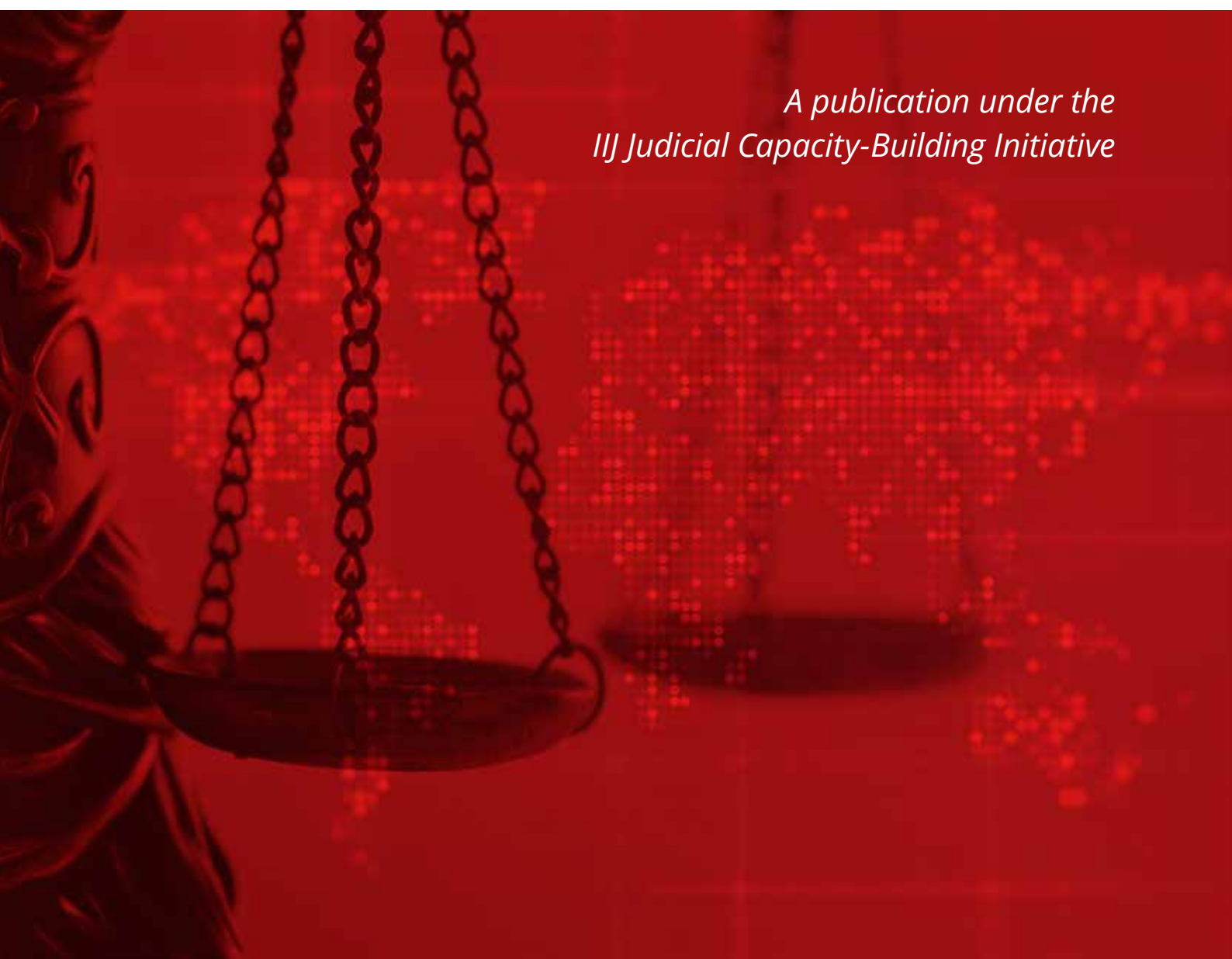




The International Institute for
Justice and the Rule of Law

IIJ PROSECUTOR OUTLINE

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The International Institute for Justice and the Rule of Law

Inspired by the Global Counterterrorism Forum (GCTF), the IJJ was established in 2014 as a neutral platform for training and capacity-building for lawmakers, judges, prosecutors, law enforcement, corrections officials, and other justice sector practitioners to share and promote the implementation of good practices and sustainable counterterrorism approaches founded on the rule of law.

The IJJ is an intergovernmental organisation based in Malta with an international Governing Board of Administrators (GBA) representing its 13 members: Algeria, France, Italy, Jordan, Malta, Morocco, the Netherlands, Nigeria, Tunisia, Turkey, the United Kingdom, the United States, and the European Union. The IJJ is staffed by a dynamic international team headed by an Executive Secretary, who are responsible for the day-to-day operations of the IJJ.

Disclaimer

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For more information, please contact:
The International Institute for Justice and the Rule of Law
University of Malta - Valletta Campus,
Old University Building, St. Paul Street, Valletta, Malta

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Mr. Abdelmonem Khalifa, Chief Prosecutor, Supreme State Security Prosecution, Egypt

Mr. Alaa El Khatib, Investigative Judge, Permanent Military Court, Lebanon

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Foreword

The Mediterranean region, and its immediate southern neighbourhood, has witnessed major terrorist activities over the last few decades. This is compounded by the protracted conflicts around the southern and eastern Mediterranean and the resulting rise in the number of trained terrorist fighters returning from conflict zones. As a result, countries in the Sahel and the Maghreb are directly exposed to risks emanating from the north and vice-versa. In this sense, the movement of ideology as well as human and material resources related to terrorism is very much a two-way street and the theatre of concern should be thought of as a continuum stretching from the Sahel, through MENA and onto East Africa. Those developments present threats not only to countries in those regions, but also to countries in Europe.

The increase in cross-border terrorist threats, compounded by the foreign terrorist fighter (FTF) phenomenon, returning foreign terrorist fighters (RFTF), and homegrown terrorists, presents numerous difficulties to national criminal justice systems. Prosecution authorities in the southern Mediterranean countries are handling heavy caseloads and such challenges as unreliable eye-witness evidence, courtroom and witness security, the need for evidence obtained outside the jurisdiction, using intelligence in court, interagency cooperation, and too little forensic evidence. Prosecutors and investigating magistrates are also being exposed to more complex transnational cases requiring detailed knowledge of international legal principles and mechanisms.

In response to these challenges, and under the auspices of the IJ Judicial Capacity-Building Initiative, International Institute for Justice and the Rule of Law (IJ) launched in partnership with the European Union (EU) a project entitled "Capacity-Building Program for Prosecutors in the Southern Mediterranean" in December 2016. The aim of the project was to build the capacity of criminal justice officials to effectively prosecute and investigate terrorism cases in southern Mediterranean countries and their immediate neighbourhood (Sahel and Horn of Africa) in line with international human rights standards, good practices and the rule of law. This was accomplished through a series of regional capacity-building workshops with integrated and cross-border training for practitioners.

The program aligns with the objectives of the Global Counterterrorism Forum (GCTF) Capacity-Building Working Groups for West Africa Region (formerly Sahel Working Group) and the East Africa Region (formerly Horn of Africa Working Group) and the Horn of Africa and complements the United Nations Integrated Regional Strategy for the Sahel, the EU Strategy for Security and Development in the Sahel, the EU Counterterrorism Action Plan for the Horn of Africa and Yemen, as well as the Council of Europe Counter-Terrorism Strategy (2018-2022).

The first regional workshop was held on 20-22 May 2017, in Marrakech, Morocco, and brought together prosecutors and investigating magistrates from Djibouti, Mali, Mauritania, Morocco, Niger, and Tunisia. A second regional workshop followed on 11-15 December 2017, in Amman, Jordan. The countries in attendance included Algeria, Chad, Djibouti, Egypt, Jordan, Lebanon, Libya, Mali, Morocco, Niger, Sudan, and Tunisia.

The workshops were organised in collaboration with the EU around objectives agreed upon by the IJ and the EU, as set forth in the project document. The EU agreement called for the workshops to be organised around three distinct units:

- (1) the development of strategies for effective relationships between investigating and prosecuting authorities which will produce international human rights and rule of law compliant prosecution cases;
- (2) the promotion of practices to assure that the nature and quality of evidence meets domestic and international standards for use in court proceedings; and
- (3) the employment of effective strategies to present all types of admissible evidence in a court proceeding, including testimonial, documentary, forensic, and other evidence in compliance with international fair trial standards. In implementing the EU requirements, the IJ workshops focused on the implementation of the GCTF's good practices for handling terrorism investigations and prosecutions in conformance with international rule of law and human rights principles.

Accordingly, participants in both workshops exchanged ideas regarding strategies for effectively prosecuting terrorism cases, with special emphasis on the good practices contained in the *GCTF Rabat Memorandum on Good Practices for Effective Counterterrorism Practices in the Criminal Justice Sector*.

With regard to the first unit, participants in both workshops noted the differences in roles prosecutors and investigating magistrates have in their respective criminal justice systems. Presentations by IJJ and outside experts highlighted the importance that, consistent with domestic law, prosecutors can play in assuring an effective, complete, and reliable investigation that leads to a thorough understanding of the circumstances surrounding a terrorist event, as well as to an accurate identification and just punishment of the perpetrators. Discussions followed concerning possible strategies and practices prosecutors and investigating magistrates could use to work with and supervise, if authorised, investigating agencies from the moment of the terrorist act through the completion of any judicial process that follows.

Concerning the second unit, presenters emphasised the importance of identifying, recovering, and analysing common types of evidence encountered in terrorism cases, including forensic evidence, military and security service intelligence information, evidence produced by undercover operations, and witness and victim testimony. A theme discussed throughout both workshops was the need to protect victims and witnesses from intimidation, coercion, and violence that could undermine the effectiveness and reliability of the investigation and prosecution. Attention was also given to the growing necessity for prosecutors and investigators to fully utilise the tools available for international cooperation in terrorism cases. Those discussions highlighted the importance of national central authorities for coordinating mutual legal assistance requests.

Relevant to the third unit, workshop participants examined several aspects of an accused terrorist's right to a fair trial under international human rights principles. Topics of discussion in this area included the right to be informed of the reasons for detention and of any charges against the person, the right to be promptly brought before an independent judicial official who can review the legality of the detention, the right to counsel during any interrogation by law enforcement authorities, and

the right to access the case file or evidence to be used against the accused, including national security and law enforcement intelligence information, as well as the right to challenge the use or admission of that evidence before or at trial. In addition, attention was also given during the Marrakesh workshop to the treatment and handling of juvenile offenders, victims, and witnesses involved in terrorism cases.

In order to capture and build upon the work done at the Marrakech and Amman workshops, the IJJ produced this Prosecutor Outline aimed at giving prosecutors, investigating magistrates, and investigators in the MENA region a practical reference tool they could use in their counterterrorism duties. The Outline is not country-specific, but is meant to provide recommendations and suggestions that will be helpful to participants in all of the countries in the region.¹ Further, it could be used by national prosecution services as a basis for developing a country-specific Prosecutor Manual. By necessity, it focuses on basic practices that are important to the effective investigation and prosecution of terrorism offenses. The Outline includes references to interventions made by practitioners during the interactive workshops implemented under the IJJ-EU project.² The Outline, however, goes beyond a mere recitation or compilation of the discussions at the workshops. It also incorporates information and recommendations relevant to those discussions produced by other international and regional bodies that have sponsored or implemented programs to help confront the challenges of terrorism in the MENA region.

The issues to which the recommendations, strategies, and practices pertain appear in the Outline in the order in which a prosecutor of a terrorism case is most likely to confront them, i.e., working with investigating agencies early in the investigation, gathering all the relevant evidence through lawful means, identifying the perpetrators and selecting the appropriate charges, and presenting the evidence in court consistently with international human rights and rule of law standards for a fair trial and punishment. An advantage of the organisation chosen for the Outline is that it can be easily supplemented with additional information and topics addressed in future IJJ workshops, conferences, and training opportunities aimed at prosecutors, investigating magistrates, and investigators of terrorism cases in the which the beneficiary countries are located.

¹ The Outline recommendations refer to practitioners by alternating pronouns "she/her" and he/him."

² Those references to participant interventions during workshops implemented under the IJJ-EU project are cited as "Participant Intervention."

Part One

I. Introduction

A. A Prosecutor's Role in Counterterrorism Efforts

Criminal prosecutors, investigating magistrates, investigators, and trial judges play indispensable roles in the efforts of individual countries and the international community to combat terrorism. Terrorism and membership in a terrorist group are crimes, and must be dealt with by the criminal justice system. By working to assure the existence of a competent, impartial, and efficient criminal justice system, these officials help discharge a state's duty under its constitution and laws, as well as international rule of law and human rights principles, to protect their citizens' right to life.³ Human rights norms also impose upon a state obligations, *inter alia*, to (1) protect its citizens by taking all reasonable steps to prevent terrorist attacks from occurring; and (2) identify, pursue, and hold accountable all those responsible in any way for the commission of a terrorist act.⁴ By investigating, identifying, and prosecuting those who have committed, or intend to commit, terrorist acts, prosecutors, investigating magistrates, and other criminal justice officials can help prevent attacks from occurring and disrupt terrorist groups before they can act. They can also curtail terrorists' abilities to finance their unlawful activities. In addition, effective prosecutions of terrorists will hold them accountable for their criminal acts and impose appropriate punishment.

B. The Role of Rule of Law and Human Rights in Terrorism Prosecutions

Prosecutors, investigating magistrates, law enforcement agents, and other government officials have a responsibility to see that terrorism and related investigations and prosecutions comply with the constitution and the laws of the country, as well as rule of law and international human rights standards.⁵ In carrying out terrorism investigations and prosecutions in compliance with these precepts, prosecutors help their governments promote the public's respect for the criminal justice system, assist the system's smooth functioning, and enhance the security of the community. These officials also deter terrorist activities and deprive terrorist groups of any possible support or sympathy. Investigations and prosecutions that fail to comply with the rule of law and international human rights principles are likely to be ineffective and unreliable in identifying and appropriately punishing those who have committed, or intend to commit, terrorist acts. A criminal justice system that ignores the rule of law and basic human rights standards in its counterterrorism investigations and prosecutions undermines its very purpose, which is to protect and secure the community against unlawful, violent acts aimed at disrupting civil society.

³ The International Covenant on Civil and Political Rights (hereafter ICCPR), 999 U.N.T.S. (December 16, 1966), art. 6(1), provides that, "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The United Nations Human Rights Commission (hereafter UNHRC) has said that the right to life is "the supreme right." HRC, General Comment No. 6 – The right to life (art. 6), 30 April 1982, para.1. The European Convention on Human Rights (hereafter ECHR), art. 2, recognises the right to life, as does the Organization for Security and Co-operation in Europe (hereafter OSCE), 1989 Vienna Document, *Questions Relating to Security in Europe: Principles*, para. 24. See also the African Charter on Human and Peoples' Rights (hereafter ACHPR), art. 4 ("Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life."); League of Arab States, Arab Charter on Human Rights (hereafter ArabCHR), art. 5 (2004) ("Every human being has the inherent right to life.")

⁴ European Court on Human Rights (hereafter ECtHR), *Osman v. United Kingdom*, Case no. 87/1997/871/1083, 28 October 1998, para. 115 (relying on art. 2 (1) of the ECHR).

⁵ See *Joint statement by Mary Robinson, United Nations High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights, 29 November 2001, available at <http://www.statewatch.org/news/2001/nov/28uncoec.htm>*; See also African Commission on Human and Peoples' Rights (hereafter ACHPR), *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa* (2015), Preamble (recognizing need to "promote and ensure the respect for human rights and international humanitarian law while preventing and combating terrorism"); The Arab Convention for the Suppression of Terrorism (hereafter Arab CT Conv) (2000), Preamble ("reject[ing] all forms of violence and terrorism and advocat[ing] the protection of human rights"); see also United Nations Office of Drug Control (hereafter UNODC), *Handbook on Criminal Justice Responses to Terrorism*, Part One, pgs. 5-6.

II. Purpose of the IJJ Prosecutor Outline

The goal of this Outline is to emphasise several responsibilities prosecutors, investigating magistrates, and law enforcement agents should undertake in helping to ensure that the criminal justice system works effectively in combatting international and domestic terrorism in accordance with international rule of law and human rights standards. These responsibilities include: (1) ensuring that an effective investigation is conducted of the terrorist attack, or of those who intend to commit a terrorist act in the future; (2) selecting the appropriate charges to bring against a terrorism suspect; (3) bringing before the court an accused terrorist who is not present in the jurisdiction in which the charges were filed; and (4) promoting the right to a fair trial for individuals suspected of or charged with commission of a terrorism or terrorism-related offence.

III. Importance of the Global Counterterrorism Forum Memoranda

The *Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector* (hereafter GCTF, Rabat Memorandum) was endorsed by the Global Counterterrorism Forum (GCTF) at its Ministerial-Level Plenary Meeting in Istanbul, Turkey, on 7 June 2012. The Good Practices contained in the *Rabat Memorandum* provide helpful practical suggestions relating to, *inter alia*, important aspects of an effective investigation and a fair trial. They also highlight the need to comply with international rule of law and human rights principles. This Outline emphasises the importance of, and elaborates on, those Good Practices by referencing information from materials produced by several international and regional rule of law and human rights bodies, as well as capacity-building organisations under the auspices of the United Nations, Council of Europe, African Union, and others.

IV. Organisation of the IJJ Prosecutor Outline

Part Two of the outline briefly describes the elements of an effective terrorism, or any other criminal, investigation that complies with human rights and rule of law standards. Part Three addresses the role of the prosecutor in conducting an effective investigation and assuring that investigators have done so. Part Four highlights certain aspects of a prosecutor's role in selecting appropriate criminal charges in terrorism cases. Part Five examines a prosecutor's role in bringing before the court a terrorism suspect who is located outside the prosecutor's country, as well as evidence relevant to the case that may be located in a foreign jurisdiction. Finally, Part Six explores particular elements of a fair trial under international human rights law.

Part Two

I. The Right to an Effective Investigation: International Human Rights Law

International human rights conventions, as well as constitutions and national laws, impose duties upon States and establish rights for individuals regarding basic human rights recognised by the international community. Those rights, inherent to all human beings, include the right to life and liberty; freedom from slavery, torture, or other cruel and inhumane punishment; freedom of expression and opinion; a right to privacy, and many more. The overarching responsibility of a State under such instruments, and their constitutions and laws, is to give effect to the rights granted by the convention to its citizens. It stands to reason, then, that when a violation of a person's human rights may have occurred, the State has an obligation to properly investigate the matter and provide anyone who has been harmed as a result of that violation with a legal mechanism to seek an adequate remedy for the injury. Indeed, those propositions are engrained in human rights conventions in force in Europe and Africa, and elsewhere. For instance, the European Court of Human Rights (hereafter ECtHR) has held that a State's responsibility to protect an individual's right to life under Article 2 of the European Convention on Human Rights (1970) (hereafter EConvHR) includes its duty to conduct an adequate investigation into the circumstances of any loss of life of its citizens,⁶ which necessarily includes losses due to a terrorist attack. Likewise, under the African Charter on Human and Peoples' Rights (1990) (hereafter AChHPR),⁷ an element of the State's duty to provide an adequate remedy for victims is a requirement to conduct an effective, timely investigation into violations of rights guaranteed by the Charter.⁸

⁶ Organization for Security and Co-operation in Europe (hereafter OSCE), *Countering Terrorism, Protecting Human Rights, A Manual* (2007), pg. 103 (citing ECtHR, *Çakici v. Turkey*, Application no. 23657/94, 8 July 1999, para. 87: "[. . .] Having regard to the lack of effective procedural safeguards disclosed by the inadequate investigation into the disappearance and the alleged finding of Ahmet Çakici's body [. . .] the Court finds that the respondent State has failed in its obligation to protect his right to life").

⁷ AChHPR, art. 1 (State's obligation to give effect to rights provided by Charter) and art. 7 (right to have one's cause heard by a competent national court).

⁸ See African Court on Human and Peoples' Rights (hereafter ACtHPR), *In the Matter of the Beneficiaries of Late Norbert Zolongo, et al. v. Burkina Faso*, Application No. 013/2011, para. 156 (finding Burkina Faso had violated art. 7 of the AChHPR in failing to act with "due diligence in seeking out, prosecuting and placing on trial those responsible for the murder of Norbert Zongo and his three companions"). See also EConvHR, art. 13 (right to an effective remedy). The Universal Declaration of Human Rights (1948) (hereafter UDHR), art. 8, which provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The International Covenant on Civil and Political Rights (1966) (hereafter ICCPR) provides for a victim's right to an effective remedy for a violation of her Covenant rights (art. 2 (3)), which include the right to have one's cause heard by a competent, independent and impartial tribunal (art. 14); see also ArabChHR, art. 23 (right of victims to effective remedy, even when offence committed by state actors).

A. Determining Circumstances and Responsibility for the Incident

The ECtHR has described the important elements of an effective criminal investigation, which are equally applicable to an investigation into an act of terrorism. With a slight modification for emphasis, the description is as follows: “To sum up, the judicial system required by Article 2 [of the European Convention on Human Rights] must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation [...] In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the [individuals or groups responsible, including] State officials or authorities involved in whatever capacity in the chain of events in issue.”⁹ Similarly, the Arab Charter on Human Rights proclaims in Article 5 that “[e]very human being has the inherent right to life”, and that “[t]his right shall be protected by the law.” And Article 23 of the Charter enshrines the obligation of each State party “to ensure that any person whose rights or freedoms (...) are violated shall have an effective remedy”.

B. Transparency of the Investigation

Moreover, “there must be a sufficient element of public scrutiny of the investigation and its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests”.¹⁰

1. The Media’s Role in Transparency and a Fair Trial

In many countries, the judiciary and the media have a relationship that can bring 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 total control over what it reports to the public about the proceedings occurring inside the courtroom. Concerns have arisen 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.¹¹

⁹ ECtHR, *Öneriyildiz v. Turkey*, Application no. 48939/99, 30 November 2004, para. 94.

¹⁰ ECtHR, *Hugh Jordan v. United Kingdom*, Application no. 24746/94, 4 May 2001, para. 109.

