

South Asia Regional Toolkit for Judges

Supporting the Development of National Bench Books
for the Effective Adjudication of Terrorism Cases



CTED

UNITED NATIONS SECURITY COUNCIL
COUNTER-TERRORISM COMMITTEE
EXECUTIVE DIRECTORATE

**GLOBAL
CENTER** 
ON COOPERATIVE SECURITY

The purpose of this Toolkit is to provide practice-oriented guidance to judges and judicial training academies of the Member States of the South Asian Association for Regional Cooperation on the adjudication of terrorism and related cases in line with customary international and human rights law and norms. The Toolkit is designed to support judicial academies in the development of national bench books and practice manuals by providing guiding principles and resources. In the absence of a national manual, the toolkit can be used by judges as a reference guide. The contents of the Toolkit may also prove useful for other professionals working in this field, such as prosecutors and investigators.

Recognizing the evolving global landscape of terrorism and the emergence of new international conventions, resolutions and standards, the Toolkit was conceived as a living document to be periodically updated and amended to retain its value. It is designed as a reference guide, rather than as a manual that should be read sequentially. For this reason, certain topics are cross-referenced as they may be covered in more than one section. The content is not exhaustive but references other resources for further study.

The topics that are included are designed to address the needs of judges as shared through a multi-year programme. They elaborate and build on relevant Security Council resolutions and international instruments on counter-terrorism, as well as the Global Counter Terrorism Forum memoranda, notably The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses.

The preamble of The Hague Memorandum recognizes that States can only implement 'those aspects of any set of good practices that their legal systems allow for' and encourages States to implement the good practices that are 'appropriate to their circumstances and consistent with their domestic law, regulations and national policy, while respecting applicable international law.' This principle is also qualified in the GCTF Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector (Rabat Memorandum) which states that recommendations 'must be built on a functional criminal justice system that is capable of handling ordinary criminal offences while protecting the rights of the accused.' This toolkit should be used in the same manner.

Support and interest in the contents of this Toolkit are not limited to

countries burdened with large terrorism and related caseloads. The Toolkit can also be used to prepare judiciaries, given the constantly evolving global security environment, the multitude of transnational criminal activity that supports terrorism, and the need for increased international and regional cooperation.

The discussion will proceed as follows:



Chapter 1 sets out the foundations necessary for effectively adjudicating terrorism matters, notably judicial independence and ethics and judicial security;



Chapter 2 examines how good case and court management practices can achieve many important aims such as improve the protection of witnesses and protect the rights of the defendant;



Chapter 3 discusses the various stages of a case from the importance of a judge's understanding of investigative techniques, the rights of a defendant during arrest and detention, evidentiary issues and witness testimony, sentencing through appeal;



Chapter 4 deals with international cooperation; and



Chapter 5 concludes by providing the framework of international counter-terrorism and human rights frameworks.

Recent years have seen a dramatic rise in terrorist activities around the world, including in South Asia. Effective and timely international and regional cooperation is essential for States to prevent terrorist acts and bring terrorists to justice. The United Nations Counter-Terrorism Committee Executive Directorate (CTED), with the assistance of the Global Center on Cooperative Security and other partners, has been assisting South Asia in these efforts in a unique and concrete fashion for over a decade.

What started as a series of regional workshops, bringing together judges, prosecutors and police officers, has since grown considerably. Through 13 workshops in nine years, more than 300 judges, prosecutors and police from Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka have shared experiences, lessons learned and best practices on how to counter terrorism in their region and beyond. The aim of the workshops is to promote habits of regional cooperation, expand professional networks and develop a regional platform for the delivery of technical assistance and training.

The primary objectives of this process are to:

1. promote cooperation among counter-terrorism practitioners in the region;
2. establish the groundwork for the institutionalization of cooperation among law enforcement officials and regional counter-terrorism practitioners; and
3. create the conditions for the enhancement of regional law enforcement capacities to address terrorism and related crimes throughout South Asia.

Over the years, these discussions have played a vital role in CTED's assessment of counter-terrorism capacities and priorities in the region, as well as the identification of emerging trends and threats. The gatherings serve as a laboratory for innovation by generating and testing new technical ideas, many of which now inform the core work of the United Nations Counter-Terrorism Committee, other United Nations entities and implementing partners. The workshops have focused on a broad range of topics, usually proposed by the participants, including anti-money laundering and countering the financing of terrorism (AML/CFT); effective

interview and interrogation techniques; the education and training of law enforcement personnel; foreign terrorist fighters; gender dimensions of the criminal justice response to terrorism; and the collection and use of electronic evidence in terrorism cases.

A parallel process in support of the practitioners' dialogue was launched in 2011 by the Global Center, in partnership with the Institute of South Asian Studies at the National University of Singapore, bringing together key experts, academics and practitioners to explore national and civil society responses. With support from the government of Norway, this initiative informed and supported CTED's work on the basis that non-governmental actors and practitioner networks can be valuable partners in developing cooperative efforts to address terrorism and violent extremism, complementing more formal regional initiatives.

CTED greatly appreciates the commitment to this innovative initiative of the eight States of the South Asian Association for Regional Cooperation (SAARC), as well as the SAARC Secretariat, which participates as an observer. CTED and the Global Center are also grateful for the generous support provided by Australia, Canada, Denmark, India, Japan, Norway, Sweden and the United States of America. Participating entities have included numerous United Nations Member States, INTERPOL, OHCHR, the UNODC Terrorism Prevention Branch (TPB) and the pro bono contributions of Baker McKenzie and Salesforce.

The South Asia cooperation has generated several follow-up initiatives, which have expanded the dialogue beyond the core workshops, spawning capacity-building based on the findings of the workshops and delivered by CTED's implementing partners. These include:

- A series of expert and practitioner workshops that allowed for enhanced cooperation among critical expert stakeholders on key issues relating to countering terrorism and violent extremism;
- Technical assistance facilitated by CTED for Member States generated by the workshops' findings, including in the areas of adjudication of terrorism cases and enhancing counter-terrorism investigations and prosecutions;
- Technical assistance on strengthening criminal justice responses for the protection and support of witnesses and victims in criminal proceedings related to terrorism, delivered by UNODC/TPB and the UNODC Regional Office for South Asia, in cooperation with CTED;
- Sitting Supreme Court Justices convened for the first time in United Nations history on 10 March 2016 in an open briefing in New York organized by the Security Council Counter-Terrorism Committee on the

special role that Supreme Court Justices play in strengthening States' capacity in the effective adjudication of complex terrorism cases. Supreme Court Justices from Afghanistan, Bhutan, Bangladesh, India, Nepal, Pakistan and Sri Lanka participated, as well as a sitting Supreme Court Justice of the host country;

- Extensive work with the national judicial academies of South Asia including the Nepal National Judges Academy, the Sri Lanka Judges' Institute and the Pakistan Federal Judicial Academy on enhancing capacity through workshops and through the publication of an anti-money laundering bench book for judges in Nepal in early 2017.

Counter-Terrorism Committee Executive Directorate

The Counter-Terrorism Committee (CTC) was established by United Nations Security Council Resolution 1373 (2001) which was adopted unanimously on 28 September 2001 pursuant to Chapter VII of the UN Charter. Resolution 1373 requires all member states to implement a number of measures intended to enhance their legal and institutional ability to counter terrorist activities at home, in their regions and around the world, including taking steps to: criminalize the financing of terrorism; freeze without delay any funds related to persons involved in acts of terrorism; deny all forms of financial support for terrorist groups; suppress the provision of safe haven, sustenance, or support for terrorists; share information with other governments on any groups practicing or planning terrorist acts; cooperate with other governments in the investigation, detection, arrest, extradition and prosecution of those involved in such acts; and criminalize active and passive assistance for terrorism in domestic law and bring violators to justice. The CTC is assisted by the CTED, which carries out the policy decisions of the Committee, conducts expert assessments of each Member State and facilitates counterterrorism technical assistance to Member States.

Global Center on Cooperative Security

The Global Center works with governments, international organizations and civil society to develop and implement comprehensive and sustainable responses to complex international security challenges through collaborative policy research, context-sensitive programming and capacity development. In collaboration with a global network of expert practitioners and partner organizations, the Global Center fosters stronger multilateral partnerships and convenes key stakeholders to support integrated and inclusive security policies across national, regional and global levels.



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CHAPTER

1

**Foundations for Effectively
Adjudicating Terrorism
and Related Cases**

Section 1. Judicial Independence and Ethics

Key Principles

An independent judiciary is one of the most important foundations of a democratic society. An independent judiciary free from improper influence and pressure from the executive and the legislative branches to responsibly interpret and apply the law is the best safeguard of individual rights and collective security. Although a court must at times agree with the executive and impose appropriate sanctions to protect the state and its people from continuing harm, a court must also ensure that accused individuals are fully protected from arbitrary and unlawful state action and that their human rights are fully protected. A weak and dependent judiciary cannot be expected to fully protect the rights accorded to the accused.

I. Judicial Independence

Judicial independence refers to both structural independence and decisional independence. Structural independence describes the independent manner in which the judiciary is organized, governed and funded, such as the process by which judges are appointed and removed, the length of tenure of judges, case assignments and the absence of executive and legislative interference with the judicial role.

Decisional independence is the process by which judges make decisions as neutral arbiters. Judges must make decisions based solely on the applicable law and resist outside pressure or other improper influences. With independence comes responsibility – accountability to the law and to codes of ethics that require transparency and adherence to rules that help guarantee impartiality and the rule of law.

A judicial code of conduct or ethics should provide (i) guidance to judges as to proper behavior and (ii) clear standards that govern when judges are to be disciplined for improper conduct. Keys to development of a code of ethics are (i) a transparent process by which judges are guided in their interpretation of the code and (ii) a fair process by which complaints against judicial conduct are reviewed. Proper development and implementation of a code of ethics will build respect for the judiciary and help the public understand the important role judges perform in a democratic society.

Terrorism prosecutions and trials place special demands on judicial independence. Judges are often the target of persecution, including public

criticism and threats aimed at intimidation. Female judges can often be a special target of threats. Structural independence for a judiciary within a country's legal system, together with a well-understood and applied code of ethics, are the best protections.

A. Applicable International Principles

A competent, independent and impartial judiciary is necessary to guarantee the proper administration of justice, including criminal prosecutions conducted in line with due process and human rights law.¹ Notably, '[j]udicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.'² Fair trial rights are recognized in Article 10 of the Universal Declaration of Human Rights ('UDHR') and Article 14 of the International Covenant on Civil and Political Rights ('ICCPR'), which provides in paragraph (1) that

All persons shall be equal before the courts and tribunals. In 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.

The basic principles of judicial independence have been endorsed by the United Nations General Assembly on several occasions.³ In a report to the UN Commission on Human Rights in April 2004, the UN Special Rapporteur on the Independence of Judges and Lawyers stated:

[T]he fact that the public in some countries tends to view the judiciary as a corrupt authority is particularly serious: a lack of trust in justice is lethal for democracy and development and encourages the perpetration of corruption. Here, the rules of judicial ethics take on major importance. [J]udges must not only meet objective criteria of impartiality but must also be seen to be impartial; what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society.⁴

1 Judicial Group on Strengthening Judicial Integrity, The Bangalore Principles of Judicial Conduct (2002), available at [http://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/ \(Bangalore Principles\)](http://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/(Bangalore%20Principles)), Preamble

2 Bangalore Principles (n 1) Principle of Independence 1

3 UNGA Res 40/32 (November 1985) UN Doc A/40/32; UNGA Res. 40/146, (December 1985) UN Doc A/40/146

4 Special Rapporteur on the Independence of Judges and Lawyers, *Rep. pm Civil and Political Rights, including the Questions of Independence of the Judiciary, Administration of Justice, Impunity* (31 December 2003) UN Doc. E/CN.4/2004/60, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/100/26/PDF/G0410026.pdf?OpenElement>.

B. Applying Principles of Judicial Independence and Ethics

The rigorous application of these principles will help ensure an independent and fair judiciary, greater professionalism among judges and increased public confidence in judicial integrity and capability:⁵

1. The Judiciary and the Executive and Legislative Branches

The separation of powers among the judicial, executive and legislative branches of government should be enshrined in the Constitution in order to guarantee the independence of the judiciary.⁶ It is preferable that the central responsibility for judicial administration should be vested in the judiciary and all government agencies and institutions must respect the independence of the judiciary.⁷ Government employees must not exercise any form of pressure on judges, whether overt or covert and must not make statements that could adversely affect the independence of judges or of the judiciary as a whole.⁸

The Executive should not have any control over judicial functions.⁹ The judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive.¹⁰ Individual judges should enjoy both personal independence and substantive independence. Personal independence requires that the terms and conditions of judicial functions are well-defined and secure in order to ensure that judges are not subject to any form of executive control.¹¹

2. Judicial Appointments, Terms and Discipline

Judges should be selected and promoted through the use of an objective, merit-based and transparent process to ensure the most qualified candidates become judges in a process free from political or social influence. Any method of judicial selection should guard against appointments for improper motives. The best process utilizes a meritocratic selection system that chooses judges from among applicants on the basis of their qualifications, not on the basis of political and social connections. In its resolution on *Independence and impartiality of*

the judiciary, jurors and assessors and the independence of lawyers, the Human Rights Council also encouraged the implementation of a system that promotes diversity, non-discrimination and gender equality in the composition of the members of the judiciary.¹²

If possible, a nonpartisan commission of lawyers and non-lawyers should be used to locate, recruit, investigate and evaluate applicants for judgeships. Minimizing partisan and personal influences and a transparent recruitment process, usually results in better-qualified candidates who do not have to compromise their integrity to get selected. The recruitment process should assess knowledge of substantive and procedural law, as well as personal integrity and temperament. Highly qualified judges will help ensure a strong and independent judiciary. The recruitment process should assess knowledge of substantive and procedural law, as well as personal integrity and temperament. Highly qualified judges will help ensure a strong and independent judiciary.

Generally, the longer and more secure a judge's tenure, the more likely the judge will feel secure enough to make independent decisions. Fear of removal or fear of non-reappointment may cause judges to issue decisions biased in favor of the executive. The judges' position, term, independence, security and remuneration should be fixed in law.¹³ In democratic countries, the most common term is appointment to a judgeship for life or until the judge reaches a mandatory retirement age, such as 70 years. Shorter terms of five years or less, or probationary periods before permanent appointment, are prescriptions for judges who are dependent upon the executive. These should be avoided, as they may affect a judge's ability to be fair and independent.¹⁴

The power to transfer a judge from one court to another should be vested in a judicial authority and should preferably be subject to the judge's consent.¹⁵ Judges should not be subject to removal from office or decisions not to reappoint except for good cause or compulsory retirement at an age fixed by law.¹⁶ Good cause, which means commission of a serious crime such as corruption, a serious violation of an ethics code, or demonstrated unfitness for the position, should be reserved for rare and serious instances.¹⁷ The grounds for removal should be fixed and clearly defined by

5 G.A. Res. 40/32 (n 3); G.A. Res. 40/146 (n 3); International Bar Association, Minimum Standards of Judicial Independence (1982), available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/IBA_Resolutions_Minimum_Standards_of_Judicial_Independence_1982.pdf (IBA Minimum Standards of Judicial Independence)

6 Basic Principles on the Independence of the Judiciary, Seventh UN Cong. on the Prevention of Crime and the Treatment of Offenders (26 August-6 September 1985).

7 IBA Minimum Standards of Judicial Independence (n 5), standard #9

8 Ibid, standard #16

9 Ibid, standard #5

10 Ibid, standard #2

11 Ibid, standard #1

12 OHCHR, 'Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers' (adopted 2 July 2016) UN Doc A/HRC/RES/29/6 article 2

13 IBA Minimum Standards of Judicial Independence (n 5) standard #15a

14 Ibid, standard #23

15 Ibid, standard #12

16 Ibid, standard #22

17 Ibid, standard #30

law.¹⁸ Judges should be removed only after receiving due process, including formal proceedings initiated by independent authorities and significant procedural protections.¹⁹

A judicial code of conduct, drafted primarily by judges, should provide the standards by which judicial conduct will be evaluated.²⁰ Disciplinary procedures should ensure judicial integrity, accountability and professionalism and are important tools for securing a judge's tenure. A well-designed, transparent disciplinary process will reduce the vulnerability to abuses that can have a significant impact on judicial independence. Judgments in disciplinary proceedings, whether held *in camera* or in public, may be published.²¹ The public should be advised as to how and where to file complaints against the conduct of judges and the process utilized should be fully transparent.

3. Preventing corruption in the judicial system

Implementing strategies to prevent and deter corruption is a critical responsibility of the court. Corruption is abuse of entrusted power. Judicial corruption is highly problematic because it 'erodes the principles of independence, impartiality and integrity of the judiciary, infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system.'²² Although there is no universally agreed definition of 'corruption', it may be informally defined as being the abuse of entrusted power for private gain, including financial, material and non-material gain.²³ 'Judicial corruption' specifically refers to 'all forms of inappropriate influence that may damage the impartiality of justice and may involve any actor within the justice system, including, but not limited to, judges, lawyers, administrative Court support staff, parties and public servants'.²⁴ However, corruption is not limited to acts that may be considered criminal offences under national law. Judicial corruption also occurs when, rather than making a determination on the basis of evidence and law, a

¹⁸ Ibid, standard #29a

¹⁹ See section on Disciplinary Proceedings

²⁰ If followed, codes of conduct protect judges from discipline as well as provide important guidance of ethical conduct. Int'l Criminal Court, Code of Judicial Ethics (2005), available at http://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf; IBA Minimum Standards of Judicial Independence (n 5), standard #29b

See section on the Judicial Code of Ethics

²¹ IBA Minimum Standards of Judicial Independence (n 5), standard #28

²² UN Special Rapporteur on the independence of judges and lawyers, Report on judicial corruption and combatting corruption through the judicial system (13 August 2012), UN Doc A/67/305, para. 109

²³ Ibid

²⁴ IBA The Judicial Integrity Initiative: Judicial Systems and Corruption, p12 http://www.ibanet.org/Legal_Projects_Team/judicialintegrityinitiative.aspx

determination is made on the basis of improper influence, inducement, pressure, threats, favouritism, or politics.²⁵

Article 11 of the UN Convention against Corruption emphasizes the crucial role that the judiciary plays in combating corruption.²⁶ Structural and decisional independence of the judiciary should be adequately secured by law.²⁷ Suggested measures to prevent judicial corruption include implementing merit-based systems for judicial appointments; establishing codes of conduct for judges; holding corrupt members of the judiciary accountable by criminalizing corrupt judicial conduct; providing fair salaries and pensions for court personnel; and, judges to deter accepting bribes and ensuring timely court proceedings with schedules publicly visible is another manner in which bribes to fast-track and delay trials can be deterred.

