

IIJ RECOMMENDATIONS FOR JUDGES IN THE SAHEL AND WEST AFRICA

Implementing the GCTF's *The Hague Memorandum on
Good Practices for the Judiciary in Adjudicating Terrorism Cases*





ABOUT THE IIJ

The **International Institute for Justice and the Rule of Law (IIJ)** is a non-profit, intergovernmental training institute based in Malta, which serves as a regional hub for sustainable, results-driven rule of law-based training and capacity-building activities for justice sector and other stakeholders.

The IIJ's mission is to enhance and strengthen the competencies of criminal justice practitioners and other stakeholders to address terrorism and related transnational criminal activities within a rule of law framework, and to promote co-operation and information exchange on a national, regional and international basis. The IIJ was established in 2014 by twelve founding member states and is one of three Global Counterterrorism Forum (GCTF)-inspired institutions.

For more information on the *IIJ Recommendations for Judges in the Sahel and West Africa: Implementing the GCTF's The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Cases*, the IIJ Judicial Capacity-Building Initiative, or other IIJ-led initiatives and programs, email info@theiij.org or visit www.theiij.org. For more information about the Global Counterterrorism Forum, visit www.thegctf.org.



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Preface

The area known as the Sahel and West Africa is increasingly being affected by terrorist activities. Recent years have witnessed the proliferation of terrorist groups, including Al Qaeda in the Islamic Maghreb (hereafter AQIM), Boko Haram, and the emergence of new movements and violent extremist organizations that have significantly increased their activities in the region. Destabilizing factors such as poverty, rapid population growth, overwhelmed criminal justice systems, official corruption, internal political tensions, lack of effective state control over long and porous borders, and the dramatic increase in the presence of weapons since the 2011 upheaval in Libya, have all created an environment in which cross-border crime and terrorism have taken hold.

The increase in cross-border terrorist threats, compounded by the foreign terrorist fighter phenomenon, present numerous challenges to national criminal justice systems. Practitioners from West Africa and the Sahel have voiced the need for additional capacity building in the area in order to help them meet those challenges in confronting the growing menace of terrorism. Prosecution authorities from countries in the Sahel and West Africa are struggling to handle heavy caseloads with few or severely limited resources. Effective prosecutions of terrorist offenses often suffer from unreliable eye-witness evidence, difficulty in securing evidence from outside the jurisdiction, limitations or prohibitions on the use in court of information obtained by security or law enforcement intelligence agencies, lack of cooperation among governmental agencies involved in counter-terrorism efforts, and lack of proper identification, collection, analysis and preservation of forensic and other evidence produced by terrorist events. In addition, justice officials face difficulties in maintaining security for witnesses, victims, judges, prosecutors, and other criminal justice actors. Finally, judges are being called upon to manage increasingly complex transnational cases in which both investigators and terrorists employ highly sophisticated technology in their operations.

In response to these challenges, the International Institute for Justice and the Rule of Law (hereafter IIJ), launched the *Capacity Building Program for Judges in the Sahel and West Africa* in April 2017, under the auspices of the IIJ Judicial Capacity-Building, one of the IIJ's eight Core Initiatives. The aim of the project, funded by the Government of Canada, is to increase the capacity of trial judges and other criminal justice officials to effectively handle terrorism cases in the Sahel and West Africa in line with international human rights standards, applicable Global Counterterrorism Forum (hereafter GCTF) good practices, and rule of law principles. The IIJ has implemented this initiative through a regional approach with integrated and cross-border training for practitioners.

The program aligns with the objectives of the GCTF Working Group for Capacity Building in the West Africa Region, co-chaired by Canada and Algeria. It also complements the United Nations' *Integrated Regional Strategy for the Sahel* (S/2013/354), the European Union (EU) *Strategy for Security and Development in the Sahel* (2018-2022), and the United Nations *Support Plan for the Sahel* (2018-2022), which builds upon the EU strategy.

The project has sought to build capacity at the practitioner level through delivering training to trial judges who handle terrorism cases. It has also sought to provide judges with a forum for sharing best practices in the management of trials involving terrorism charges. Participants have included representatives of national judicial training centres in order to ensure the training is included in the curriculum of these institutions. Four regional training workshops and a study visit to several justice sector agencies in Morocco took place between May 2017 and July 2018. The workshops focused on common regional needs and allowed practitioners from different countries to meet, share experiences and build trust on a professional level in a collegial atmosphere. Discussions during the workshops and study tour were forward-looking and action-oriented and resulted in concrete suggestions for follow-up.

The first regional program was held on 8-11 May 2017 in Dakar, Senegal, and brought together twenty-seven trial level judges and representatives from the national public defenders' offices from Burkina Faso, Cameroon, Cote d'Ivoire, Mali, and Senegal. The workshop was structured to include presentations by experts followed by collaborative sessions in which participants engaged in exercises based upon a fact pattern designed to promote discussions of the recommendations in the GCTF's *The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Cases* (hereafter *The Hague Memorandum*). During the four days, participants identified and shared common national and regional challenges encountered in adjudicating terrorism cases and discussed how international human rights and rule of law standards can be incorporated into the responses to those challenges.

A second regional program was held on 16-19 January 2018 in Cotonou, Benin, and brought together thirteen criminal justice practitioners from Benin, Chad and Nigeria, including public prosecutors and officials from judicial training institutes. All of the practitioners had experience in handling counterterrorism related cases. The Benin workshop followed the format utilized in Dakar in order to promote the participants' discussions of the issues they face in their counterterrorism efforts and how implementing *The Hague Memorandum* good practices would assist in the development of effective solutions. The participants echoed the principal concerns and priorities identified during the first workshop. They also added a call for a legislative counterterrorism framework dealing with all of the matters covered by *The Hague Memorandum* in order to promote a fair trial for the accused, victims, witnesses, and the public in accordance with international good practices.

The third regional program, held on 26-28 March 2018, consisted of a Study Tour of Moroccan institutions (hereafter IJ Rabat Study Tour). The Kingdom of Morocco's Ministry of Justice and the Ministry of Interior worked closely with the IJ to design the study tour for judges from fifteen countries, primarily from the Sahel and North African regions, with all countries that participated in the Dakar or Cotonou workshops represented by the same individuals who attended the previous event. The Kingdom of Morocco opened the doors of six

Moroccan criminal justice institutions and welcomed participants from the IJJ program to tour, meet personnel, and discuss with agency directors the integrated approach Morocco takes to fighting terrorism through the rule of law. During the three days, participants visited the Appellate Court of Rabat, the Mohamed VI Foundation for Detainees Reintegration, Morocco's Central Bureau of Judicial Investigation, the Higher Institute of Magistrates, the National Security Police Scientific Laboratory in Casablanca, and the Royal Police Training Institute. The IJJ Rabat Judicial Study Tour proved to be an excellent vehicle for Sahel region judges to engage with each other, with the Moroccan judicial system, and with international experts on issues common to judges responsible for adjudicating terrorism trials.