¹¹ The ECtHR has recognised 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.

a. Establish a Centralised Press Office

Prosecution services should consider establishing a permanent public affairs office on a national, regional, or local level in order to disseminate accurate information about their operations and, to the extent allowed under national law, proceedings occurring in the court, including trials, hearings, and other matters. The public affairs office should also be authorised to set policy regarding prosecution service officials' contacts with the media about specific cases or concerning the operation of the court system or any specific tribunal.¹²

b. Require Training in Media Relations

Prosecution services may wish to consider the creation of a training program setting out best practices in responding to media inquiries about cases in which those officials are involved. Such training could establish permissible and impermissible media contacts for prosecutors.¹³

2. Victims' Rights in Terrorism Cases

Transparency is also promoted by respecting the rights of victims throughout the investigation and prosecution of a terrorism case. Prosecutors and investigating magistrates, among other judicial officials, should be aware of the increasing attention paid to victims' rights triggered by a terrorist incident.¹⁴ This Outline focuses upon a victim's right to an effective investigation in order to seek redress as a result of injuries and losses from the attack, *i.e.*, support services, reparations, and restitution. Providing such services is a responsibility mainly of the government rather than an individual prosecutor or investigating magistrate. Prosecutors and investigating magistrates, however, can be directly involved in respecting other rights enjoyed by victims of terrorism, and other crimes. Those rights include the right to protection and the right to participate in the judicial proceedings, including, in some States, the investigation and prosecution, occasioned by the terrorist incident.¹⁵ Many of the considerations discussed here also apply to witnesses, who may have been victims of the terrorist attack.

¹² A similar recommendation has been made regarding the judiciary. See, European Network of Councils for the Judiciary entitled, *Justice, Society and the Media, A Report 2011-2012* (hereafter *ENCJ Report*), section 2.2 (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 on 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>.

¹³ Such training could complement similar efforts for the judiciary. See, *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).

¹⁴ The Global Counterterrorism Forum (hereafter GCTF) has emphasised the growing attention to victims' rights. See, GCTF, *Madrid Declaration on Victims of Terrorism* (hereafter GCTF, *Madrid Declaration*), available at: <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Madrid-Declaration-ENG.pdf>. See also GCTF, *Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings* (hereafter GCTF, *Madrid Good Practices*), available at: <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Madrid-Memorandum-ENG.pdf>.

¹⁵ United Nations Office on Drugs and Crime (hereafter UNODC) (2009), *Handbook on Criminal Justice Responses to Terrorism*, Part VIII, pg. 110.

a. Protecting Victims Through the Proceedings

There are many ways in which a prosecutor or investigating magistrate can promote the safety and security of victims of terrorism, and prevent them from being re-victimised during the judicial process. For example, prosecutors and investigating magistrates should take steps to make sure victims receive physical protection by the proper government agencies, as well as services such as housing, food, and childcare. Justice officials need to be alert to, and to take action against, any threats, intimidation, or efforts to corruptly influence victims.¹⁶ Victims' rights to protection begin at the time of the terrorist incident and continue throughout the judicial proceedings. If necessary, victims should receive protective services even beyond the final determination of the responsibility of the individuals prosecuted. In addition, personal information of victims, including name, address, telephone number, should be kept confidential to the extent possible under national law. Protection measures should also include, where appropriate, alternative means for allowing victims and other witnesses to testify.¹⁷ Prosecutors and investigating magistrates should minimise the inconvenience to victims during the proceedings by providing them timely and detailed information about their roles in the investigation and prosecution. Victims should also receive regular explanations of the progress of the matter in a language they can understand.¹⁸

b. Victims' Rights to Participate in the Proceedings

Prosecutors and investigating magistrates should also take steps to allow victims to participate in the investigation and prosecution, as permitted by national law. Prosecutors should consider facilitating victims' legal representation (at no cost) so they can more effectively communicate with judicial officials.¹⁹ In addition, victims should be given the opportunity to meet with the investigators, prosecutor and investigating magistrate during the progress of the case, according to national law.²⁰ Victims also should be advised well in advance of the dates for court hearings and trials so they can attend, and when judicial decisions have been made, including plea bargains, verdicts, and appeals.²¹ When national law permits, victims should be allowed to express their views to the court regarding the proceedings and sentencing.²²

II. Reasons for Effective Investigations of Terrorism Offences

A fair, complete, and diligent investigation of violations of counterterrorism laws, consistent with human rights and the rule of law, will help to prevent impunity, lead to conviction and punishment of the responsible perpetrator(s) of the offences, and promote public respect and moral authority for the role of legal institutions in promoting and maintaining a country's internal security. In many cases, the results of an effective investigation and prosecution will add to the national or regional counterterrorism information base, which can be used in future terrorism prevention and investigation efforts. A thorough and honest investigation will also facilitate international cooperation by engendering trust in the integrity of a state's criminal justice system by other countries. Further, it will support efforts to ensure the safety of victims, witnesses, and judicial officials.

¹⁶ GCTF, *Madrid Good Practices*, Good Practice 7 (Establish accessible crisis services), Good Practice 9 (Protect victims in counterterrorism investigations and criminal proceedings).

¹⁷ See GCTF, *Abuja Recommendations on the Collection, Use and Sharing of Evidence for Purposes of Criminal Prosecution of Terrorist Suspects* (hereafter *Abuja Recommendations*), section VI and Recommendation 24, available at: https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/C/GCTF-Abuja-Recommendations_ENG.pdf?ver=2018-09-21-122246-523.

¹⁸ GCTF, *Madrid Good Practices*, Good Practice 11 (Provide victims with access to justice, including legal assistance at no cost, as well as information, as appropriate, about criminal justice process and the case), available at: <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Madrid-Memorandum-ENG.pdf>; UNODC, *Handbook on Criminal Justice Responses to Terrorism*, Part VIII, pg. 110.

¹⁹ GCTF, *Madrid Good Practices*, Good Practice 11.

²⁰ GCTF, *Madrid Good Practices*, Good Practice 12.

²¹ GCTF, *Madrid Good Practices*, Good Practice 13.

²² GCTF, *Madrid Good Practices*, Good Practice 14.

Part Three

I. A Prosecutor's Role in Terrorism Investigations

A. A Prosecutor's Role in Different Criminal Justice Systems

Prosecutors may have different roles in the investigation and prosecution of offences, including terrorism cases, in different countries. Consistent with national law, a prosecutor or investigating magistrate should actively supervise terrorism investigations to ensure they are carried out by the investigative services in accordance with the rule of law and international human rights principles.²³ Whether actively supervising a terrorism investigation or reviewing its results in deciding whether to file charges, a prosecutor or investigating magistrate should take all possible steps, in concert with judges and investigators, to ensure that the investigative services have conducted an effective, fair, and complete investigation of the offences. As noted, a principal goal of an effective investigation is to establish, based on reliable and lawfully obtained evidence and information, the identity of the individual(s) responsible for commission of terrorism offences.²⁴

B. Gathering All Relevant Evidence: Exculpatory and Incriminating

Prosecutors and investigators should search out all relevant information, whether it is incriminating or exculpatory, regarding any criminal suspect(s), including those who may have committed an act of terrorism. Most criminal cases will involve some exculpatory evidence or information helpful to the accused. Such exculpatory information could lead a prosecutor to decide against charging a particular person at all, or could result in the person being charged with a less serious offence. A prosecutor or investigating magistrate must take into account all such information when deciding to initiate or continue a terrorism investigation or prosecution. Only by taking account of all information and evidence can the judicial official make a fair and impartial decision regarding the individual's criminal responsibility that respects that person's right to life, freedom, and a fair trial. Moreover, accurately assigning responsibility for terrorism offences will increase the public's confidence in the criminal justice system and the state's counterterrorism efforts.

²³ UNODC *Handbook on Criminal Justice Responses to Terrorism*, Part Two, pg. 74 (the role of prosecutor as guarantor of compliance with international rule of law and human rights principles, citing *Guidelines for the Role of Prosecutors (Eighth United Nations Congress of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: Report Prepared by the Secretariat)* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C.26, annex, available at: <http://www2.ohchr.org/english/law/pdf/prosecutors.pdf>).

²⁴ GCTF, *Rabat Memorandum*, Introduction ("The criminal justice system must also be able to respond to terrorist acts with [a] fair and effective investigation, prosecution, and punishment in the unfortunate event that they occur"); OSCE, *Human Rights in Counter-Terrorism Investigations, Introduction*, pg. 13 ("It is a fundamental requirement of international human rights law that a fair trial depend[s] on a fair and impartial investigation conducted in full compliance with legal and human rights standards").

C. Inter-agency Cooperation and Coordination

1. A Prosecutor's Role in Assuring Inter-agency Cooperation

A prosecutor should take all lawful steps available under national law to ensure that domestic agencies and authorities with counterterrorism responsibilities share information that may be relevant to the investigation and prosecution of the offence involved.²⁵ Only when the prosecutor or investigating magistrate has access to all information relevant to a terrorism investigation can he make fair and impartial decisions concerning whether a criminal offence has occurred, and, if so, the identity of the suspect and the appropriate charges to bring.

a. Common Law Systems

In countries with criminal justice systems based upon common law traditions, a prosecutor will often directly participate in and supervise terrorism investigations. In that case, the prosecutor should, consistent with national law, require investigators to contact all agencies, including intelligence, law enforcement, military, finance, and banking agencies, to obtain any information or evidence those agencies may have that could be relevant to the investigation.

b. Civil Law Systems

In civil law based criminal justice systems, a prosecutor may play a less direct role in a terrorism investigation by reviewing the results of the investigating agency or an investigating magistrate. A prosecutor should, as part of that review, verify that such contacts and information sharing have appropriately taken place.

2. Specific Agencies to Inquire

a. Agencies with Criminal Histories of Individuals

Prosecutors should conduct, or request the appropriate investigative agency to conduct, a criminal history inquiry of individuals under investigation for terrorism offences. Many countries maintain national or other centralised databases containing records of an individual's previous arrests, prosecutions, or contacts with law enforcement or security agencies. In addition, other regional or international organisations, such as Eurojust and INTERPOL, maintain databases with such information. A prosecutor or investigating magistrate should also secure and review any prior case files of the suspect for leads regarding her past criminal activity; her past and present family members and associates; her history of domestic and international travel; memberships in groups, clubs, and other organisations; places of domicile; employment; past telephone numbers; and aliases. That information could also lead investigators to other possible individuals who may have participated with the suspect in the terrorist activities.

²⁵ GCTF, *Rabat Memorandum*, Good Practice 2, encourages intelligence, law enforcement, military, finance, and banking authorities at the national, state, and local levels to share among themselves information that could be relevant to preventing and prosecuting terrorists and terrorist acts. Countries that have created counterterrorism "fusion centres" or interagency task forces promote information sharing by having representatives of their domestic agencies work together, either in one location or virtually through secure cyber systems, to receive, analyse, and distribute information according to established protocols. In the absence of such arrangements, prosecutors and investigators should take all possible steps to access relevant information held by the various agencies. *See also* United Nations Convention Against Corruption (hereafter UNTOC), article 38 ("Each party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offenses").

b. Other National and Local Prosecutors' Offices

Inquiries should be made of other investigative and prosecution authorities to determine if there are other current investigations or prosecutions regarding the same individual(s) or incidents(s). If there are multiple investigations or prosecutions, authorities should consider whether it would be more efficient or advantageous to prosecute all of the suspect's criminal conduct in one case, if permitted by national law. Even if overlapping cases are to remain separate, investigators and prosecutors should willingly share information and evidence, including informants and cooperating witnesses, in order to bolster all pending cases.

c. Banking and Financial Agencies or Authorities

In appropriate cases, and consistent with national law, a prosecutor or investigator should contact banking and financial authorities to obtain financial information concerning suspected individuals or entities. These agencies often have especially useful information in terrorism financing and money-laundering cases. If the prosecutor's country has established a financial intelligence unit (FIU) that is a member of the Egmont Group,²⁶ the FIU may be able to provide financial information about a suspect's banking relationships and activity conducted inside and outside the prosecutor's country. That information may lead to the identification of others who assisted or financed the terrorist activity under investigation, as well as to the existence and location of bank accounts and other assets that could be seized and forfeited upon a suspect's conviction, or in a related civil action, depending upon national law.

d. Border Control Agency

If an individual's travel history is relevant to the investigation, investigators should contact the national border control agency to request evidence and information about a person's leaving and entering the country. Such information could be relevant to an investigation or prosecution involving, *inter alia*, a suspected terrorist who has entered the country from abroad, a person accused of having trained in another country with a terrorist organisation, or an individual accused of traveling outside the country in order to provide material assistance to such a group.

e. Immigration Authorities

If the person under investigation immigrated to the prosecutor's country, investigators should obtain, consistent with national laws, a copy of any file maintained by the relevant immigration authorities. In some countries, immigration files contain information about a person's background, family members, associates, prior residences, and other data that could be highly relevant to the investigation or prosecution.

3. Conducting Periodic Inter-agency Coordination Meetings

If the prosecutor or investigating magistrate is directly supervising the investigation, consideration should be given to conducting periodic meetings with representatives of all investigative agencies, either individually or jointly, to discuss developments and future steps to take in the investigation, as well as whether additional agency information might be relevant to the terrorism case.²⁷

²⁶ The Egmont Group is an international network of 155 national financial investigation units with the goal of stimulating cooperation among its members in order to combat international money laundering and terrorism financing. The Egmont Group operates in accordance with the international Anti Money Laundering and Counter Financing of Terrorism (AML/CFT) standards. The Group provides a secure information sharing system to facilitate exchange of confidential financial information.

²⁷ See *Report of the United Nations Counter-Terrorism Committee Executive Directorate on the practitioners' seminar on "The use of intelligence in counter-terrorism prosecutions"* (Ankara, Turkey 18-20 July 2011), para. 22 (recommendation for holding formal debriefings in counterterrorism cases at which prosecutors provide feedback to investigators and intelligence services).

D. Uses of National Security Intelligence Information

1. Uses Consistent with National Law

Consistent with national legislation, a prosecutor should make appropriate use, or ensure that investigators and investigating magistrates have made appropriate use, of all information from military or security intelligence agencies that could be used for leads or evidence in the terrorism investigation and prosecution.²⁸ In some countries, such information may be used only for providing investigative leads and not as evidence in a trial. In other countries, security and military intelligence information may be admissible, as long as it complies with criminal procedure and evidentiary rules for admission as evidence in a criminal trial. In either case, a prosecutor should take steps to see that this type of information is accessed and used consistently with his or her national legislation.

2. Relevance of Intelligence to a Terrorism Investigation

In most countries, security and military intelligence agencies are responsible for identifying and preventing threats to national security. Consequently, any information about a particular terror suspect or group held by such agencies is likely to involve relationships, contacts, and the suspect's activities with other terrorists and, possibly, prior or future planned terrorist events. Such information could be highly relevant to an on-going criminal investigation concerning that individual or group. For that reason, prosecutors and investigating magistrates should ascertain early in the investigation whether security and military intelligence services have information that could assist in the criminal case against a terrorism suspect.

²⁸ GCTF, *Rabat Memorandum*, Good Practice 6 emphasises the importance of protecting sensitive law enforcement and intelligence information that is used in counterterrorism investigations and prosecutions. *Recommendations for Using and Protecting Intelligence Information in Rule of Law-Based Criminal Justice Sector-Led Investigations and Prosecutions* (hereafter *Rabat Intelligence Memorandum*) contains detailed recommendations aimed at implementing Good Practice 6 of the *Rabat Memorandum*, available at: <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rabat-Good-Practice-6-Recommendations-ENG.pdf>. See also GCTF, *Abuja Recommendations*, section IV.

3. **National Security Intelligence and Criminal Evidence**²⁹

Prosecutors should recognise, however, that the military and other security intelligence services may not have acquired the information and potential evidence in accordance with the requirements of the criminal procedure code and court rules, making it inadmissible in a criminal trial. Military and national security services gather intelligence principally for purposes of detection and prevention of future terrorist incidents, not for use as evidence in the investigation or prosecution of a past or continuing criminal offence.³⁰ In addition, the national security implications of the information and evidence gathered by the military or intelligence services may mean that it cannot be readily shared with the defence counsel or the court. Depending upon the legal requirements in effect in the prosecutor's jurisdiction, the information and evidence gathered by military and security intelligence agencies may have to meet the same standards for admissibility in a criminal trial as information from law enforcement agencies. In some cases, military or intelligence service information or evidence may comply with those criminal procedure rules for admission in a terrorism trial. In other cases, it may not. A prosecutor or investigating magistrate should be aware of all such material and determine its relevance and whether it can be used for leads or as evidence in the criminal case.³¹

Note

In a recent terrorism case in Ethiopia, the prosecution presented a written national security agency report, which included transcribed conversations that it claimed the defendant engaged in with other suspected members of the terrorist organisation. The defence argued to the court that the transcriptions did not clearly show that it was the defendant who participated in the conversations, and requested that the court order the prosecution to produce the original tape recordings on which the transcriptions in the agency report were based. The court agreed. The prosecution was, however, unable or unwilling to make available the original tape recordings. As a result, the court found the agency report alone was unconvincing regarding both the defendant's identity as a participant in the intercepted conversations and the facts surrounding the level of engagement, and entered an acquittal order, thereby releasing the defendant from custody.

The case illustrates the necessity for the prosecutor or investigating magistrate to carefully evaluate the contents of written reports from security agencies, which may not be knowledgeable about court rules regarding admissibility of evidence, to ensure that the information they contain is accurate and convincing. In this case, a forensic expert may have helped with investigation by analysing the voices in the tape recordings.³²

²⁹ In some countries, "intelligence" is a general term used to refer to information developed through covert operations conducted by both national security and law enforcement agencies. For sake of clarity, this Outline will refer to "national security (or security) intelligence," which is generated by the agencies and bodies responsible for detection and prevention of national security threats to the nation, and "law enforcement intelligence," which is information gathered by law enforcement investigative agencies, normally using "specialised investigative techniques" (*infra*, section E), for possible use as evidence in criminal prosecutions.

³⁰ See *Report of United Nations Counter-Terrorism Committee Executive Directorate on the practitioners' seminar on "The use of intelligence in counter-terrorism prosecutions"* (Ankara, Turkey 18-20 July 2011), para. 11.

³¹ Security intelligence services may also have information that may be helpful to the accused, in either mounting a defence to the charges or trying to mitigate his culpability. Prosecutors and investigating magistrates should ensure that any such information is collected, retained, and disclosed to the defence in accordance with applicable legal requirements in the jurisdiction.

³² Federal Democratic Republic of Ethiopia, Federal High Court, *Case of Constable Birhan*, C/F/No. 204546, 26 June 2018.

4. International Standards for Admission at a Trial

Prosecutors should keep in mind the relevant international instruments and reports that provide recommendations regarding how law enforcement agencies can lawfully employ covert operations and appropriately collect and use the information produced as evidence without infringing upon an accused person's right to a fair trial.³³ In general terms, such international recommendations call for the investigative technique which produced the information or evidence to be properly authorised by law; to be used only in serious cases, including terrorism; to appropriately balance the objective of the operation with its intrusiveness on individual rights of those affected; to be used only after other, less intrusive, investigative techniques have been employed; and, as more fully discussed below, allow for disclosure to the accused of the information produced in a form and to the extent that guarantees a fair trial.³⁴

³³ See, Council of Europe: Committee of Ministers, *Recommendation Rec (2005)10 of the Committee of Ministers to Member States on "Special Investigation Techniques" in Relation to Serious Crime Including Acts of Terrorism*, 20 April 2005 (hereafter COE Rec 10 (2005)), available at: <http://www.refworld.org/docid/43f5c6094.html>.

³⁴ *Ibid.* See also COE *Protecting the Right to a Fair Trial under the European Convention on Human Rights, A handbook for legal practitioners* (2nd ed.), pg. 61; UNODC *Handbook on Criminal Justice Responses to Terrorism*, pg. 50.

5. **Non-Evidentiary Uses of Security Intelligence Information**

Many circumstances can result in military or security intelligence information being inadmissible as evidence in a criminal trial. For example, several participants, during participant interventions at the IJ Project workshop, stated that certain State laws specifically prevented its use as evidence. As mentioned, the method of gathering and preserving, or just the highly sensitive nature of the intelligence, may also preclude its use as evidence. Even if that is the case, prosecutors should determine if their national laws permit such information to be used for other, non-evidentiary, purposes in an investigation or prosecution.³⁵ In some countries, intelligence information may be used to justify judicially-approved searches or interceptions of a suspect's communications by law enforcement agents, which might lead to other, admissible evidence. National law might also allow intelligence information to be used by an expert witness as a foundation for his or her testimony, or as background information about the suspected terrorist or terrorist organisation.

Note

- a. A prosecutor during a participant intervention at the IJ Project workshop explained that in her country military or security intelligence is not admissible as evidence in a criminal trial. If a general prosecutor receives an investigative report from the military or a security intelligence service, a request is made to all law enforcement agencies seeking information that could corroborate the intelligence with information that would be admissible in a criminal case. If corroboration is located, that law enforcement information is usually admissible in the criminal trial, instead of the inadmissible intelligence. If the military or security agency intelligence cannot be corroborated, the general prosecutor may order, or instruct an investigating magistrate to order, additional law enforcement investigative steps, including covert operations, to determine if the investigation or prosecution should be brought or continued, depending on the circumstances.
- b. The workshops implemented under the IJ Project used a hypothetical case to facilitate a discussion identifying concrete ways in which inadmissible national security intelligence might be used to develop evidence that could be admitted in a criminal trial. The simple fact pattern was as follows: a prosecutor received a report from a national security agency indicating that during an intelligence operation, person A was overheard during a conversation on his telephone explaining to B that A was recruiting young males to travel to foreign terrorist training camps, then return home to conduct violent terrorist acts against civilians. The security service said it would not permit that information to be used as evidence in court because it would require the disclosure of the highly confidential source of the intelligence. During participant interventions, prosecutors identified ways to use the information as a lead to investigate A's possible terrorist recruitment activities. Ideas included using the intelligence to support a request for judicial authorisation for law enforcement agents to intercept A's telephone conversations; interviewing B to see if he is willing to provide corroborating evidence; interviewing A's family; and using another individual to gain A's confidence and attempt to learn more about A's recruitment activities.