4. Governance of the Judiciary

Structurally, governance of the judiciary should be entrusted to a judicial council on which senior level judges play an important role. Executive agencies, which often are parties to disputes before the courts, should not govern the judiciary. It is essential that the judiciary employ professional administrators to oversee operations. Poor management and lack of structural independence can impact judicial independence. Judges should be staunch defenders of judicial independence and should be vigilant, both individually and collectively, with respect to any attempts to undermine their structural and decisional independence.²⁸

Strong judicial leadership is essential to inspire confidence that judges are in the best position to oversee the courts and ensure an independent judiciary. Public confidence and respect is essential if the judiciary is to be accepted by the executive and the legislative as an equal branch of government. Judicial leadership should include representatives of different courts and regions and different ethnic minorities and a judicial governing council should hire and oversee experienced administrative and operations staff to ensure a smooth functioning system for managing

²⁵ CIJL Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, in CIJL Yearbook vol. IX, *Strengthening judicial independence, eliminating judicial corruption*, 2000, p. 129.

²⁶ '[E]ach State Party to (a) take measures to strengthen integrity among members of the judiciary, and (b) take measures to prevent opportunities for corruption among members of the judiciary' UN Convention against Corruption (adopted 31 October 2003) UN Doc A/RES/58/422, available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (UN Convention against Corruption)

²⁷ See section on The Judiciary and the Executive and Legislative Branches

²⁸ Canadian Judicial Council, 'Ethical Principles for Judges'

court operations. There should be checks and balances for all financial management and regular audits to ensure that finances are properly managed. Likewise, resources should be fairly allocated throughout the court system.

5. Accountability and Transparency of Court Decisions and Operations

Judicial independence is strengthened when courts are transparent in their work. Public understanding is critical to building the respect that enhances the judiciary and embraces independence.

Judges should decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason. Judges should always state their reasons for decisions in public or in publicly available written decisions so that decisions are not based on considerations other than the law and facts and the public understands a court's reasoning.

Court operations and procedures should be transparent so that the public and parties understand what to expect in the courts. All cases should be assigned to a judge or to a court in a random manner that makes it impossible for judges or parties to choose the judge for a particular case. Judges, pursuant to codes of conduct, should be required to disclose personal and family finances and conflicts of interest to ensure accountability and deter corruption.

The judiciary should explain its management of public resources and promptly disclose any misuse of public funds.

6. Adequate Judicial Resources

A common manner of controlling a judicial system and judges is to provide insufficient resources for the court system. A judiciary must have sufficient resources to effectively manage the court system and to deter corruption. 'It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.'²⁹

The judiciary should carefully develop its proposed budget and advocate for resources sufficient to effectively manage the court system. Legislative and executive bodies must recognize the independence of the judiciary and provide adequate resources to enable the judiciary to properly perform its functions.

Judges must be provided with adequate salaries, benefits and pensions.³⁰ This is needed both to attract and retain qualified judges and diminish the likelihood of corruption.

In addition to adequate financial resources, states should, in collaboration with relevant national entities (e.g. bar associations, associations of judges and prosecutors and educational institutions), provide adequate training for judges, prosecutors and lawyers throughout their careers, including training on regional and international human rights law.³¹ In the context of counterterrorism cases, a 'competent and impartial judiciary attuned to the complexity and importance of terrorism cases, including human rights aspects, is [...] critical to an effective criminal justice approach to counterterrorism within a rule of law framework.'³²

7. Judicial Code of Ethics

The purpose of a judicial code of ethics, sometimes called a judicial code of conduct, is to provide objective standards for judicial conduct to judges and to afford the judiciary a framework for regulating judicial conduct and to assist members of the executive and the legislature and lawyers and the public in general, to better understand and support the judiciary.

States should consult the *Bangalore Principles of Judicial Conduct* for development of a code of conduct and for evaluating whether their current applicable codes of conduct are sufficient.³³ States should ensure that their judicial code of conduct complies with their international obligations in the areas of the administration of justice and the rule of law.³⁴ The *Bangalore Principles* are divided into six interrelated core values: independence, impartiality, integrity, propriety, equality and competence and diligence. Each core value contains a number of specific applications, some of which are listed below.

Judges should keep in mind that a well-crafted judicial code of conduct not only provides standards for proper conduct of judges and ethical behavior, but it also provides protection for actions that judges take in

²⁹ IBA Minimum Standards of Judicial Independence (n 5), standard #14

³¹ OHCHR, 'Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers' (adopted 2 July 2016) UN Doc A/HRC/RES/29/6, article 9 -

³² Global Counterterrorism Forum (GCTF), 'The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector' 7, available at <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rabat-Memorandum>

³³ *Bangalore Principles* (n 1)

³⁴ OHCHR, 'Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers' (adopted 2 July 2016) UN Doc A/HRC/RES/29/6, article 18

accordance with the code. A code guards against both impropriety on the part of a judge and the appearance of impropriety.

There should always be a mechanism in place to provide guidance to judges in understanding the code and in properly following its prescriptions. This is best done through a committee of judges or a judicial council, backed by a professional staff. There must also be a fair process in place for evaluating complaints and determining whether discipline is warranted. Again, judges should perform a primary role in the evaluation of complaints.

The following is a list of common applications of ethical principles to judicial conduct:



Independence

Judges should be independent in the exercise of all judicial functions and shall not allow any external influence or improper internal influence to impact their independence.

Judges should not engage in **any** activity or be a member of any association that could impact public perception and confidence in the independence of their decision-making.



Impartiality

Judges should exercise all responsibilities impartially. Impartiality should characterize both the decision itself and the process by which the decision is made.

Judges should avoid all conflicts of interest and shall disqualify themselves from participation in any case in which their impartiality may reasonably be questioned.

Judges should perform judicial duties without favor, bias or prejudice toward any party or member of the public.

Judges should not allow personal opinions or personal financial interests to improperly impact their fair review of a case presented for decision.

Judges should avoid inappropriate contact with government officials on matters unrelated to the judiciary and especially avoid any appearance of impropriety in relationships.



Integrity

The conduct of judges, at all times, should be consistent with the high moral character that is essential to upholding the reputation of the judiciary.

Judges should always be aware that their personal and professional conduct may impact the public respect for the judiciary and shall conduct themselves with the judiciary's standing in mind.

Judges should not accept any gift, advantage, decoration, honor or award that would cause the public to question their independence or impartiality.

Judges should not allow family, relatives, government officials, or other persons to improperly influence in any way their judicial decision-making.

Judges should not permit public opinion, pressure, threats, the news media, or criticism to impact the independence of their decisions.



Extrajudicial Activities

Judges should not engage in extrajudicial activities that are inconsistent with independence, impartiality and the demands of the judicial appointment.

Judges may undertake activities that are intended to improve the judicial system and the administration of justice. Such activity may include teaching, lecturing, or writing on subjects related to the law. Participation in such activities should not interfere in any way with the performance of judicial duties, which shall take precedence over all other activities. Extrajudicial activities should be reported in an appropriate manner as prescribed by the judicial code of conduct.

Judges should not hold membership in a political party or political organization and shall never participate in political or partisan activities.

Judges should not serve in executive or legislative functions

Judges should exercise care in the use of electronic communications or social media to avoid violating any provision of the code of conduct.



Confidentiality

Judges should never disclose secret or confidential information relating to proceedings that are pending before the Court.

Judges should respect the secrecy and confidentiality of all court deliberations.

Judge should not make public comments or release information concerning cases before they are decided and any public comments should ordinarily be limited to procedural matters that can clarify the application of a decision. The rationale for a decision should always be contained in a well-reasoned opinion or announced in open court before the parties.



Freedom of Expression

Judges should exercise their freedom of expression in a manner that is fully compatible with the dignity and respect of their judicial office.

Judges, when exercising freedom of expression, should avoid public statements or comments that may undermine the authority of the judiciary or give rise to reasonable doubts about impartiality.



Equality

A judge, in the exercise of judicial responsibilities, should avoid any impartiality or discrimination concerning any irrelevant matter and should always treat all parties with respect, courtesy and equality.

Judges should always relate in a professional manner toward all employees of the judiciary, avoid all discrimination and ensure that employees' conduct is in conformity with the code of conduct.

Judges should work together with other judges in a collegial manner and always show utmost respect for each judge's opinion and views.



Diligence and Competence

Judges should perform their duties with diligence and competence.

Judges should continually develop their professional skills and knowledge so as to maintain a high level of competence.

Judges should resolve cases in a prompt and expeditious manner in order to provide justice to the parties and to maintain the respect for the judiciary.

Judges should, to the extent possible, provide in writing a clear explanation and reasoning for all decisions.

Judges should keep themselves informed about relevant developments in international law and comparative jurisprudence, including international conventions and other instruments establishing international norms.

Additional Resources

*The Universal Charter of the Judge*³⁵

*The Burgh House Principles On The Independence Of The International Judiciary*³⁶

*CJIL Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System*³⁷

*IBA Minimum Standards of Judicial Independence*³⁸

*International Criminal Court, Code of Judicial Ethics*³⁹

*International Commission of Jurists (ICJ), Judicial Accountability – A Practitioners' Guide*⁴⁰

*UNODC, Implementation Guide and Evaluative Framework for Article 11 of the United Nations Convention against Corruption.*⁴¹

35 International Association of Judges, *The Charter of the Judge* (1999), available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/03/IAJ-Universal-Charter-of-the-Judge-instruments-1989-eng.pdf>.

36 The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, *The Burgh House Principles On The Independence Of The International Judiciary* (2004), available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/burgh-house-principles.pdf>.

37 Centre for the Independence of Judges and Lawyers, International Commission of Jurists, *Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System* (2000), available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/CJIL-Policy-Framework-for-preventing-and-eliminating-corruption-and-ensuring-impartiality-of-the-judicial-system-2000.pdf>.

38 IBA Minimum Standards of Judicial Independence (n 5)

39 Int'l Criminal Court, *Code of Judicial Ethics* (2005), available at http://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/CCBD020105_En.pdf (n 20)

40 International Commission of Jurists, *Judicial Accountability: A Practitioners' Guide* (2016), available at <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>

41 UN Convention against Corruption, *Implementation Guide and Evaluative Framework for Article 11*, (March

Section 2. Safeguarding Judges and Ensuring Court Security

A court's security is essential for maintaining the integrity and independence of the judicial process. Uninhibited access to secure, safe courts promotes a sense of confidence in the stability of government and is an important measure of a government's performance of obligations under international legal norms related to the domestic judicial system.

The concept of 'court security' has increasingly broadened focus to include the protection of nearly all elements of court operations, including internal procedures, staffing, physical environment and related resources, as well as the 'physical safety and freedom from intimidation of courthouse users and occupants.⁴² Throughout the world, this burden often falls to local law enforcement and courthouse officials.

Being 'secure' is not a static goal. It demands constant vigilance from every member of the court system from the most senior judges to all levels of court staff. Yet, it is the responsibility of senior judges and court officials to inculcate a 'culture of security' in court staff and visitors by demonstrating their level of commitment to the court's security policies and procedures. Indeed the court's leaders set the tone for effective security. Head judges and other senior staff at the court can play a crucial role in setting security expectations for all court employees by marshaling security resources, motivating their staffs to vigilance and holding security professionals responsible for their performance.

I. Security of the Courthouse

Security in the courthouse should be orchestrated from a primary command center located in the lobby area of the court building with an assigned court security officer. For smaller courthouse facilities, this function can be executed at the front entrance screening station by the same guard that screens those entering the main entrance. The ideal

command center is equipped with a telephone and control panel that allows the court security officer to monitor all closed circuit television ('CCTV') cameras, duress alarms, fire alarms, intrusion detection systems and communication from all court security officers via radio. Courthouses situated in repurposed buildings should pay special attention to assessing security needs.

The following sections provide suggestions for judges, court officers and policy makers to consider when securing courthouses.

A. Establishing a Security Plan and Coordinating with Law Enforcement

1. Lines of Communication with Law Enforcement

Perimeter security and security at the courthouse may rely to a large degree on law enforcement. Court officials are thus advised to develop a relationship with local law enforcement, explaining the Court's security situation and establishing an open dialogue to facilitate cooperation, information sharing and resource allocation as needed. This relationship may be formalized through a memorandum of understanding.

2. Security Plan

To ensure thorough and consistent application of security measures it is necessary to develop a comprehensive security plan. This plan should be developed over time and be a living document, rather than static. A security plan should include:

- Policies and procedures, including overall court security operations; screening protocols; and defined weapons, illegal items/contraband prohibited from the court building, including the confiscation, seizure and removal procedure;
- Risk assessment and resource allocation instructions and protocols, incident reporting instruments and protocols;
- Operations manuals and contingency plans (e.g., active-shooter, security threats, incident response, etc.), training manuals and materials; and
- Administrative orders with revision authority.

2015), available at https://www.unodc.org/documents/corruption/Publications/2014/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf

42 Caroline Cooper, Nat'l Center for State Courts, *The Evolving Concept of Court Security*, 1 (2007), available at <http://www.ncsc.org/~media/Files/PDF/Publications/Justice%20System%20Journal/the%20evolving%20concept%20of%20court%20security.ashx>.

B. Accessing the Courthouse

1. Exterior Surveillance

Steps to increase exterior surveillance include:

- Requesting the relevant local law enforcement agency conduct exterior patrols, particularly during times when the building is closed,
- Court security officers should conduct both regular and periodic patrols of the courts outer facility throughout the day,
- Provide for sufficient lighting around facility perimeter to meet a reasonable level of safety for judges and staff going to and from the court building during hours of darkness and for CCTV cameras to capture images,
- Except for the main entrance, keep all doors locked 24/7 and allow access only via authorized key or access cards and
- Landscaping (trees, bushes, shrubs, etc.) should be reviewed to eliminate sheltered spots from which explosive devices could be thrown or shots fired into the facility without detection.⁴³

2. Secured and Unsecured Parking Areas

If sufficient resources are available, a secure parking lot should be made available to judges, court staff and jurors with priority to judges' security. As a best practice, a court should provide a secure parking area from which judges can proceed directly from their cars, through security screening, to their chambers without passing through any public areas or the main court building entrance. In addition, the following steps can provide additional security in parking lots:

- All signs should be removed that identify parking spaces by name or title of the judge; signs should say simply 'reserved' with a number as appropriate;
- Regular patrols of the secure parking area should be conducted by court security officers in the morning, lunch hour and evening;
- Judges should notify court security or law enforcement of their arrival in the morning and departure in the evening and be escorted by a designated court security officer if they park in an unsecured parking area;
- Judges' parking lots should be secured with fencing or walled area with sufficient barbed wire or similar to deter and impede potential

intruders; and

- Parking areas should be secured with an electronic card access system and equipped with CCTV cameras and sufficient lighting.

3. Limiting Entrances

Steps should also be taken to limit entrances to the court, as follows:

- A single main entrance should be established through which the public can enter the court building;
- Signage at the main entrance should announce that all persons are subject to search by security and include a list of items prohibited from the court facility;
- All other exterior doors should be locked during all hours, including business hours;
- Emergency exit bars should be installed on all external exit doors with proper signage indicating as such and alarmed with a ten-second delay; alarms should sound to security officers in a command and control center, not to the entire building;
- A full time court security officer should, if possible, be dedicated to secure the main public entrance;
- An entry protocol should be established that would, for instance, prohibit 'tailgating' or bringing in family members and friends, as well as require all delivery people and contractors to enter through the main entrance and make all deliveries to a central location; and
- Delivery people and contractors should be verified by an authorized representative of the court requesting the delivery or service; these individuals should always be escorted and supervised while in the court facility.

4. Metal detectors

With the exception of authorized personnel such as law enforcement, individuals must never be permitted to bring weapons into the courthouse. Magnetometers are a useful tool for identifying concealed weapons, while maintaining efficiency at the court's entrance. They should be installed at the main public entrance of the courthouse and should be tested and inspected daily in accordance with the manufacturer's specifications. In addition, all court security officers should be trained regarding proper use

⁴³ Ibid.

of the magnetometer. Additional training for judges, staff members and jurors is also an option.

If a court is unable to obtain a magnetometer or should power failures prevent this from being a steady tool, there are a number of steps it can take to achieve a comparable level of security, including the following:

- Set up a table and other physical structures (ropes, dividers, heavy potted plants, etc.) to serve as a screening station and delineate where the public should queue; sightlines from the screening station to the building entrance should be unobstructed to allow for visual assessment of those entering the building;
- Screen all those coming into the public entrance for weapons by use of a hand wand and physically search all personal items; and
- The court security officer assigned to screening should be equipped with a weapons ID chart, a list of prohibited items and a list of the daily court activities to verify if the individual is visiting for a legitimate purpose.

5. Prohibited Items

Every court should have a standard list of contraband items that is clearly visible to all court users. Items should be added to this list with the approval of the chief judge or head of security, as appropriate, in order to meet the threats specific to the context in which the court operates.

The list should be posted at the main entrance and the court security officer assigned to guard the main entrance should carry a copy for reference. All court security officers, staff and judges should be trained on what items are contraband and no exceptions should be made for any person working in the courthouse.

6. Smartphones

As mobile phone technology becomes increasingly sophisticated, it presents a growing challenge for court officials with regard to security and maintenance of court proceedings' integrity and privacy. Judges in some courts have banned mobile phones after 'spectators in courtrooms had photographed witnesses, jurors and judges and in other instances had texted testimony to upcoming witnesses waiting outside.'⁴⁴ The bans typically exempt current and former judges, lawyers, court employees, reporters and jurors. Chief judges and security officials will need to make

a decision that makes sense in the context of their particular court, weighing the security risks with the potential resistance from the public and administrative burdens of establishing a 'coat-check' system for those entering the court and requiring them to check their mobile phones. At a minimum, the use of mobile phones and other recording devices should be prohibited in the courtroom, enforceable by confiscation.

C. Ensuring Security Inside the Courthouse

1. In the Courtroom

Steps can and should be taken to provide additional security to courtrooms, as follows:

- Duress alarms should be installed on top or under the working surface of the judge's bench, at the court security officer's station and the clerk's station and be plainly marked; the alarms should be tested regularly and both judges and appropriate staff trained to know how and when to use them;
- A security sweep of the courtroom should be conducted in the morning before a proceeding is held and at the end of the day for all proceedings;
- If available, a dog trained with the ability to detect guns, bomb materials and other explosive contraband should be employed to aid in the morning and end-of-day inspections of the courtrooms and judges' chambers;
- All metal and glass items inside the courtroom that could be used as weapons should be removed, including scissors, staplers, metal or glass water pitchers, etc.;
- Emergency lighting/ fire equipment should be installed in courtrooms and regularly tested;
- Proper restraints should be used for the accused;
- Ensure weapons as exhibits are rendered inoperable; ammunition should always be secured in sealed evidence bags separate from any firearms;
- Ideally, two CCTV cameras should be installed in each courtroom; and
- Use bullet-resistant materials when constructing or retrofitting the bench workstations inside the courtroom.