The final program, held on 12-13 July 2018 in Valletta, Malta, was attended by twenty-nine national justice sector officials representing all of the countries that had participated in the Dakar and Cotonou workshops and the Rabat Study Tour. The first day of the workshop consisted of in-depth panel discussions led by experts and several country representatives who provided their respective country's experiences in implementing *The Hague Memorandum* good practices. Discussions followed in which all participants exchanged their experiences in overseeing terrorism cases and made observations that laid the groundwork for the task of the second day of the conference: participants working collaboratively to draft recommendations to support West Africa and Sahel judges, investigating magistrates, and other judicial officials to more fully implement *The Hague Memorandum*. The afternoon was spent in plenary session commenting on and refining the wording of the draft recommendations in order to obtain a general consensus on content. The results of that exercise formed the basis for the accompanying *IJJ Recommendations for Judges in the Sahel and West Africa: Implementing the Global Counterterrorism Forum's The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Cases* (hereafter *IJJ Judicial Recommendations*).

The *IJJ Judicial Recommendations* respond to the terms of Canada's IJJ grant by providing a practical set of recommendations and good practices for, and by, practitioners, with references to international human rights and rule of law standards and sources. The *IJJ Judicial Recommendations* also build upon the existing guidelines in the counterterrorism area developed by the GCTF and other organizations. They will help promote the adjudication of terrorism and related cases in accordance with human rights and rule of law principles recognized by the international community and articulated in multilateral and regional treaties and conventions to which the West Africa and Sahel countries are parties or signatories. The *IJJ Judicial Recommendations* are available in electronic form and will be made available broadly to trial judges conducting terrorism trials through the IJJ, regional judicial networks, and national judicial academies.¹

¹ The IJJ's Consulting Expert for this program, Mr. Thomas C. Black, led the discussion on the final day of the Malta program in July 2018 and compiled the results of those discussion for these *IJJ Judicial Recommendations*. The IJJ is grateful to Mr. Black for his work in drafting these recommendations.



The IIJ Recommendations for Judges in the Sahel and West Africa

Implementing the GCTF's *The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Cases*

The *IIJ Recommendations for Judges in the Sahel and West Africa: Implementing the GCTF's The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Cases* (hereafter *IIJ Judicial Recommendations*) were developed in partnership with twenty-nine judges, investigating magistrates, and other criminal justice sector officials, as well as almost twenty international experts in criminal law, human rights, and the rule of law, all of whom participated in the *IIJ Capacity-Building Program for Judges in the Sahel and West Africa* organised by the International Institute for Justice and the Rule of Law (IIJ), and funded by the Government of Canada. The culmination of that eighteen month program was a two-day workshop held in July 2018 in Valletta, Malta, during which participants drafted recommendations for implementing the nine good practices set out in the GCTF's *The Hague Memorandum of Good Practices for the Judiciary in Adjudicating Terrorism Cases* (hereafter *The Hague Memorandum*). Subsequently, the IIJ finalised the *IIJ Judicial Recommendations* by providing an organisational structure² and adding supporting material from other international and national organisations, and relating specific Recommendations to applicable international human rights and rule of law principles and sources.

The *IIJ Judicial Recommendations* are intended to support the implementation and operationalization of the *The Hague Memorandum*, specifically, “the development of a strong and independent judiciary in States, assist[ing] judges to more effectively adjudicate cases that involve terrorism while ensuring the rights of all parties involved in the cases, in particular the fair trial rights of the accused and the protection of victims and witnesses.” The *IIJ Judicial Recommendations* also offer concrete ways in which the *The Hague Memorandum* good practices can be put into practice in the Sahel and West Africa, and elsewhere.

² The *IIJ Judicial Recommendations* appear beneath the corresponding good practice in *The Hague Memorandum* to which they pertain. In some cases, good practices are grouped with other similar or related practices.

Identifying and Assigning Specially Trained Judges

IIJ Recommendations 1 - 10, implementing Good Practice 1 of the GCTF's *The Hague Memorandum*: identify and assign specially trained judges

Good Practice 1 of *The Hague Memorandum* encourages States to identify and specially train judges to handle cases involving terrorism and other national security offences in order to ensure that the criminal justice system operates in compliance with international human rights and rule of law principles, and results in fair and just determinations of the accused's guilt or innocence. All participants in the *IIJ Capacity-Building Program for Judges in the Sahel and West Africa* recognised the urgent need for specialised training for new and experienced judges, investigating magistrates, and others, in resolving the increasingly complex issues presented in terrorism cases. The following recommendations resulted from the participants' discussions during the program.

IIJ Recommendation 1

Terrorism cases should be handled by judges and investigating magistrates who have been specially trained and selected based upon their judicial experience and ability to handle high profile, national security cases.³ Judicial training focused on handling terrorism cases should be included in the initial training judges and investigating magistrates receive upon entry into their positions.⁴ In all cases, however, such specialized training should be provided to judges and investigating magistrates who are assigned to specialised anti-terrorism courts or who

³ In order to constitute a "competent tribunal" as required by the *International Covenant on Civil and Political Rights* (1966) (hereafter ICCPR), judicial officials must have the necessary training and qualifications. See United Nations Counter-Terrorism Implementation Task Force (hereafter CTITF), *Basic Human Rights Reference Guide on Right to a Fair Trial and Due Process in the Context of Countering Terrorism* (2014), para. 29 (b), available at <https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf>; citing, United Nations (hereafter UN), *Basic Principles on the Independence of the Judiciary*, Principle 10, available at <https://ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>, which provides that: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law", adopted under General Assembly Resolution 40/32 (1985).

⁴ Education of law professionals in Council of Europe (hereafter COE) member states regarding their obligations to follow and implement the human rights standards of the European Convention on Human Rights (hereafter ECHR), as interpreted by the European Court of Human Rights (hereafter ECtHR), has been a priority for the COE. In 2004, the Committee of Ministers adopted Recommendation No. Rec(2004)4, which invited member states to include human rights training in university curriculum for law professionals. See https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd13a. In 2013, the COE's Parliamentary Assembly received a report from the Committee on Legal Affairs and Human Rights, which concluded that there was a need to reinforce the training of legal professionals regarding the EU's human rights framework. The report noted that proper training of law professionals would ensure that human rights standards "are firmly entrenched in the national law of member States". See <http://website-pace.net/documents/19838/166208/20140131-PRESSajdoc39.pdf/ac911b33-bab6-4ae4-a926-dac124010c15>.

otherwise oversee terrorism cases. Judges and investigating magistrates handling terrorism cases should also receive on-going, periodic training to assist them in maintaining and further developing the judicial skills and expertise needed to effectively handle terrorism cases. In some countries, such training should include court clerks.⁵

IJ Recommendation 2

Training for judges and investigating magistrates handling terrorism cases should be the responsibility of a national judicial training center that will ensure continuity, consistency, and timeliness of the instruction. Training centers should be adequately funded and staffed for this purpose.⁶