³⁵ See GCTF, *Rabat Intelligence Memorandum*, Recommendation 4.

6. An Increasing Challenge: Obtaining and Using Evidence from Areas of Conflict

a. Domestic Conflict Areas

Prosecutors and investigating magistrates handling terrorism matters may confront cases in which they need to obtain evidence from an active or a post-conflict area.³⁶ In countries conducting military operations against terrorists, members of those groups may commit terrorist acts in the jurisdiction in which the prosecutor and investigating magistrate operate. Those officials may face difficulties obtaining evidence from the area of conflict to support criminal prosecutions of members of the groups. The chaos that often results from a terrorist attack, as well as the military's focus on assuring the safety of the public and its troops, restoring order to the area, and gathering intelligence (perhaps classified) with which they can respond to the recent attack and prevent future attacks, means that they may not be focused upon assisting criminal investigators and prosecutors in collecting evidence and taking witness statements necessary for a future prosecution. Further, military commanders may view a prosecutor's request for their soldiers to collect evidence in compliance with law enforcement protocols as an interference with their primary responsibilities and a task outside their training and capabilities. Individual prosecutors and investigating magistrates may have a difficult time overcoming these challenges, especially if there is no legal authority in the prosecutor's jurisdiction regulating the use of such information in a criminal case. In the absence of such laws, judges may be skeptical of the sources and authenticity of such information, making it difficult to use it in a criminal proceeding. A lack of good communication and working relationships between the military and law enforcement officials may make it even harder to overcome these challenges. Prosecutors and investigating magistrates should, however, become familiar with whether the military or security services operating in domestic conflict areas are capable and willing to work with law enforcement agents to identify, collect, retrieve and safeguard evidence in compliance with judicial rules and protocols for admission at trial. Joint training efforts should be considered to enhance the missions of both institutions.

³⁶ GCTF, *Abuja Memorandum*, section V. This information and material is often referred to as "battlefield evidence".

b. *Foreign Conflict Areas*

When the conflict area is in a foreign country, the evidence collection challenges can be even greater. In some conflict areas, the military or security forces conducting operations are the only parties exercising effective control. There may be no functioning government, or the government may not have the capacity to maintain order in the area.³⁷ Moreover, the military forces in charge may be from a third country, or may be a multi-national coalition of forces. The difficulties in obtaining admissible evidence from such a conflict zone may result in the inability to prosecute terrorists who committed violent acts against nationals of the prosecutor's country, or launched attacks from the conflict zone. These issues are, perhaps, most acute in cases in which the prosecutor wishes to file charges against a foreign fighter who is returning to the prosecutor's jurisdiction.³⁸ In those cases, much or all of the evidence needed to support terrorism charges may be in the conflict area.³⁹ There may be cases in which a terrorism prosecution cannot move forward because needed evidence cannot be secured from the conflict area. In such cases, some prosecutors have used an alternative approach by charging travel offenses, conspiracy to commit terrorism, or membership in a terrorist organisation, since these offenses may be proven with evidence the prosecutor has the ability to obtain.⁴⁰

c. *The Changing Landscape*

Prosecutors, investigators, and investigating magistrates need to stay abreast of developments in their jurisdictions concerning the evolving working relationships between the military and justice sector officials. As more countries recognise the problems presented by investigations and prosecutions dependent on evidence residing in conflict zones, governments are establishing legal frameworks that allow, or mandate, military authorities operating in a conflict area to collect potential evidence for a judicial proceeding.⁴¹ Some countries are also passing laws that regulate and facilitate the use by civilian judicial officials of materials and information collected in the conflict area, including standards or protocols covering proper methods of collection, securing, labeling, and storage of that information.⁴² Further, joint training programs are implemented in some countries for the military and judicial operators so each group can better understand the mission and operations of the other.

³⁷ See GCTF, *Abuja Memorandum*, section IV.

³⁸ See GCTF, *Addendum to The Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, with a focus on Returning FTFs*, for a fuller discussion and Good Practices regarding states' efforts to combat the phenomenon of returning foreign fighters, particularly Recommendation 1, which stresses the need for increased information sharing among states experiencing the challenges, available at: <https://www.thegctf.org/Portals/1/Documents/Toolkit-documents/English-Addendum-to-The-Hague-Marrakech-Memorandum.pdf>. See also, IJ, *Principles for Reintegrating Returning Foreign Terrorist Fighters (FTFs)* for a discussion of Principles and Good Practices for reintegrating returning foreign terrorist fighters, including the role prosecutors can play in that effort, available at: <https://theij.org/wp-content/uploads/22-Principles-Final-ENG.pdf>.

³⁹ *Ibid.*

⁴⁰ GCTF, *Abuja Memorandum*, section V. Prosecutors should also determine if the information sought has already been obtained by a foreign country and might be available by way of an international assistance request, through either informal channels or a treaty-based mutual legal assistance request. See *infra*, for a discussion of methods of bilateral and multilateral information exchanges.

⁴¹ See, for example, the *Non-Binding Guiding Principles on Use of Battlefield Evidence in Civilian Criminal Proceedings*. The Principles were developed collaboratively by the U.S. Departments of Defense, Justice and State. The Guidelines are available on the IJ website: <https://theij.org/wp-content/uploads/Non-Binding-Guiding-Principles-on-Use-of-Battlefield-Evidence-EN.pdf>.

⁴² The United States Government has developed fourteen *Non-Binding Guiding Principles on Use of Battlefield Evidence in Civilian Criminal Proceedings* (hereafter Non-Binding Principles) through the collaboration of the Departments of Defence, Justice, and State. The non-binding principles are aimed at assisting the U.S.'s foreign partners in reviewing, revising, or developing their own approaches to allow civilian judicial operators to use information and materials obtained by the military operating in conflict areas. The *Non-Binding Principles* were also designed to support the efforts in this area by the United Nations Counter-Terrorism Committee Executive Directorate (hereafter UNCTED) and the GCTF, available at <https://theij.org/wp-content/uploads/Non-Binding-Guiding-Principles-on-Use-of-Battlefield-Evidence-EN.pdf>.

During the training, the military is taught about law enforcement needs, evidence collection standards and protocols. In some countries, prosecutors are imbedded with military forces so they can be on the crime scene as soon as possible after the fighting stops. As prosecutors and military units become more familiar with each other's mission, protocols, and requirements, and as countries develop the legislative necessary frameworks, the chances for productive cooperation and exchanges will increase.⁴³

E. Special Investigative Techniques by Law Enforcement Agents

1. Increasing Importance of Special Investigative Techniques

Consistent with national law, a prosecutor, investigating magistrate, and investigating agencies should consider the use of "special investigation techniques" by law enforcement investigators to obtain relevant evidence and information. "Special investigative techniques" include law enforcement operations carried out without the suspect's knowledge, such as interceptions of telephone and computer communications; physical or electronic surveillance of suspects; use of informants who did not participate in the crime; use of cooperating witnesses involved in the criminal activity under investigation; controlled deliveries of arms, narcotics, or other contraband; and search warrants for physical places or electronic and other devices.⁴⁴ The "use of special investigation techniques is a vital tool against the most serious forms of crime, including acts of terrorism,"⁴⁵ and signatories to the United Nations Convention Against Transnational Organized Crime have agreed in Article 20 to establish laws that permit special investigative techniques to be used in their jurisdictions. These measures may lead to evidence and information about a suspected terrorist or terrorist organisation that might not otherwise be obtainable. When employed, such law enforcement operations must comply with domestic and international law, including international human rights and rule of law standards.⁴⁶

2. Physical Surveillance

During Participant Interventions, prosecutors recognised that some covert law enforcement investigative activities are quite straight-forward and easily implemented and, at the same time, can be very effective. If the investigation has identified a particular individual or group, undercover police or other law enforcement agents physically might follow the suspects(s), perhaps with the aid of a global positioning system (GPS) device and/or video equipment, and observe them without detection leading to information about a person's or a group's activities, associations, locations frequented, and habits. Physical surveillance can also lead to the identification of potential witnesses who might provide helpful information, or to accomplices of the main suspect. While the success of this technique may depend upon the availability of sufficient agents, it does not generally require sophisticated and expensive equipment. To be effective, however, agents should carefully coordinate their surveillance activities and prepare full and timely reports of the results. In civil law countries, those reports may constitute evidence and be included in the investigative file, while, in common law countries, the agents may be called upon to testify in court about their observations.

⁴³ In 2017, the Council of Europe Counter-Terrorism Coordinator made suggestions to the EU members states' delegations about how information exchanges among military, law enforcement, and judicial operators could be improved, including how battlefield evidence collected for possible use in criminal prosecutions could be disseminated to appropriate international organisations, such as INTERPOL, Europol, and Eurojust for diffusion to users of those entities' data bases. European Union, Counter-Terrorism Note 12347/17, *Strengthening military, law enforcement, and judicial information exchange in counter-terrorism*, Brussels, 19 September 2017.

⁴⁴ GCTF, *Rabat Memorandum*, Good Practices 3, 4; UNODC *Handbook on Criminal Justice Responses to Terrorism*, Part II, section III (A); see also *Report of the United Nations Counter-Terrorism Committee Executive Directorate on the practitioners' seminar on "The use of intelligence in counter-terrorism prosecutions"* (Ankara, Turkey 18-20 July 2011), para. 9-16; COE Rec 10(2005), Chapter I, Definitions and Scope (special investigative techniques defined as what are often called law enforcement undercover operations).

⁴⁵ COE Rec 10(2005), preamble.

⁴⁶ *Ibid*; see also *Report of the United Nations Counter-Terrorism Committee Executive Directorate on the practitioners' seminar on "The use of intelligence in counter-terrorism prosecutions"* (Ankara, Turkey 18-20 July 2011), sec. II.

3. Use of Informants and Cooperating Witnesses

a. Information That Can Be Obtained

The use of informants is another investigative technique that often can be carried out by employing readily available law enforcement investigative resources, and without resort to sophisticated and expensive equipment. Informants are individuals who provide information to law enforcement agents about criminal activity. An informant may be either someone who is not directly involved in the incident under investigation or a person who has direct involvement or is a member of a terrorist group under scrutiny. The latter individuals are sometimes called cooperating witnesses. Informants and cooperators can provide highly relevant information, including the membership of the organisation, descriptions of the organisational structure of the group, the locations at which the suspected terrorists conduct their planning and preparation, the targets that the suspected terrorists or terrorist groups may be planning to attack, the means by which the terrorists are financed, details of the command and control structure of the group, and the supply chain the terrorists use to obtain materials intended for use in their activities.

b. Need for Security for Informants and Cooperators

Three important considerations should be taken into account when using informants and cooperating witnesses. The first consideration is that informants or cooperators who are close to or inside a terrorist organisation are at great risk. As a result, prosecutors and investigators must plan the operations carefully to reduce security risks as much as possible. At a minimum, the identity of the informant or cooperator must be protected and disclosed only to investigating officials involved in the specific criminal matter at issue. One participant, during the IJ Project workshop, observed that in his country an informant could be assigned a number or code name by which he is identified in official files and reports.

c. Need to Ascertain Truthfulness of Information

The second consideration is that prosecutors and investigators should ascertain the informant or cooperator's motive(s) for working with authorities. In countries where payments for an informant or cooperator's services are permitted, they may be critical to securing the person's assistance. The payments, however, could create a motive for the informant to provide less than truthful information in order to keep receiving the benefit. Further, some informants and cooperators assist investigators in order to get revenge against their former criminal associates. Such a motive may also make them less reliable as witnesses or cause investigators to treat their information with caution. In sum, even if permitted by national law, the use of informants and cooperators should be undertaken with care to ensure the credibility and accuracy of the investigation are not compromised.⁴⁷

⁴⁷ GCTF, *Rabat Memorandum*, Good Practice 5 ("Finally, care should be taken to ensure that incentives for cooperation do not lead individuals to provide false information or evidence to law enforcement authorities.")

d. Need for Detailed Records of Activity

Thirdly, investigators and/or prosecutors should have a written agreement with the informant or cooperating witness. The agreement should describe the terms of the person's participation in the investigation, including, her compensation, how the person will be supervised by agents, precisely what activities the informant or cooperator may engage in, and a prohibition against the person's commission of any criminal offence during the engagement. Detailed record keeping by prosecutors and investigators regarding the informant's activities and the results of his efforts is critical in order to document the person's assistance to the investigation, but also to avoid later disagreements about her authorised activities. Depending upon the criminal justice system involved, and the circumstances of the case, the informant's information, in either a report or through live testimony at a trial, may prove to be critical evidence of the accused person's guilt. States might follow the example of the Netherlands which establishes a special prosecutor who is responsible for managing informants and cooperating witnesses. This special prosecutor is not involved in the investigation of the case.

4. Use of Undercover Law Enforcements Agents

If permitted by national law, prosecutors and investigating magistrates should make appropriate use of fully-vetted law enforcement agents as undercover operatives who infiltrate the terrorist group or closely associate with an individual terrorism suspect to learn about past or planned future terrorist incidents. As with civilian informants, the safety of that agent remains a main concern, but, generally, there should be fewer issues regarding reliability or any improper motive that could impeach the agent's information or testimony.

5. Information Held by an Internet Service Provider⁴⁸

a. Access Must Comply with National Law

Prosecutors and investigators should be aware of, and consider using, lawful measures to access information about suspected terrorists' communications conducted through Internet and wireless Internet Service Providers (ISP).⁴⁹ In cases in which the use of traditional surveillance and informants is not possible or has not provided sufficient results, surveillance of a suspected terrorist's electronic communications, such as emails, texts, tweets, and posts made using cellular telephones and computers, may provide useful information for the investigation. Legal requirements for obtaining, maintaining, and using this type of information may differ among countries, but most countries require judicial authorisation in advance in order to obtain this information. In light of the intrusion into a person's expectation of privacy in personal communications resulting from these investigative steps, prosecutors and investigators should use and seek them only when there is a reasonable basis to believe the information sought is related to the terrorist activity under investigation.

⁴⁸ Most telephone conversations are conducted over a wired or wireless network owned by a company that may or not also be an Internet service provider. Real time interceptions of telephone conversations (so-called "wiretaps") for use in a criminal case require prior authorisation of a judicial or other authorised official in almost all countries. Prosecutors and investigating magistrates in countries allowing such interceptions should be familiar with the legal standards and requirements for obtaining the required authorisation. Interception of telephone conversations may provide some of the best incriminating evidence against terrorist suspects. Those interceptions, however, must comply with national criminal laws. They must also respect international human rights law regarding privacy of individuals.

⁴⁹ If investigators seize cellular telephones or computers from suspected terrorists, they may be able to access information physically contained on those devices. Access should be obtained in accordance with national law, i.e., pursuant to statute, a properly authorised search warrant or court order, or by consent from the suspect. A cellular telephone may contain a list of contacts, a directory of recent numbers called from, or that called to, the particular telephone, an Internet browsing history, frequently visited websites, and copies of recent or archived electronic mail messages. In addition, computers may also contain electronic files with incriminating or otherwise relevant information. In some cases, investigators will have to consult with forensic experts to access cellular telephones and computers due to security measures that must first be surmounted.

b. *Types of Information Available*

During participant interventions, prosecutors discussed the different types of electronic information available regarding various types of communications. For example, investigators may be able to secure subscriber information from an ISP for a specific electronic mail account without seeking the contents of any of the actual communications. Subscriber information usually identifies the name used by the subscriber, perhaps the address she provided the ISP when the account was opened, the date the account was opened, and the source of payment used by the person requesting the account. Transactional information is more extensive and usually includes the date, time, and duration of the communication, as well as certain “addressing information”, such as IP addresses associated with the account; information from the email “headers”, including the source and destination network addresses, as well as the routes of transmission and size of the messages, but not content located in headers; and the size and number of any attachments to the message. Finally, the actual contents of the computer electronic mail communications, in real-time or as stored messages, may be available, depending upon the national legislation of the country involved and the retention policies of the Internet service provider.

c. *Accessing Communications Information*

Prosecutors and investigators considering accessing a person’s electronic communications information must be aware of their country’s national laws regulating law enforcement agents’ or prosecutors’ access to that information. In most countries, obtaining information concerning personal communications requires the authorisation of an appropriate judicial official, who must determine that there is a sufficient nexus under local law between the communications information sought and the terrorist activity under investigation. Some countries may require different degrees of factual justification in order to authorise law enforcement officials to access various types of information, *i.e.*, subscriber information, transactional data, or the content of the communications. Other countries may have a single standard that must be met. The intrusion into a person’s right to privacy is greatest when law enforcement agents seek the contents of a person’s communications and often requires more justification. Whatever statutory or regulatory scheme is in place, prosecutors and investigators should ensure compliance of their requests with those requirements in order to meet international rule of law interests and to ensure the admissibility of any relevant information obtained as evidence in court.

d. *Practical Problems*

(i) *Translators, Code Experts, and Jurisdiction*

Practical problems in this area include the frequent need for translators if the terrorist suspects communicate in a different language, and a need for a knowledgeable person to decipher coded language used by the suspects. Issues can also arise when a prosecutor or investigator in one country wishes to obtain access to communications information that resides on the servers located in another country, even if the communications company has a presence in the prosecutor’s jurisdiction. Prosecutors should be familiar with the policies of the ISPs in their jurisdiction and the types of communications information they can provide, whether that information is held locally or in servers maintained in another country.⁵⁰

⁵⁰ Difficult issues can arise when a prosecutor or investigating magistrate seeks communications information (subscriber or transactional information, or content of communications) maintained on servers in another country. In such a case, the prosecutor or investigating magistrate may have to comply with the other country’s privacy or other protective laws governing the disclosure and use of the information. In most cases, the investigating official should initially contact the local representative of the Internet service provider to determine whether and under what conditions the needed information may be obtained. In some cases, an informal written request to the Internet service provider may be possible. In others, the prosecutor or investigating magistrate may need to make a formal treaty-based request for mutual legal assistance or send a letter rogatory directed to the appropriate authority of the country in which the information is located.

(ii) **Rapidly Changing Technology**

Rapid changes in the hardware and software used by electronic communication device manufacturers have made it more difficult for investigators to obtain information about or the actual communications of suspected terrorists. For example, as law enforcement agents increasingly seek to access communications devices in order to investigate and prosecute terrorists, telephone and computer manufacturers and software developers increasingly try to protect the privacy of the device's users by making it more difficult to unlock the information contained on the apparatus. More sophisticated encryption can make it particularly difficult in this regard. Further, new means of communicating through social media platforms have also increased the challenges for law enforcement agents. Some of those communications can disappear from a device shortly after transmission, which may result in the loss of valuable information or evidence relevant to a terrorist case.

6. Privacy Concerns Regarding Special Investigative Techniques

Prosecutors and investigators should always be attentive to human rights concerns⁵¹ when authorising, supervising, or reviewing law enforcement agents' use of special investigative techniques, especially accessing the personal communications of terrorist suspects. Privacy interests in a person's physical movements, even in public, as well as a person's personal communications, are protected by international human rights law, and can be limited or interfered with by a national government only to the extent necessary to further a serious and important national interest. This principle applies equally in terrorism cases, as it does in other criminal cases. Special investigative techniques should be used in ways that limit, as much as possible, unnecessary intrusions into a person's privacy. In addition, requests to access a person's communications, even if they otherwise comply with national law, should be drawn no broader than is necessary to obtain the information relevant to the investigation or prosecution in process.⁵²

⁵¹ The prosecutor's national law also likely protects a person's right to privacy, including in electronic communications.

⁵² United Nations Universal Declaration of Human Rights (1948) (hereafter UNUDHR), art. 12; ICCPR, art. 17; EConvHR, art. 8; OSCE, *Countering Terrorism, Protecting Human Rights, A Manual*, pg. 196. For example, ISPs may hold large numbers of electronic mail, texts, or other content communications sent to and from the target of the investigation, many of which may be personal and not relevant to her suspected criminal activity. Internet service providers normally lack sufficient knowledge of the investigation, or the technical capability, to allow them to limit disclosure in response to a court order to communications related only to criminal activity. In the past, providers have often opted to comply with court disclosure orders by providing prosecutors and investigators with all of the suspect's communications, leaving it to authorities to separate relevant from non-relevant information. That practice has caused courts and others to raise privacy concerns about investigators' access to purely private communications. Internet service providers, their host countries, and prosecutors have struggled to find legal mechanisms that sufficiently protect a suspect's right to privacy in wholly personal communications, while allowing prosecutors and investigators to access communications that relate to criminal, including terrorist, activities. One mechanism used by some courts is a "filter team," *i.e.*, a knowledgeable investigator not associated with the criminal case who independently reviews all of the communications and discloses to prosecutors only that information relevant to the investigation.

7. *Use of Preventive or Investigative Detentions*⁵³

a. *The Purpose and Length of a Detention*

During the IJ Project workshop, participants noted that their criminal justice systems permitted investigative detentions of individuals suspected of having committed or planning to commit a terrorist offence. Some countries also provide for investigative detentions of individuals authorities believe may have information relevant to the investigation. These detentions occur before the investigation is completed and before there is sufficient evidence to charge any particular individual. The purpose of an investigative detention is to allow authorities to question a terrorism suspect and gather additional evidence without interference in order to decide if further investigations, or charges, are justified. The maximum periods allowed for such a detention vary by country. In some countries an accused may be detained for up to twelve days or more (including extensions), if the case involves a possible terrorism charge. In some cases, the person detained may have limited, delayed, or no access to legal counsel or the ability to contact family members. In countries that permit investigative detentions, a general prosecutor or investigative magistrate may be the official who authorises the measure. It is also possible that a prosecutor's involvement may start by giving advice to police officials regarding the initiation or continuation of the detention. In either case, responsible officials may wish to take into account the considerations below, which are aimed at ensuring that an investigative detention complies with international human rights and rule of law standards and is not abused.

b. *Use Sparingly, Protect Against Abuse*

(i) *In Strict Compliance with National Law*

The use of investigative detentions has raised concerns among some human rights and rule of law observers because it can be difficult to clearly define when such an intrusion into a person's liberty may be justified.⁵⁴ Nevertheless, investigative detentions have become a common feature of the counterterrorism regimes of countries in Europe⁵⁵, Africa, the Middle East, and the Americas. In order to comply with international human rights and rule of law standards, an investigative detention must not be arbitrary. That requires that the initiation and duration of an investigative detention must be based upon established law; the detention must ultimately be controlled by the judiciary; the detention can be initiated only upon reasonable suspicion of criminality; it must be strictly necessary under the circumstances; and it must afford the detained person sufficient rights, including the right to redress for abuse.⁵⁶ In light of these considerations, a prosecutor or investigating magistrate should be cautious in seeking, ordering or acquiescing in investigative detentions. Such measures seriously interfere with a person's right to liberty and personal security and should be employed only if they strictly comply with established legal procedures in the national law which ensure against arbitrariness as defined above.