⁴⁴Jennifer Delgado, *Electronic Devices to be Banned from Court*, Chi. Trib., Apr. 12, 2013, available at http://articles.chicagotribune.com/2013-04-12/news/ct-met-cell-phone-court-ban-20130412_1_ban-evans-cook-county-criminal-courthouses.

2. In the Judges' Chambers

Steps can and should be taken to provide additional security to judges' chambers, as follows:

- A duress alarm should be installed at the judge's desk, in the chamber's reception area and any conference rooms located within the judge's chambers; the alarms should be tested regularly and both judges and appropriate staff trained to know how and when to use them;
- If the route from a judge's chambers to the courtroom is unsecured, a court security officer should escort judges to and from the court room and chambers;
- Entrance doors to chambers should be locked at all times;
- Windows should have coverings so that activities cannot be observed from outside the court building; if possible, ballistic-resistant material should be installed in all windows with priority on judges' chambers;
- Cleaning crews should clean chambers at the end of the day when court staff members are still present, not at night; and
- Court security and judges should plan for and conduct emergency drills specific to the chambers areas.

3. Safe Transportation of the Accused to and from the Courthouse

Steps should be taken to ensure the safe transportation of the accused to and from the courthouse. Best practices include establishing secure circulation from the transport vehicle to the holding cell and finally to the courtroom that avoids crossing the path of judges, staff, or the public and includes CCTV cameras along the entire route. If the comingling of the accused with the public or court staff is required due to the court facility's physical design, the court security officer should:

- Make an effort to escort accused when the presence of people is at a minimum;
- Assign a second court security officer to properly clear a path ahead before beginning transport; this officer should be armed with a side arm;
- Move bystanders to the far end of the hallway, not to one side or the other; and
- If riding in an elevator, clear the elevator of all other people.

4. Closed Circuit Television Video Surveillance

CCTV cameras employ various types of technology to transmit video images and to provide for system access and control. Wireless, laptop-based CCTV technologies are recommended to allow court security officials to install cost-efficient, nimble technologies that provide high value for money.

CCTV cameras should have the following functionality:

- **Fixed or pan, tilt, zoom:** Typically used by most courts in the United States, fixed cameras with a wide-angle lens allow for a stationary focus on areas of interest. The ability to tilt and pan allows the camera to maximize its coverage area, minimizing blind spots and the overall number of cameras required.
- **Color:** Only with a color monitor can faces and other specific objects be clearly identified.
- **Recording capacity:** Digital recording capacity is advisable, enabling a court security officer to view incidents at a later time. This is essential for identifying perpetrators for the purpose of apprehension as well as conviction. Recordings should be retained for at least 10 working days.
- **Activation capacity:** The operation and recording function of a camera can be set to activate by either motion or sound, or by the setting of duress or intrusion alarms.
- **Signs:** Notices should be posted in public areas to inform the public that CCTV cameras are operating and recording activity in the area.

At a minimum, CCTV cameras should be installed at the entry screening station and in the courtroom facing the gallery. Best practice for courtroom CCTV cameras is to install: (i) one camera in the back to monitor activities up to and including the well and bench area and (ii) one behind the bench to monitor activities in the courtroom.

Best practice for CCTV camera placement in the court building is to install cameras in the following areas: detention areas for monitoring activity in holding cells and prisoner circulation areas; court building perimeter; parking and strategic areas adjacent to the building; public counters and offices where the public may visit; all hallways, elevators, stairwells and any pathway through which any accused may be escorted.

II. International Good Practices: The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses

The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses, is a document based on relevant international guidance and developed under the auspices of the 30-nation Global Counter Terrorism Forum. Of the twelve good practices it contains, Good Practice 7 is dedicated to contributing to 'the Development of Enhanced Courthouse and Judicial Security Protocols and Effective Courtroom Security'.⁴⁵ The good practice is copied here for ease of reference.

The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offences⁴⁶, Good Practice 7

While security solutions for courthouses vary in complexity and are tied to available resources, judges can contribute to the development of basic rules that may promote a secure environment in their respective courthouses, for the just and orderly adjudication of criminal offences. For example, they can assist in the development of rules for applying enhanced safety measures in the courthouse through coordination with responsible security/court officers and request sufficient funds to make the courthouse as safe as necessary from the appropriate authorities. Once developed, the security policy and accompanying procedures should be triggered when charges involving terrorism or other national security offences are filed in the jurisdiction. Enhanced security, as appropriate, may include: (i) increased police or other security staff both in and outside the courtroom; (ii) the strategic use of security checkpoints and screening procedures; (iii) the use of metal detectors, x-ray scanning devices and other screening technology at the public entrance(s) to the courthouse and courtroom; (iv) prohibiting the possession of cell phones and other electronic devices in the courthouse and courtrooms; and (v) separate and secure parking and entrances for judges, prosecutors and court personnel.

In addition, strong judicial leadership is essential to successful implementation of rules of procedure and conduct in the individual courtrooms to ensure a secure and fair trial environment. This leadership is particularly important in terrorism cases because the heightened tensions and emotional atmosphere that accompany such cases have the

potential to impact the conduct of the judicial proceedings. While judges alone cannot initiate change, their support and leadership are critical to reforming court practice.

Like all effective leaders, judges must have a vision for what can and should be accomplished in their respective trial environments. This vision should be clearly communicated by the words and actions of the presiding judge to court personnel, the litigants and the victims and witnesses who may participate in the trial process.

For example, trial judges can:

- Assist in the adoption of courtroom rules supporting a secure trial venue that can be consistently applied in all cases; these courtroom rules should clearly outline courtroom requirements for the litigants, for those actively participating in the trial process and for observers in the courtroom. The rules should be reinforced by the judge/court security as appropriate throughout the duration of the case;
- Discuss court security with the litigants, including the accused, during pre-trial conferences and meetings and prior to the beginning of court proceedings. These conduct guidelines should be highlighted daily and consistently applied throughout the proceedings; and
- Take steps to reduce the risk of threats, intimidation and confrontation involving victims and witnesses and to increase their safety. These may include: (i) designating seating arrangements for victims, witnesses and family members to help reduce opportunities for intimidation within the courtroom; (ii) ordering staggered departures of the various groups and parties; and, where possible, (iii) providing secure waiting areas for victims and witnesses and separate entrances and exits to and from the courtroom for court personnel, the accused and witnesses. Judges should be thoughtful in their approach, exercising discretion in fashioning appropriate security solutions for threats that are identified.

⁴⁵ GCTF, The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses 11, available at https://www.thegctf.org/documents/10162/140201/14Sept19_GCTF+The+Hague+Memorandum.pdf (Hague Memorandum)

⁴⁶ Ibid

CHAPTER

2

Judicial Management of the Proceedings

Section 1. Case and Courtroom Management

Case and courtroom management plays a critical role in ensuring courts are fair, accessible and efficient. It is imperative that courts deliver the quality services essential to fulfilling their role and functions in society. This requires effective and efficient management systems.

Judges throughout South Asia have reported upwards of 150 pending cases before them, handling more than 40 cases per day in a piecemeal fashion that often interferes with the proper adjudication of cases. As a result, many courts experience crippling backlogs while judges struggle to handle the many administrative tasks necessary to manage the court.

Without a thoughtful and robust case and court management system, the shared goal of affording victims and accused a fair trial is frustrated. Adequate attention on the part of policymakers, court administrators and judges at all levels, prosecutors, defense lawyers and a range of other actors is required to implement the type of management system that will allow for improved quality of justice and court administration.

This section provides basic principles and actionable methodologies to assess and improve the management of courts.

I. Standards in the Administration of Justice

The guarantee of a number of rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) requires an effective and efficient court management system. These include:

The Right to Access to Justice

Rights of access to justice and equality in the administration of justice lie at the heart of the rule of law. They demand that all persons have equal rights of access to the courts. To achieve this, the transparent, orderly and timely management of all appearances before the court must be coordinated. Article 9(3) of the ICCPR provides that '[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge

or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.'¹

The Right to a Competent Judiciary

The performance of a court relies most heavily on the administrators of justice—judges themselves. A robust court management system creates a framework from which judges are able to perform their function with the highest degree of competence, independence and impartiality. This right is more thoroughly treated in Chapter 1, Section 1, 'Judicial Independence and Ethics.' Relevant provisions of the ICCPR include the following:

- **Article 2(3)(a)-(b).** To ensure that any person [whose rights or freedoms as herein recognized are violated shall have an effective remedy and] shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.
- **Article 14:** In 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.

The Right to Equality in the Administration of Justice

This right engages the principles of equality before the law and non-discrimination. It is reflected in the following provisions of the ICCPR:

- **Article 14(1):** All persons shall be equal before the courts and tribunals.
- **Article 14(3)(c):** In the determination of any criminal charge against him, everyone shall be entitled to be tried without undue delay.
- **Article 26:** All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Right to Equality of Arms

The principle of equality of arms means that the procedural conditions at trial and sentencing must be the same for all parties. It calls for a 'fair

¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

balance' between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place that party at a substantial disadvantage vis-à-vis the opponent. Some procedural conditions are set through the court management as set forth in the ICCPR:

- **Article 14(1):** All persons shall be equal before the courts and tribunals...
- **Article 14(3):** In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.²

Right to a Public, Reasoned and Timely Judgment

Public access to judicial decisions helps to avoid the administration of justice in secret, protects against abuse of the judicial process and helps to maintain public confidence in the administration of justice. A case management system should include within its scope judicial information management, which entails the publication of judgments through law reports and via the internet. The right to a timely judgment forms part of the overall right to a hearing without undue delay (as referred to in Article 14 of the ICCPR).

II. Principles of Courtroom Management

A. Administration of Courtroom Management

Court administrators are often appointed to oversee case management and judicial administration as this requires professional skills and abilities that

² ICCPR, *supra* note 1, art. 14.

are not necessarily the traditional profile of a judge. This role may include responsibilities in long-ranging administrative planning, finance, budget, procurement, human resources, facilities management, court security, emergency preparedness planning and employee discipline.

Any courtroom management system should distribute responsibility between the head of the court and the court administrators for the overall management.

1. Judicially Driven Case Management Systems

Case management has been defined as 'the entire set of actions that a court takes to monitor and control the progress of cases, from initiation through trial or other initial disposition to the completion of all post-disposition court work, to make sure that justice is done properly.'³ Case management systems are the judicial system's mechanism to ensure disputes are handled in due process and due time.

As a general principle, judicially driven trial management is the key element to ensuring that the parties are prepared to proceed, the trial commences as scheduled and proceeds to a fair conclusion without unnecessary delays or interruption. Judicial management is all the more important in the context of terrorism cases where the judge should be in command of the proceedings in a manner consistent with the particular demands of the case. Once charges have been filed in a court of competent jurisdiction, a specific judge should be assigned a terrorism-related criminal case. The judge is then charged with ensuring the continuity of trial days in order to enhance the effectiveness of judicial management in expediting a criminal case. To support the effective judicial management of a complex or high profile criminal case, such as those involving suspected terrorists, the court should also develop trial management standards or rules that can be consistently applied. Good management practices and procedures begin with scheduling a pre-trial/trial management conference(s) as soon as possible as after the judge receives the case. Records of what was decided or ordered at each conference should be maintained in a manner consistent with domestic legal requirements.

An effective case management system has been proven to speed up litigation, to increase the number of cases resolved before trial and to reduce the number of inactive pending cases. Traditionally, courts allowed

³ David Steelman et al., *Caseflow Management: The Heart of Court Management in the New Millennium* (National Center for State Courts 2004), available at <http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/ctadmin/id/1498/rec/2>.

the parties to set the pace of the litigation process in order to ensure they prepare the case as best they can. However, this approach has been challenged in recent decades and judges have begun to play a more active role in case management in order to better manage increasing workloads. Across the SAARC region, where attorney-led case management models are prevalent, court proceedings can take years to conclude, creating tremendous backlogs and disruptions where judges cycle on and off cases. A shift in case management from the purview of the lawyer to the judge is challenging and profound, as it relates to the professional identity of both judges and lawyers, and requires long-term stakeholder engagement and articulated change management strategies.

2. Case information management systems

Case information management systems may be manual or electronic. A qualified staff to assist with the administration of these systems relieves judges of the administrative responsibilities and enables them to focus on their judicial functions. A valuable tool for ensuring efficient management is the pre-trial conference, sometimes referred to as preliminary hearings. By establishing the rules, providing guidelines and setting expectations with the attorneys, the court can better manage the proceedings and refer back to these as agreed-upon ground rules to manage any issues that arise in the course of the trial. At the conference(s), the judge and the lawyers for both sides should, inter alia, address:

- The schedule for various segments of the pre-trial process, including disclosure of evidence as required by applicable law;
- The timetable for the filing of documents or pre-trial motions with the court;
- The identification of special requirements or accommodations. These may include identifying and making necessary accommodations for qualified interpreters and specifying what technology is permissible in the courtroom, such as television screens, cell phones, video cameras, real time recordings;
- The identification of any witness issues or other specific legal, evidentiary or procedural complexities that may require court action or have the potential to delay proceedings; and
- Detailing guidelines for the media, such as whether attorneys may conduct media interviews on the courthouse steps.

Further, the trial judge, after consultation with the parties, should:

1. Set a firm trial date, ensuring continuity and predictability;

2. Outline the rules of court procedure, to include guidance on conduct of the parties, witnesses and spectators to maintain appropriate decorum and the formality of trial proceedings;
3. Review the scheduling of witnesses to ensure that there is continuity and review the nature of their testimony to avoid unnecessary duplication or determine if some evidence, if uncontested, may be presented with mutual agreement, such as through stipulations; and
4. Be receptive to using technology, as may be available, in managing the trial and the presentation of evidence.

In sum, the characteristics that support a trial judge's ability to manage a courtroom effectively include: being decisive, being consistent, requiring punctuality, minimizing trial interruptions and developing knowledge of the applicable law.

3. Case Assignment Procedures

Case assignment procedures should consider independence and impartiality, transparency, efficiency, flexibility, equal distribution of caseload and quality of judicial decision-making. The system's goal should be to guarantee internal and external transparency. Lawyers, bar associations and public prosecutor offices can help in the design and monitoring of such systems.

There are varying procedures for case assignment which include:

1. Court president or head of court section determines the distribution of cases;
2. Court administrators or court clerks determine case assignment;
3. Random case assignment; or
4. Rules and laws or informal criteria determine case assignment.

Random case assignment is the best way to ensure that judges are assigned to cases on a fair and impartial basis. Random assignment systems guard against problems of corruption and promote public trust in the judiciary as they avoid problems associated with "judge shopping". Random case assignment is the best practice for ensuring judicial transparency and building public confidence in the judiciary.

4. Calendar System

A calendar system determines how responsibility for processing the case is handled. The three typical calendar systems are individual, master or hybrid.

1. **Individual calendar system:** a judge is solely responsible for each case assigned to him or her from filing to disposition.
2. **Master calendar system:** the responsibility for processing each case is apportioned among several judges, each of whom handles a portion of the processing task.
3. **Hybrid calendar:** this model relies on elements of both the individual and master calendar systems in various combinations applied during one or more steps of the proceedings.

5. Toward Automated Court Management Systems

Automating certain aspects of the case management can be a challenging task that can take a very long time. However, once implemented, these automated systems can simplify the administration of cases.

A number of systems have been developed as courts turn to computer programs to assist in the administration of cases. These systems may be implemented to serve a variety of functions or combination of functions. The most common among these include automating administrative tasks such as case tracking, case management system and office automation. Other more advanced systems may include facilitating judicial electronic data interchange between different agencies or between courts and the parties (e-justice or e-filing) and implementing hearing room technologies (e.g., use of computerized stenotype, of audio and video-recording to take records, or use of video-conferencing for taking video-depositions).

Implementing an automated system entails conducting a thorough and careful feasibility and cost/benefit analysis and answering questions about who needs what type of information, when, and for what purpose. Further, initial development efforts require significant funding and resource support for planning, design, testing and implementation; long-term success requires the ongoing commitment of resources for regular maintenance, updates and cyclical replacement of hardware and software.

The technology of greatest interest in terrorism cases includes those related to pre-trial case preparations, remote appearances, court records, counsel communications, evidence and information presentation, jury deliberations and appeals. The application of technology at different phases include the following:

Pre-trial stage

The pre-trial process ought to consist of the creation of master database linking all known relevant information.⁴ The use of such a database can improve the ability of all parties to quickly access key information.

Videotaped interviews and interrogations can be transcribed to create an electronically searchable transcript. Electronic text can be added to the digitized video so as to create a multimedia deposition-like depiction of the interrogation or interview.

Trial stage

Public access to trial proceedings: In terrorism trials where the survivors and the families of victims are numerous, courts can provide overflow seating via remote audio/video to another room in the courthouse or to a remote viewing location.⁵ Consideration should be given to avoid the intermixing of victims' families and the family of the defendant. Video conferencing may be a useful tool to ensure that the victims' family can watch proceedings, especially when the trial is far from their homes. Courts may publish key documents regarding the trial, including evidentiary exhibits, online for public access, but such disclosure will be constrained by the potential use of classified information.

Remote Appearances: For trials with foreign involvement, including those of foreign terrorists, using foreign legal and technical assistance or involving foreign courts, trial work can be handled via videoconferencing without requirement of physical presence. The use of videoconference for other trial participants such as lawyers or judges may also be permitted, especially in cases where urgency may impel hearings when judges or counsel are outside the jurisdiction. Remote-witness testimony has been used in state and federal courts in US, courts in Australia and the International Criminal Tribunal. However, the videoconferencing of witness must not violate the accused's right of confrontation.

Counsel Communications: Software can enable counsel to communicate not only with office colleagues and support professionals, but also with experts elsewhere in the world. This can be especially useful if counsel can supply the real-time transcript or preferably a multimedia transcript to those from whom assistance may be needed.

Evidence/information presentation: Technology can enable the presentation of evidence to the factfinders and assist with opening

⁴ *Id.* at 897.

⁵ *Id.*

statements and closing arguments through use of television monitors to display images to jurors or use of software such as PowerPoint to make opening statements or closing arguments. A witness may have an individual computer monitor that is touch-sensitive, allowing the witness to annotate documentary or other evidence electronically.

Appeals

Proper use of courtroom technology can expedite the appellate process. The use of a real-time court report or a highly efficient transcription service can yield an accurate court transcript at the close of trial. Linking that transcript to electronic images of all evidentiary exhibits along with the legal documents and supporting appendices can create a complete and immediate court record that can then be distributed electronically to all parties as well as to the appellate court.