IJ Recommendation 3

Specialized training for handling terrorism cases should emphasise the need to ensure that all criminal investigations and prosecutions, including those involving acts of terrorism, comply with international human rights and rule of law standards, particularly an accused's right to a fair trial. In addition, training should focus on enabling judges and investigating magistrates to implement those international standards at each step of the investigation and prosecution, including, *inter alia*, crime scene procedures; collection, safeguarding, and admission into evidence of physical, documentary, and forensic evidence; development and presentation of witness testimony; use and disclosure of intelligence or classified information; prosecution's selection of appropriate charges; arrest and pre-trial detention of suspects; efficient oversight and/or management of the investigation and prosecution; ensuring fair trial procedures for the prosecution, defense, and victims and witnesses; burden of proof necessary for a

⁵ The African Union (hereafter AU) has also long recognized the importance of effective judicial training for judges overseeing criminal cases. *The Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa* (hereafter Dakar Declaration), adopted in 1999 by the African Commission on Human and Peoples' Rights (hereinafter ACHPR), notes the importance of judicial training. For example, States are encouraged to "[i]mprove judicial skills through programmes of continuing education, giving specific attention to the domestic implementation of international human rights standards, and to increase the resources available to judicial and law enforcement institutions". In addition, judicial officials are urged to "[m]ake recommendations to the national authorities on the resources and training needs of the judiciary to improve the implementation of fair trial guarantees". The Dakar Declaration is applicable to judicial training for handling all criminal cases, including ones that involve terrorism offenses. These same principles were included in the ACHPR's *Principles and Guidelines on a Right to a Fair Trial and Legal Assistance in Africa* (hereafter *AU Fair Trial Principles*), 2003. See section entitled Judicial Training. Available at <http://www.achpr.org/sessions/26th/resolutions/41/>.

⁶ This Recommendation is consistent with the *AU Fair Trial Principles*, *ibid*. See section on Judicial Training, para. (b): "States shall establish, where they do not exist, specialised institutions for the education and training of judicial officials and encourage collaboration amongst such institutions in countries in the region and throughout Africa.")

conviction; and imposition of individualised sentences for persons convicted of terrorism or related offences.⁷

IJJ Recommendation 4

Judicial training should also focus on the international and regional conventions involving terrorism and the criminal acts considered under those instruments to be terrorism. Specifically, judges and investigating magistrates should receive instruction regarding their role under international instruments providing for the exchange of mutual legal assistance requests and the extradition of individuals charged with or convicted of criminal offences. Particular emphasis should also be given to seeking and providing international judicial assistance to facilitate joint law enforcement counterterrorism operations involving two or more countries.⁸

IJJ Recommendation 5

The faculty of the training center should include national judges and investigating magistrates, as well as other individuals who have substantial experience and expertise in handling terrorism investigations and trials. Judges and investigating magistrates can also benefit from specialised training from police, security officials, forensic scientists, prison officials, and other law enforcement officials who have significant expertise in their respective fields regarding terrorism cases.⁹

⁷ The Organization for Security and Co-operation for Europe (hereafter OSCE), Office for Democratic Institutions and Human Rights (hereafter ODIHR), has published *Countering Terrorism, Protecting Human Rights, A Manual* (2007) containing explanations of how the main principles of international human rights law apply to criminal investigations and prosecutions for terrorism offences, including, *inter alia*, evidence gathering; privacy rights; arrest and detention; procedural rights before and at trial; and freedoms of expression, assembly, and association. In 2013, ODIHR, in collaboration with its Transnational Threats Department, Strategic Police Matters Unit, published *Human Rights in Counterterrorism Investigations, A Practical Manual for Law Enforcement Officers* (hereafter OSCE Law Enforcement Officers Manual), which links relevant human rights principles to the various phases of counterterrorism investigations. Many of the injunctions contained in these two manuals are also found in the *AU Fair Trial Principles*.

⁸ In 2009, the United Nations Office on Drugs and Crime (hereafter UNODC), Terrorism Prevention Branch, published a *Manual of International Cooperation in Criminal Matters related to Terrorism*, which provides an extensive analysis of the provisions regarding international cooperation contained in the major United Nations conventions covering conduct considered by the parties to be terrorism. In 2012, UNODC published a *Manual on Mutual Legal Assistance and Extradition*, which addresses the subject as it applies to all cases, not just those involving terrorism. The *Organization of African Unity* (now the African Union) *Convention on the Prevention and Combating of Terrorism* (1999) provides for a broad scope of cooperation among its parties, including mutual legal assistance, extradition, and judicial cooperation in extraterritorial law enforcement operations. See recital noting the parties' being ("[d]esirous of strengthening cooperation among Member States in order to forestall and combat terrorism").

⁹ Such multi-disciplinary training should not undermine the independence of the judiciary. Sharing with judges and investigating magistrates the expertise of law enforcement officials regarding, *i.e.*, developments in technology that terrorists can exploit to commit crimes, or scientific advances that

IIJ Recommendation 6

National training authorities should consider implementing a program of “train the trainers,” whereby qualified individuals receive, not only specialised terrorism training, but also instruction in how to effectively present that training to other judges and investigating magistrates.¹⁰

IIJ Recommendation 7

Once a judge or investigating magistrate receives specialised training and is assigned to handle terrorism cases, that individual should continue in that assignment for sufficient time to allow the criminal justice system and the public to benefit from the official’s increasing expertise and experience.¹¹

IIJ Recommendation 8

National training authorities should consider organising regional judicial training for judges and investigating magistrates from countries facing common problems in countering terrorism. Such training should focus on shared challenges, such as the collection, analysis, preservation, and use of physical and forensic evidence in terrorism trials. Use of international experts with experience in investigating and prosecuting terrorism cases could be especially helpful in such regional training efforts.¹²

enhance chances of authorities detecting, preventing, and pursuing terrorists will allow judicial officials to better understand and evaluate different types of sophisticated evidence that might be presented during a terrorism investigation or prosecution. These training programs could also provide an opportunity for judicial officials and law enforcement personnel to discuss non-case related issues, such as security for courthouses, victims, and witnesses, as well as logistics for dealing with cases involving large numbers of defendants or other participants.

¹⁰ The United Nations Institute for Training and Research (hereafter UNITAR) has relied on train the trainers programmes in supporting the efforts of African peacekeepers. See <http://www.unitar.org/training-trainers-course-zimbabwe>. UNODC has also used a train the trainers model in its counterterrorism capacity building efforts. See <https://www.unodc.org/westandcentralafrica/en/2018-03-02-tpb-tot-workshop-dakar.html>. The Council of Europe (hereafter COE) has also led a train the trainers effort for prison guards in Montenegro. See <https://www.coe.int/en/web/criminal-law-coop/-/train-the-trainers-programme-for-prison-guards-continues-in-montenegro>.

¹¹ In some countries, new legislation would be necessary to implement this recommendation.

