

# WHEN THE DUST SETTLES

Judicial Responses to Terrorism in the Sahel



By **Junko Nozawa** and **Melissa Lefas**

October 2018

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The authors thank the numerous officials, criminal justice practitioners, and experts whose insights shared over the course of study visits have informed the recommendations at the centerpiece of this report. Special thanks are extended to the magistrates from the participating jurisdictions who provided their thoughtful contributions, in particular members of the Sahel steering committee currently comprised of Mahamat Abderamane, Gildas Barbier, Hassane Djibo, Ahmed El Mahboubi, Matthias Niamba, Wafi Ougadeye, and El Hadji Malick Sow and advisers Michel Carrié, Serigne Bassirou Guèye, and Pierre Moreau.

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The views expressed in this report are those of the authors and do not necessarily reflect the views of the Global Center, its advisory council, its partners, or the donors.

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## ABOUT THIS REPORT

This report is part of the project “The Role of Supreme Courts in Countering and Preventing Terrorism in the Sahel.” A steering committee comprised of supreme court representatives from Burkina Faso, Chad, France, Mali, Mauritania, Niger, and Senegal appointed by their chief justices serves as the courts’ focal point for counterterrorism efforts, shaping this project and participating in its activities. The activities were led with the support and expertise of the UN Security Council Counter-Terrorism Committee Executive Directorate (CTED), UN Office on Drugs and Crime (UNODC), Association of Francophone Supreme Courts (AHJUCAF), and Global Center on Cooperative Security, with the financial support of the International Organisation of la Francophonie (OIF) and the governments of Canada and Japan.

The project brought together around select themes a wide range of criminal justice practitioners committed to the fight against terrorism in the region. National visits allowed judges of the highest courts and appellate and lower courts to exchange views on questions of law arising from the judicial investigation and management of terrorism cases. The project thus provided an interactive platform to deepen judges’ understanding of comparative and international legal frameworks in countering terrorism and served to strengthen the judicial network in the region around the supreme courts comprising the AHJUCAF membership. National study visits and training seminars were held on topics relating to the treatment of minors, in Bamako, Mali (24–26 October 2016); the collection of information by the military, in Niamey, Niger (22–24 May 2017); the rehabilitation of terrorist offenders, in Nouakchott, Mauritania (10–12 July 2017); and the qualification of terrorism acts, in Dakar, Senegal (1 March 2018).

On 2 March 2018, the project culminated in the unanimous adoption of guidelines on the handling of terrorism cases by the chief justices of the Court of Cassation of Burkina Faso, Thérèse Traoré-Sanou; the Supreme Court of Chad, Samir Annour; the Supreme Court of Mali, Nouhoum Tapily; the Supreme Court of Mauritania, El Houssein Ould Nagi; the Court of Cassation of Niger, Bouba Mahamane; and the


Supreme Court of Senegal, Mamadou Badio Camara, as well as Chief Justice Ousmane Batoko of Benin, AHJUCAF president. The document was signed in the presence of their homologues the chief justices of the Courts of Cassation in France, Bertrand Louvel; in Lebanon, Jean Fahed; and in Tunisia, Hédi Guediri, as well as the Supreme Court of Canada Registrar Roger Bilodeau and Abdelkader Chentouf, the representative of the chief justice of the Moroccan Court of Cassation.



*Closing ceremony for the adoption of the recommendations by the chief justices.*

The recommendations reflect, in a concrete way, the demonstrated commitment of the judiciaries of the Sahel countries to present a unified front against terrorism regarding respect for the rule of law and the protection of fundamental rights. This commitment builds on the initiative launched at the AHJUCAF Congress in Dakar in 2014, with the support of the OIF and the United Nations. It also comes two years after the Open Briefing of the UN Counter-Terrorism Committee held in New York on 10 March 2016, during which the justices of supreme courts from North Africa, the Middle East, South Asia, and the United States for the first time presented their perspectives on the fight against terrorism before the UN membership.

This report is organized around the priority issues identified by the steering committee and highlights important points of discussion that were raised over the course of the program. The steering committee representatives from France (Gildas Barbier), Mali



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(Wafi Ougadeye), Niger (Djibo Hassane), and Senegal (El Hadji Malick Sow) have lent their technical expertise to this process and feature as contributors to this publication. Each section presents the legal responses to terrorism in the Sahel jurisdictions represented and discusses international standards articulated in the field, providing comparative analysis and commentary. Rather than elaborating an exhaustive list of

issues pertaining to the prevention of and fight against terrorism, this report seeks to provide an overview of the terrorism challenges in this region and responses thereto while accentuating the important role the supreme court justices play in this process.

All translations are by the authors unless otherwise indicated.

## FOREWORD OF MICHÈLE CONINSX

Terrorism in the Sahel is becoming more dangerous and deadly each year, requiring all the forces of justice and, in particular, the courts to unite against it. Following the passage of UN Security Council Resolution 1373, requiring member states to ensure that all who participate not only in the execution but also in the planning and financing of terrorist activities are brought to justice, the Security Council reiterated this requirement and promulgated a number of resolutions relating to terrorism. In Resolution 2396, the council reiterated the need for a judicial response while asking states to implement strategies for the prosecution and rehabilitation and reintegration of foreign terrorist fighters.

At a time where the judiciaries in the Sahel are confronted by the rise of terrorism, it is important that the leaders of the highest national courts fully commit to countering terrorism by supporting the entire judicial system. After many years in the Belgian federal prosecutors' office and as the head of Eurojust, I can appreciate the important role of supreme courts and the added value that they can bring in resolving complex legal issues. In my new role as Assistant Secretary-General of the United Nations and the Executive Director of the Counter-Terrorism Committee Executive Directorate (CTED), I am pleased to see the agency that I lead promoting a stronger involvement from supreme courts in the judicial response to terrorism.

I also commend the innovative nature of this project, which, besides the crucial involvement of the supreme courts, has seen successful cooperation and common purpose among organizations very different from one another—the supreme courts of the Sahel, CTED, the UN Office on Drugs and Crime, the Global Center on Cooperative Security, the Association of Francophone Supreme Courts, and the International Organisation of la Francophonie.

The contribution of the supreme courts in the judicial response to terrorism can take many forms. The formal role of courts of cassation, which in most national legal jurisdictions is to make decisions in legal disputes brought before them and to give opinions on legal matters, is essential. This role, consisting of applying the law, will grow in the coming years, as will the role of lower courts, which will be called to make a growing number of decisions related to terrorism referred by prosecution offices and investigation chambers.

The formal role of the supreme courts is in addition to an equally important informal role, to the extent that supreme courts by other actions can also play a role in guiding other participants in the criminal justice system. In certain countries of the Sahel, supreme courts regularly meet with lower courts to discuss and produce ideas on salient matters of law. Even without binding force, these ideas can allow us to resolve difficulties. This informal role is all the more important because the number of terrorism cases reaching the courts of appeals and the supreme courts remains limited. So I invite the supreme courts to exercise innovation to become more actively involved, in as far as they are permitted by their respective national legislatures, in the judicial response to terrorism.

I also invite the participants in the criminal justice system to make use of recourses offered by the law. Even beyond the goal of securing justice in a single case, bringing a case to appeal or to cassation gives the legal issue in question an opportunity for reexamination and for application of the most just interpretation of the law, thus reinforcing the rule of law. Promoting means of recourse makes it possible to settle points of dispute and sends a clear message to all participants in the system, contributing to the collective goal of reinforcing the criminal justice response to terrorism.

The project that gave rise to this publication offers a rich and profound reflection of many legal issues and practices that pose difficulties, such as the laws applicable to minors, cooperation between military first responders, and the efficient functioning of the criminal justice system or the role of attorneys. A publication consisting primarily of reflection does not have an impact if the ideas are not used afterward. We must therefore demonstrate willingness and innovation to ensure that these reflections find practical application and enhance the judicial response to terrorism in the Sahel. The size of the challenge of terrorism and the scope of the responsibilities of the supreme courts call for such efforts, and CTED stands ready to give its support.

**Michèle Coninsx**  
**UN Assistant Secretary-General**  
**and CTED Executive Director**



## FOREWORD OF OUSMANE BATOKO

There is a saying where I come from: you have to come down from the tree in the same path that you climbed it. In citing it, I recall that it was in Dakar in November 2014 that our organization, the Association of Francophone Supreme Courts (AHJUCAF), with the support of the International Organisation of la Francophonie (OIF) and together with the UN Security Council Counter-Terrorism Committee Executive Directorate (CTED) decided to begin the collective discussion on the issue of terrorism. It was at the end of this journey in Dakar, in the beautiful country of Senegal, that we met to learn from this extensive undertaking and to draw up a plan for preventing and combating terrorism in the countries of the Sahel and beyond.

We carried out this work with our partners CTED, the UN Office on Drugs and Crime, and the nongovernmental organization Global Center on Cooperative Security and our experts in the countries of the Sahel, led by the court of cassation of France following the October 2015 meeting in Paris. I would especially like to thank Michel Carrié for the OIF understanding right away the importance of what was at stake in supporting the first seminar organized in Bamako, as well as President Jean-Paul Jean, AHJUCAF secretary-general, for having been so focused on this project until the end.

The seminars held in Bamako, Mali, in October 2016; Niamey, Niger, in May 2017; and Nouakchott, Mauritania, in July 2017 and the meeting of the Dakar steering committee in December 2017 culminated in a conference with high-level leaders on 2 March 2018 in Dakar and the adoption of recommendations on this issue, a first for our high courts. These guidelines were agreed upon by the presidents of our courts because they incorporate the values shared by AHJUCAF for the development of the rule of law and also because they take into account the practical realities confronting the courts of the Sahel countries.

The supreme courts of the Sahel countries—Burkina Faso, Chad, Mali, Mauritania, Niger, and Senegal—like in all AHJUCAF members, are the authority of reference for all courts in each of these countries. Through their rulings, they guide the lower courts in the application of the law while

allowing for difficulties the relevant participants face in prosecuting and trying terrorist acts. This is why the recommendations adopted in Dakar have such great importance, especially as they are adaptable to the specific situation in each country. The dissemination of jurisprudence on terrorism must also support specialized training programs for various participants in the fight against terrorism.

But if the judicial action against this evil still appears to be a downstream effort in response to criminal acts perpetrated or planned, it would also be advisable to act further upstream, in a spirit of targeted pedagogy, on the root causes and sociopolitical foundations giving rise to terrorism. Even if a judge is not a policymaker, they can also help to discover tools to protect society from everything that can foster various forms of fanaticism or obscurantism, which are fertile grounds for terrorism.

The investigation of a case, exchanges in the courtroom, and close examination of the motivation for terrorist acts present so many opportunities to understand the mind of a terrorist. It is at this level that it would be advisable for a judge not to solely adhere to a legal evaluation of the breaking of the law by an individual, but to go beyond the criminal act and its consequences by thinking critically, by examining society and its culture, by questioning the mode of governance in the country.

The present work, thanks to the partnerships that have made it possible, integrates a legal and judicial multidisciplinary approach that by itself should make it possible to effectively fight all forms of terrorism. This will naturally lead to an array of elements providing insight into the best ways to halt, if not nip in the bud, all the tendencies and all the processes that give rise to terrorism. This approach must be considered in conjunction with political players and civil society, as well as local and traditional authorities.

**Ousmane Batoko**  
**Chief Justice of the Supreme Court of Benin**  
**and AHJUCAF President**



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## ABBREVIATIONS

AHJUCAF	Association des Hautes Juridictions de Cassation des pays ayant en partage l'usage du français (Association of Francophone Supreme Courts)
AQIM	Al-Qaida in the Islamic Maghreb
AU	African Union
CAAFAG	children associated with armed forces and armed groups
CRC	Convention on the Rights of the Child
GTI	Global Terrorism Index
HDI	Human Development Index (UN Development Programme)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ISIL	Islamic State of Iraq and the Levant
MINUSMA	UN Multidimensional Integrated Stabilization Mission in Mali
MNJTF	Multinational Joint Task Force
MOU	memorandum of understanding
MUJWA	Movement for Unity and Jihad in West Africa
NMLA	National Movement for the Liberation of Azawad (Mali)
OAS	Organization of American States
OHCHR	Office of the UN High Commissioner for Human Rights
UN	United Nations
UNDP	UN Development Programme
UNICEF	UN Children's Fund
UNODC	UN Office on Drugs and Crime

## INTRODUCTION

Across the world, efforts to counter the threat posed by terrorism are being made on the battlefield, in the hearts and minds, and in the courts. A strong criminal justice system embedded in the core principles of the rule of law, due process, and respect for human rights can address the contributing factors to terrorism in the longer term.<sup>1</sup> The UN General Assembly has affirmed that effective counterterrorism responses and the protection of human rights are complementary and mutually reinforcing goals.<sup>2</sup> An effective and lasting response to terrorism therefore requires a robust and reliable judicial apparatus. In the Sahel, however, weak law enforcement capacities, vast ungoverned territories, and underdeveloped criminal justice systems have contributed to the proliferation of nonstate armed groups, and the military has been placed at the forefront of suppression efforts. Yet the primacy of the criminal law framework must not be overshadowed by the need for expedient militarized responses.

Criminal justice actors must be supported in their efforts to fight impunity and hold all actors accountable, promote the rehabilitation of low-level offenders, and involve victims in judicial proceedings. Judges play an important role in holding up the scales of justice and embodying its values for all. During times of peace as in periods of conflict, the judiciary must maintain fundamental guarantees and the rule of law in an objective and impartial manner, whatever the external pressures.

On 2 March 2018, the chief justices of the participating Sahel supreme courts unanimously adopted recommendations in countering terrorism, a document marking a decisive step in the judiciaries' engagement

in the fight against terrorism in the region. The document translates for the first time the political will of these supreme courts to present a unified front in respecting fundamental rights in the fight against terrorism, building on the Global Counterterrorism Forum's good practices documents and other international instruments listed in the recommendations' annex.<sup>3</sup> This report seeks to contextualize the recommendations and make them accessible to a wide array of practitioners and policymakers and contribute to the efficient delivery of justice consistent with human rights and the rule of law. International human rights, criminal, refugee, and humanitarian law also form a core component of states' obligations under international law, and the applicability of those directives is highlighted throughout. In this report, the Sahel countries are defined as Burkina Faso, Chad, Mali, Mauritania, Niger, and Senegal.

The Sahel region broadly encompasses the transitional zone between the Sahara desert to the north and the tropical Sudanian Savanna to the south, extending from Senegal eastward to Sudan. The region has long experienced recurring food crises, extreme poverty, and environmental degradation alongside a rapidly growing population, a majority of whom is under the age of 25.<sup>4</sup> Frequent droughts and floods have threatened the livelihoods of populations that rely overwhelmingly on subsistence farming for survival.<sup>5</sup> The dramatic reduction of the Lake Chad surface area over the past 50 years, bordering Cameroon, Chad, Niger, and Nigeria, has led to collapsed fisheries, crop failures, livestock deaths, and soil salinity in surrounding communities, which has threatened human security in

1 Liberal democracies' relative resistance to terrorism, or their "democracy advantage," has long been observed in this regard. See Amichai Magen, "Fighting Terrorism: The Democracy Advantage," *Journal of Democracy* 29, no. 1 (January 2018): 111–125; Alberto Abadie, "Poverty, Political Freedom, and the Roots of Terrorism," *American Economic Review* 96, no. 2 (2006): 50.

2 UN General Assembly, *United Nations Global Counter-Terrorism Strategy*, A/RES/60/288, 20 September 2006, Pillar IV (hereinafter "Strategy"). See Tom Parker, "Rule of Law and Human Rights," in *Toward a Rule of Law Culture* (Washington, D.C.: United States Institute of Peace, 2015), pp. 30–32, [https://www.usip.org/sites/default/files/Toward-a-Rule-of-Law-Culture\\_Practical-Guide\\_0.pdf](https://www.usip.org/sites/default/files/Toward-a-Rule-of-Law-Culture_Practical-Guide_0.pdf).

3 For the list of agreements, see appendix A.

4 UN Office for the Coordination of Humanitarian Affairs (OCHA), "The Sahel: Converging Challenges, Compounding Risks," January 2016, p. 5, <http://reliefweb.int/sites/reliefweb.int/files/resources/Sahel%20Info%20Sheet%20Jan%202016.pdf>. According to the UN Development Programme (UNDP), the median age is 17.0 in Burkina Faso, 16.0 in Chad, 16.2 in Mali, 14.8 in Niger, and 18.0 in Senegal. UNDP, *Human Development Report 2016: Human Development for Everyone*, 2016, pp. 224–225, <http://www.undp.org/content/dam/undp/library/corporate/HDR/HDR2016/UNDP-HDR16-Report-EN.pdf>.

5 OCHA, "Sahel," p. 1.

the area.<sup>6</sup> Diminishing natural resources and agrarian disputes have caused a sharp increase in violent clashes between nomadic and sedentary ethnic groups,<sup>7</sup> further displacing already vulnerable populations.

In recent years, a surge in violence and armed conflicts has exacerbated development, environmental, and security challenges in the Sahel, fueling a migration crisis<sup>8</sup> and contributing to rising economic and social inequality and diminishing opportunities. The natural and porous borders of the Sahel, whose very name signifies “shore” or “coast,” have facilitated the transnational operations of smugglers and nonstate armed groups.<sup>9</sup> <sup>10</sup> In this state of declining human security, youth in particular have been increasingly exposed to the risk of recruitment by armed groups and forces.<sup>11</sup>

The nature of the threat posed by nonstate armed groups in the region is rapidly evolving, with Sahel-based terrorist groups splintering into myriad factions and rural insurgencies expanding across the region. Meanwhile, local militia groups with various motivations are mobilized to counter this threat, exacerbating intercommunal conflicts. Local insurgencies in Burkina Faso,<sup>12</sup> Mali,<sup>13</sup> Niger,<sup>14</sup> and Nigeria<sup>15</sup> are expanding. The crisis is not limited to remote, rural areas; high-profile attacks were carried out in the capitals of Chad in June and July 2015, Mali in November 2015 and March 2016, and Burkina Faso in January

2016 and March 2018. In 2017 the UN Security Council emphasized the need for regional responses and enhanced cooperation to address the unfolding humanitarian crisis.<sup>16</sup>

Over the past two decades, national forces from across the Sahel, with support from Western governments, have contributed to multinational military responses in northern Mali and the Lake Chad Basin region in the fight against Boko Haram with mandates ranging from peace-building to counterterrorism. These forces include the Multinational Joint Task Force (MNJTF) under the mandate of the African Union (AU), the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), and the G5 Sahel Joint Force.

Although these forces have achieved certain security objectives, long-standing community grievances and development challenges must be addressed through the promotion of accountability, peace-building initiatives, and reconciliation mechanisms that will require a sustained commitment from governmental and civilian leadership. Moreover, an extended military presence and repressive security responses have the potential to backfire by raising the risk of worsening tensions and stoking local conflicts in communities under a continuous state of emergency and contribute to conditions conducive to the spread of terrorism by violating human rights and hampering the trust

6 Ibid., p. 3. See Amali Tower, “Shrinking Options: The Nexus Between Climate Change, Displacement and Security in the Lake Chad Basin,” *Climate Refugees*, September 2017, <https://indd.adobe.com/view/bf1670bb-4562-402e-a6c2-ebb3298cf8e5>.

7 Institute for Economics and Peace (IEP), “Global Terrorism Index 2017: Measuring and Understanding the Impact of Terrorism,” *IEP Report*, no. 55 (November 2017), p. 24.

8 Since it started in 2013, the Boko Haram conflict has internally displaced 2.4 million people in Cameroon, Chad, Niger, and northeastern Nigeria. Office of the UN High Commissioner for Refugees (UNHCR), “UNHCR and Partners Seek US\$157 Million to Aid Boko Haram Displaced,” 1 February 2018, <http://www.unhcr.org/afr/news/press/2018/2/5a7184f34/unhcr-partners-seek-us157-million-aid-boko-haram-displaced.html>.

9 This report uses the term “nonstate armed groups” to reflect the multiplicity of groups, including Islamic terrorist groups, that pose a threat of terrorism in the countries discussed.

10 In 2013, the UN Office on Drugs and Crime (UNODC) estimated that major illicit flows linked to criminal activities in the Sahel were \$3.8 billion annually. André-Michel Essoungou, “The Sahel: One Region, Many Crises,” *Africa Renewal*, December 2013, pp. 22–23, <https://www.un.org/africarenewal/sites/www.un.org.africarenewal/files/Africa-Renewal-Dec-2013-en.pdf>.

11 OCHA, “Sahel,” p. 1. For country-specific overviews of the security situation and the treatment of terrorism cases, see appendix B.


12 International Crisis Group (ICG), “The Social Roots of Jihadist Violence in Burkina Faso’s North,” *Africa Report*, no. 254 (12 October 2017), <https://d2071andvip0wj.cloudfront.net/254-the-social-roots-of-jihadist-violence-in-burkina-faso-s-north.pdf>.

13 UN Department of Public Information, “Stabilizing Mali, Tackling Terrorism in Sahel Region Hinges on Long-Term Plan, Sustained Support, Senior Peacekeeping Official Tells Security Council,” SC/13351, 23 May 2018, <https://www.un.org/press/en/2018/sc13351.doc.htm>; “Al Qaeda in the Islamic Maghreb,” Stanford University, 1 July 2016, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/65>.

14 ICG, “The Sahel: Promoting Political Alongside Military Action,” 31 January 2018, <https://www.crisisgroup.org/africa/west-africa/mali/sahel-promoting-political-alongside-military-action>.

15 IEP, “Global Terrorism Index 2017,” p. 24. The Macina Liberation Front in Mali has recruited members of the Fulani ethnic group and was responsible for approximately 12 percent of terrorist attacks in the country in 2015 and 2016. Ibid., p. 76.

16 UN Security Council, S/RES/2349, 31 March 2017 (on the threats to stability posed by Boko Haram and the Islamic State of Iraq and the Levant [ISIL] operating in the Lake Chad Basin region).



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between communities and state actors, who should be united in efforts to combat terrorism, especially where governmental actions in those areas have been

unaccompanied by peace-building initiatives, outreach to communities, and efforts to engage militant leaders.

## **RECOMMENDATIONS OF THE SUPREME COURTS OF THE SAHEL MEMBER COUNTRIES OF AHJUCAF IN THE FIGHT AGAINST TERRORISM**

### **FOUNDATIONS**

The Sahel countries are faced with particular challenges in the fight against terrorism, notably the existence of combat zones and first-line exposure of military units, large distances between these areas and the competent jurisdictions, material problems, difficulties in obtaining testimonies, a judicial culture that is still insufficiently developed in some institutions, challenging arrest and detention conditions, and limited operating resources for the courts. All these issues cannot be ignored for the effective application of the rules of law.

Terrorist attacks deeply offend human consciousness and call for strong and effective responses that aim to prevent and combat them but always in line with the rule of law and fundamental guarantees, whether in times of peace or in periods of conflict. Justice, whose action is long term, must therefore always be delivered objectively and impartially, whatever the external pressures.

### **The Role of the Supreme Courts in Countering Terrorism**

The supreme courts in their full independence play a crucial role in upholding the rule of law are aware of the need to counter terrorism effectively while still guaranteeing the respect for fundamental rights.

The proposed principles and guidelines are part of a framework that aims to gradually and practically assert the role of justice in the fight against terrorism.

The supreme courts of the Sahel countries Burkina Faso, Chad, Mali, Mauritania, Niger, and Senegal, which share the common values of the high courts affiliated to AHJUCAF [Association of Francophone Supreme Courts], the referential authorities for the entire judiciary, are attentive to the difficulties of the investigative services, the public prosecution, and jurisdictions responsible for and ruling on terrorist acts.

The supreme courts are thus called upon to occupy a special place in the fight against terrorism through their primary mission of interpreting the law, in the light of ratified international agreements, and of establishing jurisprudence.

The supreme courts, through their jurisprudence, are responsible for guiding the lower courts. They can also guide the various criminal justice stakeholders by means of advice, exchanges, or training on legal issues related to terrorism, which can be very complex.

The recommendations, jointly elaborated following preparatory efforts, are based on the reality of the threat of terrorism and the particular difficulties in the Sahel countries and aim to identify guiding principles elaborated by supreme court officials for the judicial aspects of counterterrorism, each of whom can adapt them to their country's circumstances.

The supreme courts of the countries in the Sahel, members of AHJUCAF and signatories of this document, make the following recommendations. The application of the relevant international and regional agreements (listed in the annex), UN resolutions, and principles of a fair trial are the reference of the applicable standards.



### **1. Competence of the judicial authority**

The perpetrators of terrorist acts are governed by criminal law.

Such persons may only be prosecuted, detained, and tried in a fair trial. They must appear before independent judges, be able to benefit from the assistance of an attorney, be judged on the basis of specific qualifications, and incur only the penalties provided by law.

If a state of emergency is declared under exceptional circumstances, it must be limited in time. Derogations from or suspensions of rights in the name of rapid and effective intervention must be accompanied by adequate and sufficient safeguards against abuse under the effective control of judges.

### **2. Qualification of terrorist acts**

To intervene effectively and to prevent attacks, criminal association in connection with a terrorist enterprise, preparatory acts, and specific minor offenses must be repressed as soon as possible once the planned terrorist act has sufficiently materialized.

For a more effective prosecution policy allowing cases to be adjudicated within a reasonable time frame, the highest criminal qualification of facts pertaining to terrorism may be reserved for the most serious acts [such as willful attacks on life, abductions and sequestrations, or leading a terrorist criminal association...].