⁵³ The preventive detentions discussed here are those carried out by civilian law enforcement agencies. Such detentions contemplate a criminal proceeding at some point, resulting in either the release or the prosecution of the person detained. Some countries, however, authorise detentions aimed solely at preventing an individual from committing a terrorist act. These so-called "preventive detentions" do not always have established time limits, as they are justified by the existence of a perceived threat posed by the person detained, rather than the initiation and completion of a judicial process. See Stigall, Dan E., *Counterterrorism and the Comparative Law of Investigative Detention* (2009) (hereafter Stigall, *Investigative Detentions*), chapter 1.

⁵⁴ Office of the United Nations High Commissioner for Human Rights (hereafter OUNHCHR), in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, section 4.7.4, pg. 180.

⁵⁵ For example, the United Kingdom and France allow investigative detentions during investigations of terrorism, and other, serious offenses. *Ibid.*

⁵⁶ Art. 9 of the ICCPR and art. 5 of the EConvHR are two of the most important limitations on the use of investigative detentions. They enumerate certain freedoms and rights of individuals. See Stigall, *Investigative Detentions*, chapter 2.

(ii) Based Upon Adequate Reasons with Safeguards Against Arbitrariness

Since arbitrary detentions will likely violate national law, as well as international human rights law, they could jeopardise the success and reliability of an investigation or prosecution, possibly resulting in impunity for a terrorist responsible for the deaths and injuries of many innocent people. If employed inappropriately, or routinely, even relatively short periods of detention can amount to harassment or intimidation of individuals who have not committed, nor plan to commit, a crime, and who do not threaten state security or public order. Unjustified use against people who are unlikely or unable to provide prosecutors or investigators with useful information can be counter-productive, as such detentions are perceived to be unfair and arbitrary. People who might come forward with relevant information may decide not to do so if they are concerned that they will be detained and interrogated for up to two weeks or more, possibly without access to counsel.

(iii) Reasonable Belief of Serious Risk

Investigative detention should be based upon a reasonable belief that the person has committed a terrorism offence or presents a serious risk to security and that investigative needs justify the person's detention. In many cases, the initial determination in this regard will be made by the police officials conducting the investigation. Some investigative detention regimes provide for more senior police officials to periodically review the investigating officer's security and necessity assessments to ensure that the basis for the detention continues. At some point before the detention becomes prolonged, further detention requires independent judicial authorisation. Following the expiration of all permissible extensions of the detention, a decision must be made to charge the person or release him.⁵⁷

(iv) Right to Consult with Counsel

A person detained has a right to know the reason and basis for the detention⁵⁸, and be able to "promptly" challenge its legality before an independent official⁵⁹, normally a judge, with the assistance of counsel. Consequently, in all but exceptional cases, a detained person should be afforded the right to the presence of his or her own attorney during detention if the person so chooses.⁶⁰ If the person cannot afford to pay for an attorney, the state should appoint one to represent the person at no charge. Normally, the person should have the right to freely, immediately, and privately communicate and consult with his or her lawyer at any time during the detention, but especially before and during any questioning by investigators.

⁵⁷ This is generally how the investigative detention law in the United Kingdom operates. See Stigall, *Investigative Detentions*, chapter 4.

⁵⁸ A person subject to detention has the same right to be informed of the reasons for his custody as a person under formal arrest. See ICCPR, article 9(1)-9(2); EConvHR, article 5(2); OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (1991) para. 23.1 (ii) ("anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him"); ArabChHR, article 21, para. 1, 2, 3, and 6; African Commission on Human and Peoples' Rights (hereafter ACHPR) (2003), *Principles and Guidelines on Human and Peoples' Rights while Combatting Terrorism in Africa*, Section M, Provisions Applicable to Arrest and Detention.

⁵⁹ ICCPR, article 9 (4).

⁶⁰ ACHPR *Fair Trial Guidelines*, section M 1 (b), (e), (f) (right of arrested or detained person to legal representation and access to a lawyer); see also OSCE, *Human Rights in Counter-Terrorism Investigations, A Practical Manual for Law Enforcement Officers* (2013), Part 3, Sec. 3.4.4, pgs. 88-90 ("the right of access to legal counsel includes being allowed to consult with a lawyer in the police station from the very first moment when a person is obliged to remain with the police," subject to only "extraordinary circumstances" in which access may be delayed for investigative or national security reasons); ArabChHR, article 16, para. 4 (right to own or free counsel).

(v) Denial of Counsel Must Be Limited

While a complete denial of a person's right to counsel during an investigative detention would likely violate international human rights standards, a temporary delay of that right in exceptional circumstances of national security may be permissible.⁶¹ Police, prosecutors and investigating magistrates should sanction such a delay only when the national security dangers are clear, the investigative needs are great, and the delay is not arbitrary under international human rights provisions. Unjustifiably delaying a detained person's exercise of the right to counsel may result not only in prejudice to the criminal investigation and prosecution, but also to the loss of public confidence in the judicial system.

Note

In some cases, investigative detentions authorised under a special national security or counterterrorism law have been used to unlawfully detain people for months or years without charges, without access to a lawyer, and without the person being informed of the reasons for the detention. Even if carried out in conformance with local law, such detentions violate international human rights law. For example, a 1989 Sudanese law passed during a state of emergency allowed for the arrest of anyone "suspected of being a threat to political or economic security". Security forces had the authority under the act to detain people for up to 72 hours without access to a lawyer or family members. The detention could be extended by order of the National Security Council and a magistrate for up to three months, if necessary, for "maintenance of public security". The person detained could appeal only to that same magistrate. A later amendment to the law allowed the initial three-month period to be renewed by order of the Council without the approval of a judicial official. There was no right to challenge that order and no reasons had to be given for the detention. In reviewing the Sudanese law, the African Commission on Human and Peoples' Rights determined that, "[i]n these cases, the wording of this [emergency] decree allows for individuals to be arrested for vague reasons, and upon suspicion, not proven facts, which conditions are not in conformity with the spirit of the African Charter".⁶²

c. Not for Use to Pressure Suspects to Confess**(i) May Result in Ineffective Investigation**

The investigative detention of a suspect or witness should never be used to pressure that person into confessing or making a statement incriminating himself or another person in order to try to quickly resolve a terrorist, or any other, case. International organisations and other observers have noted that in some countries, prosecutors and investigators focus so heavily on obtaining a confession that often other investigative measures are not fully used or are viewed as unnecessary. This approach can result in an incomplete and unreliable investigation. If the investigation of a terrorist incident is not thorough, fair, and transparent, it is unlikely to lead to an accurate determination of who was responsible for the crime or how it was accomplished. Unreliable investigations can lead to a loss of public confidence and trust in law enforcement and judicial officials, which over time can have negative effects on the government's ability to combat terrorism. Additionally, an incomplete or ineffective investigation prevents investigators from understanding how a particular terrorist group operates, how it is financed, how it recruits its members, and other important facts that could help prevent future attacks.

⁶¹ See Stigall, *Investigative Detentions*, pg. chapter 2 (citing ECt.HR, *Fox, Campbell, and Hartley v. United Kingdom*, Series A no.182, ¶ 32 (1980)).

⁶² ACtHR, *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999). Art. 4 of the African Charter states: "Every individual shall be entitled to respect for his life. . . . No one may be arbitrarily deprived of this right." In addition, Art. 6 states: "Every individual shall have the right to liberty and security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"; see also ArabChHR, art. 14, para. 2 ("No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby").

(ii) May Result in Coerced Confession

In addition, relying too much on a suspect's confession or an incriminating witness statement can lead less scrupulous law enforcement agents or judicial officials to coerce, mistreat, or torture suspects and witnesses in order to force them to admit guilt or implicate others. The fact is, however, that tortured confessions and statements are unreliable.⁶³ Further, the use of torture in criminal investigations undermines public trust in the criminal process and hinders a country's ability to engage in international cooperation, including mutual legal assistance and extradition. Other countries may hesitate to provide information to a requesting country that engages in torture, fearing that the information will lead to the arrest of individuals who might be subject to unlawful treatment. For those reasons, among others, the international community has long condemned the use of torture in all circumstances, including in the criminal justice system. Indeed, 245 states are signatories or parties to the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT or Torture Convention). All countries that participated in the IJJ Project are parties to the CAT.⁶⁴ In addition, many countries in the MENA region have constitutional or statutory provisions prohibiting torture.⁶⁵

Note

- (1.) The Torture Convention also prohibits the use of any statement produced by torture as evidence in any judicial proceeding. Specifically, Article 15 states: *Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*⁶⁶
- (2.) The African Commission on Human and Peoples' Rights has adopted a guideline providing that "[c]onfessions should only be taken in the presence of a judicial officer or other officer of the court who is independent of the investigating authority. The burden of proof lies with the prosecution to prove that confessions were obtained without duress, intimidation or inducements."⁶⁷

(iii) Duty to Investigate Allegations of Torture

Prosecutors, investigating magistrates, and judges have a responsibility to be vigilant against the use as evidence of a statement or confession produced by torture, and to take appropriate steps under national law to inquire into any allegation that a statement or confession was obtained as a result of torture.⁶⁸ If it is established that the statement or confession was so obtained, it cannot be used as evidence in any judicial proceeding, except in a proceeding against the individual(s) responsible for the torture.

⁶³ OSCE, *Countering Terrorism, Protecting Human Rights, A Manual* (2007), pg. 130 ("Evidence obtained through torture or other ill-treatment is notoriously unreliable"); *Torture during Interrogations – Illegal, Immoral, and Ineffective*, Statement by United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein, 22 September 2017 (statements obtained through torture are unreliable).

⁶⁴ The African Union (hereafter AU) has also adopted an absolute prohibition of torture as one of its human rights principles. See, e.g., ACHPR, *Principles and Guidelines on Human and Peoples' Rights while Combatting Terrorism in Africa*, Part 3, Liberty, Arrest, and Detention, D. (i). Likewise, art. 5 (right to life) and art. 8 (prohibition against torture, cruel, degrading, humiliating or inhuman treatment) of the League of Arab States, *Arab Charter of Human Rights* (2004), art. 8, para. 1; art. 16, para. 6, echoes the international consensus against torture and forced self-incrimination. For a comprehensive description of the international and human rights law prohibitions against torture, see OSCE, *Human Rights in Counterterrorism Investigations, A Practical Manual for Law Enforcement Officers* (2013), section 3.5, pg. 94-111.

⁶⁵ REDRESS, *Litigating torture and ill-treatment in the Middle East and North Africa, A manual for practitioners* (2016) (hereafter *Redress Manual*), Introduction, pg. 6; section 11.2, pg. 34-38.

⁶⁶ See ACHPR, 32nd Session, 17-23 October 2002 (Banjul, The Gambia), *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (hereafter *Robbins Guidelines*) Part II, B, para. 29 (statements produced by torture "shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made"); ACHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003) (hereafter *ACHPR Fair Trial Guidelines*), section F, Role of Prosecutors, para. (h)(4)(c) (same). According to REDRESS, most countries in the MENA region have statutory provisions against using statements produced by torture as evidence in court. Implementation of those prohibitions, however, has been uneven in the region. *REDRESS Manual*, section 11.2.5, pg. 59.

⁶⁷ ACHPR, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*, Part 2, pg. 13.

⁶⁸ OUNHCHR, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereafter *Istanbul Protocol*) (2004), ch. III, Legal Investigation of Torture, para. 74, et seq.

(iv) **Need for Corroboration of Confession**

Prosecutors and investigators should not rely on a statement from a witness or a confession from an accused without verifying its accuracy. The statement or confession should be compared against other evidence and information developed during the investigation, especially forensic evidence (see below). If there are major discrepancies, they should be adequately explained before the prosecutor or investigator accepts the statement as true. Individuals charged with a serious offence that carries the possibility of a severe punishment, as most terrorism offences do, may try to minimise their criminal responsibility in the hopes of avoiding a long jail sentence. They may also try to falsely implicate others in the offence in the hope that the prosecutor or trial judge will treat them more leniently. Corroborating a confession or witness statement will help ensure that the investigation and prosecution accurately fix responsibility and adequately punish all individuals who perpetrated the terrorist act in question.

Note

An example of how the prosecution, and ultimately the criminal court, relied upon forensic and other physical evidence to corroborate the confessions of several defendants appears in a case from Chad entitled *Public Prosecutor against Mahamat Moustapha, aka Bana Fanaye, and nine others*, Register No. 02/2015, 28 August 2015. In that case, ten members of Boko Haram faced numerous criminal charges arising out of a series of 2015 terrorist attacks in the municipal district of N'djamena. Nine of the ten defendants admitted their membership in Boko Haram and participation in the attacks. Nevertheless, the court's Criminal Judgment did not rely solely on the confessions to find the defendants guilty. The court explained that bomb fragments recovered from the crime scenes and examined by forensic experts revealed that the bombs used in all three attacks were identical and detonated by someone wearing explosive vests. Those facts were consistent with the statements of some of the defendants that three "kamikazes" had arrived in Chad before the attacks and carried them out shortly afterwards wearing bomb vests.

Several of the defendants also said in their statements to the investigating magistrate and the court that they were responsible for purchasing and transporting weapons from outside Chad to Boko Haram groups inside the country and in Nigeria. During the execution of several search warrants at two of the defendants' homes, police found weapons caches consisting of rocket launchers and anti-tank rockets, machine guns, explosive charges, and ammunition for the firearms. These items were consistent with the defendants' statements describing what kinds of weapons they purchased and transported for Boko Haram units.

The search of one defendant's house also yielded documents that supported the charges against him for forgery and membership in Boko Haram. In particular, photographs seized from computer memory cards in the house showed the defendant posing in front of a Boko Haram emblem holding an automatic weapon. Additional photographs showed the defendant at a Boko Haram training camp in Nigeria. Additionally, audio messages contained calls from a leader of a Boko Haram sect for followers to engage in jihad.

Corroboration of defendants' incriminating statements, can be found when investigators, investigating magistrates, and prosecutors pursue all possible sources of information and evidence relevant to the case being prosecuted. Presenting such convincing corroborative evidence not only increases the chances for a fair and just result in the case, but also promotes public confidence in the criminal justice system.

F. Proper Use of Forensic Evidence

1. Identifying Forensic Evidence

“Every incident, be it a crime, accident, natural disaster, armed conflict, or other, leaves traces at the scene. The goal of the subsequent investigation is to correctly interpret the facts, reconstruct the events and understand what happened.”⁶⁹

a. Forensic Evidence May Be Transient

“Due to the transient and fragile nature of those traces, their reliability and the preservation of their physical integrity depend to a very large extent on initial actions at the scene of the incident. Evidence integrity can be achieved with very limited means by observing a key set of guiding principles. Acting with care and professionalism throughout the crime scene investigation process is critical for the admissibility of evidence for court purposes as well as for human rights inquiries and humanitarian action.”⁷⁰

b. There Are Many Types of Forensic Evidence

Prosecutors and investigators should ensure that, in accordance with national law, all available physical and forensic evidence is located, reliably collected, identified, transported, and stored for use in the investigation and prosecution. Forensic evidence is a type of physical evidence and consists of all types of objects, small or large, recovered at the crime scene or other locations related to the investigation. Examples include, among other things, fingerprints, blood spatter, hair, bomb residue, cadavers, ballistic materials, and documents. Normally, forensic evidence is examined scientifically in a laboratory following its collection in order to ascertain what information can be obtained from it.

c. Development of New Types of Forensic Evidence

The type and variety of materials that can be forensically examined to provide information relevant to an investigation is constantly being expanded by the technical capabilities of forensic scientists⁷¹ Prosecutors and investigating magistrates need to be familiar with the developing types of forensic evidence, their investigative significance, the forensic analyses to which they can be put, and how to present the results of those examinations in court in a clear, understandable, and persuasive way.

Note

Kenya’s continuing efforts to establish the National Crime Forensic Laboratory (NCFL) in Nairobi is one example of the interest in developing and increasing national capabilities to collect and analyze forensic evidence in criminal offenses. Construction of the laboratory facility has largely been completed, and Kenya is now seeking international assistance in acquiring equipment and expertise in order to realise the project’s full potential. The NCFL, originally created as part of the Ministry of Health, has recently been transferred to the Directorate of Criminal Investigations (DCI). The relocation is intended to enhance the DCI’s ability to solve crimes. It will allow Kenya to save time, money, and possible evidentiary problems from having to send evidence to facilities outside the country for forensic examination. The DCI strategic plan for the NCFL includes significant investments in training of examiners to develop their forensic scientific and investigative capabilities. In addition, the DCI plans to decentralise the laboratory’s expertise by establishing facilities and assigning personnel to sub-regions of the country.⁷²

⁶⁹ UNODC, *Crime Scene and Physical Evidence Awareness for Non-Forensic Personnel* (2009), pg. 1.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* pgs. 18-25 (chart listing examples of items and substances that can be present at a crime scene, types of events at which they might be encountered, their possible evidentiary value, and special considerations in their collection and transportation for storage).

⁷² Standard Digital, *Govt Chemists moved to DCI to enhance investigations and prosecution*, posted 13 October 2018.

d. *DNA and Bomb Blast Evidence*

(i) **DNA Evidence**

Among the numerous types of forensic evidence that prosecutors and investigating magistrates may encounter in a counterterrorism case, perhaps two of the most notable are DNA evidence and the residues left after detonation of an explosive device. Advances in DNA analysis and matching science have allowed investigators and human rights experts to make great strides in identifying victims, perpetrators, and missing persons killed as a result of armed conflicts, massacres, genocide, and other crimes against humanity. That same forensic capability has also been used to identify perpetrators and victims of terrorist acts. Prosecutors, investigators, and investigating magistrates trying to reconstruct the scene of a violent attack and determine what happened and who was responsible may well need to resort to advanced forensic techniques to identify deceased individuals in order to ascertain whether a particular person was an attacker or a victim. As a result, familiarity with the national and international resources than can be marshaled for this purpose is indispensable to a prosecutor's ability to ensure that the investigation involved is complete, accurate, and reliable.⁷³

Note

The International Commission on Missing Persons, (hereafter ICMP) originally based in Bosnia-Herzegovina but now based in the Hague, has been extremely successful in developing the science behind using DNA traces to identify individuals involved in a traumatic act of violence. The Commission has identified more than 10,000 missing persons from the Balkans conflict in the 1990s. Its forensic scientists, geneticists, biologists, and human rights experts have also made their expertise available to countries suffering violent terrorist attacks. For example, ICMP assisted in the Kenyan investigation of the 2013 Al-Shabaab attack on the Westgate Shopping Mall in Nairobi, which resulted in the injury of 712 people, including civilians, Kenyan military personnel and four attackers. Initially, it was difficult to identify the attackers from among the 67 civilian casualties. DNA analysis was a crucial tool in identifying the four Somali attackers who acted on behalf of the terrorist group to carry out the attack.

⁷³ "[T]he identification of missing people is desperately important for human rights, reconciliation and justice. It establishes accurate numbers of casualties, and they prove what happened. On history's card table, they lay down a scientifically precise ace of spades. They put in place an absolutist cornerstone of the process of rule-of-law, as establishing numbers of missing persons is also vital for any war crimes trials." The Guardian, *From Bosnia to Syria: the investigators identifying the victims of war crimes*, posted 10 November 2013). The same observation applies to terrorist acts.

(ii) Bomb Blast Evidence

Evidence left at the scene of a bomb blast, including remnants of exploded and unexploded devices, can provide a wealth of forensic material important to the investigation of a terrorist act. Items including protruding wires, telephones, shrapnel, traces of detonated devices, devices that did not explode, and many other seemingly obscure and insignificant items, such as residues, and trace elements, can provide clues as to how the bombs were constructed and where the materials came from. Together with other evidence, forensic examination of such items can lead to the identification of the group or individuals responsible for the attack.⁷⁴ Collection of this type of forensic evidence can be very challenging when the debris from the attack covers a large area, such as when an airplane is exploded in mid-air,⁷⁵ or when the attack results in an explosion with damage spread over several city blocks.⁷⁶ In the aftermath of the 1988 Lockerbie, Scotland, airline attack, careful crime scene management, which included identification, collection, preservation, and examination of substantial amounts of forensic evidence resulted in the arrests of individuals who were responsible. Some of the most important evidence was traces of bomb residue that had been burned into clothing that was eventually traced to one of the planners of the attack.⁷⁷ Likewise, following the 2019 car bombing of the police academy in Bogotá, Colombia, a team of forensic experts, including forensic doctors, dentists, anthropologists, geneticists, and other, meticulously picked through the large crime scene, collecting tiny pieces of burned fabric and small pieces of the vehicle, as well as body parts. The forensic team aimed not only at identifying the victims, but also at determining the cause and manner of each person's death.

Note

The forensic investigation conducted in the wake of the 12 October 2002 bombings in Bali, Indonesia, provides another example of the value that highly capable forensic scientists bring to a terrorist investigation. That effort also emphasises the benefit of international cooperation in investigating terrorist incidents. In the Bali attack, three bombs were detonated, two in a popular tourist spot in Bali and a third bomb ten kilometers away near the U.S. and Australian consulates. The bombs caused the death of 202 people and injuries to hundreds more. Casualties included citizens from Indonesia, Australia, and twenty other countries. To manage such an intensive and complicated forensic investigation, the Indonesian and Australian national police forces established Operation Alliance, which was supported by numerous international partners. An important step in the investigation was to set up a mobile laboratory as close to the crime scene as possible. The mobile laboratory was furnished with scientific equipment used in forensic analysis of trace materials and residues. The lab was able to provide timely, although tentative, findings for investigators while they were still working on the scene to collect more evidence. Having the tentative findings so quickly helped direct the on-going investigation and guide the crime scene investigators' attention to items of possible evidentiary significance.