6. Disruptive Defendants

Trials for cases of terrorism may involve disruptive behavior by defendants, in particular because of the media and political context wherein such trials would occur. Such conduct puts in jeopardy the principle of a fair trial, as disruptive behavior has the potential to exert undue influence (e.g., through contempt or intimidation) on judges, disturb the testimony of witnesses and/or experts and undermine the public's confidence in and respect for the legal process.

A judge must ensure the integrity of the court proceedings and take proportional actions in case of disruptive behavior. These actions include escalating sanctions and other methods in an attempt to control a disruptive defendant. The judge should also make a record of the specific behavior of the defendant the judge wants to stop. This record should make clear that (i) the defendant's conduct is disruptive and will not be tolerated and (ii) that future occurrences of the conduct will result in expulsion from the trial and that the trial will continue in his absence.

If the judge removes a defendant from the courtroom, the defendant should be allowed to monitor the trial and testimony and argument produced in the courtroom via an audio and, if possible, a video connection. Further, a judge should offer the removed defendant, at appropriate intervals, an opportunity to return to the courtroom upon assurance of good behavior.⁶

⁶ American Bar Association, 'Special Functions of the Trial Judge', available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_trialjudge.html.

Below is a list of six types of disruptive behaviors and suggested actions for a judge:⁷

1. *Behavior: Passive disrespect, such as not addressing the judge with "Your honor" or refusing to stand up when the Judge enters the courtroom.*

Appropriate action: Ignore.

2. *Behavior: Refusal to cooperate with fundamental ground rules of court proceedings, such as giving political speeches during cross-examination.*

Appropriate action: Interrupt the behavior (e.g., by turning off microphone) and inquire into the reasons for the behavior. Assure defendant that his or her rights are respected and, if necessary, warn defendant that he or she will be removed from the courtroom.

3. *Behavior: Single obscenity or outburst.*

Appropriate action: Warn the defendant that continued disruptions will lead to expulsion from the courtroom.

4. *Behavior: Repeated interruptions by the defendant.*

Appropriate action: Expulsion from the courtroom, after due warning by the judge. The judge must ensure that reasonable measures are put in place to enable the defendant to continue following the court proceedings (e.g., using audio/video transmission) and to communicate with his or her lawyer.

5. *Behavior: Defendant addresses public at large (e.g., through televised transmission of the trial) for political purposes or to incite to violence.*

Appropriate action: Expulsion from the courtroom.

6. *Behavior: Physical violence in the courtroom.*

Appropriate action: The court should deal with this behavior immediately by expulsion or by use of appropriate physical restraints (such as shackling of the defendant).

7. Complex Case Management

Terrorism cases will sometimes require the handling of classified or privileged information and communications.⁸ The court must be prepared

⁷ Norman Dorsen et al., *Disorder in the Court*; Report of the Association of the Bar of the City of New York Special Committee on Courtroom Conduct (1973).

⁸ Global Counterterrorism Forum (GCTF), 'The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector' 7, available at <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rabat-Memorandum-ENG.pdf>.

to handle, store, transport and manage such materials by ensuring adequate staff have security clearances. A security expert should be trained and on hand to handle such materials. Likewise, judges, clerks and other staff may require adequate clearance.⁹

Where the possibility of classified information being discovered or introduced in the court is high, lawyers may also require adequate clearance. A roster of defense lawyers with proper clearance should be available to the accused.

A case record can include classified information if such information is revealed. Classified information security officers should manage the parts of a record that include classified information as well as handle the entering of classified documents onto the official record. Classified information security officers should interrupt and stop any proceeding where classified information may be divulged in a public proceeding or venue where unauthorized people will be privy to classified information.

In addition, the public record should not contain classified information. Documents that are unclassified, but contain some classified information can be entered into the public record after proper vetting and then redaction by the intelligence community. When classified information is being divulged, discussed, or is any part of a proceeding the court reporter should have the proper clearance and be using a properly cleared and secured recording device.

Complex cases with multiple defendants raise unique challenges and scheduling can be complex. Active judicial management in these cases is imperative. As an overarching strategy, the suspected planners and perpetrators of terrorist attacks who are subject to the harshest sentences (for instance, the masterminds behind an attack) should be tried first, followed by defendants who are accomplices subject to lesser sentences. This strategy can help reduce courthouse security concerns, improve witness participation and protection and limit the number of trials. Where the most culpable offenders are tried first, plea bargaining or sentence accommodation for those who are less culpable can be explored. This could be termed the “top down approach.”

Section 2. Managing the Media and the Public

Key Principles

The role of the media in forming public opinion on terrorism should not be underestimated. Media coverage can delegitimize and isolate terrorists and communicate reassurance to the public. Trials involving the prosecution of terrorism offences are generally high profile by their nature, inviting scrutiny from the general public and the media. These cases not only bring with them increased national and international scrutiny, but also present unique challenges to those tasked with adjudicating them.

A trial for a terrorism-related offence must strike the delicate balance between the right of the accused to a fair trial, the right of the public to be informed of the proceedings and the right of victims and witnesses to maintain privacy. Additionally, the media may have a right to cover the proceedings and in this situation, the court may have to take special steps to protect the safety and privacy of victims and witnesses.

I. Public v. Private Trial

A. Public Trial

The Universal Declaration of Human Rights contains the right to a fair and public hearing by an independent and impartial tribunal (Article 10) and the right of the accused to be presumed innocent until proved guilty according to law in a public trial at which the accused has had all the guarantees necessary for his or her defense (Article 11).¹⁰

Similarly, Article 14, Paragraph 1 of the International Covenant on Civil and Political Rights states the following:

The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in

¹⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR)

⁹ GCTF, The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses 2, available at https://www.thegctf.org/documents/10162/140201/14Sept19_GCTF+The+Hague+Memorandum.pdf (Hague Memorandum)

a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.¹¹

The balance between the much-needed protection of the rights of the accused—including the presumption of innocence, equality of arms and access to good quality defense services—and the rights of victims must be given special attention in order to ensure a fair trial. It is also necessary to prevent secondary victimization, which 'occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victims.'¹² Survivors of terrorist acts and family members suffer losses and become more vulnerable as a consequence of the criminal act. Therefore, the state's institutional framework, including its criminal justice system and its administrative organs tasked with assisting victims, must protect those victims from unnecessary additional burdens.

B. Private Trial

Upon the formal request of either party, the court may also adopt special measures to ameliorate any specific threat or general threat that is identified, if it supports a secure trial environment and does not unduly infringe on the fair trial rights of the parties. One of these measures may include imposing a ban on the publication of the name and address of the witness/victim in connection with the proceedings or in the alternative closing the courtrooms to the public for portions of the hearings or trial proceedings.

In Canada, for example, while the general rule is that all criminal proceedings shall be held in open court, the Criminal Code sets out several exceptions to facilitate the victims' or witnesses' participation and to protect privacy. Complainants of sexual offences and young victims and witnesses are the primary beneficiaries of these special provisions (e.g., Section 486.4 provides a mandatory ban on publishing the identity of a victim or witness).

C. International Good Practices

The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offences contains Good Practice 8: Develop and Articulate Media Guidelines for the Court and Parties.¹³ The good practice is copied here for ease of reference.

¹¹ ICCPR (n 1) art 14

¹² U.N. Office on Drugs and Crime 'Handbook on Justice for Victims' (1999) 9, available at https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf.

¹³ Hague Memorandum (n 9)

The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offences¹⁴, Good Practice 8

Trials involving the prosecution of terrorism offences are generally high profile by their nature, inviting scrutiny from the general public and the media. As a general rule, timely access to accurate information of court proceedings increases transparency and public confidence in the fairness of the justice system. The judiciary should develop rules and procedures for media coverage of public judicial proceedings, with good practices including the following:

- Providing the trial judge with latitude to control the conduct of the proceedings to: (i) maintain decorum and prevent distractions; (ii) guarantee the safety of any court official, party, witness, or juror (where applicable); and (iii) ensure the fair and impartial administration of justice in the pending case.
- Where the media is seeking special or additional coverage of the case, the court should establish a consistent policy that requests by representatives of the media for such coverage are made in writing to the trial judge, prior to the scheduled trial date or specific trial event. Written requests for specific or enhanced coverage may be supported by affidavits as appropriate. Notification that the media has requested such coverage should be provided by the court to the lawyers of record in the case, with the parties provided an opportunity to object.
- Before denying, limiting, suspending, or terminating media coverage, the trial judge may hold a hearing, if such a hearing will not delay or disrupt the judicial proceeding or receive affidavits to consider the positions of the parties.
- Any finding that media coverage should be denied, limited, suspended, or terminated should be supported by a finding of the court that outlines the underlying justifications for its actions.
- The court may prohibit the use of any audio pickup, recording, broadcast, or video close up of conferences, which occur in a court facility, between lawyers and their clients, between co-counsel of a client, and between counsel and the presiding judge held at the trial.
- When more than one request for media coverage is made and the trial judge has granted permission, the court may request that the media select a representative to serve as a liaison and be responsible for

¹⁴ Ibid.

arranging “pooling” among the media if such is required by limitations on equipment and personnel as a result of courtroom space limitations or as directed by the court.

- Where non-print media is covering a trial, the judge may impose additional guidelines that limit the use of photographic and audio equipment to that which does not produce distracting sound or light and may limit or prohibit the use of moving lights or flash attachments.

Stages of Terrorism and Related Cases

Section 1. Investigations

Key Principles

Investigations have become increasingly transnational, complex and more likely to rely upon covert, or so-called 'special investigative', techniques. It is incumbent upon judges to be familiar with the special investigative techniques employed by law enforcement to better assess the admissibility of evidence into court and subsequently, to weigh its reliability and probative value.

Terrorist organizations have increasingly gone online to promote, recruit and mobilize individuals to take up their causes. Knowledge of modern communication and information technologies is also of increasing importance to judges, including the international dimension of data and transfer processes and frameworks of cooperation.

I. Judicial Role in Investigations

The majority of the SAARC Member States draw on the adversarial system in their legal traditions wherein 'investigations are conducted by the police more or less independently of prosecutors until the case and the charged suspect, is handed over for prosecution in the courts'. In this approach, the judge has very little involvement in the investigation stage and does not actively participate in the collection of evidence and the examination of witnesses. The prosecution, assisted by law enforcement, is responsible for collecting the evidence and examining witnesses. Unless national law requires a warrant or court order for specific investigations, the judge is generally only involved in the court proceedings phase. The judge must therefore heavily rely on the quality of the investigation that was undertaken to assess the authenticity and admissibility of the evidence being submitted.

The judge also plays a fundamental gatekeeping role in ensuring that the use of electronic evidence and other special investigative techniques comply with human rights and is authorized by law. Law enforcement may use sophisticated investigative techniques such as intercepting phone lines and installing tracking devices to monitor a suspect and gather evidence. A warrant is typically required where surveillance technologies are used in situations where an individual being placed under surveillance may have a reasonable expectation of privacy. Proper authorization therefore ensures that the evidence was obtained lawfully, which in turn may have

implications for its admissibility.¹

While experts may be able to assist the judge in evaluating the electronic evidence, judges should also have a basic understanding of these technologies and special investigative techniques employed by law enforcement. This allows them to better assess the admissibility of evidence into court and subsequently, to weigh its reliability and probative (i.e., evidentiary) value. Terrorists increasingly make use of modern communication and information technology to promote, recruit and mobilize individuals to take up their cause.

Moreover, the increasingly international dimension of data and transfer processes require judges to be familiar with new frameworks of cooperation. Important content is hosted by internet services and social media platforms such as Google and Facebook, for instance, provided by companies based abroad and requiring close cooperation among law enforcement and criminal justice actors. While there is no international convention that governs the use of the internet for terrorist activities, the Council of Europe's Convention on Cybercrime provides a legal framework for the development of cybercrime legislation and the development of procedural instruments to enable law enforcement agencies to carry out investigations and cooperate. The Convention is open for accession to all countries, including SAARC Member States.

■ **By Contrast: The Important Role of the Judge in Civil Law Systems**

Jurisdictions with civil law traditions are referred to as having an inquisitorial legal system whereas common law jurisdictions are said to have an adversarial legal system, though some jurisdictions have a hybrid system. The way in which responsibilities related to investigation are divided between law enforcement officials, prosecutors and judges will depend on whether the system is inquisitorial or adversarial. In certain civil law jurisdictions, the responsibility for an investigation may be 'given to a prosecutor or judicial officer, such as a *juge d'instruction* or 'investigating judge.'² In such cases, the prosecutor or investigating judge oversees the investigation and instructs investigators, or special law enforcement agencies designated as 'judicial police', on how to carry out the investigation.³ In addition, in inquisitorial systems, there is an examination phase where the judge plays an active role in the collection of evidence and the examination of witnesses. The investigating judge thus plays an important role in the investigative phase in civil law jurisdictions.

1 UNODC, 'Current practices in electronic surveillance in the investigation of serious and organized crime' (2009) 13.

2 United Nations Office on Drugs and Crime, Criminal Justice Assessment Toolkit, Policing, Crime Investigation 1 (2006), available at https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/CJAT_Toolkit_full_version.pdf.

3 Ibid.

A. Human Rights Considerations for the Use of Special Investigative Techniques

The tools available to terrorists have changed since the 1990s, with ensuing practical impact upon the way that investigations are conducted. The threat now for many States is of a network or networks of loosely affiliated terrorist groups stretching to many parts of the world and having the aim, intent and capability to attack without warning and to inflict mass casualties upon the public at large. Terrorism investigations, as a result, have become increasingly transnational, complex and more likely to rely upon covert, or so-called 'special investigative techniques'. As a result, the use and protection of intelligence has become a constant focus for investigators and prosecutors alike.

The use of covert police investigative techniques can raise serious human rights considerations such as the rights to privacy and non-discrimination, among others. Generally, their use can be justified 'only on reasonable grounds based on the principles of necessity and proportionality.'⁴ Such an approach is consistent with human rights law generally, which calls for restrictions on rights to be consistent with these principles. To the extent an investigative technique may run afoul of human rights obligations, it must be subject to monitoring and oversight by persons or entities separate from the law enforcement agency implementing the technique.⁵ Notably, through their application of exclusionary rules of evidence,⁶ judges play an important oversight role in ensuring police accountability for improper use of investigative techniques.⁷ Moreover, judicial officials must also consider issues related to the admissibility of evidence collected in other States through methods that are not necessarily acceptable in their own State and make determinations on the use of evidence obtained by officials in another State in violation of the law of their own State or international law.⁸

In determining if a particular investigative technique is justified in a given circumstance, the following criteria may be used. These criteria should be carefully applied on a case by case basis.

4 Handbook on Criminal Justice Responses to Terrorism, *supra* note 85, at 50. U.N. Office on Drugs and Crime 'Handbook on Criminal Justice Responses to Terrorism' (2007) 50, available at https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf.

5 Ibid.

6 See section 4.F(1) on The Exclusionary Rule

7 Yvonne Marie Daly, 'Judicial oversight of policing: investigations, evidence and the exclusionary rule', *Crim Law Soc Change* (2011) 55, p. 199.

8 Ibid.

1. Necessity

- a. Is the measure necessary?
- b. Are there other less invasive or harmful measures that could achieve the same objective?

2. Effectiveness

- a. Is there proof that the measure can achieve the ends for which it has been conceived?
- b. If not, is there a reasonable and objective basis to believe that the measure can achieve the aim for which it has been conceived?

3. Harm

- a. To what extent will the measure affect the rights of individuals?

4. Secondary Effect

- a. Is the measure likely to produce undesirable effects?
 - i. Is the measure likely to affect the capacity of the police to work effectively with a particular community?
 - ii. Is the measure likely to affect the willingness of the community to cooperate with the police?
- b. Is the measure likely to contribute to the stigmatization of a given group?⁹

These criteria should also be considered when evaluating the need for the use of special surveillance technology.

Electronic surveillance and other covert investigative techniques have been proven to be effective tools for combatting terrorism, particularly given the clandestine nature of sophisticated terrorist organizations.¹⁰ The effectiveness of these techniques has been greatly enhanced by technological advances such as 'cross-border surveillance using satellites and the interception of telephone conversations through satellite connections make cross-border investigation possible without the physical presence of a foreign investigating officer.'¹¹ However, while improving technology has bolstered the investigative capabilities of law enforcement, they have also raised new issues regarding the legitimacy of these methods and the satisfaction of human rights obligations including the freedom of speech, privacy and the protection of personal data.¹² Judges play a critical role in balancing the necessity for effective investigative

⁹ Ibid.

¹⁰ Ibid at 54.

¹¹ Ibid.

¹² Ibid.

instruments and the protection of fundamental rights. The expanding use of electronic surveillance techniques has also 'raised questions about how the data collected are to be protected, stored and, when necessary, shared with other agencies.'¹³ Information-gathering activities, particularly forms of electronic surveillance such as wiretapping, tracking devices and the monitoring of the internet and other electronic communications, 'must be regulated by law, monitored by independent agencies and subject to judicial review' to ensure that such activities do not violate relevant human rights obligations.¹⁴

Laws authorizing intelligence gathering techniques that may interfere with personal privacy 'must specify in detail the precise circumstances in which the interference is to be permitted and must not be implemented in a discriminatory manner.'¹⁵ Such laws should also clearly delineate procedures for use of intelligence gathering techniques, including, for example, requirements to obtain a judicial warrant and guidelines for the treatment of personal information gathered on suspects in the course of an investigation. Where a State's rules are not followed by its law enforcement agencies, any evidence collected from intelligence gathering activities may be inadmissible in court.

B. Profiling and Group Targeting

More recently, certain communities or religious groups have been associated with acts of terrorism, which may lead the police to focus on those communities or religious groups while conducting investigations designed to prevent acts of terrorism from taking place.¹⁶ However, the use of broad profiling on the basis of race or religious affiliation is not a justified method for preventing terrorism. The Committee on the Elimination of Racial Discrimination has called on States to ensure that counterterrorism measures do not discriminate, profile or stereotype, whether in purpose or effect, on any grounds, including, but not limited to, race, color, national and ethnic origin.¹⁷

It is also important to ensure that profiling techniques do not

¹³ Ibid.

¹⁴ For example, Article 17 of the International Covenant on Civil and Political Rights prohibits States parties from arbitrarily interfering with the privacy of those within the State's jurisdiction, and it requires States to protect those persons by law against arbitrary or unlawful interference with their privacy. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁵ Daly n 9

¹⁶ Ibid.