Freedom of expression must be limited only in cases of glorification to terrorism and incitement to commit an act of terrorism.

### **3. Coordination between military action and judicial action**

Evidence of participation in terrorist acts should be obtained regularly in judicial proceedings, even if the suspect has been detained as part of military operations.

The military should systematically establish a report describing the circumstances of the arrest, drafted by a judicial police officer in the manner of a provost or, failing that, by the highest-ranking military officer present at the scene.

In addition to the identifying elements, such a report could specify, for instance, whether the suspect was alone or captured in a group, whether he was armed, which weapon was found in his possession, whether the weapon was warm, whether he resisted, and whether he was already injured when captured. A photograph or a digital video of the person on the scene of his arrest could be taken.

These documents, which cannot be covered by military secrecy, and all information or evidence must be communicated to the judicial authorities.

The arrested person must be transferred to the judicial authorities as soon as possible.

It is up to the magistrates to later take into account the practical difficulty of the arrest made in the course of military operations, as well as the difficulties related to the transport of persons.

Magistrates, judicial police officers, and military officers should be given appropriate training to enable them to better understand the specificities of their respective fields of action.

#### **4. Protection and support for stakeholders in the terrorism trial**

Magistrates, attorneys, defendants, civil parties, and witnesses taking part in the trial must receive appropriate protection measures.

Victims and their families must be provided with personalized support.

#### **5. Specialization of magistrates**

The public prosecutor's office, as well as the various investigative and trial magistrates handling terrorism cases, must be specialized, and the magistrates constituting them must be given special training.

#### **6. Rights of the defense**

Compliance with the principles of a fair trial requires that any person who is prosecuted, even if they do not have sufficient funds, can benefit from the effective assistance of an attorney having access to the file, to ensure their defense at all stages of the proceedings.

Every person who is arrested must have access to a judge to rule on their detention.

Any convicted person must have a right of appeal from the decision of the trial court of original or primary jurisdiction.

#### **7. Judgment**

Whatever the circumstances, it is the judges' duty to exercise discretion and to provide rationales for their decisions, both of law and of fact, so that these decisions are understood by all convicted persons, victims, and the general public.

In the event of a conviction, sentences must be tailored to the individual and proportionate to the gravity of the acts committed.

#### **8. Specificity of the criminal justice response concerning minors**

All children recruited by terrorist groups must be recognized as the victims of a violation of international law and must be subject to measures adapted to their specific situation and aimed at facilitating their reintegration into society.

Accused juveniles who were minors at the time of the offense must be judged for terrorism matters by a juvenile court, according to a procedure appropriate for juveniles.

Juveniles found guilty of terrorism acts can only be subject to individualized sanctions, which are adapted to their age at the time of the commission of the offense, and should be able to benefit from diminished responsibility and a reduced sentence, as well as from educational measures encouraging their return to their families and their social and professional reintegration.

### 9. Specificity of the situation of women

The specific situation of women, whether perpetrators or victims of acts of terrorism, must be recognized and taken into account.

The participation of women in preventing and combating terrorism must be supported.

### 10. Enforcement of sentences

When enforcing a sentence, the public authority must attempt to reintegrate the convicted person into society through specially adapted measures.


In all cases, public recognition of perpetrators' offenses and the role of family and victims' associations should be encouraged.

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The supreme courts that have adopted these recommendations undertake to disseminate them and promote them among the magistrates of their respective countries and their counterparts. To this end, they wish to benefit from the provision of documentary materials and specialized trainings for magistrates of supreme courts.


#### Signatures des premiers présidents des Cours suprêmes des pays du Sahel

Thérèse Traoré-Sanou Présidente de la Cour de cassation du Burkina Faso	Nouhoum Tapily Président de la Cour suprême du Mali	Houssein Ould Nagi Premier président de la Cour suprême de Mauritanie	Bouba Mahamane Premier président de la Cour de Cassation du Niger	Mamadou Badio Camara Premier président de la Cour suprême du Sénégal	Samir Adam Annour Président de la Cour suprême du Tchad
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En présence de :

- AHJUCAF
- DECT
- ONU DC
- OIF
- Global Center
- Cour de cassation de France
- Cour suprême du Canada
- Cour de cassation du Liban
- Cour de cassation du Maroc
- Cour de cassation de Tunisie

 O. BATOUCO

Dakar, le 2 mars 2018

  
S. P. S. M. Soudanais général  
AHJUCAF

## THE PRIMACY OF THE CRIMINAL JUSTICE FRAMEWORK IN THE FIGHT AGAINST TERRORISM

Across the Sahel, difficulties abound in implementing an effective criminal justice response to terrorism. The underdeveloped criminal justice system in many countries, chronically hampered by insufficient resources, a shortage of judges, low investigative and forensic capacities, and sparse governmental presence in remote territories, has contributed to inefficiencies in the delivery of justice. To overcome these challenges and address the threat of terrorism, states have favored a strong, securitized response within the framework of armed conflict. Military actors have been deployed in conflict zones to contain the threat posed by nonstate armed groups and, in the process, have undertaken the role of first responder. An effective criminal justice response led by the judiciary, however, anchored in the principles of the rule of law and international law, including human rights, humanitarian, and refugee law, is integral in supporting longer-term solutions on the road to accountability and reform. Criminal justice actors must be supported in their efforts and institutional roles to bring terrorists to justice.

In the absence of the rule of law, repressive, security-based counterterrorism responses have a potential to stoke discontent and contribute to narratives used for recruitment by nonstate armed groups. A 2017 UN Development Programme (UNDP) report based on interviews with former recruits in multiple terrorist groups operating in Cameroon, Kenya, Niger, Nigeria, Somalia, and Sudan stated that “as many as 71 percent of the voluntary group point[ed] to ‘government action,’ including traumatic incidents involving state security forces, as the immediate reason for joining.”<sup>17</sup> One study found in Mali that injustice, weakness and corruption of state agents, extreme poverty, lack of

economic opportunities, and self-preservation were the primary contributors for the recruitment of children to nonstate armed groups.<sup>18</sup> These conclusions suggest that the implementation of state security-focused interventions, including military campaigns, and their impact on local populations must be carefully considered.

The judiciary plays a central role in supporting longer-term solutions as institutional guarantors of the rule of law and respect for human rights that must counterbalance executive excesses. Difficulties in collecting, transmitting, and preserving information found in conflict zones through appropriate criminal procedures have contributed to the slowness of judicial proceedings. Empty or incomplete files on the accused fail to meet the high evidentiary threshold required in criminal cases, leading to dismissals or remands.<sup>19</sup> The difficulty of securing admissible evidence creates challenges for judges who must also decide whether to place the accused in provisional detention. In addition, impunity, whether real or perceived, builds frustration among community members and judiciary actors.

Under exceptional circumstances, terrorist attacks can trigger derogation regimes that allow for the application of measures that temporarily restrict certain civil liberties or may lead to human rights violations following a declaration of a state of emergency. Chad, Mali, and Niger have all declared and extended states of emergencies.<sup>20</sup> For magistrates and attorneys working in zones under states of emergency, challenges may arise when populations are not made aware of their rights or have insufficient information on how particular measures are intended to achieve a specific goal. This is exacerbated in the absence of attorneys who can

17 UNDP, *Journey to Extremism in Africa*, 2017, p. 87, <http://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf>.

18 Jaimie Bleck, Marc-André Boisvert, and Boukary Sangaré, “‘I Joined to Save My People’: Children and Non-State Armed Groups in Mali,” in *Cradled by Conflict: Child Involvement With Armed Groups in Contemporary Conflict*, ed. Siobhan O’Neil and Kato Van Broeckhoven (n.d.), pp. 142–175, [https://collections.unu.edu/eserv/UNU:6409/Cradled\\_by\\_Conflict.pdf](https://collections.unu.edu/eserv/UNU:6409/Cradled_by_Conflict.pdf).

19 Ibrahim Boubacar Zakaria and Maman Aminou A. Koundy, “Les cours suprêmes dans la prévention et la lutte contre le terrorisme au Sahel: Rapport général,” 7 June 2017 (copy on file with authors) (proceedings of the seminar held in Niamey, Niger, 22–24 May 2017) (hereinafter Niamey seminar proceedings).

20 In April 2016, Chad extended the state of emergency imposed in the Lake Chad region for six months. In Mali, the nationwide state of emergency, continuously renewed since the 2015 attack at the Radisson Blu Hotel in Bamako, was extended in October 2017. In February 2018, Niger extended the state of emergency for three months in the regions of Diffa, Tillabéry, and Tahoua.

inform the population of its rights. When terrorism and the fight against it may be broadly defined, have an uncertain end time, and remain undefined at the international level, states risk inscribing a permanent state of emergency onto the existing criminal justice framework and destabilizing its very foundation.<sup>21</sup>

The *United Nations Global Counter-Terrorism Strategy* affirms that promotion of the rule of law, respect for human rights, and effective criminal justice systems form the “fundamental basis of our common fight against terrorism.”<sup>22</sup> At the international level, 19 universal instruments in countering terrorism have been elaborated.<sup>23</sup> They embody a criminal justice– and law enforcement–based approach to counterterrorism that places national judicial and criminal institutions as the “central engines of the system.”<sup>24</sup> Key to this approach is a coordinated response among law enforcement, prosecutors, judges, and other criminal justice actors to ensure successful prosecutions in the fight against terrorism grounded on the principles of human rights and the rule of law.<sup>25</sup>

The chief justices of the supreme courts of the Sahel unanimously assert the primacy of the criminal justice framework in the fight against terrorism in recommendation 1.

The recommendation reflects the realities on the ground in the Sahel, where the suppression of terrorism has been heavily securitized and the magnitude of the threat posed by nonstate armed groups has led to the creation of states of exception. Recommendation 1 emphasizes the importance of judicial and regulatory oversight to safeguard against overreach or abuse by the state, consistent with the

## 1. Competence of the judicial authority

The perpetrators of terrorist acts are governed by criminal law.

Such persons may only be prosecuted, detained and tried in a fair trial. They must appear before independent judges, be able to benefit from the assistance of an attorney, be judged on the basis of specific qualifications, and incur only the penalties provided by law.

If a state of emergency is declared under exceptional circumstances, it must be limited in time. Derogations from or suspensions of rights in the name of rapid and effective intervention must be accompanied by adequate and sufficient safeguards against abuse under the effective control of judges.

rule-based derogation regime of the International Covenant on Civil and Political Rights (ICCPR) that applies in exceptional circumstances, to the extent strictly necessary and proportional to the exigencies of the situation, and consistent with the state’s other obligations under international law.<sup>26</sup> Even in situations of armed conflict, derogations are allowed “only if and to the extent that the situation constitutes a threat to the life of the nation.”<sup>27</sup>

Although resource constraints and political priorities in many of the countries discussed in this report may hamper the effective implementation of criminal justice in some areas, judges can take a number of positive actions to ensure that the due process rights

21 For this reason, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has prioritized what she has termed to be the “proliferation of permanent states of emergency and the normalization of exceptional national security powers within ordinary legal and administrative systems” on her agenda. UN Human Rights Council, “Human Rights Council Discusses the Protection of Human Rights While Countering Terrorism, and Cultural Rights,” 1 March 2018, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22742&LangID=E>. See UN General Assembly, “Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Note by the Secretary-General,” A/72/43280, 27 September 2017 (transmitting the first annual report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism).

22 Pillar IV of the Strategy commits member states to, inter alia, “make every effort to develop and maintain an effective and rule of law–based national criminal justice system that can ensure ... that any person who participates in the financing, planning, preparation or perpetration of terrorist acts is brought to justice ... with due respect for human rights and fundamental freedoms.” Strategy, Pillar IV, para. 5.


23 For a list of these instruments, see appendix A.

24 UNODC, *The Universal Legal Framework Against Terrorism*, June 2010, p. 37, [https://www.unodc.org/documents/terrorism/Publications/Training\\_Curriculum\\_Module2/English.pdf](https://www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module2/English.pdf).

25 Ibid.

26 ICCPR, 16 December 1966, 999 U.N.T.S. 14668, art. 4(1).

27 UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3.



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of the defendants are respected at every stage of the proceedings. All admitted evidence against the accused must be in compliance with human rights obligations, including the prohibition against torture, which is a nonderogable right. Judges must have the full authority to act free from pressures and threats in the deliberation of individual cases. For these reasons, they must be supported in their role, their security safeguarded, and their independence guaranteed.<sup>28</sup>

The preamble of the recommendations recognizes the special institutional place that supreme courts occupy in leading a criminal justice response to terrorism. Judge El Hadji Malick Sow of the Supreme Court of Senegal reflects on the important role of supreme courts in those efforts and highlights a few concrete steps they can undertake to harmonize the judiciary's efforts in the fight against terrorism.

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<sup>28</sup> A number of international and regional human rights instruments contain the right to a competent, independent, and impartial tribunal. UN General Assembly, A/RES/217(III), 10 December 1948, art. 10 (Universal Declaration of Human Rights); ICCPR, art. 14; African Charter on Human and Peoples' Rights, 27 June 1981, 1520 U.N.T.S. 26363, art. 7; "Basic Principles on the Independence of the Judiciary," n.d., <http://www.un.org/ruleoflaw/files/Basic%20Principles%20on%20the%20Independence%20of%20the%20Judiciary.doc>.

## THE ROLE OF SUPREME COURTS IN COUNTERING TERRORISM IN THE SAHEL

by *El Hadji Malick Sow*

Supreme courts are jurisdictions that sit at the top of the judicial pyramid. Under the rule of law that guarantees the independence of the judiciary, their role is to state the law by means of clear, instructive, and accessible jurisprudence, which constitutes a source of inspiration for the harmonized interpretation and application of the rule of law by the lower courts.

The supreme courts, members of AHJUCAF, make this mission an indispensable condition for the success of good judicial policy in general and good criminal policy in particular, especially with respect to the prosecution of terrorism offenses. Issues relating to due process, detention, and qualification of offenses based on elements of the crime require particular attention from supreme courts. The latter must always maintain that even in cases of terrorism, respect for human rights and the rights of the defendant constitute fundamental principles of good criminal justice. It is in the application of these rules that the supreme courts can play their role as regulatory institutions for the application of the law, ensuring its sound interpretation to be harmonized by trial and appellate judges.

In this view, the jurisprudence of supreme courts must be authoritative and indicate the way through practical and comprehensible decisions that are accessible as soon as they are pronounced. This authority is conferred to them by law, but also by purview of their position as a supreme jurisdiction, whose decisions are binding under certain conditions. They must therefore be of quality, clear and precise in their guidelines and details. They must also and above all be published, disseminated, and discussed in meetings and exchanges with the various actors.

### Clear and Instructive Judgments

The supreme courts, having the responsibility to indicate the way in which the rule of law must be understood, interpreted, and applied, had until recently the reputation of rendering decisions that were often incomprehensible and difficult to use by the trial and appellate judges, their primary audience. This perception was based in part on the fact that they are not determining issues of facts, but of law. They also had a style and an approach that were rightly considered as particularly concise with a somewhat “archaic” writing style. This technique of drafting judgments was mainly criticized by the lower courts, but also by law professors who commented on these decisions. Such a style would be especially contested today in criminal matters, particularly with regard to terrorism offenses, which is a specific and new subject matter that requires more clarity, precision, guidance, and orientation. The reasoning above all is that good judgments based on the above-mentioned principles allow for better understanding and greater acceptance of a decision.

In general, the supreme courts of the Sahel, with the exception of Mauritania and Senegal, have not yet heard a case on appeal in this subject matter and consequently have not had the opportunity to issue judgments involving terrorism. We hope that, in the very near future, the lower courts that are handling various proceedings under investigation and pending before them will soon complete their review, thus opening the potential for appeal to the highest courts.

The highest courts will thus have the opportunity to implement a new technique in drafting their decisions in terrorism cases, which consists of significantly improving the presentation, formulation, and justification of the judgments to make them clearer, more explicit, well founded, and, as a consequence, more understandable. This is consistent with recommendation 7, which states that “it is the judges’ duty to exercise discretion and to provide rationales for their decisions, both of law and of



fact, so that these decisions are understood by all convicted persons, victims, and the general public.” This “enhanced or developed justification” technique makes it possible to clarify the rule of law through more precise guidance and orientation. It is also more instructional and allows for more complete explanations. This new approach, which is being implemented in the Supreme Court of Senegal, is starting to produce significant results. It constitutes a good practice that needs to be generalized, deepened, and welcomed by those assisting in the harmonized application of the law at the national level, particularly in the Sahel countries.

It is useless to make decisions, even if they are scientifically based, if the judges for whom they are intended in the first place do not understand them or cannot transpose them on a day-to-day basis into the rules of procedure within which they are seized. This innovation in the drafting of judgments is also in line with good case-law policy and a better translation of the decisions of the supreme courts by the lower instance courts, with a view to better harmonize national application of the law.

To achieve this goal, it is not enough to have more intelligible decisions. They must be immediately available, that is to say, printed, signed, and made available to the parties and the public through the supreme courts’ websites and other forms of publication. It is also up to the supreme courts to ensure the dissemination and promotion by various means.

### **A Permanent Dialogue With Lower Instance Courts**

As soon as decisions are pronounced and made available in the above-mentioned conditions, they must be made available, accessible, and disseminated; but they must, above all, be the subject of exchanges and discussions in meetings between the different panels of the supreme courts and judges of the lower courts. These various means of dissemination and communication must allow the judges of the supreme courts and appellate and first

instance courts to establish a true dialogue among one another. Such a mechanism allows the judges of lower courts to have access to the decisions of the higher courts in real time and to have instruments allowing them to consult the state of their case law for reference at any time if needed. This system can be complemented by setting up a network of correspondents from lower courts. The latter will be responsible for communicating the most significant decisions to the supreme courts to allow them to become acquainted with and understand the way in which their judgments are understood and applied on a day-to-day basis.

To make this communication policy concrete and animated, supreme courts must periodically organize workshops or seminars in the capital or send a large delegation to the seat of the lower courts to establish a real dialogue with the judges. To this effect, our various meetings have enabled lower instance judges, judges specializing in terrorism matters, and judges of the Supreme Court to discuss national experiences and good practices in the spirit of mutual learning. For example, the situation of minors prosecuted in terrorism proceedings, the question of conflicts of jurisdiction between specialized courts and juvenile courts, and the length of custody by the military and intelligence services have been the subjects of fruitful exchanges. In the same way, important discussions took place between the members of the steering committee on issues of applicable law, doctrines, and jurisprudence.

All these meetings allow a true debate on the landscape of supreme court case law from a technical and scientific point of view in order to identify the difficulties concerning essential issues. They help to overcome incomprehension, clarify certain approaches, and resolve some misunderstandings. It is also an opportunity to acquaint the lower instance court judges with the supreme courts’ techniques of drafting decisions. This indispensable and constructive dialogue also must be extended to other actors.

## Broader Consultations

The judgments of supreme courts are also of interest to defense lawyers, university professors, researchers, trainee judges, students, and journalists, as well as to criminal justice practitioners including judicial police and military officers. In short, they concern all sectors of society. Once pronounced, these decisions fall into the public domain; and it becomes necessary for all who are interested in them to be able to accurately grasp the justifications, meaning, and scope. In the same logic of dissemination, clarification, and harmonization of the rule of law, discussion and exchanges involving a broader public should be organized annually. They allow participants to register critiques, observations, proposals, and contributions that constitute mutual learning. These meetings are highly appreciated by the lawyers in particular who unfortunately still do not have the training required to bring applications for judicial review, especially in criminal matters, in many of our countries.

During the study visits undertaken within the scope of the project, the meetings among judges, intelligence services, police, and military forces

helped broaden the debate and the exchange of experiences. They have especially helped raise awareness among supreme court judges on the difficulties encountered on the ground by the aforementioned actors, especially the military and in particular in relation to the search for and collection of evidence.

## Conclusion

The supreme courts have a clear awareness of the need to move toward a new technique of drafting their judgments, more understandable and more pedagogical. They are also part of a policy of publication, dissemination, and sharing of their case law, with a view to a better interpretation and a correct harmonized application of the law at the national level.

This shared vision must be systematized and amplified in order to bring justice closer to the people for a more peaceful society that is reassured by a serene, comprehensible, and humane justice. The high courts have a legal and institutional responsibility for this mission, which they must exercise responsibly with a view to establishing a just and equitable society.

## PROPORTIONALITY OF SANCTIONS AND MEASURES TO COMBAT TERRORISM

Terrorism shocks the conscience and causes deep distress in societies. Immediate reactions to restore order and security have precipitated the hasty enactment of laws or administrative measures intended to expand and expedite investigatory powers and law enforcement measures to contain the immediate threat. Whether a state of emergency is declared or these measures are introduced through legal reforms, the trend internationally and in the Sahel region is the expansion of executive powers through the use of special investigative techniques,<sup>29</sup> curfews,<sup>30</sup> and prolonged periods of custody.<sup>31</sup> In this environment, where certain civil rights are being curtailed in favor of prevailing national security interests, the judiciary has the responsibility to provide an important function of oversight and review to ensure that fundamental rights and due process norms are upheld.

The international community has called for the criminal justice system to play a more important role in preventing attacks before they materialize. The UN Security Council directed UN member states in 2001

to criminalize terrorism acts in Resolution 1373.<sup>32</sup> In 2014, Resolution 2178 called on member states to criminalize a broad range of preparatory offenses to stem the flow of foreign fighters and bring them to justice.<sup>33</sup> States were given broad discretion to implement these resolutions, neither of which defines terrorism. This has raised concerns about potential abuses in implementation, given some jurisdictions' overly broad, imprecise definition of terms such as "terrorism" and "glorification," or "*apologie*," of terrorism, which has been impermissibly extended to political dissidents, human rights defenders, and journalists and which violates the principles of legality.<sup>34</sup>

Increasingly, states have charged individuals for inchoate group offenses, such as participation in a criminal enterprise (*association de malfaiteurs*, or criminal conspiracy) to prevent terrorism acts and to secure convictions, frequently imposing less severe sanctions.<sup>35</sup> If there exists only tenuous links between preparatory acts and the crime they are intended to further, however, this approach risks diluting the high threshold

29 In Senegal, for example, the 2016 amendments to the Code of Criminal Procedure strengthened the country's investigative capacity by creating a unit at the Dakar High Court specializing in terrorism crimes. Loi n° 2016-30 du 08 novembre 2016 modifiant la loi n° 65-61 du 21 juillet 1965 portant Code de procédure pénale [Law no. 2016-30 of 8 November 2016 amending law no. 65-61 of 21 July 1965 on the Code of Criminal Procedure], *Journal Officiel de la République du Sénégal*, no. 6976 (26 November 2016), p. 1627.

30 In Mali, a 1987 law provides powers "to regulate or prohibit the movement of persons, vehicles, or property in certain places and at certain times; to establish safety zones where people's stay is regulated or prohibited; to prohibit the stay in all or part of one or more constituencies referred to in Article 6, any person seeking to impede, in any way whatsoever, the action of public authorities; to prohibit, in general or in particular, all processions, parades, gatherings and demonstrations in public." Loi n° 87-49/AN-RM du 10 août 1987 relative à l'état de siège et à l'état d'urgence [Law no. 87-49/AN-RM of 10 August 1987 on the state of siege and state of emergency], *Journal Officiel de la République du Mali*, art. 7.

31 In Senegal, these periods have been extended from 24 hours to a possible 12 days. Loi n° 2016-30 du 8 novembre 2016 modifiant la loi n° 65-61 du 21 juillet 1965 portant Code de procédure pénale [Law no. 2016-30 of 8 November 2016 amending law no. 65-61 of 21 July 1965 on the Code of Criminal Procedure], *Journal Officiel de la République du Sénégal*, no. 6976 (26 November 2016), art. 677-28. In Mauritania, the law authorizes 15 days of double-blind custody in terrorism cases. Loi n° 2010-035 du 21 juillet 2010 abrogeant et remplaçant la loi n° 2005-047 du 26 juillet 2005 relative à la lutte contre le terrorisme [Law no. 2010-035 of 21 July 2010 repealing and replacing law no. 2005-047 of 26 July 2005 on the fight against terrorism], art. 23, [http://www.vertic.org/media/National%20Legislation/Mauritania/MR\\_Loi\\_Terrorisme.pdf](http://www.vertic.org/media/National%20Legislation/Mauritania/MR_Loi_Terrorisme.pdf) (hereinafter 2010 Mauritanian counterterrorism law). In Chad, custody can last for 30 days, renewable twice with the authorization of the public prosecutor. Loi n° 034-2015 portant répression des actes de terrorisme [Law no. 034-2015 on the suppression of acts of terrorism], art. 4.

32 The Directory of International Best Practices, Codes and Standards was created to facilitate member states' compliance with UN Security Council Resolution 1373. UN Security Council Counter-Terrorism Committee, "Directory of International Best Practices, Codes and Standards," n.d., <https://www.un.org/sc/ctc/resources/databases/recommended-international-practices-codes-and-standards/united-nations-security-council-resolution-1373-2001/>.

33 The criminalization of these offenses includes measures to "prevent and suppress the recruiting, organizing, transporting or equipping of individuals who 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, terrorist acts." UN Security Council, S/RES/2178, 24 September 2014, para. 5.

34 See Human Rights Watch (HRW), "Ethnicity, Discrimination, and Other Red Lines: Repression of Human Rights Defenders in Mauritania," February 2018, [https://www.hrw.org/sites/default/files/report\\_pdf/mauritania0218\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/report_pdf/mauritania0218_web_1.pdf).