¹² *Supra*, n. 4, *AU Fair Trial Principles*, Judicial Training, para. (b) (“States shall establish, where they do not exist, specialised institutions for the education and training of judicial officials and encourage collaboration amongst such institutions in countries in the region and throughout Africa.”); *AU Fair Trial Principles*, section entitled Cross Border Collaboration Amongst Legal Professionals (calling for regional collaboration and mandating that no national legislation should prevent such regional or national efforts).

IIJ Recommendation 9

Consideration should be given to creating a regional platform for judges and investigating magistrates in the Sahel and West Africa to efficiently communicate with each other and to exchange information and experiences in handling terrorism cases. Appropriate security measures should be implemented to protect the communications and the officials who participate in the platform.¹³

IIJ Recommendation 10

Consideration should be given to developing a training manual for judges and investigating magistrates handling terrorism cases in the Sahel and West Africa. The manual should analyse and make recommendations regarding how the judicial systems in the countries in those regions can better confront their common legal challenges in combatting terrorism.¹⁴

¹³ There are precedents in West Africa for such an effort, namely the Sahel Judicial Platform (hereafter SJP) and the West African Network of Central Authorities and Prosecutors (hereafter WACAP). The SJP is a network of “focal points,” namely officials of the member countries who facilitate transmission and execution of mutual legal assistance and extradition requests pursuant to their international, regional, and bilateral treaty obligations. The WACAP is a network of focal points for fifteen countries in West Africa in matters of organized and other serious crime. The network is dedicated to the creation and enhancement of central authorities in the region. It conducts regular meetings of central authorities, training, and information exchanges aimed at overcoming the obstacles to effective international judicial exchanges of information and evidence.

¹⁴ The United Nations and the European Union have produced useful manuals describing how international human rights principles and the rule of law apply generally to different phases of investigations and prosecutions of criminal offenses, including terrorism. A judicial training manual for the Sahel and West Africa should link the principles and practices developed by those international organizations to the particular circumstances confronting judges and investigating magistrates who handle terrorism cases in this region.

Continuous Trials and Trial Management Standards

IJJ Recommendations 11 - 17, implementing Good Practices 2 and 3 of the GCTF's *The Hague Memorandum*: supporting the use of continuous trials and developing effective trial management standards.

Good Practices 2 and 3 of *The Hague Memorandum* are related. Continuous trials and other judicial proceedings are some of the most effective tools a judge or investigating magistrate can employ to guarantee fair and expeditious management of terrorism investigations and trials. *The Hague Memorandum* recognises that judges and investigating magistrates may not be able to control all the factors that lead to delays in judicial proceedings, including terrorism cases. Nevertheless, those officials should take all available steps consistent with national law to reduce any delays and ensure to the greatest extent possible an efficient resolution of the case. In addition to the specific suggestions appearing in *The Hague Memorandum*, the program participants made the following recommendations.

IJJ Recommendation 11

Judges and investigating magistrates should support a review by an appropriate judicial body of the procedural and administrative rules that apply to terrorism cases in their jurisdictions. The purpose of the review should be to identify potential reforms that could result in reduction of case processing time and promote more efficient, continuous trials.¹⁵

IJJ Recommendation 12

If not already in existence, States should consider promulgating legislation or standardised rules of court regulating the operations and functions of the trial courts, or courts of first instance, and appeals courts in order to implement needed reforms identified by the review mentioned in Recommendation 11 in order to promote the use of continuous trials in all cases, including terrorism matters.¹⁶

¹⁵ An example of a very detailed review of a country's criminal process is the 2012 report done by the Law Commission of India for the Supreme Court of India, entitled *Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities*, Report No.239. The report identifies and discusses specific reasons for delays in a criminal corruption case against an influential individual in that country. In the section dealing with the trial phase of the case, see pgs. 22-25, several factors identified are common in high-profile cases, including terrorism prosecutions. The importance of conducting continuous trials is highlighted as an effective measure to avoid some of those delays. The complete report is available at <http://lawcommissionofindia.nic.in/reports/report239.pdf>.

¹⁶ Continuous trials promote the rights of the accused and the public to a fair and expeditious trial as contemplated by the ICCPR, Art. 14.3.c. and the *AU Fair Trial Principles* (right to trial without "undue delay"). The Supreme Court of the Republic of the Philippines has undertaken a multi-year effort to make its criminal process more efficient. In 2017, the Court promulgated *The Revised Guidelines for the Continuous Trial of Criminal Cases*. The Revised Guidelines, which built upon a previous set of reforms, apply to all first and second level courts. Their purpose is to "reduc[e] the duration of criminal proceedings and improve the trial courts' compliance with the timeframes for trial set out in the Rules of Court and pertinent laws". The guidelines consist of detailed and practical procedural steps that are

IIJ Recommendation 13

At a minimum, the laws, regulations, and rules of court should establish requirements, or at least guidelines, regarding, *inter alia*, qualifications for those who wish to appear before the court as advocates; the form and timing for filing pre-trial motions concerning detention of the accused and challenges to the charging document; permissible and non-permissible motions; and objections to the admission of evidence that can be anticipated before trial. The statutes or rules of court should also address general procedures for the trial, including location of the parties in the courtroom; seating for the public; length of court sessions; time guidelines for examination of witnesses, including cross-examination; timing and duration of court recesses; manner and timing of objections and motions made during the trial; and communications among the parties and with the court before and during the trial.¹⁷

IIJ Recommendation 14

Before the trial begins, judges should carefully anticipate and create a plan to deal with issues that could result in delays or make it difficult to conduct the trial in an efficient and continuous manner.

IIJ Recommendation 15

A competent interpreter should be provided for every accused person, victim, and witness who needs one in order to understand and participate in the criminal investigative and trial processes. Interpreters should be competent in all languages involved, preferably having been specially trained in simultaneous interpretation in a courtroom setting. They should be independent of all parties and witnesses in the case. In all but exceptional cases, they should be paid by the judicial system in order to avoid conflicts of interest. Advanced planning should

to be taken by the trial courts to ensure continuous trials and the reduction of delays in criminal cases. Before implementing the Revised Guidelines, the Supreme Court conducted a pilot program in selected trial courts around the country, which validated the anticipated efficiencies from the reforms. Monitoring for results continues after implementation. The Philippines project was accomplished with the support of the European Union through its Justice Sector Reform Programme, Governance in Justice. The Revised Guidelines can be found at: <http://oca.judiciary.gov.ph/wp-content/uploads/2017/05/OCA-Circular-No.-101-2017.pdf>.