The forensic analysis in the Bali bombings allowed investigators to determine that two of the explosions had been set off by suicide bombers. DNA analysis of body parts allowed investigators to identify the two bombers. Additionally, Indonesian National Police scientists examined fragments from the chassis of the truck that carried the largest bomb and found

⁷⁴ The Intergovernmental Authority on Development (hereafter IGAD), which operates among nations in the Horn and East Africa region, along with the Global Counterterrorism Forum, has been active in promoting awareness and adoption of good practices regarding the use of forensic evidence. IGAD and GCTF sponsored a three-day training workshop in Nairobi in October 2015 to explore the impact of forensic evidence in criminal justice systems.

⁷⁵ The terrorist attack that downed Pan Am Flight 103 as it flew over Lockerbie, Scotland, on December 13, 1988, left 300 tons of wreckage spread over 845 square miles. Some of the most critical pieces of evidence were later found 80 miles from where the airliner crashed to earth. FBI.gov, *The Bombing of Pan Am Flight 103*, posted 14 December 2018.

⁷⁶ On 17 January 2019, a left-winged terrorist group set off a car bomb near the Santander Police Academy in Bogotá, Colombia, killing 21 police cadets and injuring 68 others. Damage occurred over a several block area and consisted of burned and dismembered body parts, as well as pieces of the vehicle used. El Tiempo, *The Difficult Task of Identifying Victims of the Car Bomb* (English translation), posted 30 January 2019.

⁷⁷ The Associated Press, *Former FBI Agent says luck aided Lockerbie investigation*, posted 21 December 2013.

impressed numbers that allowed investigators to trace the owner, who proved to have been involved in the attacks. As a result, investigators gained an understanding of how the attacks were carried out, what explosives had been used, and who was responsible.

Operation Alliance is an excellent example of forensic evidence analysis at its best. It also shows how international partners working jointly can tackle even the most difficult and challenging crime scenes in terrorism cases.

2. **Advantages of Using Forensic Evidence**

The advantage of physical evidence over other types of evidence, *i.e.*, witness testimony and confessions of the accused, is that physical evidence is much less susceptible to questions regarding its reliability. It has the potential to objectively provide important information about the terrorist incident under investigation. Recognizing and understanding forensic evidence is often the best way to accurately interpret other information and evidence produced by the investigation, reconstruct the incident, and determine more precisely what happened and how it happened.⁷⁸ Proper use of forensic evidence, in accordance with national laws, regulations, and guidelines, enhances the credibility of an investigation and promotes the prosecution's compliance with the rule of law and international human rights principles by, *inter alia*, supplying reliable proof of key elements of a crime; helping to identify perpetrators; corroborating other evidence, including witnesses' testimony; providing evidence favorable to the accused; and reducing the reliance upon a suspect's confession as the principle or only evidence in the case.⁷⁹

3. **Forensic Evidence Is Not Infallible**

Despite the value of forensic evidence, prosecutors and investigating magistrates should understand its possible shortcomings as well. Studies have found that, at times, imprecise or exaggerated expert testimony has resulted in the admission of erroneous, misleading, or misunderstood forensic evidence in criminal trials.⁸⁰ Some forensic techniques, particularly those comparing patterns or similar features between objects or individuals, may not have been sufficiently evaluated and validated as producing consistently accurate and reliable results. In addition, forensic scientists have sometimes overstated the significance of similarities between individuals or oversimplified the data and its meaning. Finally, forensic scientists and examiners are fallible. They can make mistakes by mixing samples, improperly operating the scientific instruments used in the examination, or failing to appropriately take account of known limitations or error rates for the tests used.⁸¹ As a result, prosecutors and investigating magistrates should not blindly rely on forensic evidence to establish the facts. Like all other evidence, forensic evidence should be checked against, tested, and corroborated by other evidence developed in the investigation. If questions appear, they should be resolved before concluding that the forensic evidence is sufficiently reliable to be admitted in court.

⁷⁸ *Ibid.*, pg. 1.

⁷⁹ See Matthew Schwartz et al., *Strengthening the Case: Good Criminal Justice Practices to Counter Terrorism: Implementing the Global Counterterrorism Forum's Rabat Memorandum*, Global Center on Cooperative Security, September 2015 (hereafter GCCS Report 2015), pg. 18.

⁸⁰ National Academy of Sciences, *Strengthening Forensic Science in the United States, A Path Forward* (2009).

⁸¹ Innocence Project, *Misapplication of Forensic Science*, available at innocenceproject.org.

4. **Need to Assure Integrity of Forensic Evidence**

Forensic materials may be fragile, even transient in duration. Consequently, they must be collected, identified, transported, and stored in accordance with strict protocols that ensure that they are not contaminated in any way, and that they remain in the same condition as when they were first observed by investigators. Those measures will allow a scientific analysis by a qualified laboratory to be conducted on the items.⁸² In this regard, the UNODC publication entitled *Crime Scene and Physical Evidence Awareness for Non-Forensic Personnel* (2009), is an excellent resource for understanding the practical steps that should be undertaken to assure that forensic evidence encountered during a terrorism investigation is recovered and handled in accordance with recognised international protocols that will help guarantee its reliability.

Note

Prosecutors who participated in the IJJ Project noted that their countries did not have modern laboratories at which a professional and reliable forensic analysis can be performed on physical evidence. Countries without their own laboratories might consider using a mutual legal assistance treaty or convention, or a letter rogatory, to request that a laboratory in another country do a needed analysis. As will be seen below, there are ample international and regional instruments that provide a basis for such international cooperation.

G. **Use of Other Physical Evidence**

In addition to items of forensic value, investigators should photograph, collect and securely retain physical materials recovered in lawful searches of homes, vehicles, and businesses.⁸³ Such items may include telephones; agendas and calendars; computers; identification documents, such as passports and driver's licences; credit cards and receipts; utility and other bills, and bank records, including deposit and withdrawal slips, accounts statements, and evidence of wire transfers. Clothing and photographs may also prove to be relevant to the investigation. These materials may seem innocuous and unimportant in the aftermath of a horrific act of terrorism. Nevertheless, they may provide small, but consequential, leads to additional suspects and additional crimes committed by the terrorists under investigation. All evidence should be photographed and documented at the time of seizure and securely maintained, in part, so that investigators can refer to it later in the investigation, and any subsequent appeal, when its significance may be more apparent.

⁸² 2015 Inter Governmental Authority on Development (hereafter IGAD) Security Sector Program (ISSP) workshop on *Development and Use of Forensic Evidence as a Good Practices in Investigation and Prosecution of Terrorism Cases in the Horn and East Africa Region* (in partnership with the GCTF).

⁸³ OSCE, *Human Rights in Counter-Terrorism Investigations, A Practical Manual for Law Enforcement Officers* (2013), Part 2, Sec. 2.1.2.

H. Forensic or Physical Evidence Obtained Unlawfully

A prosecutor or investigating magistrate who becomes aware of, or receives, any evidence that is believed or known to have been obtained in violation of applicable national law, or which constitutes a grave violation of a person's human rights, including the right to privacy,⁸⁴ should not use the tainted evidence as proof against anyone, except the person who unlawfully seized it. Where appropriate, the court overseeing the investigation or prosecution, or other designated official, should be notified of the violation.⁸⁵ In all but the most exceptional cases, which should be clearly enumerated in the national legislation, the illegally obtained evidence should not be relied upon in determining the guilt or innocence of the accused person. Some jurisdictions also preclude the admission in court of evidence derived directly or indirectly from the evidence unlawfully obtained (so-called "fruit of the poisonous tree"), unless the prosecution can show that it had an independent, untainted, basis for securing it. Prosecutors and investigating magistrates need to be knowledgeable of any such provisions in their criminal codes or other judicial authorities. Investigations based upon unlawfully obtained evidence, or its inadmissible "fruits," will likely produce unreliable results. They are also inconsistent with the rule of law and can violate human rights standards concerning, *inter alia*, the right to a fair trial, the right against physical and mental abuse, and the right to privacy of a person and his property.

I. Privacy Concerns Relating to Forensic and Physical Evidence

Prosecutors and investigators should be attentive to the possibility that recovery of physical and forensic evidence may cause them to come into possession of sensitive personal information and data of a suspect or third parties. Personal information includes information that relates to an identified person, including disparate pieces of information that, when collected, can lead to the identification of a particular individual. Examples of personal data include a name and surname, dates of birth, home addresses, identification numbers, medical and financial details, email addresses, location data on a mobile device, and even an Internet Protocol (IP) address.⁸⁶ Applicable law may require that an individual's personal data be deleted, redacted, or replaced with pseudonyms so that public documents and other references do not disclose it. Many countries tightly control the public disclosure of personal data. Severe penalties often apply for willful violations, since improper handling of personal information may impair an individual's right to personal or family privacy. It is important, therefore, that officials receiving such information treat it in accordance with applicable privacy laws in their jurisdictions.⁸⁷ Respect for privacy rights by law enforcement officials will also promote the public's respect and confidence in the criminal justice system.

J. Identifying and Questioning Victims and Witnesses of Terrorism

1. Importance of Witnesses to the Investigation

Prosecutors should seek out information and evidence from all witnesses, including victims, who have knowledge relevant to the investigation or prosecution. Individuals who can testify or otherwise present first-hand accounts of the events constituting or surrounding an act of terror can play an important role in assuring a credible and thorough investigation and prosecution.⁸⁸ Witnesses can also help prosecutors and investigators understand the significance of other evidence, including forensic, physical, and documentary evidence. They may even be able to lead investigators to additional evidence of importance.

⁸⁴ For a discussion of how evidence collection can impact an individual's right to personal and family privacy, see OSCE, *Countering Terrorism, Protecting Human Rights, A Manual* (2007), ch. 13, pg. 196-213.

⁸⁵ UN, *Guidelines for the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, para. 16.

⁸⁶ European Commission, *What is personal data?* Available at https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en.

⁸⁷ OSCE, *Countering Terrorism, Protecting Human Rights, A Manual* (2007), ch. 13, pg. 196-213.

⁸⁸ See GCCS Report 2015, pg. 6.

2. Interviewing Witnesses Early in the Investigation

Prosecutors and investigators should identify and interview witnesses and victims as early as possible in the investigation. Often, witnesses and victims in terrorism investigations experience trauma, which prosecutors and investigators should address with the help of trained professionals before interviews are conducted. In some countries witness interviews can be informal or formal discussions with law enforcement investigators or prosecutors. In those countries, it is good practice to have at least two officials present for the interview, and for it to be memorialised in some fashion, such as having it video or audio recorded or having an investigator or stenographer take careful notes, then prepare a written report of the interview shortly after its conclusion. In other countries, formal, sworn statements taken before a judicial official may be required. Usually, a court reporter or other designated official records the statements. In either case, witnesses, even those without complete knowledge of the offence, can provide important evidence, as well as information that can lead to additional evidence relevant to the case.⁸⁹

3. Witness and Victim Security During the Investigation

The international community has recognised the importance of providing security for victims and witnesses of crime, including terrorism offences.⁹⁰ Indeed, witness and victim protection is a key aspect of human rights law. Every criminal justice official involved in a terrorism investigation, including investigators and prosecutors, has a responsibility, consistent with applicable national law and policy, to take measures to protect witnesses and victims against threats, intimidation, physical harm, and other forms of undue influence that could corrupt the fairness and transparency of the criminal justice process. Even in the absence of national legislation, prosecutors and investigators should take all reasonable steps not inconsistent with their law to assure the safety and security of witnesses. The need for effective witness and victim security exists from the initiation of the investigation through the final outcome of the prosecution, and may even be required thereafter. Witness security measures can include quite simple steps, such as not publicly disclosing a witness's name (if permitted by national law), changing the locks on a witness's home, and having investigators periodically visit the witness to make sure she is safe. More sophisticated measures include providing the witness with a mobile telephone to communicate problems to investigators and installing a security system in the witness's home with a direct connection to the police station.⁹¹

4. Protecting Witnesses and Victims During the Trial

Witnesses and victims, and sometimes their relatives at home or abroad, should also be protected during and after any testimony at a trial or other public appearance related to the investigation or prosecution. Prosecutors and investigating magistrates should consider directing victims and witnesses to use a non-public entrance to the courthouse or prosecutor's office, or concealing the identity of witnesses while entering a location where the public might be present. During public testimony, a witness might be referred to by a pseudonym or alias, or be permitted to testify from a remote location via video link. Even allowing the witness to wear a disguise has been offered as an option. Taking a witness's testimony in a secure location prior to the trial, then using a written transcript of the testimony at the public proceeding, might also be considered. Prosecutors and investigating magistrates should work with judges and other justice sector officials to devise creative and effective ways to protect witness and victims in compliance with applicable law and court procedures.

⁸⁹ A helpful collection of practical suggestions for conducting effective witness interviews can be found in OSCE, *Human Rights in Counter-Terrorism Investigations, A Practical Manual for Law Enforcement Officers* (2013), Part 2, Sec. 2.1.1.

⁹⁰ See, e.g., GCTF, *Rabat Memorandum*, Good Practice 1; GCTF, *The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses*, Good Practices 4, 9, available at: <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-The-Hague-Memorandum-ENG.pdf>; UNODC, *Manual on Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (2008); OSCE, *Human Rights in Counter-Terrorism Investigations, A Practical Manual for Law Enforcement Officers* (2013), Part 2, sec. 2.1.2.

⁹¹ *Ibid.* pg. 59.

5. **Protecting the Defendant's Right to a Fair Trial**

Measures used to protect witnesses and victims must take into account a defendant's right to a fair trial. Generally, when a witness, including a victim, testifies against someone, the accused person has a right to confront the witness and to ask the witness questions, usually through counsel, in order to test the completeness, reliability, and probity of the person's testimony.⁹² In civil law systems, witnesses may testify before an investigating magistrate. In common law systems, a witness usually testifies at the trial before a presiding judge, and in some countries, a jury. In either case, the defendant's right to refute, weaken, or explain the witness's testimony may be prejudiced if he is not permitted to see the witness or know the witness's true identity.⁹³ In addition, when a disguised or hidden witness testifies at a trial, the judge, or in some countries the jury, may not be able to fully assess the credibility and probative force of a witness's testimony in such circumstances. Consequently, steps taken to protect witnesses in presenting evidence "must be balanced to ensure that the defence is still provided a fair trial."⁹⁴

6. **Need for More Witness and Victim Protection Measures**

Many countries have no comprehensive witness security laws or regulations. Several States that participated in the IJ Project are evaluating or considering such laws. Most of the current methods used to provide witness and victim protection seem to be *ad hoc practices adopted in particular cases*. Participants agreed, however, that witness and victim security is an important part of an effective counterterrorism regime.⁹⁵

K. **Seeking Information and Evidence From Another Country**

1. **Importance of Mutual Legal Assistance**

The increasingly international nature of all criminal activity, particularly terrorism, requires countries to work together in the investigation and prosecution of terrorist groups and individual terrorists. Prosecutors, investigating magistrates, and law enforcement investigators must understand how to seek information relevant to a terrorism prosecution from another country in order to assure that the investigation is thorough, transparent, and fair. In some cases, the most important information and evidence may be located outside the prosecutor's own jurisdiction. It is important, therefore, for prosecutors to understand and effectively use the various mechanisms available to secure evidence from abroad.⁹⁶ These mechanisms include informal channels of information and evidence exchange, as well as formal, treaty-based avenues.

⁹² See ICCPR, article 14 (3)(e) and EConvHR, article. 6 (3)(d) (right "to examine or have examined witnesses against him"); OSCE, *Countering Terrorism, Protecting Human Rights* (2007), ch. 12, Right to a Fair Trial, pg. 167 ("The right to a fair hearing lies at the heart of the concept of a fair trial and encompasses all the procedural and other guarantees laid down in international standards. These include the right to cross examine witnesses and the right to be defended by a lawyer of choice, as well as the right to be presumed innocent and the right to be tried without undue delay.")

⁹³ *Ibid.*, pg. 111 (measures taken to protect witnesses at trial "may have an impact on an individual's right to a fair trial").

⁹⁴ *Ibid.* pg. 169 ("For example, the tribunal that decides the guilt or innocence of the defendant must take this into account and attach appropriate weight to the evidence.")

⁹⁵ See COE, *Recommendation of the Committee of Ministers on the protection of witnesses and collaborators of justice, Rec9(2005)*, which provides a helpful structure for witness protection, adopted on 20 April 2005, especially paras. 10-28.

⁹⁶ GCTF, *Rabat Memorandum*, Good Practices 3, 4; see *Report of the United Nations Counter-Terrorism Committee Executive Directorate on the practitioners' seminar on "The use of intelligence in counter-terrorism prosecutions"* (Ankara, Turkey 18-20 July 2011), sec. VII, para. 40-48.

2. *Informal Channels of International Cooperation*

a. *Law Enforcement and Judicial Attachés*

Initially, in accordance with national law, prosecutors, investigating magistrates, and law enforcement agents should make use of any existing informal channels for obtaining important information and evidence from abroad.⁹⁷ Informal channels can operate efficiently and quickly because they do not require compliance with a treaty's cumbersome procedures for seeking legal assistance. Law enforcement and intelligence services, and, in some countries, judicial representatives of a prosecutor's country, may be assigned to that country's embassy in the foreign country. Those officials often maintain regular contact with their counterparts in other nations in their region and, possibly, in other parts of the world. Those counterparts frequently have good working relationships that facilitate informal and rapid exchanges of information relevant to each country's criminal investigations and prosecutions. In many cases, memoranda of understanding between those agencies provide guidelines for what types of information can be exchanged without resort to a formal treaty or convention. Prosecutors and investigating magistrates should become familiar with the representatives their governments place in foreign embassies and with how those officials work with their foreign counterparts.

b. *Information Obtainable Through Informal Channels*

In countries in which this form of informal cooperation is used, law enforcement and intelligence agents may be able to quickly exchange a wide variety of information that does not require the prior authorisation of a judicial official in the requested country. Materials that the requested country may be willing to supply include copies of police or investigative reports; copies of public documents, such as drivers' licences, birth certificates, and titles to properties; criminal histories; known addresses of suspects or witnesses; and business organisation documents and licences. Law enforcement agents in the requested country may also be able to conduct voluntary interviews with potential witnesses located in their jurisdiction. Prosecutors, investigating magistrates, and agents should be familiar with, encourage, and utilise these efficient channels of informal exchanges in order to obtain needed information from another country without delay.

c. *Use of Information Obtained Informally*

The inter-agency memoranda of understanding that often regulate the informal exchanges of information and evidence may also provide guidelines or rules about how such information can be shared and used by investigators and prosecutors in the requesting country. Some countries may limit the use of the information to providing investigative leads in the matter under investigation, while other countries may allow the information to be used for any purpose authorised under the requesting country's law, including as evidence in a public terrorism trial. Prosecutors and investigating magistrates need to ensure they understand the proper uses of the information and evidence they seek through informal exchanges in order to avoid misunderstandings that could damage the cooperative relationship between the countries involved.

⁹⁷ Many international terrorism and serious crime conventions contain provisions requiring the parties to facilitate increased informal cooperation in combatting the offences covered by those instruments. See, e.g., United Nations Convention Against Transnational Organized Crime (hereafter UNTOC), art. 27 (signatories agree "[t]o enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention . . .").

In addition, prosecutors, even if they are not directly involved in the investigation of the terrorism offence, should be aware of the various regional information exchanges in which their law enforcement and intelligence services may participate. For example, several countries in the Sahel region⁹⁸ participate in the Sahel Fusion and Liaison Unit established under the auspices of the African Union's African Centre for the Study and Research on Terrorism (ACSRT). The mission of the Unit is to, *inter alia*, increase regional cooperation in the exchange of information regarding terrorist activities. For participating countries, the Unit may be a good source of information received from other participating countries regarding a terrorist or a terrorist group operating in the investigating country. Prosecutors in the participating countries should know how to make requests to the Unit so they can ensure investigators have sought out all information relevant to the investigation.

Prosecutors and investigators should also make use of international bodies whose databases and resources may contain useful information about particular individuals and groups involved in terrorist activities. These groups, including INTERPOL's diffusion notices and data bases, Europol's databases, and the European Union Judicial Cooperation Unit's (hereafter Eurojust) Focal Point Travelers system, have robust counterterrorism efforts that can help identify, track, locate, and detain terrorists and seize their financial assets all over the world. In addition, they have the capacity to assist national police and law enforcement agents in investigations of terrorist incidents in certain cases.⁹⁹

Note

There is a growing awareness that nations on the African continent have a need to access information held by regional and international police organisations in Europe. In January 2019, INTERPOL and the African Union (AU) signed an information sharing agreement, which created a platform for INTERPOL cooperation with AFRIPOL in confronting the challenges of terrorism and organised crime.¹⁰⁰

⁹⁸ Algeria, Burkina Faso, Chad, Libya, Mali, Mauritania, Niger, and Nigeria.

⁹⁹ In 2016, Eurojust established EuroMed as a forum for fostering judicial cooperation among prosecutors general in Europe and those in Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority and Tunisia. Since the inception of the forum, Eurojust has assisted in more than 35 cases with the partner countries, and has established approximately a dozen focal points to assist in the joint cases. Eurojust, *Collaboration, communication and continuation: Euromed Forum of Prosecutors General meets at Eurojust*, posted 30 January 2019 (<http://www.eurojust.europa.eu>).

¹⁰⁰ AFRIPOL is a technical body of the African Union whose goals include, *inter alia*, improving the effectiveness of cooperation among African police agencies through sharing information and enhancing coordination. AFRIPOL was established by the African Union's adoption of the Statute of the African Union Mechanism for Police Cooperation on 30 January 2017 in Addis Ababa.