35 In Niger and Senegal, a large number of cases with multiple accused parties are currently being tried under conspiracy liability. In France, the vast majority of cases involving multiple offenders are prosecuted for the offense of participating in a terrorist group or conspiracy (*participation à un groupement ou à une entente*). Henri Decoeur, "The Criminalisation of Armed Jihad Under French Law: Guilt by Association in the Age of Enemy Criminal Law," *European Journal of Crime, Criminal Law and Criminal Justice* 25, no. 4 (2017): 324–325.

required of criminal law and violating the principles of legality and the presumption of innocence, a non-derogable right.<sup>36</sup>

Recommendation 2 broadly underlines considerations on the definitional scope, sentencing, and qualification of terrorism crimes that must fit the nature and seriousness of the offense, particularly where preventive approaches are becoming increasingly important prosecutorial tools in the fight against terrorism in the Sahel. Offenses of speech must be strictly limited and defined, and preparatory offenses must specifically intend a harm that has sufficiently materialized, consistent with states' international human rights obligations.

The first paragraph provides an important objective-linking element to the preparatory act or criminal conspiracy undertaken in view of the terrorist act, by requiring the planned terrorist act to be “sufficiently materialized” so as not to attribute individual criminal responsibility from hypothetical acts, beliefs, or extremist tendencies in isolation. Consistent with international human rights law, the implementation of Resolution 2178 would also require a “specific intent” (*dolus specialis*) threshold for individuals taking part in the preparation or commission of terrorist acts.<sup>37</sup> Intent to participate in armed struggle against governmental forces as part of a nonstate armed group does not automatically entail intent to participate in a terrorist group. Under the protection regime of international humanitarian law, individuals' combat status and the classification of an international armed conflict must be determined by a competent tribunal.<sup>38</sup>

## 2. Qualification of terrorist acts

To intervene effectively and to prevent attacks, criminal association in connection with a terrorist enterprise, preparatory acts, and specific minor offenses must be repressed as soon as possible once the planned terrorist act has sufficiently materialized.

For a more effective prosecution policy allowing cases to be adjudicated within a reasonable time frame, the highest criminal qualification of facts pertaining to terrorism may be reserved for the most serious acts [such as willful attacks on life, abductions and sequestrations, or leading a terrorist criminal association...].

Freedom of expression must be limited only in cases of glorification to terrorism and incitement to commit an act of terrorism.

Resolution 2178 further calls for states to develop strategies to counter incitement to terrorism.<sup>39</sup> The criminalization of various forms of speech and expression falling short of incitement to violence has the potential to threaten legitimate protest and individuals' fundamental rights. The limitation contained in recommendation 2 is important in that regard because some countries have used provisions in the laws to prosecute individuals for offenses of “incitement to military disobedience”<sup>40</sup> or “diverting” officials from

36 See 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, para. 6. Some scholars have criticized the French approach, reproaching it for its tendency to impermissibly extend the scope of criminality to “actor-based criminal law” typical of a form of “enemy criminal law” (*Feindstrafrecht*), “whereby individuals are punished not on account of the harm they have actually caused, but because of the threat that they represent by virtue of their actual or perceived belonging to a group designated as an enemy of the state.” Decoeur, “Criminalisation of Armed Jihad Under French Law,” pp. 324–325. Other jurisdictions have imposed specific limitations to ensure an objective link with the underlying offense. For example, the German Federal Court of Justice has imposed limitations “where the offender’s conduct does not pose any threat to the German public order.” Bundesgerichtshof [BGH] [Federal Court of Justice], 27 October 2015, 3 StR 218/15, para. 14.

37 The Office of the UN High Commissioner for Human Rights (OHCHR) endorsed this interpretation. UN Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law While Countering Terrorism, *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters*, 2018, para. 68, <https://www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf>.

38 Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135, art. 5; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3, art. 45(1).

39 UN Security Council, S/RES/2178, para. 16.

40 In July 2017, radio journalist Mohamed Youssouf Bathily was sentenced to one year in prison for “incitement to military disobedience” following criticisms of the army in 2016. Amnesty International, “Mali 2017/2018,” n.d., <https://www.amnesty.org/en/countries/africa/mali/report-mali/>.

their duties<sup>41</sup> in the counterterrorism context, offenses that would go against these recommendations.

Unlike incitement, which has long been contained in national and international legal instruments, glorification of terrorism is not criminalized in international instruments.<sup>42</sup> Indeed, various human rights bodies have expressed concerns for its potential to encroach more flagrantly on the freedom of expression when left unclearly defined in the law.<sup>43</sup> These offenses should be clearly defined to ensure that they do not lead to an unnecessary or disproportionate interference with the freedom of expression, consistent with the legality principle.<sup>44</sup> This preventive strategy has important implications for the rights of the accused and the delivery of justice in full respect of fair trial and due process rights.

Senegal, for instance, has centralized the adjudication of glorification offenses in the capital city, far removed from the cultural, linguistic, and religious context in which the allegedly offensive speech arises. During a convening of judges and prosecutors, the concern

was raised that this context may not be properly appreciated by judges and prosecutors based in Dakar, already burdened with a heavy caseload. In interpreting provisions on incitement and glorification, judicial actors should ensure that any restrictions on speech are narrowly tailored to serve a legitimate national security interest in a democratic society.<sup>45</sup>

Underlying these considerations is the principle appearing under recommendation 7, which provides that, in the event of a conviction, “sentences must be individualized and proportionate to the gravity of the acts committed.”<sup>46</sup> In the vast majority of countries, life imprisonment is the harshest sentence permissible under law.<sup>47</sup> Burkina Faso and Senegal abolished the death penalty in 2018 and 2004, respectively.<sup>48</sup> Mali, Mauritania, and Niger have effectively abolished the death penalty, with the last recorded executions occurring more than 20 years ago. The death penalty in Chad, however, abolished in 2013, was reintroduced on 30 July 2015 with the passage of a new antiterrorism law subsequent to Boko Haram attacks carried out in N’Djamena in June–July 2015.<sup>49</sup> On 29 August 2015,

41 A Mauritanian ordinance penalizes “any provocation ... addressed to military or police officials with the objective of getting them to deviate from their duties and the obedience that they owe to their superiors.” Ordonnance n° 017-2006 sur la liberté de la presse [Ordinance no. 017-2006 on press freedom], *Journal Officiel de la République Islamique de Mauritanie*, no. 1123 (31 July 2006), art. 34.

42 UN Security Council Resolution 1624 condemns, in the strongest terms, “the incitement of terrorist acts and repudiating attempts at the justification or glorification, or apologie, of terrorist acts that may incite further terrorist acts” but does not directly call on member states to criminalize glorification. UN Security Council, S/RES/1624, 14 September 2005.

43 OHCHR, the Organization for Security and Co-operation in Europe, and the Organization of American States (OAS) adopted a joint declaration on 21 December 2005 recommending that states “not employ vague terms such as ‘glorifying’ or ‘promoting’ terrorism when restricting expression” and noting that restrictions on this right would facilitate terrorists’ objectives of dismantling human rights. See OAS, “International Mechanisms for Promoting Freedom of Expression: Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression,” n.d., <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=650&IID=1>.

44 UN Human Rights Committee, *General Comment No. 34; Article 19: Freedoms of Opinion and Expression*, CCPR/C/GC/34, 12 September 2011, para. 49.

45 See Article 19, “The Johannesburg Principles on National Security, Freedom of Expression and Access to Information,” November 1996, principles 1.2 and 1.3, <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>.

46 For a listing of the crimes of speech offenses and criminal association and the applicable penalties for terrorism acts, see table C-1.

47 The African Charter on the Rights and Welfare of the Child, adopted in 1990 and ratified by all Sahel countries discussed in this report, prohibits the consideration of the death penalty for children, expectant mothers, and mothers of infants and young children. African Commission on Human and Peoples’ Rights, “African Charter on the Rights and Welfare of the Child,” CAB/LEG/24.9/49, n.d., arts. 5 and 30.

48 La Peine de Mort dans le Monde, “Le parlement du Burkina Faso adopte un nouveau code pénal sans peine de mort,” 31 May 2018, [https://www.peinedemort.org/document/9955/parlement\\_Burkina\\_Faso\\_adopte\\_nouveau\\_code\\_penal\\_sans\\_peine-de-mort](https://www.peinedemort.org/document/9955/parlement_Burkina_Faso_adopte_nouveau_code_penal_sans_peine-de-mort). Senegal abolished the death penalty with the modification of articles 337 and 346 of its penal code on 10 December 2014.

49 Loi n° 034/PR/2015 de 30 juillet 2015 portant répression des actes de terrorisme [Law no. 034/PR/2015 of 30 July 2015 on the suppression of acts of terrorism], art. 14.



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Chad executed 10 suspected members of Boko Haram after a three-day hearing.<sup>50</sup>

Reflecting on recommendation 2, Judge Gildas Barbier from the French Court of Cassation calls for the

differentiation and qualification of terrorism acts in accordance with their gravity (*crime* or *délit*) to ensure that the criminal sanction is proportionate to the gravity of the offense committed.

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<sup>50</sup> Grave concerns have been raised as to the due process rights afforded these defendants. Reportedly, three defense attorneys were called to represent the defendants on the eve of the proceedings, none having had the opportunity to consult with their clients prior to the trial. Fédération Internationale de l'Action des Chrétiens pour l'Abolition de la Torture and Action des Chrétiens pour l'Abolition de la Torture au Tchad, "Rapport alternatif de la FIACAT et de l'ACAT Tchad pour l'adoption d'une liste de points à traiter avant soumission du rapport à l'occasion de l'examen du quatrième rapport périodique du Tchad sur la mise en œuvre du Pacte international relatif aux droits civils et politiques," April 2017, [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/TCD/INT\\_CCPR\\_ICS\\_TCD\\_27154\\_F.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/TCD/INT_CCPR_ICS_TCD_27154_F.pdf).

## QUALIFICATION OF TERRORIST ACTS

by *Gildas Barbier*

Qualification, a true bridge between fact and law, is the intellectual process of classifying a fact or an act into a legal category. If, on the surface, the issue in question is seemingly of substantive law and procedural law, however, in matters of counterterrorism the choice of qualification is a highly political issue in the classic sense in the short term, when it comes to the authorities protecting the population by preventing a terrorist attack, and in the long term, when it comes to the same authorities protecting the society by promoting the reconstruction of the social fabric.

Recommendation 2 benefits from additional commentary. Although the diversity of the situations requires an adaptation of criminal policy to local specificities, terrorism poses shared challenges for the signatories to the recommendation. If we consider the situation in France or the Sahel countries, the primary concern of the political authorities is always the same. Faced with a terrorist threat, their concern is to protect the population. To do this, criminal law is called to provide the tools to interrupt an act of terrorism before any damage is done. This is the challenge of qualifying the various stages of a terrorist act. As a result, there has been great inventiveness in the field of qualification.

At the same time, there is a desire to promote social ties everywhere. The various issues associated with the process of qualification thus emerge from the main definitions of terrorism offenses, which are found in most laws of the Sahel countries, but also from the long-term, practical consequences of the choice of qualification. Thus, the meaning of recommendation 2 is extended by the links that can be established to many other recommendations.

### **Qualification of Terrorism Offenses and the Need to Prevent the Acts From Being Committed**

For crimes relating to terrorism, criminal law takes a double approach of qualification “in scope” and “in intensity.” It is therefore a whole set of qualifications that tend to suppress all terrorist crime while incidentally depriving it of all political character.

#### *The Generic Qualification of an Act of Terrorism*

In general, terrorism offenses fall into two categories: crimes and délits. The distinction between crimes and délits, which does not exist in all legal systems, is known to all French-speaking countries that have signed on to the recommendations. It results in the establishment of two sets of offenses. Délits are medium to serious offenses, while crimes are the most serious offenses. According to the Ministry of Justice, in France in 2013, 112 offenses were classified as acts of terrorism, 62 crimes and 50 délits.

In France, crimes are tried by Assize (criminal trial) courts, which in common law comprise professional judges and a majority of jurors drawn by lot from among the population and in terrorism law are made up solely of professional judges in order to prevent potential intimidation of jurors. In criminal matters, the investigation is compulsorily conducted by an investigating judge, following a particularly thorough procedure. Délits are tried by correctional courts and do not require the referral of an investigating judge, unless it is appropriate to place suspects in pretrial detention. The investigation is then conducted by the police under the direction of the public prosecutor.

One may wonder what could lead to not necessarily characterizing an act of terrorism as a crime, because these acts are considered to be the most serious in terms of common law offenses. To

understand this, qualifications that allow for the punishment of preparatory acts must be examined.

### *The Criminalization of Preparatory Acts*

The criminal law of terrorism establishes the preparation of terrorist acts as an independent offense. This is its sole distinctiveness. Several levels of preparation can be criminalized, depending on the progress of the terrorist plan. If the act is stripped of any substantive content, the law criminalizes the mere glorification of a terrorist act. This is a method of criminalization based on intensity, the criminal intensity of the criminalized act being very variable.

The criminalization most often practiced in terrorism law, at least in France, is that of criminal terrorist conspiracy. Criminal terrorist conspiracy exists in a *délit* version and a crime version. The substantial aim of the latter is to cause the death or likely death of the victims, resorting to the most dangerous means (article 421-6 of the Criminal Code). Furthermore, leading a criminal terrorist conspiracy, even if it is a *délit*, is in itself a criminal offense (article 421-5).

The distinction between crimes and *délits* thus covers a range of severity of the various acts of terrorism. If such an act “aims at seriously disturbing public order through intimidation or terror,” it must not necessarily be intended to harm human life. In addition, justice could not be done without taking into consideration the different levels of involvement of the suspects in the terrorist organization. Thus, criminal terrorist conspiracy makes it possible to prosecute adherents, accomplices, and secondary actors, even after the attack has occurred. If the attack was prevented, it allows for the prosecution of all involved.

The judges of the French Court of Cassation have long been called on to define the outlines of this offense, for example, the conditions of accountability of criminal terrorist conspiracy to a legal person<sup>51</sup> or by not requiring evidence of specific preparation of the project<sup>52</sup> or precise and concrete knowledge of the terrorism project<sup>53</sup> to be reported against each member of the organization. Terrorism law is thus in no way devoid of subtleties. In reality, its handling requires a high level of expertise on the part of practitioners, which entails appropriate training. This is the purpose of recommendation 5.

The criminalization of preparatory acts, however, does not stop there because terrorism law tends to isolate each behavior within the possible preparation of a terrorist attack to establish a new, autonomous terrorist act. This is the question posed by infractions termed “*obstacle*,” which tend only to only suppress objective behavior. This category includes “individual terrorist undertaking” (article 421-2-6), “habitual consultation of terrorist websites” (article 421-2-5-2), and “incitement of a terrorist act” and “glorification of a terrorist act” (article 421-2-5). This list is not exhaustive. For example, leaving the territory of France to participate in terrorist activities or going to the theater of operations of terrorist groups is also a crime (article L 224-1 of the Code of Internal Security), an offense punishable by three years imprisonment. The guiding logic is the same: to stop the development of a terrorist act as far upstream as possible, even if the criminalization of preparatory acts even further upstream tends to challenge, implicitly, the principle of discontinuity of criminal law.

Holding that this logic could not be pushed too far, the French Constitutional Council found the

51 Cour de cassation, “Arrêt n° 2790 du 21 mai 2014 (13-83.758) - Cour de cassation - Chambre criminelle - ECLI:FR:CCASS:2014:CR02790,” n.d., [https://www.courdecassation.fr/jurisprudence\\_2/chambre\\_criminelle\\_578/2790\\_21\\_29368.html](https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/2790_21_29368.html) (accessed 4 September 2018) (case no. 2790 of 21 May 2014).

52 “Cour de cassation, criminelle, Chambre criminelle, 12 juillet 2016, 16-82.692, Publié au bulletin,” Legifrance, n.d., <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032900180> (accessed 4 September 2018) (case no. 16-82.692 of 12 July 2016).

53 “Cour de cassation, criminelle, Chambre criminelle, 7 octobre 2016, 16-84.597, Publié au bulletin,” Legifrance, n.d., <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000033207643&fastReqId=589043078&fastPos=1> (accessed 4 September 2018) (case no. 16-84.597 of 7 October 2016).



infraction obstacle of “habitual consultation of terrorist websites” to be in violation of the Constitution on two occasions.<sup>54</sup> In doing so, the Constitutional judge opposed the legislative power, which, providing for this criminalization on the basis of article 421-2-5-2, believed it was a useful contribution to countering terrorism on the assumption that “lone wolves” are likely to self-radicalize by consulting websites that glorify terrorism. In practice, this law targeted the consultation of the propaganda sites of the Islamic State of Iraq and the Levant (ISIL), also known as Daesh. Yet, it turned out that investigation units tended to prefer monitoring the Internet users in question rather than interrupting their sessions in order to apprehend them later on the basis of more compromising evidence.

When the opportunity presented itself, the criminal chamber of the Court of Cassation appealed to the Constitutional Council, holding that the text could pose difficulty in view of the principle of the freedom of communication and that the concept of habitual consultation in good faith (*consultation habituelle de bonne foi*) was not sufficiently precise. In its first decision on 10 February 2017, the Constitutional Council pointed out that the available sanctions are already well provisioned, warranting doubt as to the need for this new qualification. It added that the scope of the reference to the concept of “good faith,” which could be invoked by the suspect to exculpate himself, was uncertain, even though the established criminalization does not require the perpetrator to be driven by terrorist intent. The Constitutional Council concluded that the contested provisions “undermine the liberty of expression in a manner that is not necessary, appropriate or proportional,” which led it to declare this text to be in violation of the Constitution. The new text adopted by the legislature in response, then the new decision of the Constitutional

Council, were nothing more than a repetition of the previous sequence.

It also found that if the criminalization of the glorification of a terrorist act, an offense subject to five years in prison, is not in violation of the Constitution, this offense cannot be qualified as an act of terrorism.<sup>55</sup> Important differences exist between the laws of the different state signatories to the recommendations with respect to the details concerning preparatory offenses, but the principle of criminalization of preparatory acts is accepted by most.<sup>56</sup> Nevertheless, fairly clear convergences in the apprehension of terrorist criminals were apparent from the range of qualifications provided by various national laws, the necessary gradation of which is the subject of recommendation 2.

### **Qualification of Terrorism Offenses and the Need to Regulate Crime**

The choice of qualification has implications beyond the mere prevention of the attack, as it influences the regulation of terrorist crime in two ways: by affecting the judicial system and impacting society.

#### ***Regulating the Functioning of the Judiciary***

It is common practice in France, as in countries that have signed the recommendations, that terrorism prosecution be centralized. In Paris, the prosecutor of the republic of the high court has sole jurisdiction to lead investigations and decide on prosecutions until an investigating judge is appointed, if one is needed. This system allows for a great specialization by the judges who work under his authority on terrorism cases, guaranteeing great technical competence and an in-depth knowledge of the terrorist organizations. These judges are also the natural interlocutors of the intelligence services, which are involved on a different level in countering terrorism.

54 “Décision n° 2016-611 QPC du 10 février 2017,” 10 February 2017, [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/decisions/2016611qpc/2016611qpc.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2016611qpc/2016611qpc.pdf); “Décision n° 2017-682 QPC du 15 décembre 2017,” 15 December 2017, [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/decisions/2017682qpc/2017682qpc.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2017682qpc/2017682qpc.pdf).

55 “Décision n° 2018-706 QPC du 18 mai 2018,” 18 May 2018, [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/decisions/2018706qpc/2018706qpc.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2018706qpc/2018706qpc.pdf).

56 Table B-2.

On the other hand, the exclusive jurisdiction of a sole prosecutor of the republic has a logistical disadvantage in the case of states with a large territory. In Niger, for example, the location of the Specialized Judicial Pole in Niamey, stipulated by ordinances, involves long travel times due to the distance between Niamey and Agadez, a target of terrorist attacks, as well as between Niamey and Diffa, the regional capital of southeastern Niger on the border with Nigeria, where Boko Haram is on the rampage.

It is essential that the choice of qualification in the investigation stage rest on the prosecutor of the republic of the capital and his substitutes. This is a very important responsibility, as all the signatory states have agreed. Control over the choice of qualification in the investigation and prosecution stage makes it possible to effectively administer these cases and avoid bottlenecks caused by minor offenses, taking into account the capacities of the investigatory and judicial units. Thus, simple cases on the level of délits can follow a “short” circuit, without referral to an investigating judge. Investigation by police investigators is the only basis for prosecution. Such a system makes it possible to speed up the course of proceedings in cases where it is not necessary to place suspects in pre-trial detention and is mainly used for preparatory offenses. The Prosecutor’s Office on counterterrorism may even separate the proceedings to allow for judgment on these offenses in conditions differentiated by the judicial system, for example, by opening two cases, one criminal involving the main perpetrators and the other for délits, for the accomplices. The importance of these issues was one of the lessons of the Niamey trials in Niger, which took place in 2017, when several hundred people were tried.

Incidentally, the fact that the choice of classification is the responsibility of the public prosecutor alone at the stage of prosecution is one of the conditions of his autonomy vis-à-vis the other institutions

called on to intervene in counterterrorism, such as the intelligence services in France or Mali, the police in all signatory states, and the army in Niger and Mali, where the national and French armies intervene. Quality relationships between these institutions and a good understanding by both parties of the logic that governs their respective actions are a necessity in counterterrorism efforts. Recommendation 3 covers this point.

The choice of the qualification thus allows for a great plasticity in the prosecutorial organization and, consequently, in the regulation of the activities of jurisdictions in charge of adjudicating terrorism cases. These are also centralized in the signatory countries of the recommendations, such as the public prosecutor’s office, within a specialized judicial pole.

### *Regulating the Society*

Upstream, the control over the choice of qualification by the public prosecutor’s office constitutes an important instrument of the office’s penal policy. Thus, in an interview given to *Le Monde* on 3 September 2016, the Paris prosecutor of the republic made public his decision to prosecute under the qualification of criminal terrorist conspiracy “all those who have been in the conflict zones [Syria, Iraq] since January 2015, who have participated in fighting patrols or the Islamic police with [ISIL] or Al-Nusra Front, now Fatah Al-Sham.”<sup>57</sup> The purpose here is to dissuade would-be terrorists at the outset.

Downstream, the choice of qualification has important implications for law enforcement. Under French common law, délits are punishable by up to 10 years imprisonment except in cases of recurrence, in which case the penalty is doubled; in criminal cases, life imprisonment may be incurred. In the terrorism law, the maximum penalty that can be imposed in the case of a criminal terrorist conspiracy délits is 20 years imprisonment. Yet, the

57 “Risque d’attentat et politique pénale: l’analyse du procureur François Molins,” Agence France-Presse, 3 September 2016, <https://www.midilibre.fr/2016/09/02/risque-d-attentat-et-politique-penale-l-analyse-du-procureur-francois-molins,1387744.php>.

death penalty is not stipulated by French law and is not adjudicated when it is incurred in most of the state signatories of the recommendations, except for Chad.

In practice, if no persons have died, the penalties imposed on accomplices or adherents, namely against most of those prosecuted, do not reach such a level of severity. This is not surprising because the role of justice is to punish people differently depending on the very heterogeneous levels of involvement in the crime. Therefore, the vast majority of those convicted are destined to regain their freedom in the future, which poses the difficult question of their reintegration and, in the worst cases, their monitoring. The fact remains that systematic maximum sentences against those convicted, which do not take into account the specific acts with which they can be charged and the character of the perpetrators, would only be felt as an injustice and stoke terrorist criminal activity. This

concern is particularly strong in the case of minors, giving rise to recommendation 8.

In the case of societies that face a growing terrorism risk, it is therefore essential to continue fighting terrorism within a judicial framework, the guarantor of society's rights and the rights of defendants. This requires appropriate use of qualifications and proportionate use of the penalties attached to them. This is the purpose of recommendations 7 and 10.

### **Conclusion**

Qualification represents all the paradoxes of counterterrorism. It aims to protect the population by preventing the commission of acts that are at the apex of the crime scale and, to this end, to suppress their preparation, but also to protect the society by allowing those who commit terrorism acts to be appropriately punished and thus to administer justice, a necessary condition for the endurance of the social bond.



## COORDINATION BETWEEN MILITARY ACTION AND THE JUDICIARY

Terrorist organizations often operate in the grey zones between traditional warfare and peace, posing particular ambiguities concerning the application of international humanitarian law,<sup>58</sup> the status and objectives of each group, and the role of military actors in this realm. The response to the security threats in the Sahel has been primarily militaristic, which has placed military officials as the first responders on the battlefield and crime scene. Whether undertaken for investigative ends or not, military and peacekeeping actors in the Sahel have contributed to the collection of information and evidence that may be used in court in a terrorism case. Given their primary security objective, they have often been ill equipped to undertake investigatory activities, with its obligations of upholding detainees' due process rights and preserving the chain of custody, resulting in cases being dismissed for lack of sufficient or admissible evidence. Addressing these challenges in the Sahel requires enhanced coordination between military and judicial actors to ensure a criminal justice response to terrorism compliant with the rule of law.