¹⁷ Effective case management practices can prevent the problem of unwieldy backlogs of unresolved criminal matters, including those involving terrorism charges. Conversely, mechanisms used to reduce existing court backlogs may be useful tools that judges can employ to conduct continuous, efficient trials. For some additional case management ideas, see Philip Langbroek and Matthew Kleiman, *Backlog Reduction Programmes and Weighted Caseload Methods for South East Europe, Two Comparative Inquiries, Final Report* (2016) (need to set firm deadlines for steps in litigation) prepared in cooperation between the European Union's Regional Cooperation Council and the European Centre for Dispute Resolution at <https://www.rcc.int/download/.../Court.../f2bdb2ae4d27f8588034538cb54b6011.pdf>.

take place in cases in which multiple interpreters are required because of the high number of individuals or languages involved.¹⁸

IJJ Recommendation 16

Judges and investigating magistrates should also anticipate issues presented in a case involving numerous defendants who are to be prosecuted together. Adequate planning in advance can ensure that the trial or other proceeding is not delayed or disrupted due to a lack of sufficient space or other facilities needed to accommodate all necessary parties. In addition, such a case may require the presiding judge to consider the implementation of necessary security measures in and near the courthouse and courtroom.

IJJ Recommendation 17

Judges should use pre-trial conferences involving the prosecutor, defence counsel, relevant courthouse personnel, prison officials, and, if appropriate, experts providing support to victims and witnesses who will appear at the trial in order to decide what, if any, special measures should be put into place to ensure the efficient completion of the trial without undue delays or continuances. The judge, or a delegated court official, should have the responsibility to see that any such measures ordered by the court are fully implemented in a timely fashion, so the trial may proceed as planned.¹⁹

¹⁸ The ICCPR, article 14 (3)(f) guarantees an accused the right to an interpreter, if she does not understand the language used in the proceeding. That right, however, has often been understood to apply only to oral communications in the courtroom. Consequently, the European Union (hereafter EU) has expanded the scope of the right in its member states. Specifically, *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings* calls for interpretation services to be provided free of charge to an accused during police interrogations, lawyer-client meetings, and at trial. It also requires EU countries to provide translation of essential documents in the case, including any detention order, the indictment (or other charging document), and the judgment. The Directive can be seen at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>. Similarly, the *AU Fair Trial Principles*, section entitled “The right to an interpreter”, states that the right of the accused “applies to all stages of the proceedings, including pre-trial proceedings.” In addition, translation is mandated for “all documents or statements necessary for the defendant to understand the proceedings or assist in the preparation of a defence.”

¹⁹ An informative study of the benefits of using pre-trial conferences in Nigerian criminal cases was prepared by Ted C Eze and Eze Amaka G, published by the European Centre for Research Training and Development UK, and appears in the *Global Journal of Politics and Law Research*. Vol. 3, No. 4, pp. 44-54, August 2015. It is titled *Exploring the Benefits of the Pre-Trial Conference Procedure to Judicial Proceedings in Nigeria*. The study observes “[t]here has been great concern across the world over the slow pace of judicial proceedings. The fear in many quarters is that this problem could ultimately defeat the very purpose of adjudication, to wit, dispensation of substantial justice. As a consequence, the pretrial conference procedure has evolved as a way of preventing unnecessary delays in judicial proceedings ...”. The paper also examines the origins, forms, and benefits in general of using pre-trial conferences. The study can be found at <http://www.eajournals.org/wp-content/uploads/Exploring-the-Benefits-of-Pre-Trial-Conference-Procedure-to-Judicial-Proceedings-in-Nigeria1.pdf>.

Special Measures to Protect Victims and Witnesses

IIJ Recommendations 18 - 25, implementing Good Practices 4, 7 and 9 of the GCTF's *The Hague Memorandum*: supporting special measures to protect victims and witnesses.

The topics covered by *The Hague Memorandum's* Good Practices 4 (support special measures to protect victims and witnesses in the trial process), 7 (contribute to the development of enhanced courthouse and judicial security protocols and effective courtroom security), and 9 (ensuring victims of terrorism access to justice) often do not receive as much attention by practitioners as the core evidence-gathering and trial practice elements of a terrorism investigation and prosecution. They are, nevertheless, important components of international human rights standards regarding the right to life of the participants in the process and a fair trial for victims and their families.²⁰ Recognising the need to support and implement efforts to increase the security for victims, witnesses, and the physical locations of judicial proceedings, the participants made the following recommendations.

IIJ Recommendation 18

In developing security policies and plans where resources are limited, officials should consider establishing inexpensive and easily-implemented security measures that may be necessary to protect witnesses from intimidation, threats, or physical harm while participating in the trial or other judicial proceeding.²¹ In this regard, judges and investigating magistrates should consider allowing appropriate redaction of witnesses' names from documents used in the case; use of aliases when witnesses testify; use of a witness's recorded deposition in place of the person's live testimony in court; allowing the witness to testify outside the presence of the accused; allowing witnesses to enter and leave the courthouse through separate, secured, non-public entrances and exits; limitations on the possession or use of communication devices by the public in the courthouse and during judicial proceedings; and, in rare occasions, closed court proceedings.²²

²⁰ In general, a State's responsibility to provide adequate security for victims, witnesses, and individuals who enter the courthouse or other place where judicial proceedings take place implicates the right to life, right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, the right to be free from discrimination, the right to a fair trial, and the right to respect for private and family life. *Supra*, n. 6, *OSCE Law Enforcement Officers Manual*, Section 2.1, pg. 58.

²¹ In 2001 Ukraine, with support from the OSCE, established a working group to promulgate recommendations for a program to assist victims and witnesses in human trafficking and organized crime cases. Members of the group included representatives from the General Prosecutor's Office, the Ministry of Internal Affairs, the State Security Service, and non-governmental organizations. <https://www.osce.org/ukraine/53925>. Similar groups could be set up for victims and witnesses in terrorism cases.

²² The OSCE has made substantial efforts to assist and support countries in Europe, including those recently emerging from conflict or war, in developing policies, programmes, and practical short-term steps to protect witnesses and victims in criminal proceedings, including high-profile trials of war criminals. See, e.g., *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and*

IJJ Recommendation 19

Judges and investigating magistrates should support the establishment of a body or committee within the national judiciary or other appropriate agency that would have the responsibility for considering and recommending to judges and investigating magistrates handling terrorism matters possible steps to be taken regarding security for court officials and personnel, witnesses, victims, and the physical location of the proceeding before, during, and after a terrorism investigation or trial.²³ The body or committee making the recommendations should work with the appropriate government officials to secure funding and other resources that are necessary to put into place adequate security measures at the locations at which legal proceedings occur.²⁴

IJJ Recommendation 20

Officials responsible for the operation of each courthouse or location at which judicial activities occur should also develop a local security plan to protect the facilities and personnel involved in the investigation and prosecution of terrorism and other criminal cases. The security plan should take into account the recommendations from the body or committee described above,²⁵ but should also address any additional measures needed to meet the particular security concerns of the court officials, trial participants, and the physical location involved in the specific case. Development of the plan should include, as appropriate, judges, investigating magistrates, local law enforcement officials, victim/witness support personnel, and prison officials responsible for housing and transporting accused individuals to and from the place of the proceeding. Planning for such security measures should begin as early as possible in order to avoid delays in adjudicating the case.

recommendations a year after adoption of the National Strategy for War Crimes Trials, (January 2010) at <https://www.osce.org/bih/118893?download=true>.