3. Mutual Legal Assistance Treaties

a. Reasons to Use a Mutual Legal Assistance Treaty

Even though informal exchanges of information between law enforcement agents and intelligence services can be expeditious, many civil law countries do not permit such information to be admitted as evidence in court. Rather, to be admissible as evidence in the country making the request, the information or evidence from abroad must be “judicialised”, i.e., obtained through the formal process under a mutual legal assistance treaty or convention and transmitted by the appropriate method. That process, however, is often more time consuming than using informal channels of information exchange. As a result of these realities, many experienced prosecutors and investigating magistrates utilise informal law enforcement agency and intelligence service channels to quickly obtain a broad array of relevant information early in the criminal investigation. Then, later, they submit a treaty-based mutual legal assistance request to the other country for only that information and material the prosecutor intends to use as evidence in court or otherwise needs to have judicialised. It is important for prosecutors and investigating magistrates to understand how the use of treaty-based legal assistance requests can be used in conjunction with informal information exchanges made to a foreign country in order to support a thorough and fair criminal investigation of a terrorist, or other criminal, act.

b. International Mutual Legal Assistance Treaties

When a prosecutor or investigating magistrate needs to make a formal, treaty-based assistance request to another country to obtain information relevant to a terrorism investigation, there are numerous possibilities. There are many counterterrorism and other transnational crime conventions, treaties, and agreements that promote the sharing of information and evidence between countries if the investigation involves a crime covered by the treaty or convention. There are nineteen United Nations multilateral conventions covering specific conduct that form the international community's framework to combat terrorism.¹⁰¹ Prosecutors and investigating magistrates should understand how each of those instruments functions and how to use them to seek information and evidence from other countries.¹⁰² In addition, other United Nations conventions, including the Convention Against Corruption, the Convention Against Transnational Organized Crime (including the protocols against trafficking in persons and trafficking in migrants), and the counter-narcotics conventions contain provisions aimed at facilitating information and evidence exchanges in cases involving offences that may be part of, or closely associated with, the commission of a terrorism crime.¹⁰³

¹⁰¹ A list of the United Nations counterterrorism conventions is attached to this document as Appendix I.

¹⁰² The beneficiary countries are signatories to most of the United Nations counterterrorism conventions.

¹⁰³ All of the beneficiary countries are signatories to the United Nations Convention Against Transnational Organized Crime and its protocol against trafficking in persons, as well as the 1988 United Nations anti-narcotics convention.

c. Regional Mutual Legal Assistance Treaties

(i) Organization of African Unity

Regional mutual legal assistance conventions can also be very useful in furthering counterterrorism investigations and prosecutions. For example, Article 5 of the 1999 Organization of African Unity (hereafter AU) Convention on Prevention of Terrorism¹⁰⁴ obligates signatories to grant each other a broad scope of assistance in order to fight terrorism, including “the exchange of information among them[selves]”, and “co-operation among themselves and to each other with regard to procedures relating to the investigation and arrest of persons suspected of, charged with or convicted of terrorist acts, in conformity with the national law of each State”. In addition, Part V of that convention (Articles 14-18) authorises one signatory to request another to carry out “criminal investigations” (special investigative techniques) in the latter’s territory, including specific, listed actions.¹⁰⁵ The seven IGAD member countries have also entered into a regional mutual legal assistance agreement covering a broad range of assistance in criminal matters.¹⁰⁶

(ii) League of Arab States

Another example of a regional cooperation agreement is The Arab Convention on the Suppression of Terrorism, signed in Cairo, Egypt, in 1998. Ten of the thirteen beneficiary countries are members of the Arab League; Chad, Mali, and Niger are not members. The convention obligates member countries to provide each other with a broad range of assistance in terrorism cases (as defined in Articles 1, 2), including cooperation in the prevention and suppression of terrorism offences, (Article 3) information exchanges regarding terrorist groups and individuals (Article 4), extradition of offenders located in their territories (Articles 5-10), judicial assistance, including requests to the asylum state for the prosecution in that country of a suspected terrorist (Articles 9-18), and seizure of terrorists’ assets and proceeds from their illegal activities (Articles 19-20). Procedures for executing member states’ requests for these types of assistance are also set out in the convention.

¹⁰⁴ All but one of the African beneficiary countries are signatories to the AU counterterrorism convention.

¹⁰⁵ None of the beneficiary countries appears to have a bilateral mutual legal assistance treaty in force with another beneficiary country. As a result, the African countries represented should find the OAU convention very helpful.

¹⁰⁶ IGAD Convention on Mutual Legal Assistance in Criminal Matters (2014). The seven IGAD members are Djibouti, Eritrea, Ethiopia, Kenya, Somali Republic, Sudan, and Uganda.

d. Scope of Cooperation Provided in Treaties

When considering requesting legal assistance from another country in a terrorism case, or any other criminal matter, prosecutors and investigators should understand that mutual legal assistance conventions are designed to facilitate many types of assistance between and among signatory countries. Each treaty contains provisions detailing the different types of assistance the parties undertake to provide to each other. In addition, mutual legal assistance treaties usually contain a general provision stating that the parties may agree to provide each other with any other type of assistance permitted by their domestic laws. Some less complex mutual legal assistance requests may seek copies of public and law enforcement agency documents and reports; business records; bank, financial, and corporate records; birth and death certificates; immigration records; and criminal history records, among other materials. A prosecutor or investigator may also ask another country's appropriate authorities to take sworn witness statements or secure evidence from potential witnesses located in the requested country; or search locations where it is believed that evidence of the terrorist act may be found. If the law of the requested country allows, the assistance request may seek monitoring, interception, and recording of a suspect's communications, or a controlled delivery of arms, for example, in order to identify other members of a terrorist group. Even undercover operations, including having a cooperating individual or undercover law enforcement agent infiltrate a terrorist group, may be requested, the treaty so provides. Prosecutors may also seek permission to travel to the other country to be present for, or assist in, the law enforcement operation requested.¹⁰⁷

¹⁰⁷ Joint Investigative Teams (hereafter JITs) are one way to formalise bilateral or multilateral collaboration for specific cases, including terrorism and terrorism-related matters. A JIT is an international cooperation arrangement, often set up pursuant to an MLA, between competent judicial and law enforcement authorities of two or more countries for a limited duration to carry out criminal investigations in one or more of those countries. Europol, *Joint Investigative Teams – JITs, Numerous Successes Across the Board*, posted at www.europol.europa.eu.

e. Witness Testimony Taken Abroad

Prosecutors and investigating magistrates sometimes need to secure sworn testimony from a witness located in a foreign country. That evidence may be critical to the success of the prosecution of a violent terrorist or terrorist group. In some cases, informal arrangements may be coordinated by each country's law enforcement agencies to take a statement from a witness who is willing to provide it. More often, however, the other country will insist that the prosecutor seeking the statement submit a mutual legal assistance request, if a treaty is in place between the two countries, or some other type of formal request. Prosecutors and investigating magistrates must consider many issues in making such a request and seeking the testimony. The overarching question concerns the procedures that will be used to take the witness's statement. Normally, the requested country's laws and rules for taking sworn statements will apply. Those procedures may be very different from the rules that apply in the prosecutor's country. For example, in the requested country, questions to the witness may have to be asked by one of that country's judicial officials, rather than the prosecutor seeking the evidence. Or, questions may have to be submitted in writing, rather than asked in person. There may be little or no opportunity for the accused's defence attorney to be present or participate in the questioning. In some countries, the witness may be able to claim privileges not recognised in the prosecutor's jurisdiction that allow her to avoid testifying altogether or regarding certain topics. These differences may limit the effectiveness of the questioning and prejudice the prosecutor's ability to obtain the needed evidence. In some cases, the deposition may prove to be of little or no value. These problems could result in the witness's statement being inadmissible as evidence in the trial in the prosecutor's jurisdiction. The requesting prosecutor may also have to pay the witness's expenses to travel to the location of the deposition. Arrangements may have to be made in the foreign country to have an oath administered to the witness and to have the statement recorded in a way that will allow its admission in the prosecutor's case. If national law requires that the accused be present at all depositions, the prosecutor should ensure in advance that the requested country is willing to allow that person to enter the requested country for purposes of attending the testimony. Problems can arise in this regard if the accused must be detained while attending the deposition. Experienced prosecutors have had to engage in sometimes long and difficult negotiations with officials in the requested countries about the deposition procedures to be used. If the prosecutor's jurisdiction has a central authority charged with coordinating mutual legal assistance requests, that office may be able to assist the prosecutor in resolving the potential problems that can arise (see next section). The key is anticipation and advanced planning, which will provide the best chance for the prosecutor to obtain the witness's statement in a manner that can be used at the trial.¹⁰⁸

¹⁰⁸ IJ *Good Practices for Central Authorities*, GP 3, 4. The IJ Good Practices can be found at: https://theijj.org/wp-content/uploads/The-IJ-Good-Practices-for-Central-Authorities_September-2018_ENG.pdf.

f. Central Authorities and International Cooperation

Choosing the most appropriate mutual legal assistance instrument, and preparing a request that complies with that convention's requirements and the law of the country to which the request will be sent, can be a complex and technical undertaking.¹⁰⁹ For example, the countries involved may have different legal systems and may speak different languages. For those reasons, a prosecutor or investigator contemplating such an effort should determine if his or her country has a "central authority" for making and receiving mutual legal assistance requests. A central authority ideally is a dedicated group of criminal law experts who are skilled in preparing mutual legal assistance requests in compliance with different conventions, coordinating the transmission and execution of the request, and verifying the accuracy and completeness of the evidence and information obtained.¹¹⁰ Normally, the central authority expert will maintain regular contact with her counterpart in the central authority in the requested country.¹¹¹ Working with a central authority can greatly enhance the chances that a prosecutor or investigator will obtain the information and evidence sought from abroad in the form requested. Prosecutors need to be familiar with the central authorities in their countries and should use them appropriately.

Note

Three developments in recent years highlight the growing importance of mutual legal assistance practice and the need for more central authorities in Africa. First, in 2010, the Sahel Judicial Platform (hereinafter SJP) was created with the assistance of the UNODC. 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 obligations. Participants include Mali, Mauritania, Niger, and Burkina Faso, with membership open to other countries. Chad and Senegal are observer countries. To date, several mutual legal assistance requests have been transmitted through the SJP. Consistent with their national law, prosecutors and investigators in the region should consider using the SJP, which may require non-member countries to join the network. One of the important efforts of the SJP has been the creation of practical tools and resources, including manuals, guides, and training modules aimed at strengthening the abilities of the member countries to investigate terrorism offences, as well as engage in international legal assistance exchanges.¹¹²

Another development is the West African Network of Central Authorities and Prosecutors (hereafter WACAP), also a UNODC-sponsored organisation. WACAP was established in 2013 as a network of focal points of the fifteen member countries of the Economic Community of West African States (hereafter ECOWAS),¹¹³ and non-member Mauritania. 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.

Thirdly, on May 9, 2017, Chad, Mali, and Niger ratified a judicial cooperation agreement inspired by the SJP and the WACAP. The agreement facilitates the effective handling of mutual legal assistance requests relating to transnational organised crime by using the same type of "focal points" as the SJP and WACAP in each signatory country.

¹⁰⁹ Requesting electronic evidence from private sector social media and other platforms presents significant challenges. However, a joint publication from UNODC, the International Association of Prosecutors (IAP), and the United Nations Counter-Terrorism Committee Executive Directorate (CTED) - entitled the Practical Guide for Requesting Electronic Evidence Across Borders (2019) - contains useful information to help Central Authorities identify relevant points of contact through which to request the preservation of and access to such evidence.

¹¹⁰ See IJJ *Good Practices for Central Authorities*, Good Practices 1, 2.

¹¹¹ *Ibid.* Good Practices 3, 4.

¹¹² UNODC, *Sahel Judicial Platform, Regional Judicial Platform of the Sahel Countries*, available at http://www.unodc.org/documents/congress/background-information/Terrorism/Sahel_Judicial_Platform_E.pdf.

¹¹³ The WACAP members include ECOWAS members Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo, plus non-member Mauritania. The website for WACAP is www.wacapnet.com.

Part Four

I. A Prosecutor's Selection of Criminal Charges

A. A Prosecutor's Role in Charging Decisions

Once the investigation has gathered as much relevant evidence as possible, and properly identified the individuals(s) responsible for committing a particular terrorism offence, a prosecutor should choose the appropriate criminal charges to be brought against that person or group. In the countries in North Africa and the Mediterranean region, the general prosecutor, or the public prosecutor is responsible for deciding whether to charge, who to charge, and what charges to institute.

B. Charges Based Solely Upon Evidence From Investigation

A prosecutor should choose charges based only upon his assessment of the evidence from the investigation, including any evidence and information that is favorable to the suspected offender. The prosecutor should avoid any improper motivation when choosing charges.¹¹⁴ In this way, the prosecutor will promote public confidence in the integrity, fairness, and outcome of the investigation and prosecution. It will also help to prevent impunity for the guilty or the wrongful prosecution of the innocent.

1. *Charges Reflecting the Seriousness of Conduct Involved*

A prosecutor should objectively and impartially evaluate all of the information and evidence developed during the investigation and file only those criminal charges that accurately and adequately reflect the seriousness of the accused individual's conduct in committing the terrorism offence(s).

2. *Evidence Supporting Every Element of Offences Charged*

Before bringing charges, the prosecutor should have admissible evidence to prove, in accordance with the legal standard required for a criminal conviction, each element of every offence to be charged.

¹¹⁴ The following guidelines regarding the role of a prosecutor in general apply equally to his decisions concerning what charges to bring against an individual suspected of committing a terrorism offence. "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." *Guidelines for the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, para. 12. Prosecutors are to "[c]arry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;" *ibid.* para. 13.

C. Charging “Participatory Offences”

If authorised by national law, a prosecutor should consider bringing charges against individuals who gave aid and assistance to the perpetrators of the terrorist act, either before or after its completion, even if those individuals did not participate directly in the act’s execution. For example, individuals who conspired with the actual perpetrators to plan the crime, or individuals who aided or abetted the actions of the perpetrators by, *i.e.*, soliciting others to join in the commission of the act, providing needed material or supplies, providing a safe house for planning or escape, or helping to conceal from police authorities the identity or the location of the perpetrators following the offence, may be guilty of conspiracy, solicitation to commit a terrorist act, participation in a criminal organisation, aiding and abetting a terrorism offence, or acting as an accessory to the terrorist act.¹¹⁵ Charging these “participatory” offences when the evidence supports them will ensure that all individuals who participated in the terrorist act will be held to account before the criminal justice system.

D. Charging “Preparatory Offences”

Even in cases where the terrorist act was not fully completed, or the act was attempted but failed, prosecutors should be alert to charge individuals with any offences authorised by law that proscribe conduct in preparation for a terrorist act. These “preparatory” activities could include fundraising for a terrorist organisation, providing propaganda or other material support, criminally associating with known terrorists to plan a terrorist act, or recruiting members for the terrorist organisation. Some countries have adopted legislation criminalizing those preparatory activities. Even without specific laws covering that conduct, however, a prosecutor may be able to charge individuals engaged in such conduct with conspiracy or attempt to commit a terrorist act, if national law allows.¹¹⁶ As with the preparatory offences mentioned above, charging preparatory offences is aimed at holding responsible all those who acted with the intent to aid the commission of the terrorist incident, even if they did not personally commit the core criminal conduct, *i.e.*, the bombing, kidnapping, or assassination.

E. Human Rights and Participatory and Preparatory Offences

Charging participatory offences (conspiracy, aiding and abetting, accessory), as well as preparatory offences (such as solicitation for terrorism, providing material support to a terrorist group, recruitment of terrorists), is an effective way to protect innocent people from harm. Nevertheless, the scope of conduct they cover can be difficult to precisely define. If the laws are written too broadly or misapplied, they can result in unjustified invasions of individuals’ personal and family privacy and security, or interferences with an individual’s freedoms of thought, expression, association, and religion. In some cases, the purposes of the laws have been ignored and they have been used to criminalise innocent conduct engaged in by political opponents of the ruling government, or by groups disfavored by the government because of their religion, ethnicity, sex, race, or national origin. A similar problem arises when countries define terrorism using vague and subjective terms in their domestic legislation. Terrorism laws written to criminalise activities that the government considers to “undermine public confidence in governmental institutions,” “prejudice the public order,” or “criticise the lawful operations or decisions of the government” are so broad that they may be used to improperly investigate, detain for long periods, and prosecute political opponents or disfavored groups for acts or speech, or even a status, that are protected under international human rights laws.

¹¹⁵ GCTF, *Rabat Memorandum*, Good Practice 14.

¹¹⁶ GCTF, *Rabat Memorandum*, Good Practice 13.

1. **A Prosecutor's Role in Preventing Abuses**

National governments have the primary responsibility to ensure that counterterrorism and other criminal laws clearly and precisely define the conduct they prohibit in accordance with international human rights and rule of law precepts.¹¹⁷ Many countries have incorporated international human rights principles into their domestic law. Prosecutors can also play an important role in assuring compliance with their national law and applicable international human rights principles by charging individuals or groups with terrorism crimes, including preventive and preparatory offences, only for conduct that exhibits a clear intention to commit or assist violent terrorism, or which directly calls for others to engage in terrorist violence. Prosecutors should also take whatever steps are available under national or international law to prevent terrorism or other criminal laws from being used to discriminate or persecute an individual or group based upon a motive or reason prohibited by domestic law or international human rights principles.¹¹⁸

2. **Charging Association Offences**

A prosecutor should be cautious in charging someone with a terrorism offence that criminalises membership or association in a particular group. If applied to a group whose connection to terrorism is not legally established¹¹⁹, the charge and subsequent prosecution could result in interferences with the accused's and others' freedoms of expression, assembly, association, and property rights.¹²⁰ The same is true in cases involving charges of solicitation or incitement of terrorism, or recruitment for a terrorist organisation, advocating for the overthrow of the government, and providing support to a terrorist organisation.

3. **Charging Offences Related to Speech**

An individual's right to freedom of expression is deeply rooted in international human rights law¹²¹, as well as in most country's domestic legislation. It is not a right without limitations, however. Freedom of expression may be restricted when necessary to ensure "respect of the rights or reputations of others" and to maintain "the protection of national security or of public order (*ordre public*), or of public health or morals."¹²² A prosecutor's decision whether to charge a person with terrorism based upon her speech or other expression of her ideas and opinions can present difficult questions in identifying the border between lawful speech and the State's legitimate interests in protecting its national security. For example, a prosecutor may need to distinguish lawful criticism of the government's exercise of power, its record of promoting the country's overall welfare, and its ability to protect the legal, social, and political rights of all, on the one hand, and the spread of rumors and falsehoods that could actually promote violence and the breakdown of the country's internal security, on the other hand.

¹¹⁷ ACHPR, *Principles and Guidelines on Human and Peoples' Rights*, Part 6 B-D, pg. 28.

¹¹⁸ For example, the European Union Charter of Fundamental Rights (hereafter EUChFR), art. 21 provides that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." ACHPR, *Principles and Guidelines on Human and Peoples' Rights*, Part 6 D, pg. 28 ("States shall be prohibited from targeting an individual on the basis of discrimination of any kind, such as on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, disability, or any other status.")

¹¹⁹ GCTF, *Rabat Memorandum*, Good Practice 15. Some countries have officially designated particular groups as "terrorist organisations," including Al-Qaeda, Taliban, Al-Shabaab, and FARC. These designations are made by an authorised governmental agency, which applies written criteria based upon legally sufficient information. Designations should be based on sufficient compelling information to justify naming groups as "terrorist organizations." Efforts should be made to confirm that designations are sufficiently supported by evidence.

¹²⁰ OSCE, *Human Rights in Counter-Terrorism Investigations, A Practical Manual for Law Enforcement Officers* (2013), ch. 14, pg. 215.

¹²¹ AChHPR, art. 9 (2) ("Every individual shall have the right to express and disseminate his opinions within the law"); ICCPR, art. 19 (1) ("Everyone shall have the right to hold opinions without interference"); ArabChHR, art. 24, para. 5 (freedom of association), art. 5, para. 6 (freedom of assembly), art. 30, para. 1-3 (freedom of thought, conscience, and religion), art. 32 (freedom of opinion and expression).

¹²² ICCPR, art. 19 (3) (a)-(b).

A prosecutor deciding whether to institute charges against a person for making statements that “foment terrorism” or “undermine state security,” or “attempt to discredit state institutions,” should make sure that the statements present a clear and articulable national security threat.¹²³ A prosecutor should recognise that bringing terrorism charges based upon the speech, statements, or writings of individuals whose opinions are disfavored or by political opponents risks imposing unjustified restrictions on that person’s or group’s freedom of expression, thought, or assembly.

In a 2014 decision, the African Court of Human and Peoples’ Rights considered such a question in the *Ingabire case*.¹²⁴ Its opinion provides an example of the type of careful and thoughtful analysis required to harmonise lawful freedom of expression and legitimate counter-terrorism laws.

Note

In *Ingabire*, the Applicant had been convicted by Rwandan courts of “minimisation of genocide” committed against Tutsis based upon her public statements, including remarks at a national genocide memorial and interviews in which she criticised the government. The Rwandan courts had concluded that the Applicant’s statements constituted “spreading rumours likely or seeking to cause a revolt among the population against established authority.” Ingabire asserted to the ACtHPR that she had exercised her freedom of expression in making comments concerning the Rwandan government’s “management of power, the sharing of resources, the administration of justice, the history of the country and the attack that led to the demise of the former President of the Republic.” She disclaimed any intention of minimising the genocide against Tutsis.

The Court first decided two threshold issues raised by the Applicant, holding that: (1) the Rwandan minimisation of genocide law was a reasonably clear “law” under international rule of law principles; and (2) the law served important and legitimate national security interests in light of Rwanda’s history concerning genocide.

After a detailed analysis of the Applicant’s statements at the genocide memorial, the Court held that “there is nothing in the statements made by the Applicant, which denies or belittles, the genocide committed against the Tutsi or implies the same.” Consequently, the Court concluded that under international human rights principles, application of the Rwandan minimisation of genocide law to the Applicant’s statements in this case did not serve a legitimate national security purpose.

Regarding the Applicant’s interview statements criticizing the government, the Court noted that even statements that could be considered to be offensive and to discredit government officials are “statements . . . of a kind that is expected in a democratic society and should thus be tolerated, especially when they originate from a public figure, as the Applicant is (footnote omitted). By virtue of their nature and positions, government institutions and public officials cannot be immune from criticisms, however offensive they are; and a high degree of tolerance is expected when such criticisms are made against them by opposition political figures.”¹²⁵ The Court held that criminalising the interview statements also violated Article 9(2) of the African Charter on Human and Peoples’ Rights (freedom of speech), as well as Article 19 of the International Covenant on Civil and Political Rights (right to hold opinions).