In the context of foreign fighters, UN Security Council Resolution 2396 acknowledges the difficulties of collecting, preserving, and storing evidence in conflict zones leading to national prosecutions of activities that may amount to international crimes. Inherent difficulties arise in securing and preserving information from remote, transitional, or otherwise inaccessible areas,<sup>59</sup> which may require military officials to place suspects at the disposal of investigators. Prosecutors in turn face

difficulties in court in converting intelligence information into admissible evidence or presenting evidence acquired through special investigative techniques and other secretive mechanisms. For these reasons, the role of military actors in the counterterrorism space is increasingly becoming a priority for the international community, and specific guidelines concerning measures to ensure information retrieved by the military meets the legal threshold for admission as evidence in criminal proceedings are currently being elaborated by the United Nations.<sup>60</sup>

In the Sahel as in other parts of the world, nonstate armed groups, including terrorist organizations, and other criminals have taken advantage of remote, ungoverned spaces to carry out their operations in the peripheral regions where conflicts are often born and efforts to prevent them are directed. Vast stretches of unpopulated land, far removed from police posts and the presence of other governmental services, have placed military officials in the position of assuming a number of tasks typically entrusted to civilian law enforcement officials. In the Sahel region, the *gendarmerie prévotale*, consisting of military judicial police officers or *prévôts*, often accompany the military on missions and carry out administrative and judicial police functions. Duties include questioning suspects, arresting and transferring individuals to judicial authorities, collecting materials, and gathering intelligence in the aftermath of a criminal incident or attack. Their actions may fall within the scope of carefully

58 For more information on the challenges concerning the applicability of international humanitarian law to acts considered terrorism, see International Committee of the Red Cross, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," 31 October 2015, <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts/>. UN peacekeeping personnel, including military and police, should act in accordance with international human rights law, which forms an "integral part of the normative framework for UN peacekeeping operations." UN Department of Peacekeeping Operations, *UN Peacekeeping Operations: Principles and Guidelines*, 2008, p. 15, [https://peacekeeping.un.org/sites/default/files/capstone\\_eng\\_0.pdf](https://peacekeeping.un.org/sites/default/files/capstone_eng_0.pdf). See UN Secretariat, "Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law," ST/SGB/1999/13, 6 August 1999.

59 See Global Center on Cooperative Security, "Delivering Justice: Views From Supreme Courts in the Euro-Med Region on Countering Terrorism," December 2016, p. 6, <http://www.globalcenter.org/wp-content/uploads/2016/12/Delivering-Justice-low-res.pdf> (magistrates in the Euro-Mediterranean region noting difficulties in obtaining evidence of their citizens' involvement in terrorist activities in Syria, with whom their countries have no diplomatic relations, or at refugee camps operating outside of governmental authority).

60 The United Nations is currently developing guidelines to facilitate the use and admissibility as evidence of information preserved, collected, and shared by the military to prosecute terrorism offenses before national courts under the framework of the UN Counter-Terrorism Implementation Task Force Working Group on Legal and Criminal Justice Responses to Terrorism. The guiding principles on stemming the flow of foreign fighters adopted by the UN Security Council Counter-Terrorism Committee further recognizes the need to strengthen investigative efforts "by developing multi-agency task forces and liaison officers in order to ensure a collective response." 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/2015/939, 23 December 2015, annex II ("Guiding Principles on Foreign Terrorist Fighters," no. 27).

delineated mission mandates, or they may be incidental to the military operation.<sup>61</sup>

The large distance between the scene of attacks and the capital—the central situs for the investigation, prosecution, and adjudication of terrorism cases—also affects questions of coordination. Limited means available to investigators and the location of bodies such as central counterterrorism services contribute to transportation delays, affecting the investigation. Investigators may call on local prosecutors and prosecutors of the specialized counterterrorism pole located in the capital to investigate an attack, especially when the act may not have been immediately identified as terrorism, contributing to further delay and overlap.<sup>62</sup>



Crime scene elements from an attack on the military camp in Agadez (courtesy of Samna Soumana Cheibou)

The expanding role of military actors and peacekeeping mandates in counterterrorism efforts pose significant human rights considerations. Military and peacekeeping forces have been deployed in northern Mali and in the Lake Chad Basin region in the fight against Boko Haram. MINUSMA was established to stabilize the country in 2013,<sup>63</sup> and French forces led counterinsurgency efforts beginning in 2013. To complement those efforts, the AU-backed G5 Sahel Joint Force was launched in July 2017 with a specific mandate to fight terrorism and transnational crime in the border regions.<sup>64</sup> In the Lake Chad Basin region, the MNJTF was brought on to enhance regional military cooperation to combat the threat posed by Boko Haram in 2012.<sup>65</sup>

Across the Sahel, magistrates bemoaned the poor quality of investigations and management of the crime scenes by first responders.<sup>66</sup> Difficulties in verifying the identity of witnesses in the theater of conflict, information lost in translation or altered by interpreters, witnesses' fear of reprisals,<sup>67</sup> and testimonies tainted by mistreatment, intimidation, or perceptions toward the military all affect the quality, authenticity, and preservation of information that may potentially serve as evidence in judicial proceedings.<sup>68</sup>

The risk of ill-treatment by military actors is not negligible and is arguably heightened in high-intensity situations. There are well-documented instances of

61 For the mission mandates, see table C-2.

62 In their response to terrorism, several countries in the Sahel have established centralized, specialized judicial poles and investigative services with specific jurisdiction over terrorism and other national security offenses, including in Bamako, Mali; N'Djamena, Chad; Niamey, Niger; Nouakchott, Mauritania; and Ouagadougou, Burkina Faso. See appendix B.

63 Its mandate was extended in 2017. UN Security Council, S/RES/2364, 29 June 2017.

64 "Situation Analysis: Challenges and Opportunities for the G5 Sahel Force," *ISS Peace and Security Council Report*, no. 93 (July 2017), pp. 7–10, <https://issafrica.s3.amazonaws.com/site/uploads/psc93.pdf>.

65 Lake Chad Basin Commission, final communiqué of the 14th summit of heads of state and government, 30 April 2012, [http://www.cbtl.org/sites/default/files/communique\\_final\\_14\\_sommet\\_fr.pdf](http://www.cbtl.org/sites/default/files/communique_final_14_sommet_fr.pdf). See UN Security Council, "Statement by the President of the Security Council," S/PRST/2015/14, 28 July 2015, p. 2. For a description of the missions, including investigative mandates, see table C-1.

66 In the aftermath of a terrorist attack at a military base camp in Agadez, for instance, defense and security forces, followed by visits from administrative authorities, inadvertently mishandled important clues and stomped around the grounds unaware that a hostage-taking was occurring in the camp. Niamey seminar proceedings, p. 16.

67 In Niger, witnesses lacked special protection, and local populations often refused to cooperate with investigators and were afraid to denounce suspected terrorists. *Ibid.*, p. 17.

68 See Bibi van Ginkel and Christophe Paulussen, "The Role of the Military in Securing Suspects and Evidence in the Prosecution of Terrorism Cases Before Civilian Courts: Legal and Practical Challenges," *ICCT - The Hague Research Paper*, May 2015, p. 15, <https://www.icct.nl/download/file/ICCT-Van-Ginkel-Paulussen-The-Role-Of-The-Military-In-Securing-Suspects-And-Evidence-In-The-Prosecution-Of-Terrorism-Cases-Before-Civilian-Courts.pdf>.

abusive practices by military forces in the Sahel<sup>69</sup> and pressures arising from the need to secure convictions in terrorism cases.<sup>70</sup> Judges similarly may feel pressured to issue a conviction based on sparse evidence or be hesitant to inquire into the circumstances and excessiveness of detention.<sup>71</sup> Under international law, evidence obtained under torture and all related evidence subsequently obtained through legal means is inadmissible.<sup>72</sup> This exclusionary rule is a function of the general and absolute prohibition of torture and other ill-treatment.<sup>73</sup> In addition to criminal proceedings, the rule extends to military commissions, immigration boards, and other administrative or civil proceedings.<sup>74</sup> Where there is a real risk that the suspect was abused,<sup>75</sup> judges must ask questions relating to the circumstances surrounding the arrest and questioning of individuals, the extended periods of administrative or military detention, the transfer of terrorism suspects, and the rights of the defense in the declassification of evidence.<sup>76</sup>

In this regard, the UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment has admonished the global trend of expanding executive agencies' powers of arrest, detention, and interrogation in the fight against terrorism, which have retracted traditional safeguards against torture and other ill-treatment and led to further abuse.<sup>77</sup> The role of military actors should not be similarly expanded to assume judicial responsibilities in the absence of governance or to circumvent safeguards provided under a criminal justice or law enforcement framework that emphasizes accountability for state actors for human rights abuses.

Recommendation 3 addresses the importance of creation of a record regarding detention conditions and the preservation of the chain of evidence to support criminal proceedings and deter abusive practices and prolonged periods of administrative detention by the military.

69 Since 2016, serious human rights abuses have reportedly occurred during military operations in Burkina Faso and Mali, including extrajudicial killings, enforced disappearances, torture, and arbitrary arrests of individuals accused of supporting jihadist armed groups. HRW, "West Africa: G5 Sahel Should Prioritize Rights," 13 December 2017, <https://www.hrw.org/news/2017/12/13/west-africa-g5-sahel-force-should-prioritize-rights>. The UN Human Rights Council has noted that courts in Mali "have not followed up credible reports by witnesses and victims of ill-treatment or torture or cases of enforced disappearances of persons detained by Malian armed forces during the conflict in the north." UN General Assembly, *Report of the Independent Expert on the Situation of Human Rights in Mali, Suliman Baldo*, A/HRC/25/72, 10 January 2014, para. 34. The Malian army's indiscriminate use of violence against certain nomadic troops has also fueled support for nonstate armed groups. Bleck, Boisvert, and Sangaré, "I Joined to Save My People," p. 142.

70 In 2015 the UN High Commissioner for Human Rights reported that the Nigerien ministries of interior and defense had rejected requests from judicial authorities to investigate allegations of torture and ill-treatment, "stating that they would 'demoralize' the troops." UN General Assembly, *Violations and Abuses Committed by Boko Haram and the Impact on Human Rights in the Countries Affected: Report of the UN High Commissioner for Human Rights*, A/HRC/30/67, 9 December 2015, para. 76.

71 The excessive period of detention of suspects by armed forces was widely reported by the participants of the study visits. In a case involving a group of pirates apprehended and detained off the Somali coast for five days, the European Court of Human Rights held that the long period of overseas detention was justified given the "insurmountable circumstances" of the arrest, which took place thousands of miles from French territory. *Ali Samatar and Others v. France*, app. nos. 17110/10 and 17301/10, 2014 Eur. Ct. H.R., <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-148290%22%5D>}. In a separate case involving Somali pirates, however, the court found that the suspects' rights to liberty and security were violated when they were held in custody for six days at sea and an additional 48 hours on French soil before being charged with specific crimes. The court found that the suspects were not brought "promptly" before a judicial authority and held that "[Art. 5(3)] is not intended to allow authorities the opportunity to intensify their investigations and to collect serious and corroborating evidence" for the purpose of bringing formal charges against the suspects. *Hassan and Others v. France*, app. nos. 46695/10 and 54588/10, 2014 Eur. Ct. H.R., para. 103, <https://hudoc.echr.coe.int/eng?i=001-148289>.

72 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, para. 29 (hereinafter 2014 report of the Special Rapporteur on torture).

73 See UN Human Rights Committee, *General Comment No. 20: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 7)*, 10 March 1992, para. 12; UN General Assembly, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," A/RES/39/46, 10 December 1984.

74 2014 report of the Special Rapporteur on torture, para. 30.

75 The UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment has asserted that a suspect must "only advance a plausible reason as to why the evidence may have been procured by torture or other ill-treatment" and the burden of proof then shifts to the state. The courts must thereafter "inquire as to whether there is a real risk that the evidence has been obtained by unlawful means. If there is a real risk, the evidence must not be admitted." *Ibid.*, para. 67.

76 *Ibid.* See UN General Assembly, "Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," A/RES/30/3452, 9 December 1975, art. 12.

77 2014 report of the Special Rapporteur on torture, para. 18.

### 3. Coordination between military action and judicial action

Evidence of participation in terrorist acts should be obtained regularly in judicial proceedings, even if the suspect has been detained as part of military operations.

The military should systematically establish a report describing the circumstances of the arrest, drafted by a judicial police officer in the manner of a pro-vost or, failing that, by the highest-ranking military officer present at the scene.

In addition to the identifying elements, such a report could specify, for instance, whether the suspect was alone or captured in a group, whether he was armed, which weapon was found in his possession, whether the weapon was warm, whether he resisted, and whether he was already injured when captured. A photograph or a digital video of the person on the scene of his arrest could be taken.

These documents, which cannot be covered by military secrecy, and all information or evidence must be communicated to the judicial authorities.

The arrested person must be transferred to the judicial authorities as soon as possible.

It is up to the magistrates to later take into account the practical difficulty of the arrest made in the course of military operations, as well as the difficulties related to the transport of persons.

Magistrates, judicial police officers, and military officers should be given appropriate training to enable them to better understand the specificities of their respective fields of action.

In elaborating these guidelines, the justices have sought to strike a balance between the practical realities on the ground in the Sahel and the judiciary's imperative to deliver justice consistent with international obligations. On the practical side, the recommendations suggest simple operating procedures, such as taking

Figure 1 : Sample prosecutor's form

<u>INDIVIDUAL FORM</u>	
Name:	
First name:	
Nickname:	
Name of the mother:	
Date and place of birth:	
Age:	
Cut:	
Eye color:	
Hair color:	
Profession:	
Family situation:	
Number of brothers and sisters:	
Location of capture:	
Documents taken:	<input type="text"/>
Materials taken:	<input type="text"/>
Circumstances of capture:	<input type="text"/>


photographs on a mobile phone capturing the circumstances of an individual's detention, which may be quickly transmitted to the judicial authorities. The *prévôt* generally records the proceedings, as designated in the military code<sup>78</sup> or consistent with a mission mandate.<sup>79</sup> The recommendations provide that, in the absence of military and civilian judicial police officers, the highest-ranked military officer present should provide a basic report detailing the circumstances of arrest for the judge to consider in a suspect's case (fig. 1).

More fundamentally, the recommendations stress that judicial frameworks apply to individuals detained as part of military operations. All terrorism suspects may be investigated, detained, and tried only in accordance with due process and consistent with international human rights obligations (recommendation 1). Detainees must be transferred to judicial authorities as quickly as possible, and their file should include a record of the circumstances surrounding their capture (recommendation 3). Terrorism

78 See Code de justice militaire au Mali [Code of Military Justice of Mali], art. 25 (providing that military judicial police officers may comprise "[a]ny Officer of the Army or the National Guard invested of this quality by the Minister, in charge of the Armies").

79 Table C-2.





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suspects must appear before independent judges, be able to benefit from the assistance of an attorney (recommendation 6), be judged on the basis of specific qualifications, and incur only the penalties provided in the law (recommendation 7).

By putting these ideas into practice, Judge Hassane Djibo describes Niger's experience and provides recommendations on improving coordination between the judiciary and the military to safeguard due process and the integrity of evidence.

## THE EXPERIENCE OF NIGER IN MILITARY AND JUDICIAL COOPERATION

*by Hassane Djibo*

In Niger, as in all of the Sahel, terrorism is more than a criminal phenomenon requiring adequate judicial response; it is a major security concern. Terrorist attacks against civilian populations and public officials, including defense and security forces, are permanent and multiple. The authority of the state and its obligation to maintain public order or even its territorial integrity are called into question. The military therefore has been called to play a leading role, and the security approach and the use of exceptional measures has been favored. Nevertheless, the judicial approach to countering terrorism is not ignored by the military. Far from considering combatants as enemies to be destroyed, the military, despite the difficulty of its mission, arrests terrorist suspects whenever possible and hands them over to the judicial authorities for prosecution and punitive sanctions. The current conditions of this appreciable state of affairs is not without its difficulties in the conduct of judicial proceedings.

Indeed, military action emphasizes the security approach and is not well adapted to the judicial approach, with its requirements of respect for the rules of procedure and human rights, in short, respect for the principles of a fair trial consistent with Niger's international commitments. As it is often said, justice is the guardian of human rights, and the fight against terrorism must not derogate from these principles. Therefore, to achieve the good administration of justice through a security and judicial approach to countering terrorism, efficiency and respect for the rule of law must be reconciled. To do this, coordination between military action and judicial action is necessary. On the one hand, minimum procedural requirements are observed by the military in the arrests of terrorism suspects to support judicial proceedings. On the other hand, judges must take into account and be made aware of the difficulties faced by the military in making arrests during operations and the

challenges linked to the transfer of suspects from zones of combat to the judicial authorities.

This analysis of the situation in Niger will focus on the current state of affairs and its impact on judicial proceedings, concluding with current and proposed initiatives to overcome these difficulties by identifying the challenges and creating a synergy between military and judicial actions for a more effective and peaceful approach to fighting terrorism, in accordance with the fundamental principles of human rights and the principles of a fair trial.

### **The Findings and Their Consequences on Judicial Proceedings**

In the Nigerien areas exposed to terrorism, mainly in the Lake Chad Basin region; the Diffa region, where Boko Haram rules; and the southwestern and northern strips—Tillabéri, Tahoua, and Agadez regions bordering Burkina Faso, Mali, Libya, and Algeria where Al-Qaida in the Islamic Maghreb, Ansar Dine, the Movement for Unity and Jihad in West Africa, and other groups are active—the army is deployed to lead the fight against these terrorist groups. A state of emergency was declared in these regions a few years ago and has been renewed regularly. The military alone can act on the ground and arrest terrorism suspects without citing conditions and circumstances; suspects are detained for several days before being handed to the regional investigative authorities (police or *gendarmerie*), which makes it difficult for investigators to collect evidence and for magistrates to examine these cases and who, in many cases, cannot reach the zones of conflict.

For various reasons, the preliminary investigation is usually limited to hearings involving only the accused when, for example, the conditions and circumstances of arrest are lacking, the investigators cannot go to the scene of operations for security reasons, witnesses refuse to cooperate for fear of reprisals, the exact place where the acts that the person is accused of having committed is not determined, and the alleged acts are not clearly defined. It is not uncommon to see several people arrested in different places and at different times handed to

the investigation units in the region or even transferred to the Central Counter-Terrorism Service in Niamey under the same conditions. Quite often, those arrested are transferred in physical states that leave no doubt of ill-treatment, such as inhumane and degrading treatment and torture. The accused persons deny the facts in their entirety, and the investigation tends toward self-incrimination in the absence of witnesses or material facts, even though self-incrimination is prohibited.

Frequent mass arrests are a constant reality and another issue rendering the management of terrorism proceedings more difficult. When hundreds of people are arrested in different places, at different times, and under different circumstances and are prosecuted in the same proceedings, it is extremely challenging to establish the truth when no evidence has been collected at the moment of arrest. In the rare cases where there are exhibits, including cell phones and weapons, they are handled carelessly by the military, who often use them or, worse, throw them together into bags without identification of their owner or the place of seizure. Such exhibits naturally become unusable, although they could have been a treasure trove of information for judicial and military actions. These practices have the effect of weakening the judicial process, because the collection of evidence becomes difficult or impossible in some cases, and of prolonging and complicating proceedings, with individuals who languish in pretrial detention for years without the authorities amassing the necessary evidence to support the charges against them.

Thus, one of the first challenges is the lack of respect for temporal limits on custody. The law provides for a period of 15 days, subject to an extension of the same duration by written authorization of the prosecutor or examining judge.<sup>80</sup> Despite this limit, the suspects are kept longer by the military before being transferred to the prosecutors if counted from the date of their arrest, a starting point often ignored. Many judges have

complained that alleged terrorists were not transferred to the judicial authorities as soon as possible. Due to the remoteness of the arrest zones and the difficult situation of the military operations, however, the immediate transfer of suspects to the judicial authorities is rendered difficult. Moreover, the authority in charge of terrorism investigations is located in Niamey where the courts tolerate that the clock does not begin to run until the accused is released to the judicial authority. Despite this custodial period, which should allow for fine-tuning the judicial proceedings, the situation does not seem to evolve in many cases.

In the course of the investigation and even in the judicial investigation, despite the seriousness of the charges, the presumption of innocence does not seem to be respected; the proceeding is conducted to incriminate individuals by exerting real or presumed pressure on the actors of the system. Lawyers have complained of lack of access to their clients detained on the premises of the Central Counter-Terrorism Service, and members of civil society and the bar association have denounced the fact that the suspects of terrorism acts released by the judicial authorities continued to be held in custody. Judicial investigation, such as the preliminary investigation, often conducted from a distance, does not usually lead to the determination of truth. Despite the absence of material evidence, defendants remain imprisoned for years while the proceedings do not advance. The initial years of the conflict (2013 to 2016) were marked by systematic prosecutions with placements in detention.

The exceptional situations imposed by terrorism allow for certain restrictions on individual or collective rights and freedoms, but unfortunately, violations of nonderogable human rights have also been observed, including damage to physical and bodily integrity, inhumane and degrading treatment, and torture. If the creation of the specialized judicial pole resulted in systemized detentions during the investigation phase, the reality is different today,

<sup>80</sup> Article 605.5 (new) of loi n° 2016-21 du 16 juin 2016 [Law no. 2016-21 of 16 June 2016] of the Criminal Procedure Code (copy on file with authors).

according to the public prosecutor. Cases have been closed without further action because of serious reports and supporting documentation of grave human rights violations, which rendered invalid some criminal legal procedures or undermined their bona fide nature. It is in this sense that the prosecutor of Diffa declared, during the meeting in Niamey in May 2017, the need for a state report to be established for handover procedures.

Another finding is that the proceedings usually involve a large number of accused, often arrested separately at different times and places, but handed over at the same time to the investigators who initiate a common procedure against them. As discussed by colleagues during various meetings, the causes for nullity are numerous. Despite these challenges, there has not been a decision for annulment of proceedings to date, perhaps because nullities have neither been asserted by the parties nor brought by the courts or because the fight against terrorism silences everyone on the violation of rules of law and procedure. In this respect, the attitude of the Court of Cassation, the court of jurisdiction over the regularity of the proceedings, in case of appeals against judgments in cases of terrorism is in question. Yet, statistics on decisions to dismiss proceedings or to discharge or acquit individuals reveal the negative impact of the above-mentioned findings concerning judicial proceedings.<sup>81</sup> The dismissals are motivated mainly by the lack of sufficient charges or an inability to meet the burden of proof. The negative consequences on the judicial proceedings require a response in order to bring criminal proceedings to their successful conclusion and to prevent impunity.

### **Avenues for Coordination Between Military and Judicial Action**

To effectively counter terrorism, military and judicial actions must be complementary even if their

approaches to this phenomenon diverge. Whenever military action in countering terrorism takes into account the prosecution or punishment of terrorists by the courts, it has to concede that the end does not justify the means. Our states have international commitments that terrorism must not be allowed to violate, and the conviction of the judge to establish guilt and condemn individuals is built on elements of evidence. The judge must prohibit illegal practices that are detrimental to human dignity. It is therefore essential to minimize the risk of procedural nullity or nonconvictions due to a lack of evidence as a result of the primary intervention by the military.

Following this approach, several solutions are being implemented on the ground while others are desired.

#### ***Improve the Documentation of Information Through Increased Use of Provost Marshals and Improved Record Keeping***

First, on a formal level, it is urgently necessary to modify and apply the provisions of articles 327 and 328 of the Code of Military Justice<sup>82</sup> concerning the *prévôtés*. Indeed, the fight against terrorism in Niger is comparable to a state of war; and it is very much necessary for the provost marshals to be established during military operations against terrorist groups, that is, on the national territory, every time there are military operations. This would make it possible for judicial police officers trained in judicial investigations to draw up minutes of proceedings every time individuals are arrested in the course of military operations. In the absence of *prévôtés*, the head of the military mission or a senior officer present must draw up a detailed report, including the conditions of arrest, the exhibits seized, the physical condition of the arrested persons, any information that is likely to establish the presence of a terrorism infraction, and

81 The specialized judicial pole in two sessions in 2017 and one session in 2018 released 95 defendants and sentenced 17. The judgment chamber of the Court of Appeal in 2017 acquitted 16 and convicted 14.

82 Article 327 of the Code of Military Justice states that the provost marshals are formed from the gendarmerie and established “in times of war in the country” or “any time large units, military forces or detachments are stationed or operating outside national territory.” Article 328 stipulates that the organization and the conditions of establishment of the provost marshals are determined by decree.

its attribution to the arrested person or persons, as provided in recommendation 3.

For this purpose, the prosecutor of the specialized judicial pole prepared a form for the military leaders in the field with all the elements necessary for the judicial proceedings (fig. 1). This form should be completed with as much information as possible about each person arrested, the place and circumstances of the arrest, and the documents and other material seized on them. It is important to mention other information, such as the full identity of the one who filled it out and the date of editing or creation.

The use of the form is of primary interest because in some cases it may indicate that there is no terrorism offense, thus allowing for the proper determination of jurisdiction to the antiterrorism pole or ordinary courts. Previously, those arrested by the military during operations in areas where terrorist groups operated were prosecuted for acts of terrorism, including criminal association with a terrorist organization.<sup>83</sup> Another positive result for use of this form is mitigation of the effect of the law that establishes the organization of jurisdictions in Niger and according to which “in antiterrorist matters, the specialized judicial pole retains jurisdiction, once seized, regardless of the charges upheld.”<sup>84</sup> In other cases, the judicial authority has evidence that allows it to make an assessment and decide accordingly.