¹⁷ UNGA Report of the Committee on the Elimination of Racial Discrimination (October 2004) UN Doc A/59/18

disproportionately and arbitrarily interfere with the right to privacy, which is guaranteed by Article 17 of the ICCPR. Notably, data mining programs that include broad characteristics such as religion and nationality in order to create terrorist profiles may constitute disproportionate and arbitrary interferences with the right to privacy.¹⁸ In addition, 'profiling based on stereotypical assumptions may bolster sentiments of hostility and xenophobia in the general public towards persons of certain ethnic or religious backgrounds.'¹⁹

C. Incentives for Terrorist Suspects and Others to Cooperate in Counterterrorism Investigations and Prosecutions

Effective counterterrorism investigations and prosecutions often rely on the cooperation of terrorist suspects, witnesses and informants. Testimonial evidence of this nature is often critical to the outcome of a trial and, therefore, there are many protections and limitations set forth with respect to its collection and use. The testimony of co-defendants and accomplices who are willing to cooperate and provide evidence against former associates is an important tool for the prevention of terrorism. This tool is actively promoted by various international agreements and conventions.²⁰ States may also have specific laws that authorize the use of 'accomplice testimony' in criminal investigations and dictate how and when evidence gathered from such testimony can be used against accused individuals.²¹

To secure a cooperator, there must be incentives for testimony, as well as protections for the individuals who agree to testify. These efforts are critical because the establishment of adequate incentive programs such as witness protection programs may encourage terrorist suspects and others to cooperate with authorities by reducing their fear of reprisal from members of the terrorist organization.²² As stated in the Rabat Memorandum, '[w]ithout adequate incentives, those with knowledge of or involvement in terrorist activity may have little reason to cooperate with law enforcement authorities, especially given the fear of retribution by members of a terrorist organization.'²³ Due to the importance of accomplice testimony, other measures, such as guilty plea negotiations and offers of immunity or leniency, are used to elicit cooperation with terrorist suspects in addition to witness protection.²⁴

¹⁸ Handbook on Criminal Justice Responses to Terrorism n 6.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² *Id.* at 5.

²³ Global Counterterrorism Forum (GCTF), 'The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector' 7, <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rabat-Memorandum-ENG.pdf> (Rabat Memorandum)

²⁴ Handbook on Criminal Justice Responses to Terrorism n 6

Though incentives and witness protection are critical to successfully investigating crimes, care should be taken to ensure that the established incentive measures do not lead individuals to provide false testimony or evidence.²⁵ Guilty plea negotiations and offers of immunity or leniency are often used to incentivize co-defendants and accomplices to cooperate with law enforcement in criminal investigations.²⁶ Where an accomplice's cooperation may put them in danger of retribution by former associates, witness protection measures may also be required.²⁷ In order to clearly define the obligations of potential informants and law enforcement, parties often enter into formal written agreements. Because 'accomplice testimony' plays such a crucial role in criminal investigations, including investigations involving terrorism, States should evaluate whether or not it would be appropriate to implement a tighter legal framework, in the form of guidelines, statutory regulations and increased independent oversight, for the management of potential informants.²⁸ An effective first step that agencies can take to provide an opportunity for dialogue with potential witnesses is to set up a 'confidential telephone line that people can call anonymously [...] and provide an opportunity to persuade them to identify themselves.'²⁹

In making special provisions for the protection of witnesses, judges should also be careful in allowing the use of anonymous witnesses which may violate a defendant's right to a fair trial. Judges should also authenticate the validity of confessions and take steps to ensure that they were not obtained under duress. Police and correctional officers can also engage in various forms of misconduct, varying from mistreatment of suspects under custody, the inappropriate use of informants, compelling false testimony and accepting bribes, to list a few. These should be subject to....

D. Obtaining Complete Police Investigations

In the event that law enforcement is unable to obtain sufficient evidence against a suspect, or if the evidence obtained was collected unlawfully, a prosecution against such suspect may be dismissed and the suspect set free. As discussed above, the judiciary plays a role in establishing procedures for investigators and prosecutors to follow that are designed

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid See Section IV on Witness Protection.

²⁸ Ibid.

²⁹ Organization for Security and Co-operation in Europe, 'Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers' <https://www.osce.org/odihr/108930?download=true>

to ensure the accountability of law enforcement officials as well as the production of admissible evidence of criminal plans, preparations, actions and involvement that can be used as the basis for a successful prosecution.

A frequent problem can be the failure of police agencies to make complete criminal investigations of alleged crimes. The challenges associated with obtaining a complete police investigation are illuminated with a discussion of First Incident Reports ('FIR'), which are used in many States, including a number of SAARC Member States. FIRs are written documents prepared by police organizations when information is received about the commission of a cognizable criminal offence. This usually takes the form of a complaint lodged with the police by the victim of such a crime or someone on his or her behalf. However, anyone can make such a report either orally or in writing to law enforcement. Regardless of whether the information being given to the police is derived from first-hand knowledge or from hearsay, the individual who is providing the information must take responsibility for the authenticity and veracity of the information that he or she is giving.³⁰

The FIR can be used for various purposes during the investigation or during judicial proceedings: to corroborate statements, contradict evidence, refresh an informer's memory, prove informer's conduct and establish the identity of the accused and witnesses.³¹ Because the FIR forms the basis of the entire investigation to follow, the strength of a criminal case depends in large part on a consistent and credible FIR. Any lacking elements or inconsistency in the description of an FIR may impact a subsequent court proceeding. In addition, any alteration or deviation in subsequent legal proceedings from the description of FIR weakens the prosecution's case, which may ultimately lead to early dismissal of the case or acquittal of the accused. Finally, any delay in lodging a FIR, without any justifiable cause for such delay, can also undermine the credibility of the case against the accused.

Since FIRs have such an important evidentiary value, the recording officer must ensure that, to the extent possible, he or she captures all the essential information in the report. These essential elements include: the information conveyed, the capacity in which the information is conveyed, who committed the crime and against whom, the time and location where the crime was committed, the motive for the crime, the way in which the crime was committed, what was taken away from the crime scene, what traces were left by the accused and the names of any witnesses.³²

³⁰ FixIndia.org, 'Frequently asked questions about filing an FIR in India' <http://fixindia.org/fir.php>

³¹ Ibid.

³² Ibid.

Additional Resources

The Universal Declaration of Human Rights (1948)

Standard Minimum Rules for the Treatment of Prisoners (1957)

The International Covenant on Civil and Political Rights (1966)

United Nations Code of Conduct for Law Enforcement Officials (1979)

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)

International Association of Chiefs of Police: Model Policy on Standards of Conduct (1998)

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

United Nations—Committee on the Elimination of Racial Discrimination: Statement on Racial Discrimination and Measures to Combat Terrorism, 11/01/2002

United Nations Office on Drugs and Crime: Policing—Crime Investigation: Criminal Justice Assessment Tool Kit (2006)

United Nations Criminal Justice Standards for United Nations Police (2009)

Commonwealth Human Rights Initiative: International Laws and Standards that Affect Policing

United Nations Office on Drugs and Crime: Handbook on Criminal Justice Responses to Terrorism (2009)

Global Counterterrorism Forum (GCTF): The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector (2012)

Section 2. Arrest, Detention and the Rights of the Accused

Key Principles

Under international law, individuals suspected of terrorism offenses are afforded the same rights as any other offender. However, given the nature of such crimes, the likelihood of bias, stigmatization and ill-treatment are very high. It falls upon the judge to ensure that the accused's rights are upheld, that they are afforded a fair trial that complies with due process. Arrest and detention are stages during which the accused rights are particularly vulnerable. This section will lay out these core rights, including those that are non-derogable as well as those which have exceptions under exceptional circumstances.

I. Assessing Lawfulness of Arrest and Detention

At the detainee's first appearance, the judge should determine if the arrest was lawful. A lawful arrest should be: carried out in accordance with the formal and substantive rules of domestic and international law, free from arbitrariness (that is, the application of the law should be appropriate, just, foreseeable and should comply with due process) and reasonable and necessary in all the circumstances.³³

At the first appearance of the detainee, the judge should require the prosecutor/investigator to provide the following information (at a minimum) in order to determine whether the arrest was lawful: (i) written charges to enable the judge to review the legality of the arrest, (ii) factual information regarding the circumstances of the arrest, including factual grounds for the arrest and the time of the arrest and (iii) precise information regarding custody of the detainee pending their first appearance, including place of custody and length of time in custody. If the arrest is deemed to be lawful, then the judge will need to rule on whether the detainee should be detained or released and what conditions should be attached to the release pending trial.

In order to be lawful, a detention must satisfy the same three conditions as those required for an arrest. The detention should be: in accordance with the formal and substantive rules of domestic and international

law, free from arbitrariness (that is, the application of the law should be appropriate, just, foreseeable and should comply with due process) and reasonable and necessary in all the circumstances.³⁴

A. Arrest and Detention Must Not Be Arbitrary

Article 9(1) of the ICCPR provides that '[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' In order to comply with this provision, a lawful arrest or detention must not only be in accordance with a fixed law, but it must also not be arbitrary.³⁵ With regard to the meaning of the words 'arbitrary arrest' in article 9(1), the Human Rights Committee has explained that "arbitrariness" is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.³⁶ The ECOSOC Working Group on Arbitrary Detention has also noted that 'arbitrariness must be assessed in the light of all the relevant circumstances of a given detention.'³⁷ The remand in custody must be reasonable and necessary³⁸ in all the circumstances.³⁹

The prohibition of arbitrariness means that deprivations of liberty must not be disproportionate, unjust, unpredictable or discriminatory.⁴⁰ States must ensure the enjoyment of rights and fundamental freedoms without distinction on such grounds as race, colour, sex, language, religion and political or other opinion.⁴¹ States must observe non-discrimination principles even when they have derogated from certain provisions on the basis of a public emergency.⁴²

³⁴ Ibid.

³⁵ United Nations Economic and Social Council, 'Report of the Working Group on Arbitrary Detention' (2005) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/167/19/PDF/G0416719.pdf?OpenElement> (Report of the Working Group 2005)

³⁶ United Nations Office of the High Commissioner for Human Rights n 35

³⁷ Report of the Working Group 2005 n 37

³⁸ For a more detailed discussion of reasonableness and necessity, see the section on Reasonableness and Necessity in Section 2.II.A Pre-Trial Detention

³⁹ Communication No. 305/1988, Hugo van Alphen v. The Netherlands, in U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8

⁴⁰ Report of the Working Group 2005 n 37

⁴¹ Ibid.

⁴² ICCPR n 16

³³ United Nations Office of the High Commissioner for Human Rights, 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' (2003) <http://www.ohchr.org/Documents/Publications/training9Titleen.pdf>

B. International Law Provisions Specific to the Use of Force in Arrest Situations

The judiciary has an important role to play in safeguarding the rights of the arrested person and holding law enforcement officials accountable for abusive use of force or violations of human rights. The Basic Principles on the Use of Force and Firearms by Law Enforcement, adopted at Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, provide that 'law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.⁴³ If the use of force and firearms cannot be avoided, law enforcement officials must nonetheless:

- Act only in proportion to the gravity of the offence and in accordance with lawful and legitimate objectives;
- Minimize damage and injury;
- Respect and protect human life and dignity;
- Ensure that injured or affected persons receive assistance and medical aid as soon as possible; and
- Ensure that the relatives or friends of the injured or affected persons are notified as soon as possible.⁴⁴

It follows from these Principles that law enforcement officials may only use force 'when it is strictly necessary and to the extent required for the performance of their duty' – the highest consideration of which is the protection of the right to life, liberty and security of the person and the preservation of public safety and social peace.⁴⁵ If less extreme means are insufficient to achieve these objectives, law enforcement officials may use firearms against persons in self-defense or in defense of others against the imminent threat of death or serious injury.⁴⁶

As agents of the state, law enforcement officials must also comply with international human rights law.⁴⁷ Notably, as all human beings are born free and equal in dignity and rights,⁴⁸ they are equal before the law and must

be afforded the same level of protection. Law enforcement officials may not discriminate on any basis, including, but not limited to, race, gender, religion, language, colour, political opinion and national origin.⁴⁹

C. The Detainee's Rights

International law contains a number of provisions that apply to all arrest and detention situations, applicable in terrorism and other cases. This section will provide an overview of some of the most important rights to which arrestees are entitled. The judiciary has an important role to play in safeguarding the arrestee's rights and holding law enforcement officials accountable for human rights violations.

1. Right to be Promptly Informed of the Charges

Pursuant to Article 9(2) of the ICCPR, '[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.'⁵⁰ In order to comply with this provision, the arresting authority must inform the arrestee of the reasons for his or her deprivation of liberty in a language that he or she understands and in sufficient detail to enable the arrestee to challenge the lawfulness of his or her detention.⁵¹

The ability of an arrestee to exercise his or her right to challenge the lawfulness of the arrest is also dependent upon the requirement that the arrestee be informed *promptly*.⁵² The Human Rights Committee has concluded that Article 9(2) of the Covenant had been violated in a case where the complainant was not informed upon arrest of the charges against him or her and was only informed seven days after he or he had been detained. The Human Rights Committee has also concluded it is not sufficient under Article 9(2) simply to inform the person arrested and detained that the deprivation of liberty has been carried out on the orders of the President of the country concerned.

2. Right to be Informed of One's Rights

Principle 13 of the Body of Principles further provides that '[a]ny person shall, at the moment of arrest and at the commencement of detention

43 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>.

44 Ibid.

45 Ibid.

46 Ibid.

47 United Nations Office of the High Commissioner for Human Rights, 'International Human Rights Standards for Law Enforcement' <http://www.ohchr.org/Documents/Publications/training5Add1en.pdf> (International Human Rights Standards for Law Enforcement)

48 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)

49 International Human Rights Standards for Law Enforcement n 49

50 ICCPR n 16, art. 9(2).

51 United Nations Office of the High Commissioner for Human Rights n 35
See Section 2.1.C.10 on the Right to Challenge the Lawfulness of Detention, including information on habeas corpus

52 United Nations Office of the High Commissioner for Human Rights n 35

or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.⁵³ Such rights include the right to be treated humanely, to consult with legal counsel, to consult the diplomatic mission of the State of which the imprisoned person is a national, to notify family members and to challenge the lawfulness of the detention.⁵⁴

3. Right to Interpretation

In order to comply with the requirement to inform the arrestee of his or her rights, States must also resort to interpreters when necessary. Principle 14 of the Body of Principles provides that 'a person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands' information regarding the charges against him and the records of his arrest.⁵⁵

4. Right to Receive Assistance from Legal Counsel

A detained person should be informed of his or her right to receive the assistance of a legal counsel promptly after the arrest.⁵⁶ If unrepresented by a legal counsel, the detainee has the right to employ legal counsel or to request that one be assigned to him or her. The detainee should also be able to consult counsel for the purpose of making this decision. If a detainee does not have the means to pay for legal counsel, he or she must have access to legal aid.⁵⁷

The detainee also has the right to communicate and consult with his or her legal counsel.⁵⁸ The detainee must be given adequate time and appropriate facilities where he or she can consult legal counsel in full confidentiality.⁵⁹ This right must not be limited or restricted in anyway and must be given without delay, except in exceptional circumstances—that is, 'when it is considered indispensable by a judicial or other authority in order to maintain security and good order.'⁶⁰ This right is particularly important because it will enable the arrestee to effectively exercise his or her other rights. The judge has a particular role to play in safeguarding the accused's right to a fair trial by ensuring that the accused has adequate legal

53 UNGA Res. 43/173 (9 December 1988) A/RES/43/173 (Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment)

54 Ibid Principles 1, 17, 16, and 32.

55 Ibid, Principle 14.

56 Ibid, Principle 17(1).

57 Ibid, Principle 17(2).

58 Ibid, Principle 18(1).

59 Ibid, Principle 18(2) and (3).

60 Ibid, Principle 18.

representation.⁶¹

5. Right to Consular Assistance

Promptly after arrest, the detainee should be informed of his or her right to consular assistance and should be permitted to communicate without delay with the nearest appropriate representative of the State of which he or she is a national or resident.⁶² The detainee also has the right to be visited by a representative of that State.⁶³

6. Right to the Presumption of Innocence

Article 14(2) of the ICCPR provides that an individual has the right to be presumed innocent and to be treated as such until he or she is proven guilty.⁶⁴ If the arrest and the charges are supported by reasonable cause, the judge should determine whether pre-trial detention is appropriate or whether the individual should be released on bail with appropriate conditions.⁶⁵

7. Right against Self-Incrimination

Pursuant to Article 14(3)(g) of the ICCPR, an arrestee has the right 'not to be compelled to testify against himself or to confess guilt.'⁶⁶ In other words, arrestees have the right to remain silent and to not self-incriminate. The arrestee, in consultation with legal counsel or by himself, has 'the ensuing right to make a self-determined choice about whether and to what extent to speak to the authorities.'⁶⁷

8. Right to be Treated Humanely

Article 10(1) of the ICCPR provides that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'⁶⁸ The right to be treated with humanity encompasses

61 GCTF, The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses, https://www.thegctf.org/documents/10162/140201/14Sept19_GCTF+The+Hague+Memorandum.pdf (Hague Memorandum)

62 Art. 36 of the Vienna Convention on Consular Relations, see also ICJ decisions in *La Grand, Avena*, and also ICJ Order in the *Jadhav* case.

63 Ibid, Principle 16(2).

64 UDHR, Article 11(1). See also Principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

65 See Section 2.II.A on Pre-Trial Detention

66 ICCPR n 16, Article 14(3)(g)

67 Petra Viebig, 'Illicitly Obtained Evidence at the International Criminal Court', *International Criminal Justice Series 4* (2016) 151.

68 ICCPR n 16, Article 10(1)

the right to not be subjected to torture or ill-treatment, and the right not to 'be subjected to any hardship or constrain other than that resulting from the deprivation of liberty'.⁶⁹ The legal prohibition against torture is absolute and non-derogable.⁷⁰ The Convention Against Torture defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession' (art. 1). It may be 'inflicted by or at the instigation of or acquiescence of a public official or other person acting in an official capacity.'

Judges should authenticate the validity of confessions and take steps to ensure that they were not obtained under duress. When dealing with a detainee who has suffered injuries during his or her detention, the court should take several steps. These include: (i) ensure the detainee and any witnesses are protected against any ill-treatment or intimidation as a result of his or her complaint or any evidence given, (ii) order a medical examination and ensure the detainee has access to a doctor, (iii) require disclosure of the detention records from the police or investigative authority who detained the suspect and (iv) order an investigation into the detainee's injuries and, if necessary, instigate criminal proceedings against those responsible.

9. Right to Notification, Communication and Visitation

Promptly after arrest, the detainee should be informed of his or her right to notify family members of the arrest or detention. However, the competent authority is permitted to delay such notification 'for a reasonable period where exceptional needs of the investigation so require'.⁷¹ At the first appearance, the judge should consider whether withholding such notification is reasonable. If withholding notification is not reasonable, the judge should ensure the detainee is able to (or should require the competent authority to) notify his or her family of the detention or imprisonment and of the location where he or she is in custody.