¹²³ ACtHPR, *Principles and Guidelines on Human and Peoples’ Rights, While Countering Terrorism in Africa*, Part 6 D, pg. 28.

¹²⁴ *In the Matter of Ingabire Victoire Umuhoza v. Republic of Rwanda*, Application 003/2014, Judgment dated 24 November 2017, ACtHPR (hereafter *Ingabire*).

¹²⁵ *Ibid.* at pg. 41.

F. Charging Offences Related to Terrorism

1. Offences Covered by International Conventions

International terrorism and criminal law experts have emphasised the importance of prosecuting non-terrorist criminal activities that precede or accompany terrorist acts in order to provide an effective judicial response to terrorism.¹²⁶ The countries in the MENA region are signatories to a number of international conventions covering serious criminal activity that is often associated with acts of terrorism. Those conventions also contain provisions that facilitate increased cooperation in the prevention, investigation, and prosecution of those offences. There are several advantages to prosecuting as a separate offence serious criminal conduct that accompanies or forms a part of the terrorist act under investigation. First, charging additional offences may allow the prosecution to more completely and accurately present the court and the public with the full extent of the accused person's criminal conduct. Second, the presence of the associated charges may allow the prosecution to offer evidence about them that would not be admissible in a proceeding involving only terrorism offences. Lastly, upon conviction, the sentencing authority will be able to take into account the unlawful conduct relating to the associated offences as well as the terrorism charges in fashioning an appropriate punishment. In the following sections, some of those crimes closely associated with terrorism are discussed.

2. Criminal Activities That Facilitate Terrorism

A prosecutor or investigating magistrate should consider charging offences that facilitate terrorism activity if there is evidence to support those charges. Terrorist groups and individual terrorists often finance their existence and operations by committing non-terrorist crimes, including narcotics trafficking, migrant smuggling, engaging in fraudulent schemes to obtain money, trafficking in persons for purposes of forced labor, bribery of government officials, and kidnapping for ransom. In addition, terrorists often engage in money laundering offences in order to conceal the sources and purposes of the proceeds from their illegal activities.

¹²⁶ UNODC, *Handbook on Criminal Justice Responses to Terrorism*, Part One, pg. 28-30. In addition, the preamble to the 2004 Protocol to the African Union Convention on the Prevention and Combating of Terrorism recognises “the growing linkages between terrorism and mercenarism, weapons of mass destruction, drug trafficking, corruption, transnational organised crimes, money laundering, and the illicit proliferation of small arms” in the continent.

3. **Component Criminal Acts of Terrorist Incidents**

A person who commits “terrorism” or “terrorist acts” as defined by a country’s national legislation often engages in a course of conduct including acts of murder, assault, kidnapping, rape, threats, theft, arson, and other serious crimes. Countries universally criminalise these acts in their criminal codes. In addition, some countries have criminalised crimes including genocide, sexual slavery, persecution, forced marriages, sex trafficking, and outrages against human dignity, which might constitute all or a part of the conduct being charged under a counterterrorism statute. If permitted by national law, a prosecutor or investigating magistrate should consider charging such offences, which often carry severe penalties, in addition to a charge of terrorism, if the evidence supports doing so.¹²⁷ Including the additional charges in the case should ensure that all the evidence of the accused’s specific criminal acts will be admitted at the trial to support proof of the terrorism charge. Presence of the additional charges will also mean that the accused will answer for his alleged criminal conduct, even if, for some reason, the main terrorism charge is not successful.

Note

A case from Chad entitled *Public Prosecutor against Mahamat Moustapha, aka Bana Fanaye, and nine others*, Register No. 02/2015, 28 August 2015, provides an example. In that case, ten members of Boko Haram faced numerous criminal charges arising out of a series of 2015 terrorist attacks in the municipal district of N’djamena. “Kamikaze”, or suicide bombers, carried out the attacks using explosive vests that they detonated in public places, including a central police station, the police academy, and a central market. A private residence was also attacked. The stated purpose of the attacks was to make Chad, Nigeria, and Cameroon pay a price for their suppression efforts against Boko Haram activities in those countries. The charges in the case, however, did not include a violation of a “terrorism” statute. Rather, all ten defendants faced accusations including criminal conspiracy, assassination, willful destruction through use of explosive devices, possession of illegal war weapons, and charges of drug trafficking and document forgery. The evidence recited in the court’s criminal judgment clearly established that the attacks came within the provisions of the relevant United Nations counterterrorism framework conventions. At the conclusion of the trial, the court found all ten defendants guilty and sentenced them to death.

¹²⁷ As with statutes criminalising terrorist and related conduct, prosecutors and investigators should understand what jurisdictional bases their national legislations may provide for such prosecutions. Territoriality, nationality of the actors or victims, the affected state interest, and universal jurisdiction are the most common bases prosecutors and courts use to exercise jurisdiction over these types of offences. See, *infra*, Section II E.

4. Charging Core International Crimes¹²⁸

Prosecutors and investigating magistrates should consider whether the terrorism conduct under investigation also constitutes a core international offence, *i.e.*, a war crime,¹²⁹ a crime against humanity,¹³⁰ or genocide,¹³¹ as defined by a relevant convention or accepted international law. If the investigation uncovers such conduct, the prosecutor should determine if national law authorises an international crime to be charged in the case, in addition to any terrorism or terrorism-related offences. Many of the prosecutions of core international crimes have taken place in EU national courts and the ECtHR. Consequently, a prosecutor or investigating magistrate considering a prosecution for such offences in the MENA region may wish to consult decisions of those courts to gain insight into legal and practical issues that arise in such cases.

Note

In one of the first cases of its kind, French authorities recently charged the French cement company LafargeHolcim with financing terrorism, being complicit in crimes against humanity, and endangering lives in Syria for allegedly paying ISIS 13 million euros to enable the company to keep its Syrian plant open during the armed conflict. ISIS reportedly used some of the cash to purchase fuel and other raw materials to support its terrorist activities in Syria.¹³²

In another case, French justice officials charged an Iraqi refugee in France, believed to be a former commander of ISIS, with, *inter alia*, “killings in connection with a terrorist group” and war crimes for his alleged participation in the 2014 capture and massacre of 1700 young Shiite military recruits in Tikrit, Iraq.¹³³

¹²⁸ The EU has been at the forefront of efforts to bring to justice those who commit core international crimes. See, e.g., Eurojust, *Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States* (2014). In addition, many of the legal questions arising from prosecuting core international crimes are examined in a September 2017 practice manual prepared by Eurojust’s Genocide Network entitled *Digest of the European Court of Human Rights jurisprudence on core international crimes*.

¹²⁹ The fundamental international instruments regarding the law of war are the universally ratified Geneva Conventions of 1949 and their Additional Protocols (I and II) of 1977 and 2005 covering both state and non-state actors. These instruments provide for, among others things, the protection and treatment of individuals who were not, or who are no longer, participants in the armed conflict, such as civilians, including medical and humanitarian workers, refugees, prisoners, and the wounded and sick. The Conventions also obligate states to investigate and prosecute “grave breaches” of the provisions involving violence to a protected person (murder, mutilation, cruel treatment, and torture), taking of hostages, cruel and inhumane treatment, and unfair punishment. The law of war also restricts the means of warfare, including types of weapons used and employment of certain military tactics. For example, use of exploding bullets, chemical and biological weapons, blinding laser weapons and anti-personnel mines are prohibited. Individuals are criminally responsible for grave breaches of the Geneva Conventions. See also, art. 8 of the 1998 Rome Statute of the International Criminal Court (hereafter Rome Statute).

¹³⁰ Art. 7 of the Rome Statute defines a crime against humanity as the commission of certain serious offences as part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack”. A systematic attack is defined as a “course of conduct involving the multiple commission of acts referred to in paragraph 1 (listing examples) against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack”. Consequently, non-state organisations, as well as governments, can be answerable in the ICC for crimes against humanity committed in times of peace as well as war. In addition, individuals can be held personally responsible for their participation in such crimes. Examples include murder, extermination, enslavement, torture, deportation or forcible transfer of a population, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity, forced disappearance of any individual, apartheid, and other serious violations of human rights.

¹³¹ The 1948 United Nations Convention on Genocide criminalises conduct intended to eliminate a national, ethnic, racial, or religious group. See also, art. 6 of the Rome Statute.

¹³² The Guardian (U.S. edition), Lafarge charged with complicity in Syria crimes against humanity, 28 June 2018 (<https://www.theguardian.com/world/2018/jun/28/lafarge-charged-with-complicity-in-syria-crimes-against-humanity>).

¹³³ France 24, Iraqi refugee held in France on suspicion of IS “war crimes”, 8 June 2018 (<http://www.france24.com/en/20180608-iraqi-refugee-held-france-suspicion-war-crimes>).

a. Advantages of Charging International Crimes

Charging genocide, war crimes, or crimes against humanity in appropriate circumstances may better reflect the serious nature and broad scope of the conduct involved and allow the prosecutor or investigating magistrate to highlight the accused's criminal motives and the harm suffered by the victims. More specifically, each of the core international crimes normally requires proof of facts not generally required to be proven for terrorism offences or ordinary crimes of violence. Those additional facts relate to the victims' protected status (non-combatant, refugee, humanitarian worker, prisoner, wounded (to prove war crimes)), the existence of a governmental or organisational policy of wide-spread attack against a civilian population (to prove crimes against humanity), and the intention to destroy or eliminate a national, ethnic, racial, or religious group (to prove genocide). Proof of these facts can allow the trial judge to fully understand the breadth of the accused individual's criminal conduct, which will result in the presentation of a more persuasive overall case regarding all the charges. It will also allow a judge to impose the most appropriate sentence upon the person's conviction.

(i) Retroactive Application

Prosecutors and investigating magistrates should be aware that prosecutions for war crimes, crimes against humanity, and genocide are generally considered to be exempt from the prohibition against retroactive application of criminal offences and punishment.¹³⁴ Consequently, charging violations of war crimes, crimes against humanity, or genocide may be possible in cases in which terrorism or ordinary crimes cannot be charged because of prohibitions against retroactive application of criminal laws.

(ii) No Statute of Limitations

Likewise, there is growing authority that holds that national laws regarding limitation of actions do not apply to prescribe the time in which prosecutions for core international crimes may be brought.¹³⁵ As a result, even if statutes of limitations would bar prosecution for terrorism or ordinary criminal offenses, charging violations of core international offences may be a viable option.

¹³⁴ See, e.g., ECtHR, *Kolk and Kislyiy v. Estonia* (dec.), nos. 23052/04 and 24018/04, 2006-I (crimes against humanity): *Kononov v. Latvia Judgment*, ECHR 17 May 2010 (war crimes).

¹³⁵ See, United Nations Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, New York, 26 November 1968 (covering war crimes, crimes against humanity, and genocide, as defined in Charter of the Nuremberg International Military Tribunal, 8 August 1945 and the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948). See also, ECtHR, *Aslakhanova and Others v. Russia*, Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, 18 December 2012 (citing the seriousness of offences, the many victims involved, and the state's duty to investigate war crimes and crimes against humanity, even if they occurred in the past).

b. Appropriate Cases for International Crimes

Proving the additional facts normally required to establish the commission of war crimes, crimes against humanity, and genocide may require gathering additional evidence during the investigation.¹³⁶ Such evidence may be available only through witnesses, documents, and reports in other countries¹³⁷, or may be otherwise difficult to obtain due to the passage of time since the conduct occurred. Even if obtained, the evidence may prove to be less convincing than expected. Making an unpersuasive presentation at trial regarding the core international crimes may detract from the proof of the terrorism or other offences. As a consequence, a prosecutor or investigating magistrate should carefully evaluate the benefits and risks of charging core international offences in a terrorism case.

G. Charging Terrorism Financing Offences

A prosecutor should be aware of and take all measures authorised by his country's national legislation to ensure that terrorists cannot use or enjoy the proceeds of the activities they employ to finance their terrorist offences. The criminalisation of terrorist financing and the provision of legal mechanisms to identify, freeze, seize, and forfeit assets (hereinafter referred to as forfeiture) that have been provided or collected with the purpose of carrying out or supporting a terrorist act or organisation are important tools a prosecutor should use, if provided in the country's law. Most of the countries in the MENA region have signed and ratified the 1999 United Nations Convention on the Suppression of the Financing of Terrorism, which requires that the signatory countries criminalise terrorist financing and implement measures to identify, freeze, seize, and forfeit assets intended to be used to support terrorism.¹³⁸

Note

Terrorists, terrorist groups, and their supporters access the international financial system in all parts of the world to facilitate their operations. As a result, countries on the African and European continents are increasing their cooperation in combatting financing of terrorism. One recent example of this effort is the regional workshop on countering terrorism financing held jointly by the European Union and Kenya in September 2018. More than 120 attendees from law enforcement, police, intelligence agencies, and the judiciary from Djibouti, Ethiopia, Kenya, Somalia, Sudan, South Sudan, Tanzania, and Uganda met over three days to discuss ways to better facilitate cooperation in terrorist financing cases between European and Horn of Africa countries. The workshop was part of the ongoing efforts of the EU's Countering the Financing of Terrorism in the Horn of Africa Project.

1. Forfeiting Terrorism Funds Under National Law

If the country's national legislation provides for freezing, seizing, and forfeiting funds intended to be used for terrorism, prosecutors should understand and utilise those mechanisms in all appropriate cases. Countries may have criminal, civil, or administrative forfeiture measures. Choosing the most appropriate vehicle to accomplish the forfeiture will depend upon the circumstances of the case and the results of the criminal investigation. A prosecutor may wish to consult with other judicial officials responsible for non-criminal forfeiture matters in order to ensure that the most appropriate steps are taken to forfeit all eligible funds used or destined for use in terrorism activities.

¹³⁶ Whether conduct considered terrorism under national or international law also constitutes a war crime requires a careful analysis. IHL, or the law of war, applies in times of armed conflict, and offers different protections to different individuals or groups depending upon the precise nature of the armed conflict (*i.e.*, armed international conflict between States; armed internal, non-international, conflict between the State and a non-State combatant; and so-called "internationalised" non-international armed conflicts between a State and a non-State actor taking place in more than one State). Terrorism laws, on the other hand, usually apply at all times, regardless of the existence of an armed conflict. See COE, Committee of Experts on Terrorism, *Application of International Humanitarian Law and Criminal Law to Terrorism Cases in Connection with Armed Conflict, Discussion Paper* (2017), section III, i.

¹³⁷ United Nations Security Council Resolution 2379 (2017) is an example of how the international community has come together to address this evidentiary challenge. It calls for the establishment of a special United Nations-led investigative team to support domestic Iraqi efforts to collect, preserve, and store evidence that could be relevant to show that ISIL (Da'esh) may have committed war crimes, crimes against humanity, or genocide in that country. The evidence would be available for use in prosecutions in Iraq and other countries.

¹³⁸ United Nations International Convention for the Suppression of the Financing of Terrorism (1999), articles. 4, 8.

2. *Forfeiture of Funds For Non-Terrorism Offences*

The United Nations conventions covering other serious transnational crimes require or encourage countries to establish provisions in their laws to allow forfeiture of funds used in or generated by the criminal offences covered by those instruments, including narcotics trafficking (1988 Vienna), official corruption (United Nations Convention Against Corruption (hereafter UNCAC)), and serious transnational crime (UNTOC). Prosecutors and investigating magistrates should determine if, in accordance with national laws, they may charge offences covered by those conventions and utilise their forfeiture provisions, even in cases in which terrorism offences are also charged. If authorised, this practice could provide support for forfeiting terrorist assets if the prosecution encounters difficulties proving the core terrorism charges.

Part Five

I. Bringing the Accused Before the Court

A. A Prosecutor's Role

If the person to be arrested or called to appear before a prosecutor or magistrate judge is known to be in the country where the charges are filed, it is likely that the prosecutor will have some role in securing the person's presence. That role may be to seek, or in some systems issue, an arrest or detention order, and to work with the appropriate authorities to locate the person so he can be apprehended and brought before the appropriate official. Not infrequently, however, a person accused of a terrorism offence will not be found in the country in which the charges have been filed. In that case, depending upon the national legislation, the prosecutor will have to consider how to obtain the person's presence from abroad.

B. Deportation, Exclusion, and Expulsion from Other Country

There exist various mechanisms for securing a person's presence from another country, including, deportation, exclusion, expulsion, and extradition. Deportation, exclusion, and expulsion are normally regulated by a country's domestic law, not an international treaty. They are carried out by immigration and/or border security agencies in cooperation with the country seeking the fugitive's return. In most cases, those mechanisms can result in the prompt return of international fugitives, but they can also raise questions regarding the legality of the person's apprehension in the foreign country and the transfer to the jurisdiction where the charges were filed. In particular, in some countries the court's jurisdiction to prosecute the person may be affected if it is determined that the apprehension and/or transfer violated the apprehending country's law or an important norm of international or human rights law. In countries that follow that legal principle, a prosecutor should stay informed of the relevant circumstances of the fugitive's apprehension and transfer so she can comply with domestic law going forward with the case. Doing so may require a prosecutor to work with her contacts in the apprehending country, or coordinate through the national central authority, to obtain pertinent information and materials needed to address a claim attacking the procedures used to apprehend and return the fugitive to the charging jurisdiction.

C. Voluntary Return to Jurisdiction by Fugitive

Another, much less frequently used, method of securing a fugitive's presence from another country is generally referred to as a voluntary return. It occurs when a fugitive learns of the investigation or prosecution against him and decides to voluntarily appear in that jurisdiction to confront the charges. Voluntary returns are less likely to occur in terrorism cases, given the nature of the offence and the possibility of a severe punishment. A prosecutor in charge of a case in which there is a voluntary return should take care to learn the circumstances of the person's decision and how the return was accomplished. Those facts will help defend a later attack on the prosecution, or the court's jurisdiction, through a claim that the accused was somehow coerced to return in violation of law.

D. International Extradition

Prosecutors and investigators should be familiar with the legal bases and the processes involved in securing a fugitive's presence through extradition. Particularly important are the conventions that make up the United Nations universal framework for combatting terrorism and the relevant regional conventions that promote multilateral cooperation against terrorism and other serious crimes. Regional conventions include the African Union and League of Arab States counter-terrorism conventions.¹³⁹

1. *Four Foundations for Extradition*

Extradition is usually based upon one or more of four legal authorities: a bilateral extradition treaty between two countries; a multilateral convention that provides for extradition among the parties; the domestic extradition law of the country in which the fugitive is located; and, in rare cases, comity between the countries involved.¹⁴⁰ There are few bilateral extradition treaties involving the countries in the MENA, Sahel, or West Africa regions. Nor do many of those countries have domestic extradition laws that establish the requirements and procedures for responding to extradition requests from other states. As a result, the United Nation's framework of multilateral terrorism and other serious crime conventions provides important mechanisms for extradition between MENA countries. In addition, there are two regional conventions that enable many beneficiary countries to request extradition from each other. One regional convention is the AU Convention on the Prevention and Combatting of Terrorism (hereafter AU Conv. on Terrorism) (1999). The second instrument is The Arab Convention for the Suppression of Terrorism (hereafter Arab Conv. on Terrorism) (1998).

2. *Determining Viability of Extradition in the Case*

A prosecutor seeking another country's assistance to extradite an accused person to the jurisdiction where the charges are pending must first determine whether, and on what basis, the asylum country (where the fugitive has been found) will agree to do so. Some countries require that there be a bilateral extradition treaty in force with the country seeking the fugitive's return. The absence of such a treaty may preclude extradition from the asylum country. Other countries authorise extradition, even if there is no bilateral treaty between them, if it and the requesting country are signatories to a multilateral convention that provides for extradition. Yet other countries authorise extradition in the absence of any treaty or convention, if the request complies with the asylum country's domestic extradition law and procedures. The procedures for making a proper extradition request under each authority can differ. Prosecutors need to be familiar with the procedures required in their particular cases so they do not submit an extradition request that the other country cannot act upon favourably.

¹³⁹ The 1999 Organization of African Unity (now the African Union) Convention on the Prevention and Combatting of Terrorism (hereafter AU Conv. on Terrorism), Part IV, arts. 8-13, together with the 2004 Protocol; The Arab Convention for the Suppression of Terrorism (hereafter Arab Conv. on Terrorism) (1998).

¹⁴⁰ Comity is a discretionary, *ad hoc* and infrequently used means of extradition, which will not be discussed in this Outline.

3. ***Making an Extradition Request to Another Country***

Once the legal authority is identified, the appropriate official in the requesting country, either the prosecutor handling the criminal case, an investigating magistrate, a judge, or another designated official, must submit a written request to the asylum country for the accused's extradition. If the prosecutor's country has a central authority or office that coordinates extradition matters, the request should be reviewed by that entity, then transmitted, usually through diplomatic channels, to the appropriate person in the asylum country. The appropriate authority (a court, foreign affairs office, or executive) in the asylum country will review the request in order to determine if it meets the requirements of the treaty, convention, or domestic law upon which the extradition request is based. Often, that review is conducted by a judge or court panel. In most countries, there is also an executive review of the request and judicial decision in which the government decides whether the extradition of the person would be consistent with the asylum's country's foreign policy or other national interests. If the extradition request receives all the necessary approvals by the asylum country, arrangements will be made to surrender the fugitive to the requesting country for prosecution or service of a sentence.

II. United Nations Universal Counterterrorism Framework

The United Nations framework for countering terrorism facilitates extradition between signatory countries in several ways. As a result, prosecutors and investigating magistrates need to be familiar with the extradition provisions in those instruments.