This practice of individual reports should put an end to systematic prosecutions. In the opinion of the prosecutor of the specialized judicial pole, prosecution is now conditioned by the evidence supporting the charges. According to him, the number of terrorism suspects has dropped significantly, and the proceedings are being better managed.

### ***Increase Opportunities for Exchange of Information and Network Building Between Military and Judicial Actors***

A nonnegligible, favorable factor for coordination between military and judicial action is the awareness-raising missions led by the Defense and Security Forces, which make it possible to share observations; establish contacts between military officials and those in charge of counterterrorism, including the investigatory units and the counterterrorism prosecutor’s office; and revert, if possible, the cases to the Defense and Security Forces. These meetings will allow each to know their respective missions and requirements and develop working relationships. In this context, collaboration between the specialized judicial pole prosecutor and the military leadership, as well as between the regional branches of the Central Counter-Terrorism Service and the military units operating on the ground, is notable.

In this framework, a coordinating committee on matters of terrorism, the financing of terrorism, violent extremism, and organized transnational crime has been created by the decision of the minister of justice - keeper of the seals.<sup>85</sup> In addition to the judges and investigators of the specialized units, the committee includes the head of the Operations Office of the Niger Armed Forces, the commander of the Territorial Gendarmerie, the head of the Operations Center of the National Guard of Niger, the director of general intelligence, and the counterterrorism director of the Office of Documentation and External Security. The coordination committee is in charge of the exchange of information and the deliberation and proposal of solutions for all matters concerning the handling of terrorism-related

83 Counterterrorism requires preventing attacks and punishing certain preparatory acts. In the Diffa region, under the state of emergency, the administrative authority has banned motorcycle traffic for some time, and anyone who violates this ban is considered a terrorist. Indeed, terrorists generally operate on motorcycles, traveling separately to regroup at points of attack. This administrative authority ban allows for an effective intervention and a prevention of attacks by apprehending terrorists on the basis of the qualification as someone involved in the preparatory acts or belonging to a terrorist movement. Judicial investigations on the basis of the evidence gathered at the time of the apprehension and mentioned in the form will allow for proper qualification of the facts. See figure 1.

84 Organic law no. 2004-50 of 22 July 2004, art. 91.1, para. 2.

85 Arrêté n° 00146/MJ/GS/SG/DGAJ/DAP/G du 08 septembre 2017 portant création, composition, organisation, attributions et fonctionnement du comité de coordination en matière de lutte contre le terrorisme, le financement du terrorisme, le financement de l'extrémisme violent et la criminalité transnationale organisée [Decree no. 00146/MJ/GS/SG/DGAJ/DAP/G of 8 September 2017 on the establishment, formation, organization, powers and functioning of the coordinating committee on matters of counterterrorism, financing of terrorism, financing of violent extremism, and organized transnational crime].

cases. It is also responsible for proposing strategies and actions for deradicalization programs, developing a national plan of action in the fight against violent extremism, and undertaking all other missions entrusted to it by the minister of justice – keeper of the seals.<sup>86</sup>

### ***Respect the Rights of the Accused to the Fullest Extent, Including Those Charged With Acts of Terrorism***

Military and criminal justice actors alike must ensure that the rights of the accused are respected. During the preliminary investigation and judgment, the right to a lawyer should not be considered a “luxury” for a suspect of terrorist acts. Respect for the rights of the accused are a guarantee of a good administration of justice. During the study visit to Niger, the president of the judicial pole lamented the fact that, despite the gravity of the charges against the defendants, those unable to afford a lawyer were not provided counsel in the investigation or judgment phases. It is therefore desirable, as for certain categories of offenders such as minors or in certain jurisdictions (Assize courts) to make the counsel of a lawyer mandatory. Thus, if the defendant has not chosen legal counsel, counsel from the office must be assigned to him.

### ***Improve Relations and the Effective Adjudication of Terrorism Suspects Through Increased Access and Exposure of Judges to the Realities of the Military***

Judges must be made aware of the difficulties associated with field operations and try to conduct in-depth investigations with respect to the principles of a fair trial. To do this, it is necessary to ensure the security of all the actors in criminal trials of suspected terrorists in order to allow them to conduct their work on the ground and proceed with the inquiries and investigations of the cases. The means to do this must be available to investigators

and investigating judges. There is general consensus that local visits help strengthen the relationship with the military, which no longer considers judges as mere bureaucrats but as actors who allow for the effective management of suspects in terrorism proceedings and for exposure of the truth.

### ***Ensure the Immediate Handover of Suspects to Judicial Authorities to Protect the Integrity of the Judicial Proceedings and Reduce the Likelihood of Grave Human Rights Violations***

For an effective judicial response to terrorism, the alleged terrorists arrested by the military should be transferred to the judicial authorities as soon as possible in order to avoid the depreciation or even disappearance of evidence, but also to avoid poor detention conditions by the military. Certainly, time is a factor in the evidence that can be gathered and on the impact that the judicial investigations could have on future terrorism acts. In addition, it is necessary to avoid abuse of the alleged terrorists by soldiers, which would amount to serious human rights violations and jeopardize the judicial proceedings. It is necessary to distinguish between what can be done during combat and what is not possible once these suspects are arrested. The prosecutor of the judicial unit must ensure this in his relationship with the military leadership.

## **Conclusion**

The findings and their consequences, as well as the solutions implemented or proposed, are not exhaustive, but they highlight the specific difficulties that arise in the link between military action and judicial action in countering terrorism. These difficulties can be overcome through coordination between the two. Niger is on the right track to create this coordination framework in order to make counterterrorism efforts more effective in accordance with the rules of procedure and the standards of a fair trial.

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86 Ibid., art. 5.

## THE SPECIFICITY OF THE CRIMINAL JUSTICE RESPONSE CONCERNING MINORS

The global community has struggled to define an appropriate legal framework for minors suspected of terrorism-related activity. The issue sits at the collision of two seemingly opposing systems: the antiterrorism framework that favors repressive responses and the frameworks for children associated with armed forces and armed groups (CAAFAG) and juvenile justice, which favor rehabilitative and protective measures. The issue is a political priority across the Sahel region, where nearly half the population is under the age of 15.<sup>87</sup>

Societies across West Africa view the transition from youth to adulthood as a series of important life events rather than one marked by the attainment of a specific age.<sup>88</sup> Participation in the prosperity and security of one's family and community is of great importance on the road to adulthood.<sup>89</sup> This context provides some insights into how and why children associate themselves with armed groups. Community mobilization and individual recruitment, coercion, or enticement constitute two major pathways to engagement with and involvement in nonstate armed groups.<sup>90</sup> The narrative often superimposed on conflicts in the region focuses on ideology or radicalization to violent extremism, but these characterizations risk oversimplifying intercommunal conflicts and more pressing considerations

that push children to join armed groups. For instance, researchers concluded that the primary contributors in Mali were injustice, weakness and corruption of state agents, extreme poverty, lack of economic opportunities, and self-preservation.<sup>91</sup>

A 2017 UNDP report similarly found that the majority of children who voluntarily joined a violent extremist group come from the most remote areas in their country.<sup>92</sup> These areas typically rank poorest in terms of development, including in levels of education, access to services and livelihood opportunities, personal safety and security, and trust in authorities.<sup>93</sup> In countries with vast territories such as Chad, Mali, and Niger, the presence of and services by government, such as birth registration and basic health care, are severely lacking. Armed Islamist groups in the region have further contributed to the deterioration of state services by expressly threatening and attacking schools and teachers, causing widespread closures, limiting children's access to education, and increasing their exposure to violent groups.<sup>94</sup>

Grave violations have also been committed against children by terrorism and counterterrorism actions. More than other zones of conflict, the Lake Chad Basin region has seen increasing use of children as suicide

<sup>87</sup> For national breakdowns, see appendix B.

<sup>88</sup> Significant life events may include marriage, integration in the economic cycle, the end of studies or professional training, and departure from the parental home. See Tiefing Sissoko, ed., *La jeunesse malienne: entre autonomie, mobilisation et exclusion* [Malian youth: Between autonomy, mobilization and exclusion] (Paris: L'Harmattan, 2015). Consistent with the Convention on the Rights of the Child (CRC), minors are defined by law across the region as children under the age of 18. The age of criminal responsibility across the region is set at 13 years or older with the exception of Mauritania, where it is set at seven years of age. Ordonnance n° 2005-015 portant protection pénale de l'enfant [Ordinance no. 2005-015 on the criminal protection of the child], 5 December 2005, art. 2, [https://legislationmauritanienne.files.wordpress.com/2011/06/ordonnance-nc2b02005-015-portant-protection-pc3a9nale-de-l\\_enfant.pdf](https://legislationmauritanienne.files.wordpress.com/2011/06/ordonnance-nc2b02005-015-portant-protection-pc3a9nale-de-l_enfant.pdf). See UN General Assembly, "Convention on the Rights of the Child," 20 November 1989, 1577 U.N.T.S. 3, art. 1 (hereinafter CRC).

<sup>89</sup> Bleck, Boisvert, and Sangaré, "I Joined to Save My People," pp. 142–174.

<sup>90</sup> For a detailed assessment of child recruitment in Mali, see *ibid.*, p. 151.

<sup>91</sup> *Ibid.*, pp. 142–174.

<sup>92</sup> UNDP, *Journey to Extremism in Africa*, p. 33.

<sup>93</sup> *Ibid.*, p. 33.

<sup>94</sup> In 2016, Boko Haram attacked three schools in the Diffa region of Niger. UN General Assembly and UN Security Council, *Children and Armed Conflict: Report of the Secretary-General*, A/72/361-S/2017/821, 24 August 2017, para. 211. During the 2016–2017 school year, more than 500 schools in northern and central Mali closed due to the security situation, interrupting schooling for an estimated 150,000 children. UN Children's Fund (UNICEF), *UNICEF Annual Report 2017: Mali*, n.d., [https://www.unicef.org/about/annualreport/files/Mali\\_2017\\_COAR.pdf](https://www.unicef.org/about/annualreport/files/Mali_2017_COAR.pdf). For Burkina Faso, see HRW, "Attacks on Education by Islamist Armed Groups in Northern Burkina Faso," 21 May 2018, <https://www.hrw.org/report/2018/05/21/day-we-fear-army-night-jihadists/abuses-armed-islamists-and-security-forces>.

bombers.<sup>95</sup> The use of girls in particular rose sharply after the 276 “Chibok girls” were kidnapped from their school in Nigeria in April 2014. Girls were originally presumed to have been used because they could evade suspicion by hiding bombs under their garments and hijabs; soldiers and civilian checkpoints have since been on high alert. In Nigeria, the United Nations reported that, over a three-month period in 2016, 12 girls and one boy of ages 11 to 17 were killed after security forces suspected them of being suicide bombers.<sup>96</sup> The majority of teenage girls interviewed after managing to surrender during suicide missions said they had been deployed as suicide bombers after refusing to “marry” fighters, a euphemism for being raped.<sup>97</sup> Rape and grave sexual violence are largely unreported in a climate of impunity and stigmatization.<sup>98</sup> The UN Secretary-General has observed that gender-sensitive disarmament, demobilization, and reintegration processes and access to services for survivors of sexual violence will create opportunities to better identify more girls associated with armed groups in Mali.<sup>99</sup>

Children face a number of challenges when taken into custody for their alleged involvement in armed groups, including separation from or being unaccompanied

by adults, lack of access to social services, poor conditions, and prolonged detention. In contravention of international child protection standards, children were detained in an adult detention facility for extended periods<sup>100</sup> or detained during counterterrorism responses of security forces.<sup>101</sup> Because of the grave impact on children’s welfare, the international community has adopted practices to move children encountered during military operations to civilian child protection services as soon as possible.<sup>102</sup> Such measures are typically contained within handover protocols and accompanied by standard operating procedures. Building on UN Security Council Resolution 2349 on the situation in the Lake Chad Basin and other resolutions, the council unanimously adopted a resolution in July 2018 stressing the need to develop standard procedures for the protection of CAAFAG.<sup>103</sup>

Three countries in the region have signed handover protocols with the United Nations. In 2013, Mali signed a protocol on the release and handover of CAAFAG.<sup>104</sup> From 1 January 2014 to 30 June 2017, 72 boys between the ages of 13 and 17 were released from detention for their alleged association with armed groups. Nonetheless, children still remain in custody,<sup>105</sup> and coordination between the United Nations and the

95 UN Security Council, S/RES/2349, para. 1. In Cameroon, Chad, Niger, and Nigeria, the number of children used to carry out attacks in public spaces surged from four in 2014 to 67 in the first half of 2017 alone. “Lake Chad Conflict: Alarming Surge in Number of Children Used in Boko Haram Bomb Attacks This Year - UNICEF,” 12 April 2017, [https://www.unicef.org/media/media\\_95571.html](https://www.unicef.org/media/media_95571.html). Of those killed deploying suicide bombs between January and June 2017, UN entities verified that 47 were girls and 19 were boys. Across the Lake Chad Basin region, the United Nations documented “recruitment and use by Boko Haram of 673 children, including 182 girls, in the first half of 2017.” Most of the children were recruited before 2017. UN Security Council, *Report of the Secretary-General on the Situation in the Lake Chad Basin Region*, S/2017/764, 7 September 2017 (hereinafter 2017 Lake Chad Basin report).

96 UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in Nigeria*, S/2017/304, 10 April 2017, para. 53.

97 “Boko Haram Strapped Suicide Bombs to Them. Somehow These Teenage Girls Survived,” *New York Times*, 25 October 2018, <https://www.nytimes.com/interactive/2017/10/25/world/africa/nigeria-boko-haram-suicide-bomb.html>.

98 See UNICEF Nigeria, “Girls Held by Boko Haram Need Support to Rebuild Shattered Lives,” 18 October 2016, [https://www.unicef.org/nigeria/protection\\_10782.html](https://www.unicef.org/nigeria/protection_10782.html).

99 UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in Mali*, S/2018/136, 21 February 2018, para. 26 (hereinafter 2018 Mali children and armed conflict report).

100 In Mali, one boy was detained for nearly five years. *Ibid.*, para. 28.

101 In Niger, 21 boys, including four Nigerians, were detained at the Niamey juvenile detention center, while 20 others were awaiting age determination in another detention facility. Another 33, including four girls, who surrendered were kept at a reinsertion program in the Diffa region. 2017 Lake Chad Basin report, para. 25.

102 See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, 2173 U.N.T.S. 222.

103 UN Security Council, S/RES/2427, 9 July 2018. Among previous resolutions, Resolution 2349, which is specific to the situation in the Lake Chad Basin region, stresses “the need to pay particular attention to the treatment and reintegration of women and children formerly associated with Boko Haram and ISIL, including through the signing and implementing of protocols for the rapid handover of children suspected of having association with Boko Haram to relevant civilian child protection actors, as well as access for child protection actors to all centres holding children, in accordance with applicable international obligations, and the best interests of the child.” UN Security Council, S/RES/2349, para. 30.

104 UNICEF, *Transfert des enfants associés aux forces ou groupes armés: Protocole d'accord entre le gouvernement de la République du Mali et le système des Nations Unies au Mali*, 1 July 2013 (copy on file with authors).

105 Three children of age 16 or 17 detained since April 2015, May 2015, and May 2016 remain in custody. 2018 Mali children and armed conflict report, para. 28.



Malian Ministry of Justice remains challenging.<sup>106</sup> On 10 September 2014, Chad signed a handover protocol<sup>107</sup> that was deemed to be a significant step given that the country had been listed for five consecutive years in the UN Secretary-General's report on children and armed conflict for recruiting and using children within the ranks of the national military. In 2017 the United Nations reported that Chad had met the benchmarks set out in its national action plan to end and prevent recruitment of children in armed forces.<sup>108</sup> In 2017, Niger signed a protocol agreement with the UN Children's Fund (UNICEF) for the release of children deprived of liberty for their alleged association with Boko Haram. The agreement requires that the children be systematically transferred to the Ministry for the Promotion of Women, Children and the Family.<sup>109</sup>

Across the region, ambiguities between the protected rights of minors and repressive antiterrorism laws persist. With the exception of Niger, antiterrorism laws are silent regarding their application to minors, and thus there is no clarity over whether juvenile courts or the antiterrorism judicial pole courts have jurisdiction over children suspected of terrorism offenses. Children's rights advocates and juvenile judges have raised concerns that the preventive and protective considerations for minors who have perpetrated terrorist acts do not feature in the legal framework for these children and argue that repressive judicial practice results in the contravention of certain principles for minors.<sup>110</sup>

In Niger, juvenile courts are established within each High Court.<sup>111</sup> The composition of the judicial pole includes two juvenile judges in charge of the investigation of terrorism and transnational crimes proceedings involving minors.<sup>112</sup> These juvenile judges are competent to hear cases involving minors charged with a *délit*. Any minor charged with a crime must appear before the president of the High Court, who is assisted by two magistrates, one of whom must be a juvenile judge, and a court registrar.<sup>113</sup> The system has its challenges. For instance, it is difficult for parents to appear in courts located so far from their homes although they are mandated by law to do so. Parents are reluctant to provide evidence against a child involved in a serious offense, and sometimes minors refuse to identify their true parents.<sup>114</sup> In Mali, an agreement between the government and UNICEF governs the treatment of CAAFAG, but questions remain as to whether the judicial pole or juvenile courts have jurisdiction over children charged with terrorism offenses outside of this framework. These legal ambiguities will persist in the absence of legislative efforts or judicial decisions.

Although each country may be attempting different approaches for handling children suspected of terrorism crimes, recommendation 8 reiterates many of the foundational principles contained in international guidance to inform policies on the treatment of children including their detention, transfer, adjudication, and rehabilitation. Recommendation 9 further elaborates on considerations that apply to girls and women and the role they may play in preventing and combating terrorism.

106 This has been attributed in part to the fact that the position of governmental focal point for the protocol has been vacant since 2016. *Ibid.*, para. 29.

107 UN General Assembly and UN Security Council, *Children and Armed Conflict: Report of the Secretary-General*, A/69/926-S/2015/409, 5 June 2015, para. 53.

108 UN General Assembly, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, A/72/276, 2 August 2017, para. 25.

109 UNICEF, *UNICEF Annual Report 2017: (the) Niger*, n.d., p. 6, [https://www.unicef.org/about/annualreport/files/Niger\\_2017\\_COAR.pdf](https://www.unicef.org/about/annualreport/files/Niger_2017_COAR.pdf).

110 For instance, participants during the national study visits in Mali and Niger referred to violations of the principle that incarceration is a measure of last resort and should be for the shortest period possible.

111 Loi organique n° 2018-37 du 1er juin 2018 fixant l'organisation et la compétence des juridictions en République du Niger [Organic law no. 2018-37 of 1 June 2018 fixing the organization and the competence of jurisdictions in the Republic of Niger], art. 62.

112 Loi n° 2016-19 du 16 juin 2016 modifiant et complétant la loi n° 2004-50 du 22 juillet 2004 fixant l'organisation et la compétence des juridictions en République du Niger [Law no. 2016-19 of 16 June 2016 modifying and completing law no. 2004-50 of 22 July 2004 fixing the organization and the competence of jurisdictions in the Republic of Niger], art. 62.2 (nouveau). The judicial pole also includes one or two investigative magistrates handling terrorism and transnational organized crime cases exclusively.

113 Loi n° 2014-72 du 20 novembre 2014 déterminant les compétences, les attributions et le fonctionnement des juridictions pour mineurs au Niger [Law no. 2014-72 of 20 November 2014 on the competence, attributes, and organization of juvenile courts in Niger], art. 4.

114 Maman Aminou A. Koundy, "Les spécificités de la repression des mineurs présumés terroristes au Niger" ["Specificities of the repression of the minors presumed terrorists in Niger"], Niamey, 24 May 2017 (delivered during the Niger study visit) (copy on file with authors).

## 8. Specificity of the criminal response concerning minors

All children recruited by terrorist groups must be recognized as the victim of a violation of international law and must be subject to measures adapted to their specific situation and aimed at facilitating their reintegration into society.

Accused juveniles who were minors at the time of the offense must be judged for terrorism matters by a juvenile court, according to a procedure appropriate to juveniles.

Juveniles found guilty of terrorism acts can only be subject to individualized sanctions which are adapted to their age at the time of the commission of the offense, and should be able to benefit from diminished responsibility and a reduced sentence, as well as from educational measures encouraging their return to their families and their social and professional reintegration.

## 9. The specificity of the situation of women

The specific situation of women, whether perpetrators or victims of acts of terrorism, must be recognized and taken into account.

The participation of women in preventing and combating terrorism must be supported.

Recommendation 8 unequivocally states that the juvenile justice framework applies to children in counterterrorism. A vast body of international instruments relating to children in conflict with the law provides guidance on the establishment of measures appropriate to their specific circumstances.<sup>115</sup> These apply equally to children alleged to be involved in terrorism-related activity or in any other criminal activity.<sup>116</sup> The primary consideration when making decisions affecting minors is the best interest of the child, which inherently requires an individualized approach, separating adults from children and girls from boys.<sup>117</sup> International human rights law favors the application of noncustodial measures for children in conflict with the law,<sup>118</sup> and incarceration should be a measure of last resort and for the shortest amount of time possible. Although laws governing the conviction of minors in all of the countries discussed in this report provide that the penalties incurred should be two times lighter than those applicable to an adult, administrative circulars and directives on sentencing could go further and take into account noncustodial sentences<sup>119</sup> and rehabilitation programs.

Recommendation 8 also provides that children recruited by terrorist groups must be treated primarily as victims, consistent with the Paris Principles and Guidelines. The principles state that “children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not


115 Core international instruments relating to children in conflict with the law include the ICCPR and the CRC, in addition to four main instruments known collectively as the UN Minimum Standards and Norms of Juvenile Justice: the Havana Rules, Beijing Rules, Riyadh Guidelines, and Vienna Guidelines. UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, A/RES/45/113, 14 December 1990 (hereinafter Havana Rules); UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)*, A/RES/40/33, 29 November 1985 (hereinafter Beijing Rules); UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, A/RES/45/112, 15 December 1990 (hereinafter Riyadh Guidelines); UN Economic and Social Council, *Administration of Juvenile Justice*, 1997/30, 21 July 1997, annex (hereinafter Vienna Guidelines).

116 Global Counterterrorism Forum, “Initiative to Address the Life Cycle of Radicalization to Violence: Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context,” n.d., p. 3, <https://www.thegctf.org/Portals/1/Documents/Toolkit-documents/English-Neuch%C3%A2tel-Memorandum-on-Juvenile-Justice.pdf> (hereinafter Neuchâtel Memorandum).

117 CRC, art. 3(1). Children must be separated from adults on account of their mental, social, and physical immaturity and their greater capacity for change. See Neuchâtel Memorandum, p. 3.

118 See CRC, art. 37(a); Havana Rules, rule 2; Riyadh Guidelines, para. 46; Vienna Guidelines, para. 29. For individual dates of ratification, see table C-3.

119 The negative effects of juvenile detention on high recidivism rates are well documented. Ian Lambie and Isabel Randell, “The Impact of Incarceration on Juvenile Offenders,” *Clinical Psychological Review* 33, no. 3 (April 2013): 448–459; Richard A. Mendel, “No Place for Kids: The Case for Reducing Juvenile Incarceration,” Annie E. Casey Foundation, 2011, <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>; Barry Holman and Jason Ziedenberg, “The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities,” Justice Policy Institute, n.d., [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf).



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only as perpetrators.”<sup>120</sup> They furthermore urge that alternatives to judicial proceedings be sought wherever possible and that children be treated in accordance with restorative justice and social rehabilitation frameworks and according to the best interest of the child.<sup>121</sup>

Malian Attorney General Wafi Ougadeye explains Mali’s attempts to tackle the rehabilitation of CAAFAG, the legal issues that must be resolved to meet Mali’s international obligations, and the country’s ongoing challenges.

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120 “The Paris Principles: Principles and Guidelines on Children Associated With Armed Forces or Armed Groups,” February 2007, para. 3.6, [https://www.unicef.org/protection/files/Paris\\_Principles\\_EN.pdf](https://www.unicef.org/protection/files/Paris_Principles_EN.pdf).

121 *Ibid.*, paras. 3.6 and 3.7. The 2015 Neuchâtel Memorandum also provides that when a criminal procedure is deemed appropriate, a system designed for minors should be the primary and preferred jurisdiction. Neuchâtel Memorandum, p. 3.

## THE JUDICIAL FRAMEWORK FOR MINORS IN MALI

by Wafi Ougadeye

After gaining its independence on 22 September 1960, Mali experienced four armed rebellions (1963, 1990, 2006, and 2012) and three coups (1968, 1991, and 2012) that resulted in human rights violations and undermined the state's very foundations. Following the end of the security, institutional, and humanitarian crises of 2012 linked to the revival of the rebellion in the country's north, the increase in trafficking of all kinds, the presence of terrorists in the northern part of Mali, and the sudden change of political power, Mali is resolutely committed to the lasting and definitive conclusion of these recurring crises. These difficulties have greatly reduced the state's presence in its regions and makes any intervention of the justice authorities with a view to reducing crime hypothetical.