²³ Security for courthouses and judicial officials who work in them is an element of a State's obligation to ensure a right to a fair trial in criminal cases, which requires an independent and impartial judiciary. In order to be independent and impartial in fact and appearance, a judiciary must be free from improper influences, including threats, intimidation, and corruption, that can undermine its credibility in providing justice to defendants, victims, witnesses, and the public. See OSCE, *Intimidation of the Judiciary: Security of Judges and Prosecutors* (April 2010) (monitoring study in Kosovo; hereafter *Kosovo Study*) at <https://www.osce.org/kosovo/67676?download=true>; see also UN, *Basic Principles on the Independence of the Judiciary* (1985), no. 2 (independent judiciary is one free from "improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason") (available at https://www.ohchr.org/en/professionalinterest/pages/independence_judiciary.aspx).

²⁴ See *Kosovo Study* at 6 (recommending that the Kosovo Judicial Council "[c]onsider establishing a committee for dealing with security related concerns raised by judges and prosecutors").

²⁵ Consideration should be given to having periodic meetings between the recommending body and judicial officials handling trials in courthouses or other locations.

IIJ Recommendation 21

Judges and investigating magistrates should ensure that prosecutors, defence counsel, clerks, and law enforcement officials exercise safe practices in presenting and handling evidence in the courtroom, especially in terrorism cases. Evidence in such cases may include firearms, explosive devices, or other dangerous materials. Firearms should be unloaded and disabled, such as by use of a trigger guard; ammunition should be kept separate from weapons; explosive devices and detonators should not be placed together.

IIJ Recommendation 22

Prison officials should be encouraged to identify those detainees who pose a high risk to the proper functioning of the judicial system, and to take steps to isolate and reduce the opportunities for such individuals, or their associates, to corruptly influence witnesses, judges, investigating magistrates, or lawyers through violence, intimidation, or threats before, during, and after the trial. Consideration should be given to using special detention measures for those detainees, and for prohibiting or monitoring their visitation rights and use of communication devices while detained.²⁶

IIJ Recommendation 23

In countries with high threat rates, competent national and local authorities should develop and implement security measures for judges and investigating magistrates, as well as their families, during times when the court is not in session.²⁷

²⁶ In 2009, Serbia approved a law to provide special imprisonment facilities and conditions of confinement for individuals convicted of organized crime, war crimes, and terrorism offenses. The purpose of the new law is to prevent the offenders from continuing to conduct their criminal, sometimes violent, activities from prison. It calls for imposing restrictions on certain prisoners' ability to communicate with other inmates and the outside world. The *Special Imprisonment Regime Law of 2009* was the result of collaboration between the Serbian Ministry of Justice and the OSCE. *OSCE helps Serbia to strengthen prison security for high-risk offenders*, 18 February 2010, <https://www.osce.org/serbia/57780>. Any such program must respect the human rights principles that apply to prisoners. *OSCE/ODIHR meeting explores importance of independent detention monitoring to protecting human rights while preventing violent extremism and terrorist radicalization in prisons*, 5 December 2017, <https://www.osce.org/odihr/360501>.

²⁷ This recommendation was made by the OSCE in Kosovo, in part, due to several attacks on judges and prosecutors. See OSCE, *Observations and Recommendations of the OSCE Legal System Monitoring Section: Report 2 – The Development of the Kosovo Judicial System (10 June Through 15 December 1999)*, pg. 6 at <https://www.osce.org/kosovo/13041?download=true>. A State's duty to protect the right to life, and related rights, of every person within its territory applies in all situations in which a known or reasonably foreseeable threat exists. In countries in the Sahel and West Africa in which judges, investigating magistrates, and their families have experienced specific threats, attempts at intimidation, or acts of violence in their daily lives, the State's obligation to provide adequate protection seems clear. See also COE, *Guidelines on Human Rights and the Fight against Terrorism, Guideline I* ("States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life."); OSCE, *Countering Terrorism, Protecting Human Rights*, ch. 9, *Right to Life*, pg. 100 ("From a counterterrorism

IJJ Recommendation 24

Judges and investigating magistrates should be fully knowledgeable concerning the rights of victims and witnesses to access the criminal justice system, as provided by applicable international, regional, and national laws, conventions, and policies.²⁸ Those officials should also take reasonable steps consistent with national law to ensure the rights of victims and witnesses are enforced in all terrorism and related proceedings. Specifically, judges and investigating magistrates should take reasonable steps to ensure that State officials, including police officers, prosecutors, court officials, and victim/witness support, have provided all required assistance.²⁹

IJJ Recommendation 25

Judges and investigating magistrates should ensure that their courtrooms or other official spaces in which judicial proceedings are conducted are adequate to accommodate victims' and witness's presence and participation in the proceedings, as permitted by law. Court officials should work with competent government authorities to secure sufficient funding and resources for courthouse construction or remodelling, if needed.

perspective, the positive obligation to protect life may under certain circumstances require the state to protect individuals from identifiable threats to their lives".)

²⁸ The rights of victims in a terrorism or related criminal justice process are recognized in international human rights law, as evidenced by their inclusion in the ICCPR, Art. 2, para. 3 (regarding the right to an effective remedy for those aggrieved by human rights violations). For a fuller explanation of victims' rights, see UNODC, *Criminal Justice Responses to Terrorism* (2009), section VIII A., pg.108.

²⁹ As part of its new counterterrorism strategy for 2018-2022, the COE Committee of Ministers, Steering Committee for Human Rights, has promulgated the "Revised Guidelines on the Protection of Victims of Terrorist Acts", CM-44, adopted at the 127th Session of the Committee of Ministers (Nicosia, May 19, 2017). The revised guidelines focus on measures that "[m]ember States may take to support and protect the human rights of persons who, as a result of a terrorist act, have suffered a direct attack on their physical or psychological integrity and, in some cases, circumstances of their close family".

The Use and Protection of Sensitive Evidence

IIJ Recommendations 26 - 33, implementing Good Practices 5 and 6 of the GCTF's *The Hague Memorandum*: supporting special measures to protect victims and witnesses.

It might be said that the most basic element of a fair trial is the accused's right to know all of the evidence and information that will be used against her, as well as any information in the possession of the State that may assist her in defending against the charges. When the evidence and information relevant to the proof of terrorism charges involves classified or otherwise protected material, the legal issues surrounding disclosure to the defence become more complex. Judges in several West Africa countries noted the need for a comprehensive statutory framework that can be used when such evidence is involved in terrorism, or other criminal cases. The judges described their struggles in trying to fairly resolve those questions on an *ad hoc*, case-by-case basis. Legislative frameworks adopted to provide comprehensive solutions to the concerns raised by the judges should implement the Good Practices 5 and 6 of *The Hague Memorandum* as well as the GCTF *Recommendations for Using and Protecting Intelligence Information in Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions*, which implements Good Practice 6 of the GCTF *Rabat Memorandum*³⁰ and examines in more detail the main issues surrounding the use of intelligence as evidence in criminal terrorism trials.

