitioners who would benefit most from them. Increased access to these tools provides the judiciary with additional, readily available resources to conduct their duties.

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