A large part of the national territory thus escapes the jurisdiction of the national courts at a time when the demand for countering terrorism has become imperative and requires a response at the higher political level. During the period of occupation of the northern regions by terrorist and rebel forces, serious and massive violations of human rights were committed, notably against women and children. Children under the age of 18 have been enlisted to participate in the hostilities. Hence, to guarantee peace and promote economic and social development of the regions concerned, the Agreement for Peace and Reconciliation was signed in Bamako in May 2015 between select armed groups and the government of Mali.<sup>122</sup>

In recent years, northern Mali has been plagued by protean crime fueling terrorism networks

and causing instability throughout the country. Insecurity makes people lose sleep at night and hampers social and economic development. Between January 2013 and January 2018, 546 violent crimes against people and property were registered. Voluntarily or not, young people faced with endemic unemployment and poverty play an important role in the ills that plague Mali. It is within this movement of peace and reconciliation that the topic of "minors in the fight against terrorism in Mali" must be considered.

### The Problem of Minors in Terrorism in Mali

The Malian population is characterized by its extremely young age. Of a population of 18.8 million, almost half are under 15 years of age, 62 percent of whom have no formal education. Mali has one of the highest fertility rates in the world, with more than six children per woman, and correspondingly is one of the poorest countries in the world.<sup>123</sup> The unemployment rate for 15- to 24-year-olds was 10.5 percent in 2014.<sup>124</sup> These young people will do anything to escape unemployment. Thus, unemployment and poverty remain the two main causes of the youth rush to the north of Mali, where they try to reach Europe via Niger, Algeria, and Libya or are recruited by armed groups. These armed groups take advantage of their fragility and immaturity to exert a real moral authority on the children once recruited. The young person is first removed from their natural environment, and the normal development of their personality is disrupted. In the grip of the jihadists, they are instrumentalized to commit terrorism acts.

In the view of the public authorities, the minor caught in the theater of military operations must be considered a victim, not a terrorist. This same principle applies to the exemption from criminal

122 UN Security Council, "Letter Dated 22 January 2018 From the Permanent Representative of Mali to the United Nations Addressed to the President of the Security Council," S/2018/58, 31 January 2018, annex (containing "Memorandum on the Implementation of the Agreement on Peace and Reconciliation in Mali Emanating From the Algiers Process, Signed on 15 May and Finalized on 20 June 2015 at Bamako").

123 UNDP, *Human Development Report 2016*, pp. 202 and 206, <http://www.undp.org/content/dam/undp/library/corporate/HDR/HDR2016/UNDP-HDR16-Report-EN.pdf>.

124 Statistics provided by the Malian Ministry of Planning, Spatial Planning and Community Development.

responsibility advocated by the Agreement for Peace and Reconciliation and the memorandum of understanding (MOU) between Mali and the UN system in Mali on the transfer of CAAFAG. This concept is de facto sanctioned by the judicial authorities of Mali, which have favored social reintegration over criminal punishment. The treatment of minors under Malian law and the MOU between Mali and the UN system on CAAFAG will be discussed below.

### ***Specifics of Malian Law Concerning Minors in Terrorism***

Malian law on the criminal responsibility of minors and the institution of juvenile courts provides that “[a] minor who is charged with an offense classified as a crime or a *délit* shall not be referred to ordinary criminal courts; only juvenile courts will have jurisdiction over minors.”<sup>125</sup> The law establishes criminal responsibility at age 18 and specifies that the criminal responsibility of minors can be sought when they are between the ages of 13 and 18 and acted with discernment.<sup>126</sup>

The national provisions on counterterrorism are completely silent on minors suspected of terrorism. Although CAAFAG are treated very specifically, none of the legal provisions refer to minors suspected of acts of terrorism. Neither do the texts on the composition of the courts responsible for investigating or judging terrorism suspects nor those on the procedure reserved for them make mention of it.

Given this legal vacuum, the interministerial circular of 1 July 2013 on the prevention, protection, and return of CAAFAG to their family finds that (1) CAAFAG recruited by force participate in

hostilities, (2) the government owes them protection and rehabilitation, and (3) CAAFAG are victims of adults and any act committed by them, thus calling for the criminal responsibility of their military leader.<sup>127</sup> This circular refers in particular to article 28 of the Criminal Code, according to which “there is no crime or *délit*” when the accused was “in the grip of an irresistible force.”<sup>128</sup>

Unlike those who favor a security-based approach, Mali tries to apply the natural rules favorable to juvenile delinquents. Mali has ratified or acceded to a number of international human rights instruments, including those addressing the rights of women and children, in particular the 1989 Convention on the Rights of the Child and its two optional protocols and the Paris Commitments, adopted in 2007 to protect children from unlawful use and recruitment by armed forces or groups. In the absence of special provisions, minors in Mali cannot be subject to sanctions other than those for which the basic text specifically reserved for them provides. This foundational text, however, provides that all educational measures for the social and professional reintegration of the minor are possible. Thus, Malian positive law enshrines the principle of the primacy of educational measures over punishment and the jurisdiction of juvenile courts over those of ordinary law in relation to ordinary offenses.

The principle of legality of criminal offenses and procedure makes it possible to conclude that, in the absence of specific provisions relating to minors suspected of terrorism offenses, minors do not fall under the jurisdiction of the antiterrorism courts in the current state of the positive law of Mali. This

125 Law no. 01-081 of 24 March 2001, art. 3.

126 *Ibid.*, art. 1.

127 This rule of responsible command is reminiscent of the rule of responsible command in international criminal law, with the difference that “the responsibility of a superior depends on his obligations as a leader of troops constituting an organized military force under his command and not the precise context in which a given act was committed by one of the members of that military force.” Moreover, the criminal responsibility of a superior does not relieve the members of the military group whose criminal responsibility may be sought. Olivier de Frouville, “Decision of the Appeals Chamber in the Hadzihasanovic Case,” in *Droit international pénal*, ed. A. Pedone (2012), p. 401.

128 Malian Ministry of Justice, “Circulaire interministérielle relative à la Prévention, la Protection et le Retour en Famille des Enfants Associés aux Forces et Groups Armés [Interministerial circular on the prevention, protection and return to their families of children associated with armed forces and groups],” 7 February 2013, p. 5.

position is reinforced by the fact that since the creation and operationalization of the specialized judicial pole of the High Court of Commune VI of the District of Bamako, only two cases involving minors have been the subject of investigative proceedings. One ended with a dismissal on the grounds that the international conventions ratified by Mali consider the child to be a victim to be protected; the other is waiting for the execution of the issued arrest warrant. After the decision to dismiss by the investigating judge and the signing of the memorandum, all minors liable to be charged with terrorism offenses are referred exclusively to orientation and transit centers for their appropriate care. The investigative offices of the judicial pole also have ceased to register the receipt of new proceedings involving minors after the decision to dismiss and the signing of the memorandum.

The conflict of jurisdiction therefore exists only in theory. In effect, two specific laws coexist: one for terrorism offenses and the other reserved for minors. In practice so far, it is the judicial unit that intervenes in the treatment related to the socioeducational reintegration of CAAFAG. Once detained in the north or center of the country in the theater of military operations, the minor is transferred to the *prévôté* of the place of his arrest, who in turn informs the competent judicial authorities. They inform the public prosecutor of the specialized judicial pole, which gives instructions on his transfer to Bamako where he is referred to one of the orientation and transit centers responsible for his reception and stabilization. The orientation centers, through the National Directorate for the Advancement of Women, Children and the Family focal point channel, report to the antiterrorism prosecutor about any events at the centers involving CAAFAG placed there. As for juvenile courts, they intervene only with regard to ordinary offenses committed by minors. In our opinion, there is no ambiguity as to the treatment of

children engaging in terrorism-related activities who do not fall within the status of CAAFAG, but instead a legal void that must be quickly filled by the public authorities.

### **Memorandum of Understanding Between Mali and the UN System in Mali**

The MOU<sup>129</sup> puts forward the effectiveness of security measures and protection of CAAFAG by the public authorities and describes the process to be followed from their arrest until their eventual reunification with their families. It illustrates the willingness of Mali to implement the international human rights conventions and instruments to which it has become a party.

It highlights two fundamental principles: the best interests of the child and nondiscrimination. Emerging from the first principle is the idea that any action in favor of the child is based on this norm, which directs the decision toward the measures favoring their safety, well-being, and development. With regard to nondiscrimination, the MOU specifies that the child shall be welcomed and receive care regardless of their sex or religious, tribal, racial, or other status. Therefore, the intervention of the public authorities will be based only on the child status, the holder of rights.

In consequence, the contracting parties have agreed with respect to the treatment of CAAFAG that minors arrested on the front lines by the Malian defense and security forces or by their allies must be systematically transferred to the national gendarmerie, which is also in charge of monitoring the children, thus serving as a link between the National Directorate and UNICEF. Within 48 hours, any child transferred to the gendarmerie must be moved to the National Directorate in partnership with UNICEF for their appropriate care.<sup>130</sup>

In case of custody by the Malian defense and security forces or their allies, children must

129 “Transfer of Children Associated With Armed Forces or Groups: Memorandum of Understanding Between the Government of the Republic of Mali and the United Nations System in Mali,” 1 July 2013.

130 *Ibid.*, pp. 8–9.

be separated from adults and boys from girls. Particular attention should be paid to food, shelter, and basic care, as well as protection against all forms of violence, abuse, and neglect.<sup>131</sup> The MOU limits the exchange of information concerning the identity of minors, their origin, and their health situation.<sup>132</sup> Minors must be protected from the media and thus cannot be exposed to journalists' requests. These protections also extend to minor children who do not have Malian nationality so that they can enjoy the same rights and benefits as nationals. Their repatriation therefore must be ensured by the National Directorate with the support of UNICEF and in consultation with the countries concerned.

### **Impact of State Policy on Stabilized Minors**

With regard to CAAFAG, two orientation and transit centers ensure their reception and holistic care. The private center in Bamako was initially created to provide care for street children. Later, it was designated to receive and take care of former child combatants. Its staff mainly comprises social workers who receive training adapted to the needs of the children in question. The public center was created by the Regional Directorate for the Advancement of Women, Children and the Family of Gao in partnership with UNICEF to deal with the problem of care for CAAFAG.

Since 2013, the transit and orientation centers have accommodated 97 minors. Of these, 92 children (89 percent) were reunited with their families. Only five children are currently staying in orientation centers, and two cases of recidivism have been reported.<sup>133</sup> The International Committee of the Red Cross (ICRC), which is conducting the reunification and is monitoring the first three months following the handover to the families, have stated that these children have since reengaged with the armed groups fighting the Malian armed forces and their allies.

### **Main Challenges**

Minors in terrorism in Mali present some challenges: the law is incomplete, and Mali's current position is neither just nor sustainable. The dimension of minors in terrorism cannot be reduced, as Mali has done, to young people enlisted by armed forces or groups. What about minors who opt freely and commit terrorism offenses without any force and without any organized command? What of minors radicalized on their own or those who act in isolation? In the current context, all minors arrested for suspected acts of terrorism in Mali are treated as CAAFAG. In fact, almost all arrests are made by the military and in the theater of military operations, which is the subject of recommendation 2.

Yet, the problem of minors in terrorism should not be limited solely to CAAFAG covered by the MOU. Children always have the right to be judged by the juvenile courts and to benefit from all the protections provided by national laws and international conventions ratified by Mali. To this effect, recommendation 8 declares unequivocally that the accused minor must be judged "by a juvenile court, according to a procedure appropriate for juveniles."

Despite the efforts made, a number of challenges remain with respect to the process of transferring CAAFAG in implementation of the MOU. For example, UNICEF is the only financial partner that has set up a joint support program with the centers that receive and take care of the children. The other difficulty relates to the complications associated with the involvement of multiple actors in the transfer of children to the reception centers. In effect, the transfer of the child to the National Directorate involves the Operation Barkhane force, MINUSMA, the Malian army via the judicial investigation service of the national gendarmerie, the ICRC, and the prosecutor of the specialized judicial pole. The monitoring of reunited children also poses problems insofar as their parents are mainly

<sup>131</sup> Ibid., p. 10.

<sup>132</sup> Ibid., p. 9.

<sup>133</sup> Statistics provided by the National Directorate focal point in charge of CAAFAG.

nomadic herders and do not have a fixed place of residence. For the moment, the role of magistrates in dealing with terrorism cases involving minors is limited to the interface that the public prosecutor plays between the investigative services and the focal point of the National Directorate. Insecurity in the parents' residential areas also delays the reunification process. Once with their families, however, the children return to their traditional activities of breeding, agriculture, fishing, trade, and school.

### ***Good Practices***

The Mali experience demonstrates several good practices. The close cooperation and flow of information among the gendarmerie, the prosecutor of the specialized judicial unit, and the focal point of the National Directorate have enabled personalized monitoring of the placed minors and their stabilization. This situation has produced commendable results, supporting the pursuit of state policy in this sensitive area.

Cooperation with international agencies has helped to ensure the protection of certain fundamental rights of the child. As a result of this kind of cooperation, Mali can ensure, for example, that, from

the gendarmerie to the centers, adults are separated from children and boys from girls.

The involvement of civil society organizations has contributed to the protection of children. Food, accommodation, and medical care for the children are supervised and monitored by the Ministry for the Advancement of Women, Children and the Family by UNICEF officials and by human rights organizations such as Demeso Legal Clinic, Enda Third World, the National Commission for Human Rights, and the Association for the Advancement of Women and Children in Mali. Such protection extends to the learning of spoken languages.

### **Conclusion**

The problem of minors in terrorism is a complex, sensitive, and topical issue. Due to their high number in the theater of operations and the importance of the role they play, minors are a concern for the public authorities that try to find a middle ground between punishment and rehabilitative measures. For the moment, the latter prevails over the former. It seems more appropriate to combine the two solutions, one not precluding the other. This combination will undoubtedly confer a new dynamic on the fight against terrorism and impunity.



## CONCLUSION

The international community has repeatedly affirmed that effective counterterrorism responses and the protection of human rights are complementary and mutually reinforcing goals. Human rights cannot be effectively protected in societies that lack a strong rule of law, and the rule of law gives effect to the promotion and protection of human rights. Terrorist suspects may be prosecuted, detained, and tried only in accordance with the edicts of a fair trial. All suspects are presumed innocent under the rule of law, must appear before independent judges to be judged on the basis of specific qualifications, and incur only the penalties provided in the law.

In Burkina Faso, Chad, Mali, Mauritania, Niger, and Senegal, the number of international instruments ratified is high, yet barriers to judicial responses to terrorism remain significant. Security-based responses have long been the default approach to addressing the terrorism threat in the region, with military actors often assuming law enforcement functions as the deployment of civilian investigative units remains underfunded or underconsidered. Difficulties in coordination, the paucity of resources, and the large influx of terrorism cases in many of the countries create challenges for the effective functioning of the criminal justice system. Longer-term solutions to bolster the criminal justice response alongside civilian-led approaches to terrorism and oversight mechanisms must be supported as implementation catches up to policy to align with the principles of human rights and the rule of law.

In the Sahel, magistrates have been on the front lines of conflict, investigating a terrorism incident and bringing the victims of those acts closer to the protection of the law. They also are called to rule on sensitive issues involving abuses committed by state and nonstate actors. Supreme court judges seated at the highest appellate courts occupy a particular leadership role within the institution in light of their primary function to interpret national law, including ratified international agreements, and establish jurisprudence on these complex matters. Although they largely have yet to hear many terrorism cases on appeal, they have issued these recommendations in anticipation of their growing involvement.

The recommendations, signed by all Sahel supreme court justices, mark a decisive step in the national and international fight against terrorism. They translate, in a concrete way, the declared will of the supreme courts of the Sahel countries to present a unified front respecting fundamental rights in the fight against terrorism. They must be read in line with each state's international obligations and commitments, noting the difficulties confronted by investigative services, public prosecutors, and the tribunals in charge of adjudicating terrorism cases. The recommendations, which may be adapted to each country's circumstances, form an important source of judicial authority and cooperation on this subject. Above all, they unequivocally assert the role of justice in the fight against terrorism in the Sahel.



# APPENDIX A. REFERENCE DOCUMENTS ACCOMPANYING THE RECOMMENDATIONS

## ANNEX – COUNTERTERRORISM DOCUMENTS

### A. International Instruments

Since 1963, the international community has developed 19 international instruments to prevent acts of terrorism. Developed under the auspices of the United Nations and the International Atomic Energy Agency (IAEA), these international legal instruments and supplementary amendments concern civil aviation, hostage taking, nuclear material, shipping, explosive materials, terrorist bombings, terrorism financing, and nuclear terrorism:

- ▶ 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft
- ▶ 1970 Convention for the Suppression of Unlawful Seizure of Aircraft
- ▶ 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation
- ▶ 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation
- ▶ 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation
- ▶ 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft
- ▶ 2014 Protocol to Amend the Convention on Offences and Certain Other Acts Committed On Board Aircraft
- ▶ 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents
- ▶ 1979 International Convention Against the Taking of Hostages
- ▶ 1980 Convention on the Physical Protection of Nuclear Material
- ▶ 2005 Amendment to Convention on the Physical Protection of Nuclear Material
- ▶ 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
- ▶ 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
- ▶ 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
- ▶ 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
- ▶ 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection
- ▶ 1997 International Convention for the Suppression of Terrorist Bombing
- ▶ 1999 International Convention for the Suppression of the Financing of Terrorism
- ▶ 2005 International Convention for the Suppression of Acts of Nuclear Terrorism

### B. Resolutions of the Security Council and General Assembly

The Security Council has also adopted several resolutions to counter terrorism. A selection of relevant resolutions for the countries of the Sahel can be found below:

- ▶ S/RES/1373 (2001) – Adopted by the UN Security Council on the threat to international peace and security caused by terrorist acts
- ▶ S/RES/1540 (2004) – Nonproliferation of weapons of mass destruction
- ▶ S/RES/1624 (2005) – Threats to international peace and security (Security Council Summit 2005)
- ▶ S/RES/1631 (2005) – Cooperation between the United Nations and regional organizations in maintaining international peace and security
- ▶ S/RES/2170 (2014) – Threats to international peace and security caused by acts of terrorism
- ▶ S/RES/2178 (2014) – Threats to international peace and security caused by acts of terrorism (foreign terrorist fighters)

- ▶ S/RES/2242 (2015) – Women and peace and security
- ▶ S/RES/2322 (2016) – International judicial cooperation in countering terrorism
- ▶ S/RES/2349 (2017) – Peace and security in Africa
- ▶ S/RES/2354 (2017) – Threats to international peace and security caused by terrorist acts (countering terrorist narratives)
- ▶ A/RES/71/187 (2017) – Moratorium on the use of the death penalty
- ▶ S/RES/2368 (2017) – Threats to international peace and security caused by acts of terrorism (renewal and update of the 1267/1989/2253 ISIL (Da'esh) and Al-Qaeda sanctions regime)
- ▶ S/RES/2379 (2017) – Threats to international peace and security (accountability for crimes committed by ISIL in the territory of Iraq)
- ▶ S/RES/2396 (2017) – Threats to international peace and security caused by acts of terrorism (returning foreign terrorist fighters)

### C. Regional Instruments

Over the years, Africa has taken into consideration and developed common positions that reflect its determination to counteract and contain the mechanisms and practices that facilitate terrorism. Here are some examples:

Documents of the Organization of African Unity (OAU)

- ▶ Yaoundé Declaration and Plan of Action on Drug Abuse Control and Illicit Drug Trafficking in Africa, 1996
- ▶ Dakar Declaration on the Prevention and Control of Organized Transnational Crime and Corruption, 1998
- ▶ Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, 2000
- ▶ OAU Convention on the Prevention and Combating of Terrorism, 1999
- ▶ Protocol to the OAU Convention on the Prevention and Combating of Terrorism, 2004

Documents of the West African Economic and Monetary Union (UEMOA)

The legal framework of the fight against the financing of terrorism in UEMOA, in light of the international norms and standards in force. This legal framework comprises the sequence of several legal instruments, namely:

- ▶ Directive No. 07/2002/CM/UEMOA on the Fight Against Money Laundering in Member States of UEMOA, 2002
- ▶ Rule No. 14/2002/CM/UEMOA on the Freezing of Funds and Other Financial Resources in Combating the Financing of Terrorism in UEMOA Member States, 2002
- ▶ Decisions adopted by the UEMOA Council of Ministers in application of Regulation No. 14/2002/CM/UEMOA on the list of persons, entities and organizations affected by the freezing of funds and assets and other financial resources in combating the financing of terrorism in UEMOA member states
- ▶ Uniform law on the fight against money laundering, accompanied by a uniform decree establishing the National Financial Intelligence Processing Unit (CENTIF), 2003
- ▶ Directive No. 02/2015/CM/UEMOA on the Fight Against Money Laundering and the Financing of Terrorism in UEMOA Member States, 2015

Documents of the Economic Community of West African States (ECOWAS)

- ▶ Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, 1999
- ▶ ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, 2006
- ▶ Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, 2011
- ▶ ECOWAS Political Declaration and Common Position Against Terrorism, 2013

## D. Normative Instruments

The Global Counterterrorism Forum (GCTF) is a nonpolitical, multilateral counterterrorism platform, created in 2011 in New York by 29 countries and the European Union. GCTF members have adopted framework documents in the form of good practices, recommendations, or action plans covering various key areas in the fight against terrorism and violent extremism. These documents are not binding or intended to create legal obligations for governments:

- ▶ Global Counterterrorism Forum, 2012, Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector
- ▶ Global Counterterrorism Forum, 2014, Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses
- ▶ Global Counterterrorism Forum, 2016, Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context

## E. Tools and Other Resources

A selection of manuals and other publications of the UN Office on Drugs and Crime (UNODC) can be found below:

- ▶ UNODC, 2008, Legislative Guide to the Universal Legal Regime Against Terrorism
- ▶ UNODC, 2009, Handbook on Criminal Justice Responses to Terrorism
- ▶ UNODC, 2009, Frequently Asked Questions on International Law Aspects of Countering Terrorism

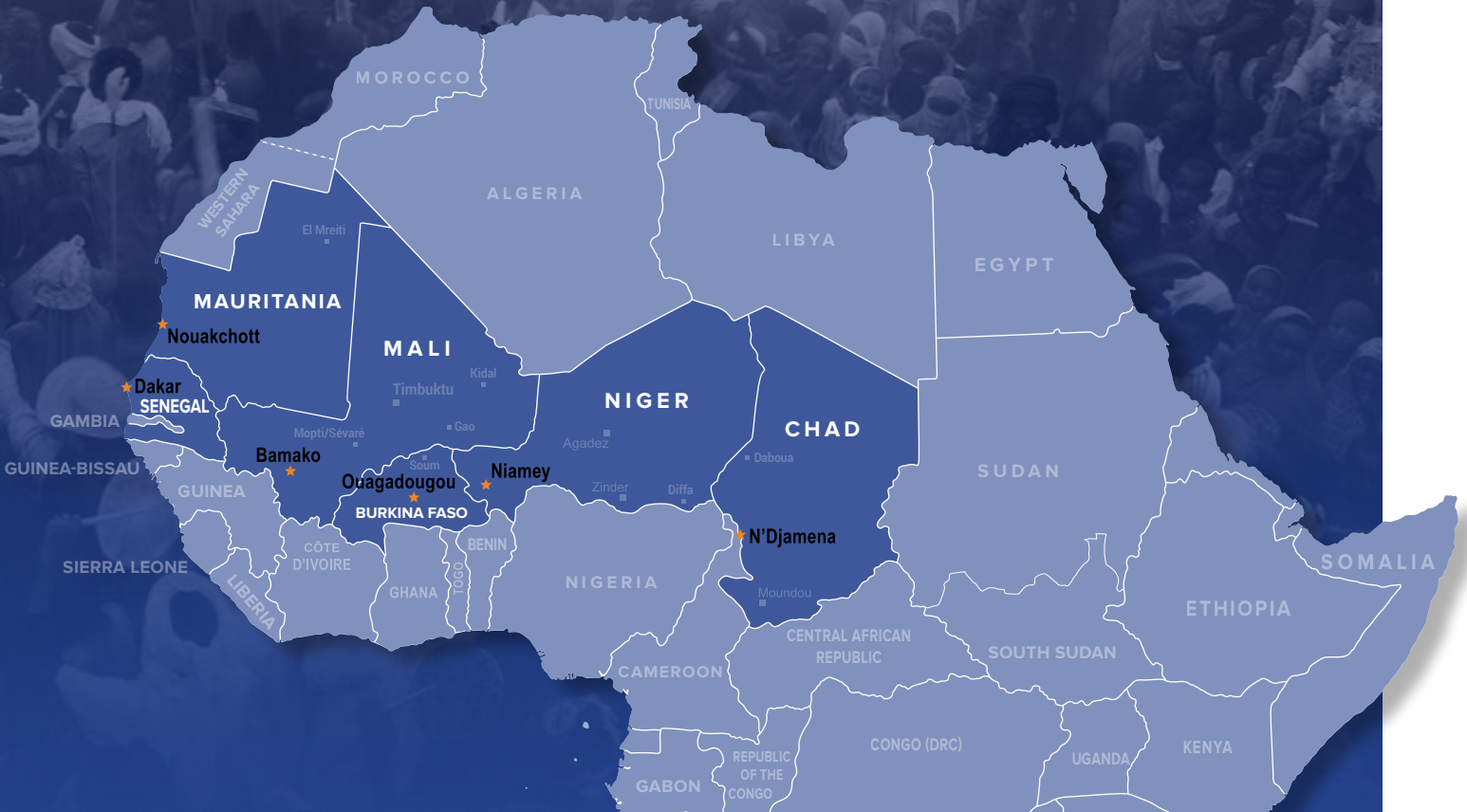
- ▶ UNODC, 2009, Manual on International Cooperation in Criminal Matters Related to Terrorism
- ▶ UNODC, 2010, Digest of Terrorist Cases
- ▶ UNODC, 2010, Counter-Terrorism Legal Training Curriculum: Universal Legal Framework Against Terrorism
- ▶ UNODC, 2011, Counter-Terrorism Legal Training Curriculum: International Cooperation in Criminal Matters: Counter-Terrorism
- ▶ UNODC, 2012, The Criminal Justice Response to Support Victims of Acts of Terrorism (revised edition)
- ▶ UNODC, 2012, The Fight Against Terrorism in the Sahel Region: Legal Framework, Investigation Techniques and Police Cooperation – Training module for judicial police officers of Burkina Faso, Mali, Mauritania, and Niger
- ▶ UNODC, 2012, The Use of the Internet for Terrorist Purposes
- ▶ UNODC, 2014, Human Rights and Criminal Justice Responses to Terrorism
- ▶ UNODC, 2015, Transport-Related (Civil Aviation and Maritime) Terrorism Offenses
- ▶ UNODC, 2016, Good Practices in Supporting Victims of Terrorism Within the Criminal Justice Framework
- ▶ UNODC, 2017, The International Legal Framework Against Chemical, Biological, Radiological and Nuclear Terrorism



## APPENDIX B. TERRORISM IN THE SAHEL: COUNTRY OVERVIEWS

The country overviews provide a brief analysis of the nature and extent of the terrorism threat and present some highlights of the legal responses and mechanisms that have been put into place by each state to investigate and adjudicate terrorism and related offenses. Using data from the Global Terrorism Database, the Global Terrorism Index (GTI) produces a composite score to provide an ordinal ranking of 163 countries on the impact of terrorism, where a ranking of 1 indicates the

country ranks highest as impacted by terrorism. The Human Development Index (HDI) from the 2016 UN Development Programme (UNDP) Human Development Report ranks 183 countries based on three basic dimensions of human development: life expectancy, access to knowledge, and a decent standard of living. A ranking of 1 indicates the country ranks highest in human development. Demographic data are taken from the UN Population Fund.