The detainee also has the right to communicate with his family during detention. While the right to notification should be given immediately unless exceptional circumstances require otherwise, the right to communication may be slightly delayed, though it should not be denied for more than a matter of days.⁷² Finally, subject to reasonable conditions

69 Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), at para 3.

70 ICCPR n 16, Art.7; See also the Convention Against Torture.

71 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment n 57, Principle 16(4).

72 Ibid, Principle 15.

and restrictions provided for by law, a detainee has the right to be visited by family members.⁷³

10. Right to Challenge the Lawfulness of Detention

Any individual who is deprived of liberty by arrest or detention is entitled to commence a proceeding before a court requesting that the court decide, without delay, the lawfulness of the detention and whether to order the release of the individual if the detention is unlawful. This is commonly known as the right to '*habeas corpus*' or '*amparo proceedings*'.⁷⁴ Some of the core international human rights instruments that set out this right include the UDHR, the ICCPR and the International Convention for the Protection of All Persons from Enforced Disappearance.⁷⁵

The right to challenge the lawfulness of detention before a court is 'a self-standing human right, the absence of which constitutes a human rights violation per se'.⁷⁶ The safeguarding of this right is especially important given the fact that 'persons deprived of their liberty not only have difficulties in verifying the lawfulness of their detention, but also find themselves subjected to a lack of an effective control of their other rights'.⁷⁷ Persons deprived of their liberty are in precarious situations and are often deprived of access to substantive, procedural and institutional guarantees.⁷⁸ The deprivation of these guarantees has been noted with serious concern in the context of counterterrorism measures by the Working Group on Arbitrary Detention.⁷⁹ The Working Group has thus set out several principles that should be followed to ensure that persons detained under charges of terrorist activities will enjoy their effective right to challenge the lawfulness of their detention. These principles include the following:

- Terrorist acts must be established as criminal offences under domestic

73 Ibid Principle 19.

74 See Section 2.I.C.10 on the Right to Challenge the Lawfulness of Detention, including information on habeas corpus.

75 Specifically, see articles 8 and 9 of the UDHR, article 9(4) of the ICCPR and article 17(2)(f) of the International Convention for the Protection of All Persons from Enforced Disappearance. See also Principles 32 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

76 United Nations Economic and Social Council, 'Report of the Working Group on Arbitrary Detention' (2014) A/HRC/27/47, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/167/19/PDF/G0416719.pdf?OpenElement> (Report of the Working Group 2014) para 13

77 United Nations Economic and Social Council, 'Report of the Working Group on Arbitrary Detention' (2009) A/HRC/10/21, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/167/19/PDF/G0416719.pdf?OpenElement> (Report of the Working Group 2009) para 47

78 Report of the Working Group 2009, para 46

79 Report of the Working Group 2014, para 30

law and must be accompanied by appropriate sanctions;

- The administrative detention of persons suspected of terrorist activities is inadmissible and such detentions must be accompanied by concrete charges;
- Persons detained under terrorist charges must be immediately informed of the charges against them and of their right to challenge their detention and must be brought before a competent judicial authority within as reasonable time period;
- Persons accused of having engaged in terrorist activities must have the right to enjoy the guarantees of a fair trial;
- Persons convicted of having engaged in terrorist activities must have the right to appeal their sentences.⁸⁰

It must also be noted that, whether or not the detainee chooses to exercise the right to challenge the lawfulness of the detention upon his or her detention, this right does not cease to exist. Depending on the circumstances, this right may be asserted at various points from the time of the arrest until the release. A detention that is lawful at its inception may become unlawful if the circumstances that justify the detention have changed or if the individual has completed a sentence of imprisonment. Hence, while the right to challenge the lawfulness of detention arises as of the moment of the arrest, it may be asserted in the future if the circumstances of the detention have changed.⁸¹ The European Court of Human Rights has applied this principle and held that it was reasonable for a detainee to seek a second review of his detention one month after the first review.⁸²

A writ of habeas corpus is a petition brought by a detainee challenging the legality of his or her detention based on a legal or factual error. Article 9(4) of the ICCPR provides that 'anyone who is deprived of his liberty by arrest or detention shall be entitled to have a proceeding before a court, so that a court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'⁸³

Judges should ensure that the exercise of the right to habeas corpus is effective. In order to make this right more effective, the court should permit others to apply for the remedy of habeas corpus on the detainee's behalf (for example, family members or friends) and the court should

ensure that this right is not limited. The court should be open to reviewing the necessity of the detention of a suspect periodically or as the circumstances that justify the detention change.⁸⁴ It is also important to note that any 'court review of the lawfulness of detention under article 9, paragraph 4, [...] is not limited to mere compliance of the detention with domestic law' but must also assess compliance with international law.⁸⁵ Finally, since the objective of this procedural right is to provide for the release from the ongoing unlawful detention, the review must provide for the real possibility of release. In other words, the review must be, in its effect, real and not purely formal. It follows that the court must in fact be empowered to order the release.⁸⁶

D. Permissible derogations of International Law Obligations during a State of Emergency

Article 4(1) of the ICCPR provides that:

'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'⁸⁷

With regard to Article 4(1), the Human Rights Committee explains:

'Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.'⁸⁸

80 Report of the Working Group 2009, para 54

81 Report of the Working Group 2014, para 14. Also see Communication No. 1090/2002, *Rameka v. New Zealand*, para. 73.

82 *Toth v Austria*, App. No. 11894/85, Eur. Ct. H.R. 18 (1991), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57710#{'itemid':\['001-57710'\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57710#{'itemid':['001-57710']}).

83 ICCPR n 16, article 9(4)

84 See Section 2.1.C.10 on the Right to Challenge the Lawfulness of Detention.

85 *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997), para. 9.5., <http://hrlibrary.umn.edu/undocs/html/vws560.html>

86 Communication No. 1255/2004 et al., *Shams et al. v. Australia*, para. 73. http://www.bayefsky.com/pdf/australia_iccpr_t5_1255-56-59-60-66-68-70-88_2004.pdf

87 ICCPR n 16 art. 4(1).

88 United Nations Human Rights Committee, General Comment 29 article 4 (2001), UN Doc. CCPR/C/21/Rev.1/Add.11 <http://www.refworld.org/docid/453883fd1f.html>

Not all acts of terrorism instigate a state of emergency. If acts of terrorism perpetrated within a State amount to a public emergency that threatens the life of the State and the State officially proclaims a state of emergency to fight against terrorism, national measures derogating from some of the provisions of the ICCPR can therefore be taken provided they are of an exceptional and temporary nature, but only to the extent strictly required by the exigencies of the situation.

Article 4(2) of the ICCPR provides a list of the articles for which there can be no derogations:

- The right to life (Article 6)
- The prohibition against torture, cruel, inhuman or degrading treatment or of medical or scientific experimentation without consent (Article 7)
- The prohibition against slavery and servitude (Article 8)
- The prohibition against imprisonment based on the inability to fulfil a contractual obligation (Article 11)
- The respect of the principle of legality in criminal law (Article 15)
- The right to be recognized as a person before the law (Article 16)
- The right to freedom of thought, conscience and religion (Article 18)⁸⁹

According to the Human Rights Committee, the fact that some of the provisions of the Covenant have been listed in Article 4(2) does not mean that the other provisions are subject to derogations at will.⁹⁰ Article 4(1) explicitly includes the caveat that measures adopted as derogations in times of emergency cannot be inconsistent with state obligations under international law and cannot involve discrimination on the grounds of race, colour, sex, language, religion or social origin.

II. Ordering Bail or Remand

A. Detention

Article 9(3) of the ICCPR provides that it should not be a general rule that persons awaiting trial be detained in custody. 'In view of the principles of the presumption of innocence and of minimum intervention, pre-trial detention should only be used when considered absolutely necessary for specific purposes.'⁹¹ In other words, liberty is the rule and deprivation of

liberty must be the exception.⁹²

The court should carefully consider whether it is reasonable and necessary to detain the accused pending trial or whether release or other non-custodial orders might be more appropriate in the circumstances. At the outset, the judge should ask the prosecutor whether the government is moving for pre-trial detention and if so, whether the detainee is opposing detention. The prosecutor should state the grounds upon which detention is sought. Unless domestic law provides otherwise, the prosecutor will have the burden of demonstrating that detention is 'reasonable and necessary'.

If rules of domestic law provide that pre-trial detention is mandatory for the crime that has been charged, which may be the case in terrorism-related crimes, the detainee should be informed that the judge is not authorized to release him or her. Due process will also require that the detainee be informed of his or her right to a hearing on the proposed pre-trial detention and the standard for determining whether he or she will be granted pre-trial release. If necessary, a separate hearing date should be established for the detainee's petition to challenge detention. The court may also decide this at the first appearance provided that the detainee has been given access to legal counsel and has the opportunity to consult and prepare for the hearing.

In order to detain a suspect pre-trial, the judge should consider whether there is reasonable suspicion the detainee has committed an offence. This is a *sine qua non* condition for the validity of the continued detention. A reasonable suspicion means that, in light of all the circumstances, there are sufficient facts or information which would satisfy an objective observer that the accused may have committed the offence.⁹³ In the context of terrorism cases, the reasonableness of the suspicion may not always be judged according to the same standards as conventional criminal cases. However, 'the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard [relating to the reasonableness and necessity of deprivation of liberty] [...] is impaired'.⁹⁴ The reasonableness of pre-trial detention should be assessed in light of all the circumstances and should include consideration of the following factors:

Measures (the Tokyo Rules), p.15

<https://www.ncjrs.gov/pdffiles1/Digitization/147416NCJRS.pdf>

⁹² United Nations Office of the High Commissioner for Human Rights n 35

⁹³ Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, Series A No. 182, p. 16, para. 32.

⁹⁴ Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, Series A No. 182, pp. 16-17, para. 32.

⁸⁹ ICCPR n 16, art. 4(2).

⁹⁰ General Comment 29 n 93

⁹¹ UN doc. ST/CSDHA/22, Commentary on the United Nations Standard Minimum Rules for Non-custodial

1. The gravity of the offence;
2. The risk of absconding;
3. The risk of influencing witnesses and of collusion with the co-accused;
4. The detainee's behavior;
5. The conduct of the domestic authorities; and
6. The complexity of the investigation.⁹⁵

A detention will be considered 'necessary' if there are substantial reasons to believe that, if released, the accused would either:

1. Abscond,
2. Interfere with an ongoing investigation or the course of justice,
3. Commit a serious offence, or
4. Constitute a clear and serious threat to society and to public order which cannot be contained in any other manner.⁹⁶

The judge should consider the following factors when determining whether detention is necessary:

1. The nature and circumstances of offence charged, including violence or special circumstances;
2. The weight of the evidence against the accused;
3. The detainee's criminal record, if any;
4. The history and characteristics of the detainee, including mental and physical condition;
5. The record of appearances in court in prior proceedings;
6. Community and family ties;
7. The history of drug and alcohol abuse, and the possible benefits of treatment outside prison;
8. The length of residence in the community;
9. The possible danger to others in the community if the detainee is released;
10. The detainee's financial resources if bail is granted; and
11. Other factors that may impact on whether bail is appropriate.

⁹⁵ United Nations Office of the High Commissioner for Human Rights n 35

⁹⁶ Council of Europe 'Recommendation of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse' (27 September 2006) article 7b.

Unless the judge has determined that the detention is in accordance with rules of domestic and international law, free from arbitrariness and both reasonable and necessary, release should be granted pending trial.

Once the court has determined whether the detainee should be detained or released pending trial, the court should draft a written order which provides:

1. The court's ruling on detention or release;
2. Any conditions of detention or release;
3. If release has been refused, cite reasons for the refusal; and
4. If the detainee is detained, the court should set a date for trial within a reasonable time (bearing in mind that the aim should be to limit the length of a person's detention).

Detainees suspected of terrorism-related offences or convicted on such charges are sometimes placed in detention regimes, including in solitary confinement, to prevent them from communicating with fellow detainees or other members of terrorist organizations outside the prison, from seeking to recruit other prisoners to their cause, or from planning an escape.

Persons deprived of their liberty for terrorist activities must, in all circumstances, be treated with due respect for inherent dignity of the human person.⁹⁷ The imperatives of terrorism cases may nevertheless require that persons deprived of their liberty for terrorist activities be subjected to more severe restrictions than those applied to other prisoners. For detailed discussion on managing this offender population in prison, see UNODC's Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons.⁹⁸

1. Children and Detention

Children in conflict with the law are those who are above the national age of criminal responsibility who, by law, are distinguished from adult offenders in the criminal justice system on account of their age. In the majority of the SAARC Member States, this constitutes those under the age of 18 years. Judges have a responsibility to uphold the protections

⁹⁷ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment n 57, Principle 1; ICCPR n 16, Article 10(1)

⁹⁸ U.N. Office on Drugs and Crime 'Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons' (2016) https://www.unodc.org/pdf/criminal_justice/Handbook_on_VEPs.pdf.

enshrined in the UN Convention on the Rights of the Child and other international juvenile justice standards for youth convicted of terrorism and related activities. Juvenile justice standards provide the foundational basis for detaining, rehabilitating and reintegrating juveniles convicted of terrorism and violent extremism–related offenses. Children in conflict with the law are recognized as a distinct offender class in the criminal justice process on account of their mental, intellectual and physical maturity.

Accordingly, international juvenile justice standards and norms call for the use of incarceration as a measure of last resort, for the shortest time possible, and guided by the best interest of the child. If juveniles are incarcerated, they should be housed and treated separately from adults and be extended special oversight and protection given their particular vulnerabilities and risk of abuse in custodial environments. Rehabilitative measures should be prioritized. These standards should be upheld for all children, regardless of the nature or severity of their offense.

Consistent with due regard for the dignity and rights of the child, juvenile offenders convicted of terrorism and violent extremism–related offenses subject to incarceration should be treated fairly and humanely.⁹⁹ Juvenile justice standards focus on rehabilitative rather than punitive measures, and institutions responsible for the children’s custody should prioritize interventions that support their eventual reintegration into society.¹⁰⁰ Management practices must take into account the special needs of each child while maintaining an environment conducive to rehabilitation and implementing targeted interventions. The responsibility of achieving the objectives of reintegration falls on the various actors inside and outside of the prison, including a range of external stakeholders and the broader community and is at times under the purview of the judge. Coordination, consistency and reinforcement among those key actors are critical to ensure the continuity of care necessary for the child’s reintegration and to prevent recidivism.

For practices specific to the detention of children, see the Global Center on Cooperative Security report *Correcting the Course: Advancing Juvenile Justice Principles for Children Convicted of Violent Extremism Offenses*.¹⁰¹

99 International Covenant on Civil and Political Rights n 16, art. 10; UNGA Res. 40/33 (29 November 1985) UN DocA/40/33 , annex (rule 1.3)

100 UNGA, ‘Report of the Special Representative of the Secretary-General for Children and Armed Conflict,’ (25 July 2016) UN Doc A/71/205 para. 22. Punitive approaches and the poor conditions of juvenile detention systems around the world have resulted in high rates of recidivism. See Ian Lambie and Isabel Randell, ‘The Impact of Incarceration on Juvenile Offenders,’ (April 2013) *Clinical Psychological Review* 33, no. 3 448–459; Richard A. Mendel ‘No Place for Kids: The Case for Reducing Juvenile Incarceration’ (Annie E. Casey Foundation 2011) <http://www.aecf.org /m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>.

101 Global Center on Cooperative Security and International Centre for Counter-Terrorism, ‘Correcting the Course: Advancing Juvenile Justice Principles for Children Convicted of Violent Extremism Offenses,’ (September 2017)

B. Non-Custodial Measures

Since pre-trial detention should be used as a last resort, non-custodial measures should be considered at the earliest possible stage.¹⁰² A non-custodial measure refers to ‘any decision made by a competent authority to submit a person suspected of, accused of or sentenced for an offence to certain conditions and obligations that do not include imprisonment.’¹⁰³ The main purpose of non-custodial measures is to reduce crime and to increase the effectiveness of criminal sanctions by individualizing them to the needs of the offender.¹⁰⁴ The definition and application of non-custodial measures should be fixed by law.¹⁰⁵ For terrorism suspects and offenders, non-custodial measures may include tailored rehabilitation programs.

In general, pre-trial release as a non-custodial measure will be accompanied by conditions, which may include some of the measures enumerated above. The practical effectiveness of non-custodial measures within the criminal justice system will depend on the existence of an effective and fully functioning system to manage, supervise and implement these measures.¹⁰⁶

C. Release

Once a decision is made to grant release, the court must then make a decision regarding the conditions that will govern the release. This two-step approach should be utilized by all judicial authorities when deciding to detain or release individuals accused of having committed criminal offences, including terrorist-related crimes.

Once a decision has been made to release the accused pending trial, the judge should set minimum conditions to ensure the accused will return to stand trial. Those conditions may include, but are not limited to:

1. Periodic reporting to a law enforcement authority, judicial authority, or bail officer;
2. Financial guarantees;
3. House arrest or curfews;

102 UNGA Res. 45/110 (14 December 1990) UN Doc 45/110 Rule 6.2 (Tokyo Rules)

103 United Nations ‘Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)’ (1993) p. 3 <https://www.ncjrs.gov/pdffiles1/Digitization/147416NCJRS.pdf>

104 United Nations Office of the High Commissioner for Human Rights n 35

105 Tokyo Rules n 108, Rule 3.1

106 American Bar Association ‘Handbook of International Standards on Pretrial Detention Procedure’ (2010) p.5, https://www.ilsa.org/jessup/jessup16/Batch%201/handbook_of_international_standards_on_pretrial_detention_procedure_2010_eng.authcheckdam.pdf

4. Surrendering passport and other documents;
5. Electronic monitoring;
6. Supervision by an agency appointed by the judicial authority;
7. Prohibition from engaging in certain conduct or activities, including activities related to a given profession or employment;
8. Prohibition from meeting with specific persons without authorization;
9. Prohibition from leaving or entering specific places without authorization;¹⁰⁷ or
10. In the case of juveniles, close supervision, intensive care or placement with a family or in an educational setting.¹⁰⁸

In making a determination regarding the conditions of release, the judicial authority must consider the following factors: the stability of the family, social circumstances, current employment, past conduct including lack of a criminal record, or a history of complying with conditions in past criminal proceedings. While not exhaustive, the factors provide a framework by which the judicial authority can determine whether the release should be supervised or not. In considering these factors, judges should be cognizant of the fact that, 'in legal systems where pretrial detention is ultimately linked to bail, poverty and social marginalization appear to disproportionately affect the prospects of persons chosen to be released pending trial'.¹⁰⁹ The bail system places poor and marginalized persons at a disadvantage and it frustrates their right to a fair trial and their right to be equal before the law.¹¹⁰

¹⁰⁷ Ibid.