IIJ Recommendation 26

Judges handling terrorism trials should ensure the proceedings comply with the elements of a fair trial that appear in Good Practice 5 of *The Hague Memorandum*.³¹ Implementing those elements to the fullest extent possible is the best way to promote a fair trial for the accused. Even if circumstances prevent the implementation of all elements, judges should strive to achieve as many as possible in each case.³²

³⁰ The GCTF *Rabat Memorandum* sets out "good practices for an effective and rule of law-based criminal justice sector response to terrorism, including those aspects related to international cooperation." Good Practice 6 calls upon States to enact measures to protect sensitive intelligence and law enforcement information in terrorism cases.

³¹ Good Practice 5 of *The Hague Memorandum* calls upon the judiciary to support the right of the accused to a fair trial with adequate legal representation. It also lists several of the most important of the person's rights critical to a fair trial.

³² This Recommendation supports Recommendation 3 made above regarding Good Practice 1 (judicial training). It emphasizes the need for judges and investigating magistrates to not only understand international fair trial requirements, but also to implement them at every terrorism or other trial over which they preside.

IIJ Recommendation 27

Judges and investigating magistrates should recognize that ensuring the accused receives a fair trial in accordance with applicable international human rights principles could present significant challenges when the case involves information and evidence obtained by security and law enforcement intelligence services.³³

IIJ Recommendation 28

National authorities should be encouraged to establish, if not already in existence, a comprehensive statutory framework regulating the disclosure to the accused and counsel of information and evidence that the prosecution will rely upon to seek a determination of the accused person's guilt or innocence of terrorism, or other, charges.³⁴ The framework should provide for the accused's right to know and access information and evidence that may tend to exonerate him, reduce his criminal responsibility, or mitigate his punishment. The statutory regime should comply with international human rights standards regarding an accused's right to a fair trial and the rule of law.³⁵

³³ Many of the issues involved in dealing with protected information are discussed in a 2014 comparative study conducted by the European Parliament's Policy Department entitled *National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges* (hereafter EU Comparative Study). The study analyses the different ways that five European member states deal with presentation of classified or secret information in court, and seeks to determine the extent to which each method complies with basic human rights and rule of law principles. Available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU\(2014\)509991_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU(2014)509991_EN.pdf).

³⁴ A court's use of evidence, of which the defense has no knowledge, to determine the accused's guilt presents serious questions about whether international human rights standards for a fair trial have been met in the proceeding. See ACHPR, *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa* (2015), Part 4 C. ii ("Before judgment or sentence is rendered, the accused shall have the right to know and challenge all the evidence which may be used to support the decision."). Such a practice would also likely violate an accused's right to an adversarial proceeding and his right to equality of arms in presenting his defense. See OSCE, *Countering Terrorism, Protecting Human Rights* (2012), ch. VI. Equality of Arms and Rights to a Fair Hearing, section 6.1. An analogous situation arose in *Nedim Şener v. Turkey* (application no. 38270/11) and *Şık v. Turkey* (application no. 53413/11), where the Chamber of the ECtHR noted that neither the defendants nor their lawyers had had sufficient knowledge of the content of certain documents relied upon by the prosecutor to bring the charges, but which the prosecutor refused to disclose on confidentiality grounds. The Chamber determined that the withheld materials were of crucial importance for the purpose of challenging the lawfulness of the defendants' detention. As a result, the Court found a violation of article 5.4 of the EConvHR (right to challenge lawfulness of detention).

³⁵ The *AU Fair Trial Principles*, section entitled Right to adequate time and facilities for the preparation of a defence, enumerates the rights of an accused to "access to appropriate information, files and documents [possessed by competent authorities] in sufficient time to provide effective legal assistance. . . ." That section also establishes the accused's right to "all relevant information held by the prosecution that could help the accused exonerate him or herself." See also, UN Counterterrorism Implementation Task Force (hereafter CTITF), *Right to a Fair Trial and Due Process in the Context of Countering Terrorism, a Basic Human Rights Reference Guide* (hereafter CTITF Fair Trial Guide),

IJJ Recommendation 29

The framework should establish procedures for resolving a claim by intelligence or law enforcement agents that information or evidence, or part of it, is classified, constitutes a state secret, or is otherwise protected from disclosure at a terrorism trial.³⁶ The procedures adopted in the framework should balance the State's interest in promoting and maintaining its security interests with the accused person's right to a fair trial, specifically, the right to know the evidence that will be used to determine her guilt or innocence.

IJJ Recommendation 30

Specifically, the framework should identify the competent authority for making a claim that all or part of the information or evidence should be protected from disclosure, as well as the permissible reasons for doing so.³⁷ Consideration should be given to providing for an administrative review of the appropriateness of the claim for protection and the relevant procedures for seeking and resolving the request for review. Specification should also be made of who may seek the review, who may participate in the review process, and who will decide the matter.

IJJ Recommendation 31

Further, the framework should provide that the trial court, or court of first instance, is the competent authority³⁸ to decide whether the information or evidence subject to a claim of protection must be disclosed to the accused and his counsel in order to comply with national

Principles and Guidelines 9 ("the prosecution must disclose any relevant material in its possession, or to which it may gain access, including exculpatory material").

³⁶ Some potential evidence gathered by or in the possession of intelligence agencies may not involve sensitive operations or constitute classified information, and its disclosure may not risk exposure of secret sources or methods of collection. In those cases in which the intelligence agency does not seek protection from disclosure, the information should undergo the regular admissibility analysis the trial court applies to prospective evidence gathered by criminal law enforcement agencies.

³⁷ In most countries, the executive has authority over the decisions regarding the proper classification of information, including national security and law enforcement sensitive information.

³⁸ This Recommendation adequately respects the separation of powers between the judiciary and the executive branches. The determination of what information should be classified for national security or law enforcement reasons is properly left to the executive. The judiciary, however, must independently assess whether the use or the prohibition of the use of the classified information or evidence in the particular court proceeding would adversely affect the accused's right to a fair trial. The Recommendation is also consistent with the growing recognition that judicial oversight of the use of classified or otherwise protected evidence in a criminal trial is necessary to ensure a fair proceeding for the accused. In a broader sense, it also guarantees an independent judiciary with authority to decide all issues of a justiciable nature, which is an indispensable requirement for not only a fair trial, but also the proper operation of a liberal democracy. See *EU Comparative Study*, pgs. 12-14.

law and international human rights standards for a fair trial.³⁹ The framework should also establish the procedures the court must follow and identify the mechanisms the court may consider in determining whether it can order disclosure to an extent and in a manner that would adequately protect the state's interests in protecting its classified or sensitive information and the accused's right to a fair trial.⁴⁰ In the absence of an adequate disclosure mechanism, the evidence should be excluded from consideration of the accused's guilt or innocence. The trial judge should then determine whether, without consideration of the excluded information or evidence, the accused's rights to a fair trial could be assured if the case proceeds to a conclusion.