# BURKINA FASO

POPULATION: 19.2 million  
POPULATION LESS THAN 15 YEARS OLD: 8.3 million  
GTI: 43/134 (score: 4.52 out of 10)  
HDI: 185/188 countries



## Overview of Security Situation

Since 2015, Burkina Faso has suffered increasingly frequent and deadlier attacks in its northern region at its border with Mali. The country's ability to contain and respond to terrorism threats has been complicated by internal political turmoil. The popular uprisings of 2014 that led to the ousting of President Blaise Compaoré has further weakened the security apparatus in the country, especially after the dismantling of the Regiment of Presidential Security.<sup>1</sup> These uprisings have also had the effect of exacerbating ethnic tensions. Terrorist groups, including Al-Qaida in the Islamic Maghreb (AQIM) and the Islamic State in the Greater Sahara and their affiliates, have increased their operations, threats, and attacks on civilians and the military. Ansarul Islam, a local movement not classified as a terrorist group by the United Nations, is also responsible for repeated attacks and for challenging national authority in Soum province.<sup>2</sup>

Since January 2013, national security forces have been deployed to the border with Mali to contain the terrorism threat. Burkina Faso has intensified its

military action at the national and regional levels. Along with the impending creation of an investigative service specializing in terrorism, two special units have been formed in response to the growing threat of armed groups: the Combined Anti-Terrorism Forces and the Special Intervention Unit of the National Gendarmerie.<sup>3</sup> Burkina Faso has contributed up to 1,887 military personnel to support UN peacekeepers as part of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). Although some significant progress has been made in the fight against terrorism, the country remains vulnerable to the threat, as illustrated by attacks in Ouagadougou on 13 August 2017 and 2 March 2018. Unlike its neighbors, Burkina Faso has not yet developed a national strategy for fighting terrorism.<sup>4</sup>

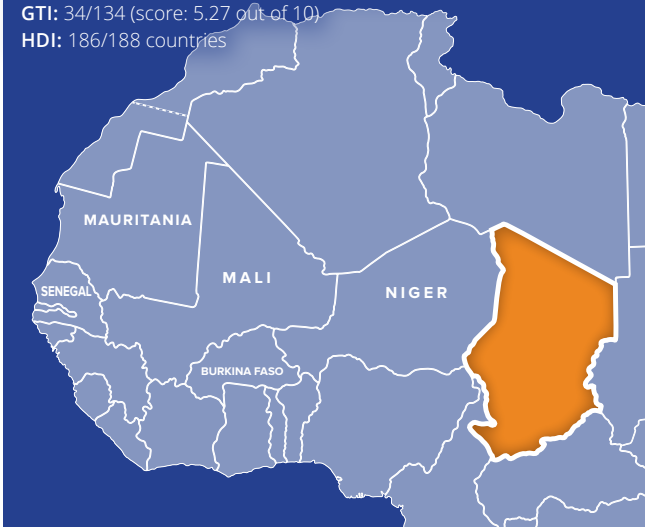
## Treatment of Terrorism Cases

Burkina Faso has had a centralized judicial antiterrorism pole since 2017, but its efficiency has been hindered by inadequate staffing.<sup>5</sup> The judicial treatment of offenses pertaining to terrorism and the funding for those operations fall under the purview of a specialized judicial unit attached to the District Court of Ouaga-II. This division also tries terrorism délits in the first instance.<sup>6</sup> Specialized formations of the competent Chambers of the Court of Appeal of Ouagadougou hear appeals concerning second-degree délits and crimes of terrorism in the first instance. A specialized unit of the indictment chamber of the Ouagadougou Court of Appeal receives appeals from the decisions of the investigating judges of the specialized judicial pole. There is no appeal on the basis of the judgments for crimes. Investigation is obligatory in criminal matters and voluntary in actions involving délits. Yet, terrorism-related offenses are prosecuted regardless of a judiciary investigation. The judicial pole has not ruled on cases of alleged irregularities in procedures related to terrorism.



# CHAD

POPULATION: 14.5 million  
POPULATION LESS THAN 15 YEARS OLD: 6.9 million  
GTI: 34/134 (score: 5.27 out of 10)  
HDI: 186/188 countries



## Overview of Security Situation

With its immense territory undergoverned in some areas, Chad is exposed to a myriad of terrorism sources, including Boko Haram in the Lake Chad Basin region, Al-Shabaab, AQIM, and the Islamic State of Iraq and the Levant (ISIL) and its affiliates. The ongoing conflict has uprooted 2.4 million people, creating elevated levels of famine and malnutrition and subjecting millions of civilians to extreme hardship.<sup>7</sup> Insecurity has left some 10.7 million people affected by the conflict dependent on humanitarian aid to survive.<sup>8</sup> In 2015 the activities of Boko Haram on the Chadian side of Lake Chad quickly intensified, partly as a result of the intervention of Chadian forces in neighboring states.<sup>9</sup> The fight against this terrorist group is currently undertaken by the Multinational Joint Task Force (MNJTF), whose operational headquarters is located in N'Djamena.<sup>10</sup> The military offensive led by the MNJTF and the national armies of Cameroon, Chad, Niger, and Nigeria has made significant progress against Boko Haram.<sup>11</sup> Also, the number of local Chadians joining terrorist organizations declined in 2016.<sup>12</sup>

The Lake Chad Basin crisis is far from being resolved. Nations in the region must address the underlying

socioeconomic issues and settle the difficult question of reintegrating ex-combatants. The United Nations is working with Cameroon, Chad, and Nigeria to encourage communities to reintegrate ex-combatants from Boko Haram and vigilante groups and rehabilitate the victims.<sup>13</sup> On 9 May 2017, Chad, Mali, and Niger signed a tripartite agreement to reinforce judicial cooperation, including the establishment of joint investigation teams.<sup>14</sup>

## Treatment of Terrorism Cases

Chad has had a specialized judicial and institutional framework in the fight against terrorism since 2015. According to the 2015 antiterrorism law,<sup>15</sup> the disposition of terrorism cases is centralized under the prosecution office of the specialized judicial antiterrorism pole attached to the High Court of N'Djamena.<sup>16</sup> Conspirators, co-conspirators, and accomplices of terrorist acts appear before a special criminal court of seven judges chosen from the judges of the Court of Appeals in N'Djamena presided by the president of the Court of Appeals.<sup>17</sup> The public prosecutor attached to the High Court has the sole authority to initiate criminal proceedings in cases of terrorism-related offenses, but the public prosecutors attached to courts other than the one in N'Djamena can proceed in urgent cases.<sup>18</sup> All police brigades conduct antiterrorism operations,<sup>19</sup> and a specialized antiterrorism unit was created in the gendarmerie and under the direction of the judicial police in 2014.

The 2015 antiterrorism law provides for capital punishment for most offenses characterized as terrorist acts, despite Chad's announcement in September 2014 of a moratorium on the death penalty.<sup>20</sup> Currently, nearly 300 people are being prosecuted for terrorism offenses and are awaiting trial in Chad.<sup>21</sup> The large number of terrorism cases has created a backlog and has resulted in prison overcrowding.<sup>22</sup> There has been no jurisprudence from the Supreme Court of Chad related to terrorism, but it gives advisory opinions on legislation related to terrorism.<sup>23</sup>

# MALI

POPULATION: 18.5 million  
POPULATION LESS THAN 15 YEARS OLD: 8.8 million  
GTI: 25/134 (score: 5.88 out of 10)  
HDI: 175/188 countries



## Overview of Security Situation

For many years, an armed Touareg movement has been claiming a territory in northern Mali bordering Niger and Algeria, which it has named Azawagh, to be independent. In November 2011, the National Movement of Azawad, which has since become the National Movement for the Liberation of Azawad (NMLA), allied itself with other nonstate armed groups<sup>24</sup> and Islamic groups operating in northern Mali, particularly AQIM, Ansar Dine, the Movement for Unity and Jihad in West Africa (MUJWA), and Boko Haram.<sup>25</sup> In April 2012, these groups seized control of Timbuktu, Kidal, and Gao, and the NMLA unilaterally proclaimed the independence of Azawad in the north.<sup>26</sup> The coup d'état of March 2012, orchestrated by a faction of the Malian army that was dissatisfied with the government's management of the situation in the north, drew international condemnation.<sup>27</sup> On 15 May 2015, a peace and reconciliation agreement emanating from the Algiers process was officially signed by the Malian government and two coalitions of armed groups.<sup>28</sup> These events have firmly placed Mali at the center of the Sahel-Saharan conflict.

In its fight against terrorism and its efforts to stabilize and secure its northern regions, Mali receives support from, inter alia, MINUSMA, France's Operation Barkhane force, the G5 Sahel Joint Force, and the African-led International Support Mission to Mali. Insecurity, however, persists and is gradually extending into central Mali, especially in Mopti and Sévaré.<sup>29</sup> The deterioration of security conditions has worsened the humanitarian situation and food insecurity.<sup>30</sup> In response, the Malian government decided to extend the state of emergency first declared in November 2015 until October 2018.<sup>31</sup> Presidential elections were held on 29 July 2018,<sup>32</sup> which will be followed by legislative elections in November or December 2018.

## Treatment of Terrorism Cases

Mali has had a specialized legal and institutional framework in the fight against terrorism since 2013.<sup>33</sup> The investigation and prosecution of terrorism-related offenses are undertaken exclusively by a specialized judicial pole attached to the District Court of Commune VI in the District of Bamako,<sup>34</sup> which has jurisdiction over délits. For *crimes* related to terrorism and transnational crime, the Court of Assizes, or criminal trial court, comprises a president, four counselors, and a clerk.<sup>35</sup>

As of October 2017, 79 criminal cases have been received by the prosecutor's office in the specialized judicial pole.<sup>36</sup> Twelve of these cases have been dismissed, and 67 have resulted in judicial investigations.<sup>37</sup> Thirteen of these cases under judiciary investigation are now before the indictment chamber in the Bamako Court of Appeals.<sup>38</sup> The Supreme Court of Mali has not ruled on any cases of irregularities related to cases of terrorism, except for an appeal of a detention order in a money laundering case.<sup>39</sup>

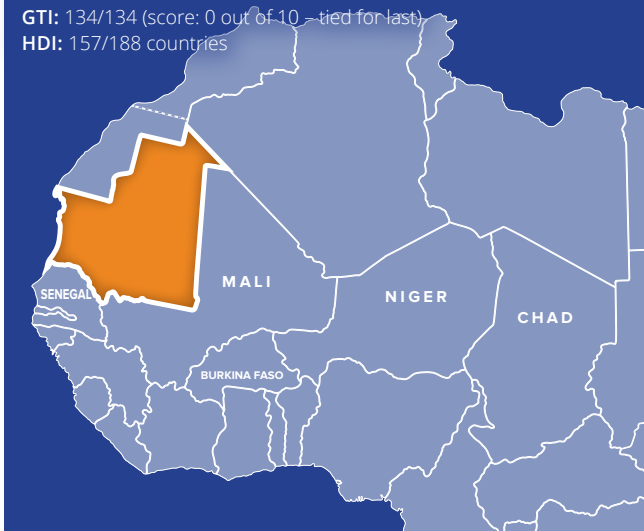
# MAURITANIA

POPULATION: 4.4 million

POPULATION LESS THAN 15 YEARS OLD: 1.8 million

GTI: 134/134 (score: 0 out of 10 – tied for last)

HDI: 157/188 countries



## Overview of Security Situation

Mauritania experienced intense terrorist activity between 2005 and 2012.<sup>40</sup> Since then, terrorist attacks have subsided, but terrorism-related offenses continue and are prosecuted. Transnational crime also remains a problem in Mauritania, especially drug and arms trafficking, which continue to pose a significant security risk.<sup>41</sup> Moreover, the spillover effects of the Malian crisis pose a challenge for Mauritania in managing refugee flows into the country. Mauritania has received and currently accommodates more than 56,000 refugees.<sup>42</sup>

Mauritania is an important regional ally in antiterrorism efforts. Its capital, Nouakchott, is home to the headquarters of the G5 Sahel; it is a member, along with Algeria, Libya, Morocco, and Tunisia, of the Union of Arab Maghreb. Mauritanian security forces successfully prevented three major terrorist attacks in 2011. Terrorism activity in Mauritania has diminished in spite of the fact that Mauritanian citizens have joined terrorist groups in other regional countries in positions of high authority.<sup>43</sup> In April 2012, the minister of foreign affairs and cooperation announced his

national strategy to combat terrorism and international crime.<sup>44</sup> He also launched a rehabilitation program for terrorists and extremists.<sup>45</sup>

## Treatment of Terrorism Cases

Mauritania has had a special judicial framework for countering terrorism since 2010.<sup>46</sup> The 2010 antiterrorism law<sup>47</sup> centralizes and specializes the prosecution of terrorism cases by creating the Office of the Prosecutor for counterterrorism, comprising three prosecutors in Nouakchott and a terrorism investigation division attached to the Wilaya, or first instance court, of Nouakchott with exclusive national jurisdiction over terrorist activities. The Criminal Court of the Wilaya in Nouakchott has sole jurisdiction over terrorism offenses. The law further provides that this court may hold mobile court hearings (*audience foraine*). Mauritania has a specialized judicial police whose actions are limited by the counterterrorism judicial pole in Nouakchott.<sup>48</sup>

In 2007 the Judicial Organization Act<sup>49</sup> introduced obligatory legal assistance in criminal cases, appeals in criminal court judgments, the creation of a juvenile court system, and the establishment of criminal divisions (*chambres d'accusation*) at the appellate level.<sup>50</sup> In terrorism cases, the prosecution office can suspend the prosecution of any person who, prior to arrest by the authorities, abandons their terrorism plan.<sup>51</sup> These procedures allow the criminal justice system to defer judgment on a large number of less serious criminal cases.<sup>52</sup>

Between 2003 and 2011, the Mauritanian Supreme Court heard 94 cases related to terrorism; two additional cases were pending in 2017.<sup>53</sup> Over the course of 2017, 51 people were detained for acts tied to terrorism committed in Mauritania, the Maghreb, and the rest of the Sahel.<sup>54</sup> A majority of the cases involved kidnapping, murder of foreigners, attempted bombing of foreign interests, and terrorism recruitment networks.<sup>55</sup>

# NIGER

POPULATION: 21.5 million  
POPULATION LESS THAN 15 YEARS OLD: 10.8 million  
GTI: 20/134 (score: 6.32 out of 10)  
HDI: 187/188 countries



## Overview of Security Situation

Niger has experienced incursions from terrorist groups in multiple regions in its territory. In the far northern region, AQIM, its affiliates, and other terrorist groups were active near the border with Algeria, Chad, Libya, and Mali. In the south, especially along the border with Nigeria, direct and repeated attacks on civilian and military targets have been carried out by Boko Haram and MUJWA, as well as ISIL, in the Diffa region. In the Tillabéri region, the number of non-state armed groups has grown. Their targets not only include humanitarian workers<sup>56</sup> and security forces but also local civilians. In all areas affected by terrorism, growing intercommunity tensions have contributed to the worsening of security, especially where community militias have formed.<sup>57</sup>

Niger has intensified efforts under the MNJTF aimed at reducing the geographical reach and the operational capacity of Boko Haram. If 2017 saw a relative decrease in the number of attacks in the Diffa region, attacks and other violent criminal activities by Boko Haram are growing in the other countries of the Lake Chad Basin region, and this reality requires that Niger remains vigilant.<sup>58</sup> Niger has begun to turn its attention to the challenges of civilian safety and governance<sup>59</sup> to address questions related to the disarmament of and

reconciliation between different communities and to consider rehabilitation and reintegration programs for militants who have not committed serious crimes.

## Treatment of Terrorism Cases

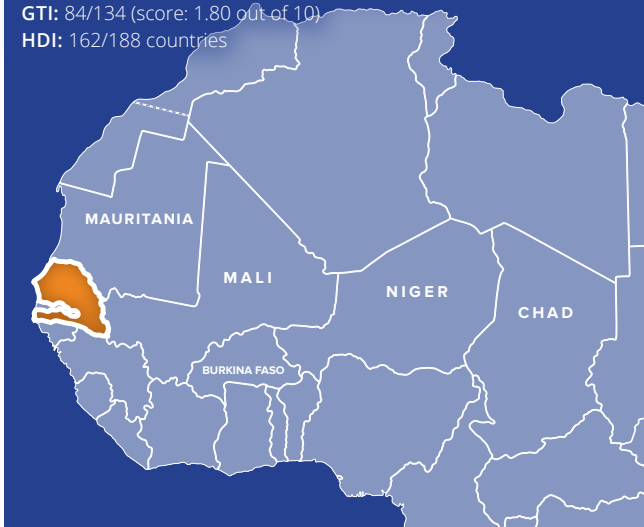
Niger has had a specialized judicial framework for countering terrorism since 2011.<sup>60</sup> The investigation and adjudication of terrorism offenses in Niger fall under the jurisdiction of a specialized judicial anti-terrorism pole whose subject matter competence was extended by legislative reform on 16 June 2016. The antiterrorism pole is located at the first instance court of Niamey and has two chambers (a control chamber and a trial chamber) specialized in the fight against terrorism at the Court of Appeal of Niamey.<sup>61</sup> Niger has a Central Service for Counterterrorism and Organized Crime to investigate those crimes; four regional branches were recently created.<sup>62</sup> The courts and investigative services in the area where an offense was committed, however, can proceed with immediate action even before referral to any centralized institution.

Judicial investigation is obligatory for crimes and délits;<sup>63</sup> the investigative and trial judge retains jurisdiction once the qualification of a terrorism act has been established, even if that qualification changes.<sup>64</sup> The specialized judicial pole hears cases on their merits, and the chamber of the Niamey Court of Appeals hears criminal cases referred by the control chamber, which receives appeals or decisions of investigative judges of the pole, as well as appeals on correctional judgments by the judiciary unit.<sup>65</sup>

Niger tried several hundred people accused of terrorism-related offenses in 2017.<sup>66</sup> Hearings continue into 2018, including in Diffa. In 2018, more than 900 people suspected of terrorism were in detention and awaiting trial, 70 of whom are minors. The majority of these cases are pending before investigative judges, two of whom specifically handle cases involving minors. The Court of Cassation has yet to hear any cases linked to terrorism.<sup>67</sup>

# SENEGAL

POPULATION: 15.9 million  
POPULATION LESS THAN 15 YEARS OLD: 6.8 million  
GTI: 84/134 (score: 1.80 out of 10)  
HDI: 162/188 countries



## Overview of Security Situation

As the only country in the Sahel that has not been directly affected by a terrorist attack,<sup>68</sup> Senegal has been characterized by its stability since gaining independence in 1960. There have been three peaceful transitions of government, and today, Senegal represents the second economic hub of West Africa.<sup>69</sup> The threat of terrorism, however, remains present. In 2016, 30 Senegalese nationals were accused of supporting Boko Haram and of planning to install terrorist cells in southern Senegal and neighboring countries.<sup>70</sup> These nationals were tried in 2018 and sentenced up to 20 years in prison, although some were acquitted.<sup>71</sup>

The risks related to violent extremism and terrorism in Senegal also stem from external threats, particularly

due to the country's participation in various theaters of military operations, including MINUSMA, making Senegal a target for AQIM and its allies.<sup>72</sup> The regions of Senegal most vulnerable to terrorism are the Senegalese-Malian border and the border region with Mauritania along the Senegal River.<sup>73</sup>

## Treatment of Terrorism Cases

Senegal has had a specialized judicial pole for countering terrorism since 2016.<sup>74</sup> It comprises an antiterrorism division within the Office of the Prosecutor in the District Court of Dakar for the prosecution of terrorism offenses, a counterterrorism unit for investigative judges for judiciary investigation procedures, and a special chamber in the District Court and Court of Appeals for trials.<sup>75</sup> The indictment chamber oversees investigations. Senegal does not have a special service to combat terrorism, but in practice, complex terrorism cases are managed by two special services: the Criminal Investigations Division of the Judicial Police and the Research Section of the National Gendarmerie.