A. **Criminalisation of Specific Conduct as Terrorism**

Currently, the United Nations framework of counterterrorism conventions consists of 19 multilateral conventions, all but two of which require the signatories to pass legislation that criminalises specified conduct, *i.e.* hostage taking, bombing or hijacking an airplane, or seizing a maritime vessel by force. The conduct identified is considered by all signatories to be terrorism. The conventions, therefore, avoid the delicate issue of establishing a universally accepted definition of terrorism. Consequently, there should be no impediment to extradition under these conventions because the requesting country may consider the conduct charged against the fugitive to be terrorism while the requested country does not.¹⁴¹

B. **Broad Geographic Coverage of Conventions**

Each United Nations convention provides an extradition mechanism that can be used by many countries, not just two, as with bilateral extradition treaties, or several, as with regional agreements. For example, 172 countries have signed the Convention for the Suppression of the Financing of Terrorism, thus avoiding the need for many hundreds of bilateral extradition treaties between the signatories. The broad coverage of these instruments also greatly reduces the possibility of a fugitive finding safe haven in any of the countries that are parties to the agreements.

¹⁴¹ A list of the conventions is attached to this document as Annex I.

C. Rejection of Political Offence Doctrine

The United Nations counterterrorism conventions and protocols explicitly reject the political offence exception, removing a principle that historically impeded extradition, often in terrorism cases. The parties have agreed that none of the offences covered by the instruments may be deemed a political offence, an offence connected to a political offence, or an offence with political motives.¹⁴²

D. Countries Urged to Expand Jurisdiction

The conventions impose an obligation on each state party to establish the scope of its jurisdiction with respect to the acts of terrorism covered by the particular instrument. Parties to the conventions are encouraged to consider establishing jurisdiction in accordance with all internationally recognised bases: territoriality, active nationality, passive nationality, and partial universality. The purpose of these provisions in the conventions and the protocols is to ensure that as many countries as possible assert jurisdiction to prosecute a suspected terrorist, regardless of where she may be located, thereby preventing the creation of safe havens for terrorists.¹⁴³

E. Place of Commission of Offence Broadened

For the purposes of extradition between signatories to the United Nations conventions, offences are considered to have been committed both in the place where they were carried out and in the territory of the countries that have established jurisdiction over them. This provision ensures that extradition is not refused by the asylum state on the grounds that the offence was not committed in the territory of the requesting state. It prevents parties to the Conventions from negating, for purposes of extradition or mutual legal assistance, another party's exercise of jurisdiction based on nationality or partial universality.

¹⁴² The "political offence" doctrine allows a state to refuse to extradite a person if the state receiving an extradition request believes that the person is charged in the requesting state with an offence of a "political nature" associated with a political uprising. The United Nations conventions that make up the universal framework to combat terrorism specifically provide that none of the acts covered in them may be considered by any party to be a political offence for which extradition or mutual legal assistance can be denied. See, e.g., United Nations International Convention for the Suppression of Terrorist Bombings, article 11 ("None of the offences set forth in art. 2 shall be regarded, for the purpose of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives."); *accord Arab Conv. on Terrorism*, article 2 (excluding certain offenses from being considered "political offence").

¹⁴³ For example, if X, a citizen of country A, committed a terrorist bombing in country B in which citizens of country A were killed or injured, country B would have jurisdiction to prosecute the offence because it was committed in its territory (territoriality principle). Country A could also assert jurisdiction to prosecute X because he was a citizen of country A (active nationality principle). In addition, country A could assert jurisdiction over X because he killed and injured other citizens of country A who happened to be in country B at the time of the attack (passive nationality principle). Finally, if X sought refuge in country C after the attack, country C could assert jurisdiction to prosecute him based upon his mere presence in that country (partial universality principle). The United Nations conventions urge parties to assert all four bases of jurisdiction over crimes covered in those agreements.

F. Obligation to Extradite or Prosecute

The conventions also require that if a party refuses to extradite a fugitive charged with a covered offence, that country must submit the case to its own judicial authorities to be considered for prosecution under domestic law.¹⁴⁴ The purpose of this provision is to reduce the chances for a terrorist to escape justice by fleeing to a country that will not extradite him to the jurisdiction where the charges were filed.

Note

The 1999 Organization of African Unity (now the African Union) Convention on the Prevention and Combatting of Terrorism, Part IV, Articles 8-13, together with the 2004 Protocol, constitute a regional basis for extradition between the 55 African signatories. That convention, which has been signed by most of the beneficiary countries, contains similar provisions to those contained in the United Nations terrorism conventions regarding extradition. The AU framework can serve as a basis for requesting extradition of individuals charged with offences identified in Article 1.3 of that instrument.

- a. The scope of the AU convention, however, is limited to the continent of Africa. If one of the signatories wishes to seek extradition from a country outside the region, the United Nations terrorism and serious crime conventions provide for broader reach.
- b. Prosecutors considering using the AU convention to seek extradition should consult in appropriate cases with the Sahel Judicial Platform (SJP) and the West Africa Network of Central Authorities and Prosecutors (WACAP) for advice and resources. These organisations have been created to support international cooperation among their member states. WACAP's website links to several useful materials prepared by UNODC. <https://www.wacapnet.com/content/homepage>.

¹⁴⁴ For example, UN Hostage Taking Convention, article 5, para. 2 (each party must "take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article (establishing jurisdiction over offenses)"); see also AU Conv. on Terrorism, article 6, para. 4; Arab Conv. on Terrorism, article 6, para. (h) (limited to refusal to extradite a national of the asylum state).

Part Six

I. A Prosecutor's Role in Ensuring a Fair Trial

A criminal justice system that respects human rights ensures that an accused person, including one charged with terrorism offences, receives a fair trial. Article 14 of ICCPR sets out precise guarantees a state must provide in this regard. Article 6 of the EConvHR also contains a similar list of fair trial guarantees, as do the ArabChHR and the AUConvHPR. Prosecutors and investigating magistrates play important roles in assuring that a person accused of a terrorist offence receives a fair trial in accordance with the rule of law and international human rights principles contained in those instruments.¹⁴⁵

A. Promptly Informing the Accused of the Charges

A prosecutor or investigating magistrate should, consistent with national law, ensure that an individual arrested for a terrorism offence is promptly informed in detail of the reasons her arrest, including any charges filed against the person.¹⁴⁶

B. Promptly Placing Accused Before a Judicial Official

In addition, a person arrested and charged should be promptly brought before a judicial officer.¹⁴⁷

1. Determining Legality of Arrest

The judicial officer should determine whether the person's arrest complies with local law, including whether it is based upon sufficient legal justification. International human rights principles also require the arrest to be reasonable and necessary under the circumstances of the case, and not based upon any form of discrimination.¹⁴⁸ That judicial officer should have the authority to make a binding decision granting the release of the person charged, if appropriate.¹⁴⁹

2. Decisions by a Neutral, Independent Judicial Official

In some civil law systems, a general prosecutor or investigating magistrate overseeing the terrorism investigation may authorise the person's arrest on the charges. In that case, the judicial official before whom the accused must be promptly brought should be a different official, independent of the investigation, who can exercise judicial powers, specifically, the review of the legality of the arrest.¹⁵⁰

¹⁴⁵ ICCPR, art.14.1 provides, "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

¹⁴⁶ ICCPR, article 9(1), 9(2); EConvHR, article 5(2); OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (1991) para. 23.1 (ii); see also ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000; para.43; ACHPR, *Huri-Laws (on behalf of the Civil Liberties Organization) v. Nigeria*, Communication No. 225/98, decision adopted during the 28th Ordinary Session, 23 October – 6 November 2000, paras. 43-44.

¹⁴⁷ UNOHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003), pg. 165-166.

¹⁴⁸ *Ibid.* at 185-189.

¹⁴⁹ *Ibid.* at 190.

¹⁵⁰ *Ibid.* at 189-190.

3. **Prevention of Unacknowledged Detentions**

Having the arrested individual promptly brought before a judicial official will help prevent unacknowledged detentions, including detentions by the military and abductions and forced disappearances at the hands of authorities acting unlawfully.¹⁵¹

C. **Pre-trial Detention**

Prosecutors, investigating magistrates, and other appropriate officials should consider seeking pre-trial detention of individuals charged with terrorism offences if they present a security risk to the community, a risk that they might influence or interfere with victims or witnesses, or a risk that they will flee before the trial, if released.¹⁵²

1. **Compliance with National Law**

Pre-trial detention of a person charged with a terrorism offence based upon national law and procedures that are consistent with international human rights law is an effective way for prosecutors and investigators to protect the public. Lawful pre-trial detention will prevent an accused person from repeating his criminal activities and reduce his opportunities to pressure, intimidate or threaten witnesses. The detention may also be justified based upon the possibility that the person will abscond.¹⁵³

2. **Detention for Reasonable Time Only**

A person may be kept in pre-trial detention only for a “reasonable time” in order to bring him before the court for a trial. What constitutes a “reasonable time” has been subject to much discussion and many decisions of national and international human rights authorities. Long delays between arrest and trial cannot be justified by the usual delays inherent in a system in which proceedings are recorded in writing, or upon time needed for the prosecution to gather evidence, or general budgetary considerations of an overburdened criminal justice system.¹⁵⁴ On the other hand, if the delays result from the accused person’s own actions, *i.e.*, filing motions attacking the investigation or prosecution, seeking evidence for his defence from foreign witnesses, or submitting requests to delay the trial to allow his defence to better prepare, the prosecution and the court should not be held responsible for any harm that results to the defendant.

3. **Continuing Justification Needed for Prolonged Detention**

Even if initially justified, pre-trial detention cannot be prolonged unless the reasons for it continue to exist or new reasons appear.¹⁵⁵ Further, the accused must have the ability to challenge prolonged pre-trial detention before the proper legal authorities, according to national law.

¹⁵¹ *Ibid.* at 169-171.

¹⁵² GCTF, *Rabat Memorandum*, Good Practice 7.

¹⁵³ UNHCR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003), pg. 193-194. Although in certain circumstances, pre-trial detention may be justified in order to protect against “prejudice to the public order,” it has been noted that extreme care must be taken to avoid abuse of such a vague standard. *Ibid.*

¹⁵⁴ *Ibid.* at 191-192.

¹⁵⁵ *Ibid.*

D. Offering Incentives to Accused Terrorists

1. *Benefits of Using Incentives*

If authorised by national law, a prosecutor should consider offering an individual charged with a terrorism offence incentives to plead guilty and/or collaborate in the investigation and prosecution in exchange for the possibility of a lesser punishment or other benefits.¹⁵⁶ There are acknowledged advantages of such arrangements, including shortening the time needed to resolve terrorism prosecutions and securing information from the accused person that could allow investigators to prevent future domestic or foreign terrorist attacks. In some countries, however, there are difficulties with using cooperation agreements for terrorism suspects.

2. *Obstacles to the Use of Incentives*

In some countries, there are no laws or procedures that authorise such agreements, so their legal status is uncertain. In other countries, such arrangements are prohibited on the bases that granting concessions to individuals who commit terrorism offences does not result in justice for the victims or witnesses, and are not in the public interest.

a. *Possible Benefits Strictly Controlled by Statute*

Participants in the IJJ Project explained that possible reductions of sentences for terrorism, or criminal offences in general, are strictly controlled by statute. Those provisions allow a terrorism defendant to lessen his possible punishment by accepting the charges early in the investigation, but do not contemplate or require that the person cooperate with authorities in counterterrorism efforts.

b. *Possibility for Undermining Justice*

In those criminal justice systems that allow such cooperation agreements, all of the considerations cited in Part Three, IE3 above, regarding informants and cooperating witnesses, are equally relevant to a cooperating defendant.

E. Accused's Access to Evidence Against Her

An accused terrorist's ability to access the criminal case file in a civil law system, or, in common law countries to obtain pre-trial disclosure of the prosecution's evidence intended for use at trial, is an integral element of the right to a fair trial. In the rubric of the European Human Rights Convention, the accused is entitled to "adequate time and facilities to prepare a defence."¹⁵⁷ Moreover, prosecutions using secret evidence to which an accused has no right of access and no way to challenge do not result in fair trials or comport with international human rights standards.

¹⁵⁶ GCTF, *Rabat Memorandum*, Good Practice 5.

¹⁵⁷ See Vitkauskas, Dovydas and Dikov, Grigoriy, *Protecting the Right to a Fair Trial under the European Convention on Human Rights, A handbook for legal practitioners* (2012) (a COE human rights handbook), pg. 61 (citing *Edwards v. United Kingdom*, UCHR), (citing EConvHR article 6 §1).

1. **Disclosure of National Security Service Information**¹⁵⁸

The prosecution's disclosure to the defence and use at trial of intelligence and security service information (sometimes called "classified information") frequently present difficulties in terrorism investigations and prosecutions. Depending upon national law, prosecutors and investigating magistrates may have different roles in deciding whether intelligence in the possession of security services may be relevant to the investigation and, if it is, how it may be used, if at all, in the judicial proceedings. These decisions are often handled quite differently in civil law and common law countries. Prosecutors and investigating magistrates need to be familiar with the mechanisms their jurisdictions use to allow security intelligence (including classified material) to be shared with judicial actors and used as evidence in court.

a. *Civil Law Countries*

In many countries with a civil law tradition, decisions about whether and how to share intelligence information with investigators or prosecutors are made by a group or board of knowledgeable individuals who are independent of the prosecution.¹⁵⁹ The group receives and reviews information gathered by the intelligence services in order to determine if it can be made available in the criminal case and used in court as evidence. The group's members balance the national security interests in maintaining the confidentiality of the information against the rights of the accused to a fair trial and access to information that will be used against him or her. Once the decision has been made, the information that may be used in the criminal case is forwarded to the prosecutor or magistrate judge for inclusion in the judicial file. In some jurisdictions, a senior counterterrorism prosecutor who is not involved in the case under investigation acts in place of the review board just described. If permitted by national law, prosecutors and investigating magistrates should also satisfy themselves that the extent and manner of disclosure of the intelligence information will allow the accused to receive a fair trial.

¹⁵⁸ This section is related to Part III, Section D, *infra.*, concerning the investigative uses of national security intelligence information.

¹⁵⁹ GCTF, *Abuja Memorandum*, Recommendation 18.

b. Common Law Countries

In countries with a common law tradition, prosecutors in charge of the case usually play a more direct role in determining what intelligence can be presented in court and how it can be done. Often, the first step is for the prosecutor to consult with the intelligence service to identify what information relevant to the criminal case the service might have. The prosecutor and the agency may then discuss whether any of that information can be “declassified” so it can be treated as any other evidence. If declassification is not possible, they will normally discuss possible steps, including the use of redactions to the sensitive information, the substitution of summaries for the actual contents of sensitive documents, or other viable alternatives, that might allow the intelligence information to be used in the prosecution without compromising important national security interests. If the prosecutor and the intelligence service agree on a plan, the prosecutor will normally consult the court (without the defence attorney present) to obtain its approval of the disclosure outline. The court will examine the proposed arrangement and decide if, under all the circumstances, the accused will still receive a fair trial, or whether the defendant will suffer such prejudice from her lack of access to critical evidence that she will not be able to mount a proper defence. If the court decides the harm to the defence will be too great, the prosecutor will have to decide whether to withdraw the case or go back to the intelligence service to see if the original plan can be adjusted.¹⁶⁰ Prosecutors working in such a system must balance their duty to zealously prosecute the case with their obligations under the law to disclose to the defence sufficient information to permit a fair trial.

Note

In France, specialised judicial police investigative units are embedded in the intelligence services assigned to investigate a particular terrorist incident. These specialised police investigators are knowledgeable about the investigation and have access to intelligence information that might be relevant to the case. It is the responsibility of the specialised unit to consult with the intelligence agency involved to decide what information can be disclosed (and how) in the criminal case without jeopardizing the country’s national security interests. Information that can be disclosed is forwarded, often through a report or summary of the raw data, to the public prosecutor, who decides if the information is relevant to the investigation and prosecution. If the prosecutor decides that some or all of the information is relevant, he adds it to the judicial file that will eventually go to the court and to which the defence will have access. If an intelligence service agent may have to testify in front of the judge or at trial in the presence of the defence, a similar process is undertaken with the goal of determining what steps to take to protect the agent’s identity and the sensitivity of the information about which he will testify.

¹⁶⁰ GCTF, *Rabat Memorandum*, Good Practice 6.

c. The Accused's Right to Disclosure Not Absolute

The accused's right to access the case file and to know the evidence to be used against him is not absolute. Limiting that right in the interests of national security or protecting sensitive law enforcement agency interests can be accomplished consistently with the rule of law and international human rights precepts. The accused's right of access to information must be balanced with the state's right to protect sensitive information. The procedures used for that balancing, however, must not prevent an accused from learning, and being able to challenge the use of, information or evidence that proves to be vital to the outcome of the case.¹⁶¹

Note

In a recent terrorism case in Ethiopia, which has a civil law tradition, the prosecution presented a written national security agency report, which included transcribed conversations that it claimed the defendant engaged in with other suspected members of the terrorist organisation. The defence argued to the court that the transcriptions did not clearly show that it was the defendant who participated in the conversations, and requested that the court order the prosecution to produce the original tape recordings on which the transcriptions in the agency report were based. The court agreed. The prosecution was, however, unable or unwilling to make available the original tape recordings. As a result, the court found the agency report alone was unconvincing regarding the defendant's identity as a participant in the intercepted conversations, and entered an acquittal order, thereby releasing the defendant from custody.

The case illustrates the necessity for the prosecutor or investigating magistrate to carefully evaluate the contents of written reports from security agencies, which may not be knowledgeable about court rules regarding admissibility of evidence, to ensure that the information they contain is accurate and convincing. Defence counsel must also be alert to protecting the defendant's right to have disclosure of information used against him, even when it comes from a national security service, as in this example.¹⁶²

d. Balancing of Interests

The balancing must also be under the ultimate control of a judicial official independent of the investigation service or prosecution, with review of that decision possible by higher domestic courts. That official will normally be, in the first instance, the judge who will decide guilt or innocence or preside over the trial. The prosecutor general, investigating magistrate, or investigator involved in the investigation cannot be the final arbiter of this question.¹⁶³ In some systems, the prosecutor or investigating magistrate may provide voluntary disclosure to the defence of sensitive information based upon the prosecutor's assessment of what is appropriate. Nevertheless, the defence must be able to seek judicial review of the prosecutor's decision by a judge who has the authority to order additional disclosures, if appropriate.

2. Recognised Methods for Disclosure

Practitioners have developed various ways to manage the disclosure to the defence of sensitive or classified materials in terrorism, or other criminal, cases.

¹⁶¹ Vitkauskas, Dovydas and Dikov, Grigoriy, *Protecting the Right to a Fair Trial under the European Convention on Human Rights, A handbook for legal practitioners* (2012) (a COE human rights handbook), pg. 61.

¹⁶² Federal Democratic Republic of Ethiopia, Federal High Court, *Case of Constable Birhan*, C/F/No. 204546, 26 June 2018.

¹⁶³ *Ibid.* at 61-62.

a. Documentary Evidence

For example, redactions or removal of highly secret information might be made to the raw data so it can be disclosed to the defence and used in court. In some cases, it may be appropriate to have the defence attorney obtain the necessary security approvals to allow him to review the materials for purposes of preparing a defence. In other cases, providing summaries of the sensitive intelligence information or evidence may suffice to meet the defence's rights. Another possible option might be for the prosecution and the defence to enter into an agreement, or stipulation, concerning the existence of certain facts contained in the sensitive materials, thereby avoiding the need to disclose the contents of the originals of those materials in the prosecution case.

b. Testimony by Intelligence Service Agent

Intelligence agents who may need to testify in the criminal proceedings, either to give substantive evidence or to qualify certain evidence for admission before the court, may require the prosecution and judge to take measures to protect that agent's identity. Recognised methods include substituting a written statement or a pre-recorded audio statement for the live testimony before the court, removal of the witness's name and other identifying information from statements and documents, allowing the witness to testify from behind a screen or from a close-by room, using a number or letter instead of the witness's name, permitting the witness to wear a disguise, and closing the courtroom to the public during the testimony. Just as with disclosure of sensitive documents, the steps taken to protect the witness's identity need to be balanced by the court against the accused's right to a fair trial and right to confront witnesses against him.

F. Respecting a Defendant's Right to Present a Defence

International human rights standards and national law universally provide that a defendant has the right to present a defence in her own behalf. As the above sections reflect, one aspect of that right is the right to know and access information and evidence that will be used against her to prove the charges. Another aspect of the right to present a defence is the defendant's ability to have favorable witnesses testify on her behalf during the appropriate proceedings. In some cases, in which the defence witnesses reside far from the location of the proceeding, indigent defendants who lack the resources to pay for the witnesses to travel may be unable to obtain their relevant testimony. The absence of the defence witness testimony may deny the defendant a fair trial if the judge does not have all the relevant information needed to make a fair and just decision about the defendant's guilt or innocence.

Note

In a recent case in Ethiopia involving more than 30 defendants charged with terrorism and related offenses, several indigent defendants were represented by the federal public defender's office. Many of those indigent defendants wished to have witnesses testify on their behalf, but had no means to pay for the witnesses to travel the long distance from their homes to the federal courthouse in Addis Ababa where the proceedings were held to make their declarations. Nor were there funds available to the court for that purpose. The defence counsel made a creative argument to the court requesting it to order the prosecution to pay the travel and per diem expenses for the defence witnesses to appear and testify. Counsel maintained that the defendants' right to present a defence would otherwise be prejudiced. This argument persuaded the court which then ordered the prosecutor's office to bear those expenses, so the defendants could present their witnesses' testimony to the court. This court order was the first of its kind in Ethiopia and will set precedent for defendants charged with terrorism crimes.¹⁶⁴

¹⁶⁴ Federal Democratic Republic of Ethiopia, Federal High Court, *Case of Ephram Konchel et al*, C/F/No. 169737, 29 May 2018.

Annex I

List of United Nations Counterterrorism Conventions

1. 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft
2. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft
3. 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
4. 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
5. 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation
6. 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft
7. 2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft
8. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons
9. 1979 International Convention against the Taking of Hostages
10. 1980 Convention on the Physical Protection of Nuclear Material
11. 2005 Amendments to the Convention on the Physical Protection of Nuclear Material
12. 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
13. 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
14. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
15. 2005 Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf
16. 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection
17. 1997 International Convention for the Suppression of Terrorist Bombings
18. 1999 International Convention for the Suppression of the Financing of Terrorism
19. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism



The International Institute for Justice and the Rule of Law

University of Malta - Valletta Campus,
Old University Building, St. Paul Street, Valletta, Malta

info@theijj.org

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