IIJ Recommendation 32

All procedural steps the court must follow in making its disclosure decision, including required legal or factual determinations, should be clearly set out in the relevant statutes. In addition, the legislation should specify who may be present or participate when the trial court considers and makes its disclosure decisions.

IIJ Recommendation 33

Consideration should be given to providing for an immediate and expedited appeal to a higher-level court of the trial court's disclosure decision. If such an appeal is permitted, the framework should clearly describe all procedural steps that will apply to the appeal and its resolution.

³⁹ *The Hague Memorandum* at footnote 16 contains a list of considerations to which the trial court should refer in making this determination.

⁴⁰ *Ibid.* A list of recommended mechanisms the trial court can consider, depending upon its national legislation, also appears in footnote 16.

Developing and Articulating Media Guidelines

IIJ Recommendations 34 - 39, implementing Good Practice 8 of the GCTF's *The Hague Memorandum*: develop and articulate media guidelines for the court and parties.

In many countries, the judiciary and the media have a relationship that frequently brings into tension a court's responsibility to ensure the accused receives a fair trial and the media's role in promoting a transparent criminal justice system in which the public's right to know about important judicial matters is respected. Inside the courthouse and in its immediate surroundings, the presiding judge may legitimately set the rules and guidelines for the media's access to the courtroom and the judicial proceedings. Outside that area, however, the media has virtually total control over what it reports to the public about the proceedings occurring inside the courtroom. Concerns have arisen among judges in the Sahel and West Africa about inaccurate media reporting regarding terrorism cases in particular. Such cases often create great public interest and produce strong reactions among citizens. If those sentiments are fuelled by inaccurate information from the media, they can distort the public's belief in the fairness and transparency of the country's criminal justice system. In some cases, such public reactions may also compromise the accused's ability to receive a fair trial.⁴¹ The following recommendations were designed to address these issues.⁴²

IIJ Recommendation 34

A judge handling terrorism or other national security cases should try to anticipate and plan for media-related issues well before the trial. The judge should consider whether and how to place restrictions on print, radio, television, and other types of media coverage, including coverage over social media, that may adversely affect or prejudice the rights of the accused to a fair trial or the privacy of any individual. Any such restrictions must respect to the maximum extent possible the right of the public to information about the case.⁴³

⁴¹ The ECtHR has recognized that "a virulent press campaign can, however, adversely affect the fairness of a trial by influencing public opinion and affect an applicant's presumption of innocence." ECtHR, *Guide on Article 6 on the European Convention on Human Rights, Right to a fair trial* (2018), para. 324. The Guide is available at https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf. In some cases, public opinion could provoke certain individuals to make threats or attempt to commit violence against the accused, judges, witnesses, or lawyers participating in the case.

⁴² All of the Recommendations regarding relations with the media are consistent with the essential recommendations in the report by the European Network of Councils for the Judiciary entitled, *Justice, Society and the Media, A Report 2011-2012* (hereafter *ENCJ Report*). That report is available at https://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf.

⁴³ *Ibid.*, section 3.2, para. A 5 (recommendation to conduct pre-trial meeting between court and media representatives to establish rules).

IIJ Recommendation 35

Special attention should be given to the presence of cellular telephones in the courtroom, as their capabilities to surreptitiously audio and video record proceedings may undermine a judge's ability to protect and balance the prosecution's and the accused's right to a fair trial, the personal privacy of victims, witnesses, advocates, and court officials, and the public's interest in having an open and transparent criminal justice system.⁴⁴

IIJ Recommendation 36

Appropriate judicial authorities should consider hiring specially trained personnel, including former members of the media, to respond in writing or in person to inquiries from the media about proceedings taking place in the courtroom, including trials, pre-trial hearings, and decisions and orders issued by the court. These communications should be made in all national languages commonly used in the country, in addition to the country's official language.⁴⁵

IIJ Recommendation 37

Such officials should also seek to educate members of the media about judicial procedures and practices followed by the court in order to reduce the chances that the media will distribute inaccurate information about the proceedings it is coverage. Consideration should be given to holding regular and case specific media briefings for this purpose.⁴⁶

IIJ Recommendation 38

Consideration should be given for establishing a permanent public affairs office on a national, regional, or local level in order to carry out the functions mentioned above. The public affairs office should also be authorized to set policy regarding judicial officials' contacts with the media about specific cases or concerning the operation of the court system or any specific tribunal.⁴⁷

⁴⁴ *Ibid.*, section 3.2, para. A 1 (video recording can affect privacy rights of trial participants); section 3.2, para. B 9 (regulation by court of cellphones and smart phones may be appropriate).

⁴⁵ *Ibid.*, section 2.2 (recommendations regarding establishing a position of press spokesperson); section 6.2 (recommending judiciary have proactive approach to informing media about individual cases and judicial system in general).

⁴⁶ *Ibid.*, section 2.2, para. 6a-f (tasks included in recommended duties of press spokesperson).

⁴⁷ *Ibid.*, section 2.2 generally (recommending establishment of a national level "press judge" or spokesperson as a permanent office); section 5.2 (recommendations for national guidelines regulating relations between the media and judiciary); An example of such policies appears in the African Court of Human and Peoples' Rights, *Rules of Conduct for the Media Covering the Court's Hearings*, available at <http://en.african-court.org/index.php/news/media-advisory-notes/90-rules-of-conduct-for-the-media-covering-the-court-s-hearings>.

IIJ Recommendation 39

Judges, investigating magistrates, and other court officials should receive training in best practices in responding to media inquiries about cases in which those officials are involved. All judges, investigating magistrates, and other court personnel should be informed about permissible and impermissible media contacts. Such training should be made part of the initial instruction that judges, investigating magistrates, and court clerks receive upon entry into the judiciary.⁴⁸

⁴⁸ *ENCJ Report*, section 6.2 4 (recommending regular judicial training regarding media operations); section 6.2, para. 6 (cautioning judicial officials not adequately trained in dealing with media).

Glossary

ACHPR	African Charter on Human and Peoples' Rights
ACommHPR	African Commission on Human and People's Rights
ACtHPR	African Court on Human and Peoples' Rights
AU	African Union
COE	Council of Europe
CTITF	United Nations Counter-Terrorism Implementation Task Force
ENCJ	European Network of Councils for the Judiciary
ECHR	European Convention on Human Rights (2010, as amended)
EU	European Union
GCTF	Global Counterterrorism Forum
ICCPR	International Covenant on Civil and Political Rights (1966)
ODIHR	United Nations Office for Democratic Institutions and Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
UNHRC	United Nations Human Rights Commission
UNITAR	United Nations Institute for Training and Research
UNODC	United Nations Office on Drugs and Crime



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