Under Senegalese law, judicial investigation is obligatory for all terrorism crimes but not délits. The Senegalese Supreme Court has made a ruling related to terrorism, on 23 February 2017 concerning the guarantee of legal representation for an individual being prosecuted for a terrorism offense who was seeking release on bail.<sup>76</sup> The Supreme Court has also ruled on the legal nature of the crime of association with terrorism offenders and declared that this offense is an autonomous offense.<sup>77</sup>

## ENDNOTES

- 1 See Rinaldo Depagne, “Burkina Faso’s Alarming Escalation of Jihadist Violence,” International Crisis Group (ICG), 5 March 2018, <https://www.crisisgroup.org/africa/west-africa/burkina-faso/burkina-fasos-alarming-escalation-jihadist-violence>; Radio France Internationale, “Burkina Faso: le Régiment de sécurité présidentielle dissous,” 25 September 2015, <http://www.rfi.fr/afrique/20150925-burkina-faso-regiment-securite-presidentielle-rsp-dissout-putsch>.
- 2 UN Security Council, *Report of the Secretary-General on the Activities of the United Nations Office for West Africa and the Sahel*, S/2018/649, 29 June 2018 (hereinafter 2018 UN Office for West Africa and the Sahel report).
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- 17 Ibid., art. 35.
- 18 Ibid., arts. 10 and 11.
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## APPENDIX C. SUPPORTING DATA AND LAWS

TABLE C-1. QUALIFICATIONS OF SELECT ACTS OF TERRORISM AND CORRESPONDING SANCTIONS

Jurisdiction	Definition of Terrorism	Criminal Association and Individual Terrorist Enterprise	Incitement, Glorification ( <i>Apologie</i> ) to Acts of Terrorism, and Regular Consultation of Internet Sites	Death Penalty or Maximum Penalty for Terrorist Acts
<b>BURKINA FASO</b>	<p>Article 2 of law no. 084-2015/CNT modifying law no. 060-2009/AN of 17 December 2009 on the suppression of terrorism acts in Burkina Faso.<sup>a</sup></p> <p>This law defines terrorism acts as specific infractions that, by their nature or context, aim to intimidate or terrorize a population or constrain a state or an international organization to perform or refrain from performing an act.</p>	<p>Criminal association is punishable by a minimum custodial period (<i>peine de sûreté</i>) of no less than two-thirds of the sentence pronounced (articles 2 and 2bis).</p>	<p>Apologie carried out publicly is punishable by three years in prison (three to five years if carried out by written or audiovisual means) (article 15).</p> <p>The regular consultation of Internet sites or possession of materials directly inciting to the commission or apologie of terrorism acts is punishable by three to five years in prison and a fine of 500,000–5,000,000 CFA francs, except where they are conducted over the course of research or in the normal practice of a profession for the purpose of informing the public, scientific research, or are intended to serve as evidence in court (article 15).</p>	<p>Burkina Faso de jure abolished its death penalty.<sup>b</sup> The date of the last known execution was December 1988.<sup>c</sup></p> <p>The maximum sentence for terrorism offenses is life imprisonment where the death of a person results (article 13 <i>in fine</i>).</p>

Jurisdiction	Definition of Terrorism	Criminal Association and Individual Terrorist Enterprise	Incitement, Glorification ( <i>Apologie</i> ) to Acts of Terrorism, and Regular Consultation of Internet Sites	Death Penalty or Maximum Penalty for Terrorist Acts
<b>CHAD</b>	<p>Article 3 of law no. 34-2015 on the suppression of acts of terrorism.<sup>d</sup></p> <p>The law broadly defines acts of terrorism as “all acts or threat of violence susceptible of endangering the life, physical integrity, and liberties of one or more persons which results in or may cause damage to private or public property, natural resources, the environment, or the cultural heritage” that is committed with the intent to “intimidate, provoke a state of terror, force, exert pressure or cause any government, its agency, institution, population or group to engage in or refrain from any initiative ... or to create a crisis situation or a general insurrection in a state party.”</p>	<p>Contributing to, aiding, conspiring, organizing, or equipping persons with the intention to commit terrorism acts is punishable by death (articles 14–15).</p> <p>Any person who voluntarily enlists or forms a foreign terrorist group with intent to commit terrorist acts on the national territory is also punishable by life in prison (article 26).</p> <p>The Penal Code criminalizes affiliating oneself to the “formation of an association, whatever its duration or the number of members, or an agreement established for the purpose of preparing or committing offenses against persons or property,” punishable by three to eight years in prison (articles 181–182).<sup>e</sup></p> <p>Chad also criminalizes the voluntary enrollment in a terrorist group abroad with the intention of committing acts of terrorism on the national territory, punishable by life imprisonment (article 26).</p>	<p>Promoting, encouraging, or inciting to terrorism acts is criminalized and punishable by death (articles 3b and 15).</p> <p>Apologie undertaken publicly and the direct provocation for the commission of acts of terrorism are punishable by 8–10 years in prison and/or a fine of 25 million CFA francs. The punishment is doubled when the acts were undertaken using a public communication service or by means of written or audiovisual press (article 32).</p>	<p>The death penalty applies to a number of infractions, including acts that may cause death or serious injury, “all promotion, financing, contribution, order, aid, incitement, encouragement, attempt, threat, conspiracy, organization, or weapons provision to any person with the intent to commit terrorist acts,” the direct or indirect financing of terrorism, and recruitment (articles 14–17, 20–21, and 24).<sup>f</sup></p>

Jurisdiction	Definition of Terrorism	Criminal Association and Individual Terrorist Enterprise	Incitement, Glorification ( <i>Apologie</i> ) to Acts of Terrorism, and Regular Consultation of Internet Sites	Death Penalty or Maximum Penalty for Terrorist Acts
MALI	<p>Articles 2–7 of law no. 08-2015 of 23 July 2008 on the suppression of terrorism enumerates a number of offenses that constitute terrorism acts.<sup>g</sup></p> <p>Article 1 of law no. 2016-08 of 17 March 2016 on the Uniform Law on the fight against money laundering and the financing of terrorism defines a terrorism act as an act defined in international instruments and “all other acts designed to kill or grievously injure a civilian, or any other person who does not participate directly in hostilities in a situation of armed conflict, where, by its nature or context, the act is intended to intimidate a population or constrain a government or an international organization to perform or refrain from performing any act.”<sup>h</sup></p>	<p>Mali criminalizes acts that, in connection with an individual or collective enterprise, are undertaken with the objective of seriously disturbing the public order by intimidation or terror (article 6; see also article 175 of the Penal Code.)</p> <p>Criminal association may be punished by life imprisonment, a fine of 2–10 million CFA francs, and/or a residency ban of 1–10 years for nationals (temporary or permanent ban for foreigners) (article 13 of the antiterrorism law).</p> <p>An exemption applies for any person who warns the administrative or judicial authority and has made it possible to avoid the commission of the offense and to identify their co-perpetrators (article 13). The exempted person may be deprived of residency (nationals) or banned from the territory (foreigners).</p>	<p>Incitement, apologie to terrorism, and the regular consultation of Internet sites are not explicitly criminalized under the 2008 law.</p> <p>The Penal Code provides that an attempt to overthrow the legal government or to change the republican form of the state, or to incite citizens or inhabitants to arm themselves against the authority, to provoke the secession of part of the territory, or to incite to civil war is punishable by the death penalty or life imprisonment (articles 45 and 47).<sup>i</sup></p>	<p>Mali has effectively abolished its death penalty. The last known execution took place on 21 August 1980.<sup>j</sup></p> <p>The death penalty officially applies to acts of terrorism that result in the death of persons (article 13 of the antiterrorism law).</p> <p>All terrorism infractions are otherwise punishable by life imprisonment and a penalty of 2–10 million CFA francs and a residency ban of 1–10 years for nationals and that may be permanent for foreigners (article 13 of the antiterrorism law; article 9 of the Penal Code). The Uniform Law provides for correctional penalties, fines, and exemptions (articles 113, 114, 116, 117, 121, 122, 124, and 125).</p>

Jurisdiction	Definition of Terrorism	Criminal Association and Individual Terrorist Enterprise	Incitement, Glorification ( <i>Apologie</i> ) to Acts of Terrorism, and Regular Consultation of Internet Sites	Death Penalty or Maximum Penalty for Terrorist Acts
<b>MAURITANIA</b>	<p>Articles 2–7 of law no. 2010-035 of 21 July 2010 abrogating and replacing law no. 2005-047 of 26 July 2005 on the fight against terrorism enumerate acts of terrorism.<sup>k</sup></p> <p>A terrorism infraction is defined as an act that, “by its nature or context, may cause serious harm to the country and is committed with the intent to seriously intimidate the public or unduly constrain” the actions of public authorities and may “pervert the fundamental values of society and destabilize the structures and/or constitutional, political, economic or social institutions of the Nation, [and] to undermine the interests of other countries or an international organization” (article 3).</p>	<p>Article 6.1 criminalizes “forming, leading or joining a group or an agreement established for the purpose of committing terrorism offenses or their preparation, characterized by one or more material facts of terrorism ... or to use terrorism as a means to achieve the objectives of the group, even if incidental to them or on an ad hoc basis.”</p> <p>These acts are punishable by imprisonment for 5–15 years and a fine of 5–15 million ouguiyas (article 10).</p> <p>An exemption is provided for any member of a group or agreement who notifies the administrative authorities and has made it possible to prevent the occurrence of the offense and/or identified its perpetrators (article 19).</p>	<p>Article 6.7 criminalizes “the calling, by any means, to commit terrorism offenses, to incite ethnic, racial, or religious fanaticism or to use a name, term, symbol, or any other sign for the purpose of making <i>apologie</i> of an organization qualified as terrorist under the Mauritania legislation, one of its leaders or its activities.”</p> <p>Incitement and <i>apologie</i> are punishable by 5–15 years in prison and a fine of 5–15 million ouguiyas (article 10).</p>	<p>Mauritania has effectively abolished its death penalty. The last known execution took place in 1987.<sup>l</sup></p> <p>The death penalty may be pronounced where the terrorism act results in the death of a person (article 17).</p>

Jurisdiction	Definition of Terrorism	Criminal Association and Individual Terrorist Enterprise	Incitement, Glorification ( <i>Apologie</i> ) to Acts of Terrorism, and Regular Consultation of Internet Sites	Death Penalty or Maximum Penalty for Terrorist Acts
<b>NIGER</b>	<p>Preliminary article of Title VI (new) of the Penal Code defines acts of terrorism.<sup>m</sup></p> <p>Terrorism acts are all acts or threat of acting in violation of enumerated dispositions “susceptible of endangering the life, physical integrity, or individual liberties that may cause damage to property, to natural resources, the environment or cultural heritage, committed with the intention of intimidating, provoking a situation of terror, forcing, exerting pressure to the government, an organization, or an institution to engage in any initiative; disrupt the normal functioning of public services, the provision of essential services to populations, or to create a crisis situation among the populations; and to create a general insurrection in the country.</p>	<p>Article 399.1.19 (new) of the Penal Code<sup>n</sup> punishes participation in a group or association established “for the purpose of preparing a terrorist act characterized by one or more material facts” with a sentence of 5–10 years in prison. Directing or organizing the group or agreement is punishable by 10–30 years in prison.<sup>o</sup></p> <p>Any member of the association or agreement is exempted from criminal prosecution if they alert the administrative or judicial authorities and their actions prevent the materialization of the infraction in question (article 399.1.20).</p>	<p>Helping, inciting, or encouraging any person to commit a terrorism act is criminalized under the Penal Code (article 399.1.17 bis).</p> <p>Anyone who, by any means, calls for the commission of terrorism offenses; incites ethnic, racial, or religious fanaticism or uses a name, a term, a symbol, public expressions of support for acts of terrorism, and/or terrorist groups; spreads hate speech or promotes ideologies that support terrorism; reinforces ethnic and religious tensions that may provide a basis for terrorism; or uses any other sign in <i>apologie</i> of a terrorist organization is punishable by 5–10 years in prison and a fine of 500,000–10,000,000 CFA francs (article 399.1.17 bis).</p> <p>Nigerian law does not criminalize the regular consultation of Internet sites.</p>	<p>Niger has effectively abolished its death penalty. The last known execution took place in 1976.</p> <p>The death penalty applies to certain acts resulting in the death of persons or acts that by their nature are intended to cause serious injury or death or considerable economic damage (articles 399.1.2, 399.1.6 <i>in fine</i>, 399.1.8 <i>in fine</i>, 399.1.10, 399.1.12, 399.1.13, 399.1.14, and 399.1.15).</p>

Jurisdiction	Definition of Terrorism	Criminal Association and Individual Terrorist Enterprise	Incitement, Glorification ( <i>Apologie</i> ) to Acts of Terrorism, and Regular Consultation of Internet Sites	Death Penalty or Maximum Penalty for Terrorist Acts
<p><b>SENEGAL</b></p>	<p>Article 279-1 of law no. 2016-29 of 8 November 2016 modifying law no. 65-60 of 21 July 1965 on the Penal Code enumerates terrorism acts.<sup>p</sup></p> <p>The code generally defines terrorism acts as specific offenses committed “intentionally in connection with an individual or collective enterprise for the purpose of intimidating a population or seriously disturbing the public order or the normal functioning of national or international institutions, coercing a government or an international organization to perform or abstain from performing any act by the use of terror.”</p>	<p>The offense of criminal association listed in articles 238–240 of the Penal Code is considered a terrorism offense when it is intentionally committed with an individual or collective enterprise (article 279-1 (new), section 7).</p> <p>Under the Penal Code, any association formed, “whatever the duration or the number of its members, all agreement established for the purpose of preparing or committing one or more crimes against persons or properties, constitutes a crime or an offense against the public peace” (article 238). Criminal association is punishable by 10–20 years in prison (article 239) or 5–10 years correctional sentence hard labor, and may be subject to a ban on residency for a period of 5–10 years (article 240).<sup>q</sup></p> <p>An exemption applies to individuals who disclosed the established agreement to the authorities or have made its existence known prior to any proceedings (article 239).</p>	<p>Apologie, undefined in the code, is punishable by 1–5 years in prison and a fine of 500,000–2,000,000 CFA francs (article 279-1 (new) <i>in fine</i>).</p> <p>Article 80 of the Penal Code (law no. 99-05 of 29 January 1999) punishes incitement to commit a crime generally, which may be punished by 3–5 years in prison and a fine between 100,000 CFA francs and 1.5 million CFA francs. The prohibition of residency can also be pursued.</p> <p>Senegalese law does not criminalize the regular consultation of terrorist websites, but the Code of Criminal Procedure allows Senegalese authorities to restrict access to sites containing “manifestly illicit content” (article 90-13).<sup>r</sup></p>	<p>Senegal de jure abolished its death penalty in 2004. The date of the last known execution was 1967.<sup>s</sup></p> <p>Life imprisonment is the maximum penalty incurred for terrorism offenses (articles 279.1–279.6, 279.9–279.10, and 279.12).</p>

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- c La Peine de Mort dans le Monde, "Burkina Faso: Pays qui prévoit la peine de mort dans sa législation," n.d., [https://www.peinedemort.org/zonegeo/BFA/Burkina\\_Faso](https://www.peinedemort.org/zonegeo/BFA/Burkina_Faso).
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- j Cornell Center on the Death Penalty Worldwide, "Death Penalty Database: Mali," 27 March 2012, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Mali>.
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- l Cornell Center on the Death Penalty Worldwide, "Death Penalty Database: Mauritania," 5 April 2011, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Mauritania>.
- m Ordonnance n° 2011-12 du 27 janvier 2011, modifiant et complétant la loi n° 61-27 du 15 juillet 1961 portant institution du Code pénal [Ordonnance no. 2011-12 of 27 January 2011, modifying and completing law no. 61-27 of 15 July 1961 on the Penal Code]; Loi n° 2016-22 du 16 juin 2016, modifiant et complétant la loi n° 61-27 du 15 juillet 1961 portant institution du Code pénal [Law no. 2016-22 of 16 June 2016, modifying and completing law no. 61-27 of 15 July 1961 on the Penal Code]. This preliminary article does not appear in subsequent amendments to the Penal Code.
- n Loi n° 2016-22 du 16 juin 2016, modifiant et complétant la loi n° 61-27 du 15 juillet 1961 portant institution du Code pénal [Law no. 2016-22 of 16 June 2016, modifying and completing law no. 61-27 of 15 July 1961 on the Penal Code].
- o Articles 399.1.1–399.1.13 and 399.1.18 paragraph 1 of the Criminal Code may allow for the criminalization of an individual terrorist enterprise.
- p Loi n° 2016-29 du 08 novembre 2016 modifiant la loi n° 65-60 du 21 juillet 1965 portant Code pénal [Law no. 2016-29 of 8 November 2016 modifying law no. 65-60 of 21 July 1965 on the Penal Code], *Journal Officiel de la République du Sénégal*, no. 6975 (25 November 2016).
- q Loi n° 99-05 du 29 janvier 1999 modifiant certaines dispositions du Code pénal [Law no. 99-05 of 29 January 1999 modifying some dispositions of the Penal Code], <http://www.wipo.int/edocs/lexdocs/laws/fr/sn/sn010fr.pdf>.
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Table C-2. Investigative Mandates of Multinational Forces in the Sahel

	<b>Mission</b>	<b>Investigative Mandate</b>
<b>G5 SAHEL JOINT FORCE (2017–PRESENT)</b>	<p>The joint force combats serious cross-border crime, terrorism, and criminal organizations. It includes personnel from the G5 Sahel member states (Burkina Faso, Chad, Mali, Mauritania, and Niger).</p> <p>The scope of its mission is meant to complement the mandate of the UN Multidimensional Integrated Stabilization Mission in Mali and goes further than Operation Barkhane in that it addresses “terrorism and transnational organized crime through joint cross-border operations and counterterrorism operations and includes the facilitation of humanitarian operations, development activities, and the restoration of state authority.”<sup>a</sup></p>	<p>The joint force appears to lack an explicit investigative mandate, but UN Security Council Resolution 2391 provides that the force must “ensure accountability and transfer to criminal justice of those apprehended during operations and suspected of terrorist and related crimes.”<sup>b</sup></p> <p>The force includes 100 police and gendarmes.<sup>c</sup></p>
<b>MULTINATIONAL JOINT TASK FORCE (MNJTF) (2015–PRESENT)</b>	<p>Originally established in 1994 to address cross-border banditry, the MNJTF was resuscitated and its mandate expanded to encompass counterterrorism operations in 2015. The MNJTF, comprising forces from Benin, Cameroon, Chad, Niger, and Nigeria, is mandated to, inter alia,</p> <p>[c]reate a safe and secure environment in the areas affected by the activities of Boko Haram and other terrorist groups ... [f]acilitate the implementation of overall stabilization programmes by the [Lake Chad Basin Commission] Member States and Benin in the affected areas, including the full restoration of state authority and the return of [internally displaced persons] and refugees [and facilitate, within the limit of its capabilities, humanitarian operations and the delivery of assistance to the affected populations.<sup>d</sup></p> <p>Three components of this mission—military, police, and civilian—appear under the concepts of operations.<sup>e</sup></p>	<p>In carrying out its mission, the MNJTF may undertake various tasks that include</p> <p>facilitating operational coordination between the countries concerned in the fight against Boko Haram and other terrorist groups, including on the basis of intelligence gathered by [Lake Chad Basin Commission] Member States and Benin and/or made available by external partners; ... contribute to the strengthening and institutionalization of civil-military coordination, including the provision, on request, of humanitarian convoys; [and] ... support regional efforts to arrest and bring to justice all perpetrators of war crimes and crimes against humanity.<sup>f</sup></p> <p>In 2015 the UN Secretary-General noted that the MNJTF’s financial challenges hampered its operations and capabilities in intelligence sharing.<sup>g</sup> To date, the police component of the MNJTF has yet to be installed.<sup>h</sup></p>



**UN MULTIDIMENSIONAL  
INTEGRATED  
STABILIZATION MISSION  
IN MALI (MINUSMA)  
(2013–PRESENT)**

MINUSMA's general mandate, established under Chapter VII of the UN Charter, is to support Malian authorities in efforts to stabilize the country and facilitate its transition.<sup>l</sup> In extending MINUSMA's mandate under UN Security Council Resolution 2423, the council reinforced the prioritized support to the implementation of the 2012 peace agreement, support to the redeployment of Malian Defense and Security Forces in the center of the country, and the protection of civilians, including against asymmetric threats.<sup>j</sup>

Although the mission does not explicitly include counterterrorism activities in its mandate, its peacekeeping operation is deployed in parallel with ongoing counterterrorism operations. MINUSMA bases, convoys, and personnel have come under numerous attacks by extremists and armed groups.

As provided in the extended mandate under Resolution 2423, peacekeeping efforts must “support, as feasible and appropriate, the efforts of the Malian authorities, without prejudice to their responsibilities, to bring to justice those responsible for serious violations or abuses of human rights or violations of international humanitarian law, in particular war crimes and crimes against humanity in Mali, taking into account the referral by the transitional authorities of Mali of the situation in their country since January 2012” to the International Criminal Court (ICC).<sup>k</sup> As the ICC Statute does not have jurisdiction over terrorism offenses, however, it does not appear that MINUSMA's broad justice mandate would extend to those actions.<sup>l</sup> Yet, a former UN Under-Secretary-General for Peacekeeping Operations has insisted that MINUSMA is a “laboratory for UN peacekeeping” facing the “new threats of the 21st century.”<sup>m</sup>

**OPERATION BARKHANE  
(2014–PRESENT)**

Launched on 1 August 2014, Operation Barkhane is led by the French armed forces in partnership with the Sahel states. It brings together 4,000 military personnel whose mission is to support the armed forces of partner countries in their efforts to combat terrorist groups in the Sahel and to foster African ownership in the management of the crisis.<sup>n</sup> Operation Barkhane replaces Operation Serval and focuses on broader counterterrorism efforts across borders in Chad, Mali, and Niger.

The operation includes a provost unit (*mission prévôtale*). Armed by officials of the French gendarmerie, functions of the unit include those of the judicial police; general law enforcement (prevention, control, and intervention); and intelligence gathering.<sup>o</sup> Officials are selected and specifically trained for this mission and participate in operational readiness capacities prior to deployment.<sup>p</sup> On 23 February 2018, operational forces arrested four suspected terrorists as part of an operation near the Nigerien border.<sup>q</sup>

**OPERATION SERVAL  
(2013–2014)**

Operation Serval was launched in 2013 at the official request of the Malian interim government for French military assistance and following the adoption of UN Security Council Resolution 2085, authorizing the deployment of an African-led international support mission in Mali.

The operation ended in July 2014 and was replaced by Operation Barkhane in August of that year.

The operation engaged two detachments of the provost gendarmerie (*gendarmerie prévôtale*) based in Bamako and Gao. They accompanied French troops and performed judicial police duties, arresting close to 430 suspects, participating in intelligence gathering on the field, and supporting the Malian gendarmerie in interrogating individuals. French troops transferred all suspects to the Malian authorities consistent with their “no prisoners” approach, after which many were released without trial.<sup>r</sup>

- a Jennifer G. Cooke, Boris Toucas, and Katrin Heger, “Understanding the G5 Sahel Joint Force: Fighting Terror, Building Regional Security?” Center for Strategic and International Studies, 15 November 2017, <https://www.csis.org/analysis/understanding-g5-sahel-joint-force-fighting-terror-building-regional-security>.
- b UN Security Council, S/RES/2391, 8 December 2017, para. 17.
- c Africa Center for Strategic Studies, “The G5 Sahel Joint Force Gains Traction,” 9 February 2018, <https://africacenter.org/spotlight/g5-sahel-joint-force-gains-traction/>.
- d Multinational Joint Task Force, “Mandate of the Multinational Joint Task Force,” n.d., <https://www.mnjtf.org/about-mnjtf/mnjtf-mandate/>.
- e See African Union, *Rapport de la Présidente de la Commission sur la mise en œuvre du Communiqué PSC/AHG/COMM.2 (CDLXXXIV) sur le Groupe Terroriste Boko Haram et les efforts internationaux connexes*, PSC/PR/2.(CDLXXXIX), 6 March 2015, <http://www.peaceau.org/uploads/cps-489-rpt-boko-haram-03-03-2015.pdf>. The police component of the MNJTF was intended to support the re-establishment of public order, the security of the Rule of Law in the mission zones ... contribute to the freedom of all the people abducted or detained ... by Boko Haram and support their return, reintegration and re-adaptation ... protect the witnesses, the unarmed civilians and vulnerable groups; combat criminality; recover stolen property; and identify and destroy the funding sources, weaponry and logistical support to Boko Haram.
- William Assanvo, Jeannine Ella A Abatan, and Wendyam Aristide Sawadogo, “Assessing the Multinational Joint Task Force Against Boko Haram,” *West Africa Report*, no. 19 (September 2016), fn. 80, <https://issafrica.s3.amazonaws.com/site/uploads/war19.pdf>.
- f African Union, *Rapport de la Présidente de la Commission sur les efforts régionaux et internationaux et la voie à suivre dans la lutte contre le Groupe Terroriste Boko Haram*, PSC/AHG/2.(CDLXXXIV), 29 January 2015, pp. 6–7, <http://www.peaceau.org/uploads/cps484-rpt-boko-haram-29-1-2015.pdf>.
- g UN Security Council, *Report of the Secretary-General on the Situation in the Lake Chad Basin Region*, S/2017/764, 7 September 2017, para. 2.
- h *Ibid.*, para. 75.
- i UN Security Council, S/RES/2100, 25 April 2013.
- j UN Security Council, S/RES/2423, 28 June 2018.
- k *Ibid.*, para. 38(3)(i).
- l The International Criminal Court (ICC) has previously worked closely with peacekeeping forces to uncover evidence of international crimes. In the Thomas Lubanga case, for instance, ICC prosecutors relied strongly on confidential information obtained from the UN Peacekeeping Mission in the Democratic Republic of Congo. Hiroto Fujiwara and Stephan Parmentier, “Investigations,” in International Prosecutors, ed. Luc Reydam, Jan Wouters, and Cedric Ryngaert (Oxford: Oxford University Press, 2012), p. 597.
- m John Karlsrud, “Are UN Peacekeeping Missions Moving Toward ‘Chapter Seven and a Half’ Operations?” Global Observatory, 12 February 2018, <https://theglobalobservatory.org/2018/02/peacekeeping-chapter-seven-half/>.
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- o *Ibid.*
- p *Ibid.*
- q “Four Jihadists Arrested in ‘Major Operation’ in Mali,” Agence France-Presse, 23 February 2018, <http://www.africanews.com/2018/02/23/four-jihadists-arrested-in-major-operation-in-mali/>.
- r See Bibi van Ginkel and Christophe Paulussen, “The Role of the Military in Securing Suspects and Evidence in the Prosecution of Terrorism Cases Before Civilian Courts: Legal and Practical Challenges,” ICCT - *The Hague Research Paper*, May 2015, p. 15, <https://www.icct.nl/download/file/ICCT-Van-Ginkel-Paulussen-The-Role-Of-The-Military-In-Securing-Suspects-And-Evidence-In-The-Prosecution-Of-Terrorism-Cases-Before-Civilian-Courts.pdf>; Ministère des Armées, République Française, “Mali: La gendarmerie prévôtale veille sur la force Serval,” 2 April 2014, <https://www.defense.gouv.fr/operations/operations/autres-operations/operations-achevees/operation-serval-2013-2014/actualite/mali-la-gendarmerie-prevotale-veille-sur-la-force-serval>.

TABLE C-3. TREATIES ON CHILDREN'S RIGHTS

	<b>Convention on the Rights of the Child (CRC)</b>	<b>African Charter on the Rights and Welfare of the Child</b>	<b>Optional Protocol to the CRC on the Involvement of Children in Armed Conflict</b>	<b>The Paris Principles</b>
	(effective date of accession, ratification, or succession)			
<b>BURKINA FASO</b>	31 August 1990	8 June 1992	6 July 2007	Endorsed as of October 2010
<b>CHAD</b>	2 October 1990	30 March 2000	28 August 2002	6 February 2007
<b>MALI</b>	20 September 1990	3 June 1998	16 May 2002	6 February 2007
<b>MAURITANIA</b>	16 May 1991	21 September 2005	Nonparty	1 October 2007
<b>NIGER</b>	30 September 1990	11 December 1999	13 March 2012	6 February 2007
<b>SENEGAL</b>	31 July 1990	29 September 1998	3 March 2004	29 September 2009

Sources: African Commission on Human and Peoples' Rights, "African Charter on the Rights and Welfare of the Child," CAB/LEG/24.9/49, n.d.; African Commission on Human and Peoples' Rights, "Ratification Table: African Charter on the Rights and Welfare of the Child," n.d., <http://www.achpr.org/instruments/child/ratification/> (accessed 26 September 2018); UN General Assembly, A/RES/54/263, 29 August 2000; "Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict," 25 May 2000, 2173 U.N.T.S. 222.





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