¹⁰⁸ Crime Prevention and Criminal Justice Branch, Centre for Human Rights 'Professional Training Series No. 3: Human Rights and Pre-trial Detention' (1994) http://www.ohchr.org/Documents/Publications/training3_en.pdf.

¹⁰⁹ Report of the Working Group 2005 n 37 para 66

¹¹⁰ Ibid.

Section 3. Evidentiary Issues

Key Principles

This section discusses issues relating to the admissibility and use of various types of evidence. Many challenges arise in this area and are further exacerbated in terrorism-related cases, where judges must balance public safety and national security with the fundamental rights of the defendant. While the international community has not elaborated a detailed set of rules on the subject, broad principles bind State actors. This section is followed by a section dedicated to witness testimony and protection.

The purpose of admitting evidence is to prove or disprove a given proposition. Evidence is therefore only relevant if it increases or decreases the probability of a material proposition being true, and the materiality of a proposition is determined by making reference to the elements of the substantive law and the reasonable inferences that can be drawn from the evidence. Accordingly, the relevance, and consequently the admissibility, of evidence can only be determined on a case-by-case basis and cannot be determined categorically for a given type of evidence. The judge does not actively participate in the collection of evidence and the examination of witnesses. The judge is responsible for determining whether, as a question of law, evidence is admissible in court. The court should admit evidence that advances the truth-seeking mission of the court and should exercise the authority conferred to it by law to rule on the admissibility of the evidence produced by the parties.

I. The Presentation of Evidence

Across the SAARC region, many cases are based overwhelmingly on witness testimony which can suffer problems of limited reliability. On the other hand, physical evidence is concrete and tangible (available to touch, feel, look at, or smell). Physical evidence can be anything from massive objects to microscopic items, generated as part of a crime and recovered at the scene or at related locations. All of these provide valuable documentary evidence of events and conditions and a visual reference. Documents, records, reports and other correspondences can be collected for use as evidence. An original document is always preferred to a copy. In any case,

documentary evidence should be authenticated.¹¹¹

A. Forensic Evidence

Forensic evidence is evidence that is obtained through scientific methods, including, but not limited to, DNA analysis, ballistics and bomb residue analysis. 'The use of scientifically accepted, human rights-compliant, modern forensic sciences is an invaluable tool in terrorism investigations.'¹¹²

The role of forensic science services starts at the crime scene with the recognition and recovery of physical evidence. It proceeds with its analysis and the evaluation of the results in a laboratory and the presentation of the findings to judges, prosecutors, lawyers and others in need of the factual information. From the first responders to the end-users of the information, all personnel involved—especially judges and lawyers representing respective parties—should have an adequate understanding of the forensic process, the scientific disciplines and the specialized services provided by forensic laboratories. In order to ensure that forensic evidence may be recovered and be admissible in court, all law enforcement personnel and first responders should receiving training on how to preserve the integrity of the crime scene and of the collected evidence.

B. Electronic Evidence

Security Council Resolution 2129 (2013) notes the evolving nexus between terrorism and information and communications technologies, in particular the Internet, and the use of such technologies to commit terrorist acts. Electronic evidence in terrorism cases is increasingly important to prove guilt after a suspect is apprehended and to potentially thwart attacks before they are undertaken. There are various types of electronic data which are not 'all created equal' for evidentiary purposes. Conditions of storage will also impact the reliability of electronic data. As technology has very rapidly evolved, and in view of the considerable value of e-evidence, legal and judicial practice must follow suit as judges in terrorism cases will increasingly be faced with deciding issues arising from e-evidence and technology generally.

The scope of electronic evidence is wide and includes:

- Physical devices: computers, mobile telephones, smartphones, personal digital assistants (PDAs), tablets, etc.
- The components: hardware, the processor, storage, software (system software, application software), the clock, time stamps, storage media

and memory; data formats, etc.

- Networks: internet, corporate intranets, wireless networking, cellular networks, dial-up, etc.
- Applications: e-mail, instant messaging, social networks (Facebook, Twitter), etc.

Electronic evidence requires the judge to reconsider some of the foundational concepts of evidence. With electronic evidence, there is no 'original document' as the law of evidence historically used and understood the term. Instead, electronic evidence is comprised of a human- or computer-generated content or a combination of both. In this manner, electronic evidence can be categorized in the following ways.

Category 1	The records of activities that contain content written by one or more people. Examples: e-mail messages; word processing files; instant messages. As evidence, it may be necessary to demonstrate that the content of the document is a reliable record of the human statement that can be trusted.
Category 2	Records generated by a computer that have not had any input from a human. Examples: data logs; connections made by telephones, ATM transactions. As evidence, it may be necessary to demonstrate that the computer program that generated the record was functioning consistently at the material time.

¹¹¹ See Section 3.A on Admissibility of Non-Oral Evidence.

¹¹² Rabat Memorandum n 25, Good Practice 10.

Category 3 Records comprising a mix of human input and calculations generated and stored by software written by a human.

Examples: financial spreadsheets that contain human statements (input to the spreadsheet program), computer processing (mathematical calculations performed by the spreadsheet program).

As evidence whether the person inputting the data or the writer of the software created the content of the record, and how much of the content was created by the writer of the software and how much by the person inputting the data.

1. Authentication

Emails and other forms of electronic communications can be authenticated in the same general manner as other forms of evidence, although each form of communication presents its own idiosyncrasies and challenges. For example, many email addresses are created by the user and lack the reliability of independent assignment of phone numbers by a public phone company. However, many individuals incorporate distinct qualities into their email settings that may make their emails as identifiable as writings or phone calls, such as an individual's name, a unique set of numbers the individual self-identifies with, and a personalized signature block. The proponent of such evidence must provide evidence of sufficiently identifying characteristics to authenticate proffers of electronic evidence, whatever the form of the evidence may be. The opponent of such evidence may always object to the authenticity of a proposed item of electronic communication.

Emails and other forms of electronic communication may be authenticated by reference to the appearance, contents, substance, internal patterns, or other distinctive characteristics of the electronic communication, taken in conjunction with the circumstances of the case. In deciding whether to hear the evidence, the court may consider the following factors:

- Evidence that the electronic message was received;
- Whether the specific electronic message bore the customary format of that type of message, including the addresses of the sender and recipient;
- Whether the electronic message address was the same as the electronic message address on a message sent to the party who has admitted receipt of that particular electronic message;

- Existence of replies to the electronic message in question;
- Whether the content of the electronic messages indicated the alleged sender's knowledge of facts that were distinctly known by the sender, or to a discrete number of persons including the sender;
- Whether the content of the electronic message contained a name, nickname, or alias of either the recipient or the sender;
- Whether the content of the electronic message is what would be expected if the electronic message is what it purports to be;
- Whether, following receipt of the electronic message, the recipient witness had a discussion with the alleged sender, and the conversation reflected the sender's knowledge of the contents of the electronic message; and
- Existence of the sender's electronic signature.

2. Metadata

Electronic data also often contains potentially important metadata, or information about the data itself. Examples of metadata include the sensor's unique identification number and the date and time of the file creation. Expert testimony can assist the judge to understand and interpret the evidence which may be of a very technical in nature.

3. Preservation of Electronic Evidence and Documentation of Metadata

Electronic evidence requires up-to-date procedures for its proper handling, storage, and maintenance, particularly to ensure its suitability for presentation in court. Moreover, protecting the sensitive sources and the content of evidence is important in order to safeguard the well-being of witnesses and informants and to protect the defendant's right to a fair trial.¹¹³

A judge has a responsibility to ensure that law enforcement agencies have followed procedures for handling digital evidence. Such procedures are necessary for dealing with the advanced technology now commonplace in the profession. Taking the time to recognize and develop procedures for devices that create electronic files, establish standard operating procedures to properly save this downloaded data, and institute procedures that explain any deviations from established standards will ensure the court

¹¹³ Rabat Memorandum n 25, Good Practice 6.

of the reliability of the data and highlight the professionalism of law enforcement officers and their agencies. On the basis of the available evidence, the judge must be satisfied that the procedures established by the law enforcement agencies for handling electronic evidence have been properly followed.

The procedures established for the preservation of electronic evidence should include several safeguards including:

- Secure storage locations;
- Sufficient back-up copies;
- Proof that data has not been altered and is authentic;
- Long-term integrity of evidence;
 - For example, making copies of a non-rewritable CD-ROMs;
- Chain of custody with a written log to document media going in and out of storage or changes of hands; and
- Personnel using electronic equipment must ensure the accuracy of the date and time displayed on the unit.

In many devices, the date and time will default to an earlier period if the batteries become depleted. Then, restoration of power can result in readings that appear out of sequence. Some detectors will not afford the operator the ability to reset the date and time without a computer interface cable. An improper reading from one instrument could result in questioning the readings from others, and they may perceive incompetence or a lack of care on the part of the operator.

Technological innovation and the cultural context may make countries feel they are constantly 'catching up' to ensure innovations are accounted for in evidentiary law. But as technology progresses, the question facing the court should remain the same: is there sufficient evidence to find the proffered evidence is what it purports to be? Social and technological trends have diverged from communicating via traditional, 'faceless' telephone conversations. Individuals are no longer required to use a telephone line, with a specific telephone number, designated by a public telephone service provider company, to conduct a phone conversation. Voice conversations are conducted via landlines, cellular towers, and the Internet. Notwithstanding any technological change, the question for the court is whether a reasonable person could find the evidence to be what it purports to be, and the proponent of such evidence may show this to be true in any reasonable manner.

C. Evidence Regarding a Telephone Conversation

Telephone or other electronic voice conversations are admissible, by evidence that a call was made to the recipient's number or address, which was assigned at the time by a telecommunications service provider, to a particular person or business, if:

1. In the case of a person, circumstances, including self-identification, demonstrate that the person who answered the call is the intended, assigned recipient; or
2. In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the phone.

A successfully authenticated telephone conversation results in showing that the conversation the proponent offers indeed occurred and that the participants of the conversation were who the proponent claimed they were. A purported telephone conversation may be authenticated with testimonial, circumstantial and documentary evidence. Typically, the proponent will elicit testimony from a sponsoring witness who was the caller and, therefore, can testify that a phone conversation took place at the time in question and that a phone conversation occurred with the individual assigned to the phone number (by the public telephone provider). The proponent can also offer evidence of phone records to support the witness' testimony. A witness can often supply additional corroborating circumstantial evidence (such as distinctive characteristics or voice recognition) or evidence that the conversation would only occur with the recipient party. In the case of a business, the proponent might provide evidence that the conversation was related to a business that reasonably includes transactions over the phone.

Opinion by a non-expert who can identify a speaker by his or her voice is admissible, based upon hearing the voice under circumstances that connect it with the alleged speaker. Identification of the voice may be made from hearing it first-hand or through electronic transmission or recording. In deciding whether to hear the evidence, the court may choose to consider among other matters:

1. The competence of the operator of the recording device;
2. The integrity of the recording equipment;
3. The absence of material alterations; and
4. The identification of relevant sounds or voices.

A determination of authenticity can be made when a layperson has knowledge of a voice under circumstances that a reasonable person, using common sense, would deem reliable.

D. Procedure for Bringing Physical Evidence into the Courtroom

Controlled, Hazardous, or Infectious Substances

The judges must ensure that all controlled, hazardous and infectious substances entering the court facility to be offered as evidence are properly secured. The court, within its discretion, may issue an order concerning the handling of dangerous or hazardous substance at an evidentiary hearing or trial. Unless otherwise ordered by the court, a representative sample of hazardous or dangerous substances may suffice as evidence brought into the courtroom. Moreover, photos of the dangerous materials or substances can be used as evidence of the volume and quantity of these items. The use of authenticated photographs eliminates the need to bring dangerous materials or substances into the courtroom. Where permissible, photos should be taken and authenticated of any dangerous materials bomb materials and weapons so that they never need to be brought to the court.

Disposition of Controlled, Hazardous and Infectious Substances

Upon conclusion of a trial or hearing, unless otherwise ordered by the court, the judge should ensure that all controlled, hazardous, or infectious substances and chemicals submitted as exhibits are immediately returned to the custody of the submitting party or appropriate law enforcement agency. The submitting party or law enforcement agency retains custody and control of the exhibit(s) until final disposition of the case or until a notice of appeal has been filed and the appellate court has made a request of transmission of non-documentary exhibits.

Contraband, Weapons and Firearms Offered as Evidence

Judges must also ensure that all firearms or other dangerous weapons entering the court facility offered as evidence are properly secured. All firearms, contraband and weapons of any kind used as evidence during trial must be properly photographed, authenticated by markings or serial numbers and certified by the presiding judge as the evidence submitted and to be used during the trial proceedings. Any authentication and certification must take place in the presence of the prosecutor and defense lawyer. Authentication and certification of submitted evidence will ensure evidence is not impermissibly altered, distorted, or replaced until final judgment of the criminal proceedings.

All firearms or weapons used as evidence and brought into the court

building and courtroom are to be unloaded and either rendered inoperable or equipped with a trigger lock/guard. Guns and ammunition, or any other weapons, are separate at all times. The clip or magazines are removed, bullets removed from cylinder and bullets removed from chamber. Knives, scissors and any other sharp object that could penetrate the skin are sealed in puncture-proof containers, provided with secure and protective sheaths, or otherwise rendered harmless.

A prosecutor or a defense lawyer who would like to refer to the firearm in an opening statement should use authenticated photographs of firearms that are to be used into evidence—taken during the initial authentication and certification process by a judge—rather than the firearm itself. Firearms, ammunition, or any weapon brought into a courtroom, to be offered into evidence, will be given to and left in the custody of a designated court official at all times except when they are being handled by prosecutors, defense lawyers or witnesses. During recesses of the court, all firearms will be locked in a secure drawer, cabinet or closet by the court reporter. It is the responsibility of the clerk of court to provide access to space that will secure the weapons, ammunition and firearm(s). The firearm will always be handled by the barrel unless otherwise ordered by the trial judge. No firearm will be pointed at a judge, court personnel or spectators. Firearms will always be pointed either at the ceiling or floor. However, if deemed valuable and necessary by the judge, the gun may be pointed for demonstrative purposes during testimony. Prosecutors and defense lawyers must obtain the permission of the judge prior to such use for evidentiary purposes.

Prosecutors and defense lawyers intending to use firearms admitted into evidence for demonstrative purposes in a final argument must inform the trial judge prior to such use, stating how the firearm will be used and obtaining the permission of the trial judge prior to such use. Firearms and ammunition should never be placed or left together

Disposition of Contraband, Weapons and Firearms

Upon conclusion of a trial or hearing, unless otherwise ordered by the court, all weapons submitted as exhibits are returned to the custody of the submitting party or appropriate law enforcement agency. The submitting party or law enforcement agency retains custody and control of the exhibit(s) until final disposition of the case or until a notice of appeal has been filed and the appellate court has made a request for transmission of non-documentary exhibits.

Explosives and Bomb Materials in Evidence

Modern explosives brought into evidence in courtrooms are safe if they are stored, transported and handled in accordance with established instructions and procedures. The environmental requirements regarding temperature, humidity and vibration control for explosives vary and are dependent on their intended storage conditions, shelf life and future transportation, handling and use.

In general, explosives used as evidence shall be:

- Kept dry and well ventilated;
- Kept as cool as possible and free from excessive or frequent changes of temperature;
- Protected from direct sunlight; and
- Kept free from excessive and constant vibration.

Many precautions must be taken to assure safety in handling explosives:

- Smoking is not permitted when handling explosives or within 30 meters of explosives;
- Explosives shall be guarded at all times;
- Only suitably qualified personnel shall handle or transport explosives into a courtroom. Unqualified personnel shall only handle explosives for administrative tasks and under the supervision of a person trained in either, the handling and storage of explosives, or a person trained in the handling and transport of explosives;
- Explosives shall only be handled in accordance with the manufacturers' instructions and specifications; and
- Clothing worn by personnel handling explosives shall not be of a type that may cause sparks. This includes synthetic clothing and boots with steel hobnails or toecaps.

Similarly, the accounting for explosives within the justice system must be accurate:

- Police and investigatory agencies shall maintain accurate records of explosives retrieved at the crime scene, explosives used by terrorist operations and missing explosives;
- All explosives used shall have signed certifications from the investigatory supervisors of the items retrieved by item and unit of measure. The record shall include the name and signature of the supervisor certifying that the explosives have been retrieved and

submitted into evidence; and

- These certifications shall be reconciled against stock figures at the end of each month and checked against explosives remaining in stock. Any discrepancies shall be investigated. All explosive records shall be made available for inspection by the court and all parties as required.

In the event of a loss or theft of explosives, extreme measure must be employed:

- As soon as a law enforcement agency suspects that explosives have been lost, it shall initiate a complete stock check of all explosives held against its records;
- If the loss is confirmed the matter shall be immediately reported to the court and all parties through the judiciary with full details of the extent of the loss. The loss shall be reported to all law enforcement agencies. The court will determine what follow-up action shall be taken;
- When the theft of explosives occurs, the area where the theft occurred shall be immediately secured without disturbing the site; and
- The details shall then be reported to the court and local law enforcement agencies through the judiciary and the local police. The extent of the theft may not be able to be determined until an investigation is started. The court shall determine what follow-up action needs to be taken.

Similar safeguards must be employed to secure evidence during the appeal process:

- Upon final judgment of the lower court's trial, all physical evidence is photographed, authenticated and certified in the presence both parties. All evidence is then immediately documented and transported to the evidence storage facility, where it will be used in the event a lower court's decision is appealed; and
- The appellate courts repeat the aforementioned process when handling physical evidence used during the appeals process.

Section 4. Witness Testimony and Protection

Key Principles

In a terrorism trial, one of the most important goals of evidence law is to facilitate the accurate, efficient and fair finding of facts pertinent to a terrorism charge. This goal is furthered by admitting testimony from witnesses with first-hand knowledge who are competent to testify and credible.

While the issue of witness protection is generally in the province of the investigating and prosecuting authority, the court also plays an important role in protecting the rights of witnesses and victims in the trial process, thus encouraging their continued vital participation.¹¹⁴ As a general good practice, the trial judge in cases involving terrorism or other national security offences should have a flexible approach to address the unique demands or needs related to victims and witnesses as they arise.

I. Admissibility of Witness Testimony

A competent witness is someone who is considered legally capable of being a witness. Unless otherwise provided by law, every person who is not qualified as an expert is competent to be a witness if the person possesses first-hand knowledge of a material proposition, understands the meaning of an oath or the duty to tell the truth, can understand questions put to him or her and can give rational answers. A competent witness should also be able to effectively consult with his or her lawyer and understand the legal proceedings in which he or she is involved.

A. Establishing First-Hand Knowledge

A non-expert witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has first-hand knowledge of the matter. Evidence to establish first-hand knowledge may consist of the witness's own testimony.

In keeping with the universal evidence rule that everything must be shown to be what it purports to be, witnesses must be shown to possess first-hand knowledge. A witness who testifies to a fact that can be perceived by the senses must have had the opportunity to actually observe the fact. This aligns with the goal of evidence law to encourage information from the most reliable source.

¹¹⁴ Hague Memorandum n 25, 4

B. Oath or Affirmation to Testify Truthfully

Some SAARC countries require a witness to give an oath to testify truthfully. In Afghanistan witnesses are required to swear to tell the truth before testifying.¹¹⁵ In other countries, the complainant must give the complaint under oath; however not all stages of the proceedings require the witnesses to testify under oath. For example, in Bangladesh and Pakistan, the complainant must give the statement under oath and the accused may testify under oath, but the court may also pose questions to the accused that do not require administering an oath.¹¹⁶ Finally, in a few SAARC countries, no oath is required before witnesses testify. For example, in Bhutan and India, the rules of evidence and the law of criminal procedure do not require administering oaths before witnesses testify.¹¹⁷

Where it is required to give an oath prior to testifying, a witness must give an oath or solemn affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress the duty to tell the truth on the witness's conscience. If the court determines that the witness understands his or her duty to tell the truth, then a witness who does not understand the nature of administered oaths may still testify. The witness should be informed that there is a possibility of being prosecuted for lying under oath.

Courts have the authority to administer oaths or affirmations to all persons examined before them. There is a general requirement of an oath that is designed to afford the flexibility required in dealing with individuals of varying religious beliefs, conscientious objectors, mental defectives and children. No particular form is prescribed for taking an oath, as long as the witness fully understands the duty to tell the truth. The court may regard the testimony of a child¹¹⁸ as material evidence corroborating the evidence of another witness's testimony.¹¹⁹ When a child does not understand the nature of an oath or affirmation, the child's evidence may still be received if, in the opinion of the court, the child understands the duty to tell the truth. The child witnesses who understand the 'duty of speaking the truth' may testify without swearing an oath.

¹¹⁵ Afg. Crim. Proc., Interim Crim. Code for Courts, Art. 50 (2004).

¹¹⁶ Bangl. Crim. Proc. Chapters XVI and XXIV (1898); Pak. Crim. Proc. (1898).

¹¹⁷ The Evid. Act of Bhutan (2005), available at, <http://www.judiciary.gov.bt/html/act/Evidence%20Act.pdf>; The Civil and Crim. Proc. Code of Bhutan (2001); The Indian Evid. Act (1872).

¹¹⁸ A child refers to every human being below the age of 18. Convention on the Rights of the Child (20 November 1989) 1577 U.N.T.S. 3 art 1, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (Convention on the Rights of the Child).

¹¹⁹ Ibid.

C. Witness Credibility

A credible witness is a person who is deemed to be a reliable source of information regarding another person, event or material proposition in the proceedings. While there is no precise formula for determining whether a witness is credible, there are several factors that should be assessed, including, but not limited to:

1. The plausibility of the witness' testimony;
2. The witness' ability to recall the information accurately;
3. The consistency of the witness' statements within his or her testimony and with previous statements made by the witness;
4. The consistency of the witness' testimony with other testimony or evidence;
5. The existence of any bias or hostility on the part of the witness that may affect his or her testimony;
6. Whether the witness has a motive to lie or an interest in the outcome of the case; and
7. Whether the witness' background, education or experience has the potential to affect the believability of the witness' testimony.

In its assessment of these factors, the court must weigh the extent to which a witness' testimony is truthful or untruthful. The maxim '*falsus in uno, falsus in omnibus*' ('false in one, false in all'), which holds that the entire testimony must be rejected if the witness willfully testifies falsely in one matter, should not be applied. Rather, as held by the Supreme Court of Pakistan, '[w]hen a fact finding body concludes that a witness has deliberately falsified in his testimony on a material point, this should be taken into consideration, along with many other tests, in determining what credence should be given to the balance of his testimony'.¹²⁰

This maxim does not enjoy general acceptance in SAARC countries where the practice is to assess witness credibility as a question of fact.¹²¹ Notably, the Supreme Court of India has held that the 'doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'.¹²² The Supreme Court of the Democratic Socialist Republic of Sri Lanka has further observed that not all falsehoods are deliberate and '[e]rrors of memory, faulty observation or lack of skill in observation upon any

point or points, exaggeration, or mere embroidery or embellishment must be distinguished from deliberate falsehood'.¹²³ In such cases, the falsity of one aspect of a witness' testimony cannot render the entirety of the testimony to be false. In assessing potential inconsistencies in a witness' testimony, judges should take into account, among other factors, the passage of time, potential trauma of the witness and the distinctions in questions put to the witness at different stages of the investigation and in court. In *Prosecutor v. Mićo Stanišić Stojan & Župljanin*, 'inconsequential inconsistencies did not lead the Trial Chamber [of the International Criminal Tribunal for the former Yugoslavia] to automatically reject evidence as unreliable'.¹²⁴ Judges must weigh all aspects of the testimony carefully to determine the credibility of the witness and the reliability of the testimony.

The court should exercise reasonable control over the mode and order of the presentation of evidence and the examination of witnesses so as to facilitate the purposes of trial, avoid wasting time and protect witnesses from harassment and undue embarrassment. While each judge must follow the Rules of Evidence, the following section presents some international best practices and tips.

1. Interpretation

A witness may use an interpreter. An interpreter must be qualified and must give an oath or affirmation to make an accurate interpretation. A qualified interpreter is a person who is capable of interpreting statements from one language into another language effectively, accurately and impartially, without altering the context or meaning of the statements. Similarly, hearing-impaired witnesses may also use sign-language interpreters.

2. Court's Calling or Examining of a Witness

The court may call or examine a witness on its own or at a party's request. In most SAARC countries, the court may address questions to the accused or any other witness at any stage in the proceedings.¹²⁵ Each party is entitled to cross-examine a witness that is called by the court. The

¹²³ The Honorable Attorney General v. Sandanam Pitchi Mary Theresa n 147.

¹²⁴ *Prosecutor v. Mićo Stanišić Stojan & Župljanin*, International Criminal Tribunal for the former Yugoslavia, IT-08-91-T, volume 1 of 3, 27 March 2013, para 15.

¹²⁵ The Evid. Act of Bhutan, Chapter 6 (2005), available at, <http://www.judiciary.gov.bt/html/act/Evidence%20Act.pdf>; Afg. Crim. Proc., Interim Crim. Code for Courts, Art. 53 (2004); Bangl. Crim. Proc. Chapters XXIV, Sec. 340 (1898); Pak. Crim. Proc., Chapter XXIV, Sec. 342 (1898).

¹²⁰ *Commonwealth v. Parente*, 184 Pa. Super. 125 (Pa. Super. Ct. 1957), para 132.

¹²¹ *The Honorable Attorney General v. Sandanam Pitchi Mary Theresa*, SC Appeal 79/08 SC, Spl LA 153/08, CA 161/04, HC Colombo 818/04 (*The Honorable Attorney General v. Sandanam Pitchi Mary Theresa*).

¹²² *Jakki @ Selvaraj & Anr. v. State State represented by the IP, Coimbatore*, (2007) 9 SCC 589

authority of a court to call and examine a witness is well established under common law. It is infrequently employed, but terrorism trials can certainly include circumstances justifying the act of calling a witness at the judge's discretion that neither party calls. By exercising the discretion to call and examine a witness, the judge is ensuring that there is a full and fair trial.

3. Sequestration of Witnesses

At a party's request, or on its own, the court may order a witness sequestered so that they cannot hear another witness's testimony. The court cannot exclude a person authorized by law to be present, or a person whose presence a party shows to be essential to presenting a party's claim or defense. Sequestration of witnesses ensures that testimony given is purely based on what witnesses perceived and is not influenced by the testimony given by other witnesses.

4. Writing Used to Refresh a Witness's Memory

If a piece of writing is used to refresh a testifying witness's memory, it must be disclosed to an adverse party who is entitled to inspect it, to cross-examine the witness about it and to introduce in evidence any portion that relates to the witness's testimony. The use of pieces of writing to refresh a witness's recollection is well established in the common law system. Documents used to refresh a witness's memory during testimony are not the same as documents that the testifying witness may have referred to in preparation for testimony. These documents are not required to be shared with all parties unless the court holds that such disclosure would serve the interests of justice.

5. Attacking and Supporting the Declarant's Credibility

Before a party may introduce positive credibility evidence, credibility must first be attacked. When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, that party may examine the declarant on the statement as if on cross-examination.

6. Impeaching a Witness

Any party, including the party that called the witness, may attack the

witness's credibility.¹²⁶ The credibility of a witness may be attacked in the following ways:

- By testimony about the witness' reputation for having a character for truthfulness or untruthfulness or in the form of opinion about that character. Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- By inquiry into specific instances of conduct that are probative of the character of truthfulness or untruthfulness of the witness. Extrinsic evidence of specific instances of conduct is not admissible to prove a witness's character for truthfulness or untruthfulness.
- By evidence that the witness was convicted of a crime, whose elements required proving—or the witness's admission of—a dishonest act or false statement.
- By evidence of prior statements that are inconsistent with the testimony of the witness. If the inconsistent statement was not made under oath, a witness's prior inconsistent statements are admissible only if the witness is given an opportunity to explain or deny the statement and the adverse party is given an opportunity to examine the witness about it.
- By evidence of impartiality owing to bias or an interest in the litigation or its outcome. Such proof of impartiality may include but is not limited to evidence of an illegal inducement made to a witness for offering testimony or evidence of personal interest such as impact on finances and reputation.
- When a witness or declarant is unavailable, but prior statements or testimony is admitted, the person's credibility may be impeached or confirmed to the extent it would have been available for inquiry had the person testified.

The assessment of a witness's credibility should be based on the formal, adversary-driven credibility assessment. Inquiry into a witness's character should be limited to character for truthfulness rather than general character and only after a witness's credibility has been attacked. The justification for this limitation is to sharpen relevancy and to reduce surprise, waste of time and confusion. Limits on character inquiries for witnesses also avoid undue delay and distraction during a trial. A witness's answer will only be inquired into if the answer has an effect on a material

¹²⁶ See Section 4.1.D on Witness Credibility

proposition or a statement made by the witness. As to the character of witnesses in previous proceedings that are now unavailable and hearsay declarants, if a statement of an unavailable person is admitted, that person's credibility is in issue.

7. Religious and Customary Beliefs or Opinions

Evidence of a witness's religious and or customary beliefs or opinions is not admissible to prove character for truthfulness or untruthfulness. Consistent with many modern constitutions that guarantee freedom of religion and the right to religious practice, many court systems acknowledge that the veracity of religious beliefs are not to be determined by a court of law.

8. Adverse Inference

A fact-finder should not be required to draw an unfavorable inference from a witness's refusal to respond to a question, but should be allowed to. A witness could refuse to respond for any number of harmless reasons. For example, a witness in certain instances may wish to refrain from answering a question due to the embarrassing or personal nature of the answer that would be revealed. When a witness refuses to answer a question, a judge should consider the totality of the circumstances and all of the reasons a witness may not answer a question rather than being required to draw an adverse inference.

9. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to opinion that is rationally based on the witness's perceptions; and helpful to clearly understand the witness's testimony or determine a fact in issue; and not based on scientific, technical, or other specialized knowledge. It is often difficult for witnesses to testify purely in the form of facts rather than opinions. For example, a lay witness who is acquainted with the handwriting of a person would find it impossible to articulate the manner in which the handwriting appears unique or identifying to the witness and thus may give an opinion as to whether or not the handwriting belongs to a particular person. Similarly, testimony of the speed of a car is opinion testimony summarizing observations of distance divided by time. Although lay witnesses should be encouraged to testify to their direct memories of events, occasionally they should be allowed to summarize those observations in the form of a lay opinion.

10. Anonymous Informants and Witnesses

Reliance on anonymous informants may be helpful during the

investigatory stage. However, during trial, if the defense is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable.

Video-link testimonies, or teleconferences as they are sometimes called, allow witnesses to testify in a location other than the courtroom. Their statements are transmitted in actual time via video-link to the courtroom, where the judge, the defendant, the defense counsel and the public prosecutor watch and listen to the transmission and can ask questions of the witnesses. In cases where it is necessary to guarantee the anonymity of a witness, video-link testimonies can be combined with techniques allowing for the distortion of the image or voice—or both—of the witness.¹²⁷ Safety of witnesses is paramount in a terrorism case. Defendants may want to frighten or even harm a testifying witness in order to secure their freedom. More than any other type of criminal proceeding, the safety of witnesses must be a constant concern in terrorism cases. It is also important to note that defendant might threaten not only testifying witnesses themselves but also their children and other members of their families. Accordingly, taking precautions for protecting witnesses and their families should be considered by the court.¹²⁸

In some cases, video-link testimonies may not be sufficient to guarantee effective protection for victims testifying against accused terrorists. Additional measures may be necessary to avoid the witness being recognized by the accused. Such measures could include video-linked testimonies combined with image-and/or voice-altering devices, or testimonies in the courtroom behind an opaque shield. However, some precautions must be taken to prevent such measures from interfering with the rights of the accused to a full defense and a fair trial. If the witnesses are not directly visible, the judge and the defendant may not be able to assess the witnesses' reactions to questions and consequently may not be able to assess their credibility fully. On the other hand, important evidence may be lost because witnesses may not be willing to testify when their image is visible and their identity revealed to the accused. It is necessary to balance carefully the rights and interests of the endangered witness and those of the accused.

Protection after the trial involves many different authorities, including law enforcement, the judiciary, immigration services, labor authorities, civil register authorities and prison services. After the trial, the role of non-

¹²⁷ See, Section 4.II on the Protection of Witnesses

¹²⁸ Ibid.

governmental organizations providing victim support services is often crucial.

D. Child Victims of Crimes and Child Witnesses

The rights of child victims and witnesses of crimes are outlined in international law. The United Nations Convention on the Rights of the Child defines a child as a 'human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier'.¹²⁹ This Convention has been ratified by 192 of 194 member countries, including all members of SAARC. Every child has the right to have his or her best interests given primary consideration,¹³⁰ while safeguarding the rights of an accused or convicted offender.

Children who must testify present another set of challenges to a court. Prior to testifying, a witness must give an oath or solemn affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress the duty to tell the truth on the witness's conscience. If the court determines the witness understands his or her duty to tell the truth, then a witness who does not understand the nature of administered oaths may still testify. When a child does not understand the nature of an oath or affirmation, the child's evidence may still be received if, in the opinion of the court, the child understands the duty to tell the truth. In many systems, child witnesses who understand the 'duty of speaking the truth' may testify without swearing an oath.

A court may take responsibility for the legal protection of a child as a ward of the court and generally has power to appoint a guardian for a child in need of special protection. In the case of juveniles, the procedure shall take account of their age and the desirability of promoting their rehabilitation.

1. Competency of Judges, Magistrates and Lay Assessors as Witnesses

Judges, Magistrates and lay assessors may not testify as witnesses at a trial over which they are presiding, nor may they be compelled to discuss such matters or anything that came to their knowledge while in court as a judge in other proceedings except upon the special order of a court to which he or she is subordinate. This prevents judges, magistrates or lay assessors from being compelled to answer any questions relating to their own conduct, thought processes, or knowledge acquired from cases over which they presided or in which they participated as lay assessors.

¹²⁹ Convention on the Rights of the Child n 144, art. 37(b)
¹³⁰ Ibid, article 3(1).

2. Confrontation of Witnesses

The defendant's right to confront witnesses is important to ensure a fair trial for the defendant and to ensure the court fully understands the evidence in this case. Questioning of witnesses by both sides ensures the court will be in a better position to ascertain the truth. International law, as embodied in Article 14(3)(e) of the ICCPR guarantees that, in the determination of a criminal charge, the accused is entitled '[t]o examine, or have examined, the witness against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.¹³¹ As an application of the principle of equality of arms, this guarantee is important to ensure an effective defence by the accused and their counsel. There are two ways to question and challenge witnesses: personally and through counsel. Providing the accused with an opportunity to question and challenge witnesses against them during trial or other stages of proceedings can fulfill the requirement of Article 14(3)(e). However, it does not provide an unlimited right to obtain the attendance of any witnesses requested by the accused or their counsel. Rather, the guarantee only gives a right to call on witnesses that are relevant to the defence's case.¹³²

3. Admissibility of Full or Partial Evidence

Evidence that is admissible for one purpose but excludable for another purpose shall be admitted and consideration of it by the fact-finder shall be limited to its permissible purpose. This allows discretionary exclusion of evidence that has weak probative value and has a high risk of unnecessary inflammatory, confusion, or misleading impact on the court.

If an individual nation's evidentiary code does not prevent it, a trial court should direct the parties to produce evidence in an order designed to advance the goals of these rules. For example, if part of a document is admitted by one party, the court may direct the remainder of the document, if otherwise admissible, to be admitted at the same time.

Some codes provide wide scope for advocates to present evidence in a manner best suited to convince the fact-finder of any material proposition. Knowing the parameters available to the court can help the truth-seeking process. It avoids a court failing to thoroughly review information because less than first-rate advocacy prevents its presentation i.e., the lawyer opposing the segment of evidence presented forgets to complete it. It also

¹³¹ ICCPR n 16 art. 14-3(e).

¹³² Jixi Zhang, 'Fair Trial Rights in ICCPR,' (2009) Vol. 2 Journal of Politics and Law No. 4, p 41.

helps the factfinder track the full pieces of evidence in their entirety. This can be accomplished by seeking admission of written or other physical evidence, or by simply allowing the court to ask questions of the witness through which evidence is presented to understand its contexts. Either way may be useful to the court in its truth-seeking mission.

It follows from this that a trial court should exercise the authority allowed by law to direct the admission of a complete series of evidence when any statement of evidence is given which forms part of a longer statement, conversation, book, or series of letters or papers. A court should admit no more of the statement, conversation, document, book or series of letters or papers as the court considers necessary in that particular case to the full understanding of the nature and effect of the statement and of the circumstances in which it was made.

4. Admissibility of Confessions

In most common law jurisdictions, the law governing confessions falls within the law of criminal procedure. Criminal procedure establishes the manner in which a government enforces substantive criminal law. Criminal procedure law functions to balance the rights of the accused against the social interest in the prosecution of crime. By contrast, rules of evidence structure trials and determine the admissibility of evidence. It is the rules of evidence that embrace and enforce the exclusionary rule to discourage the use of unreliable evidence and, ultimately, the unjust and intolerable practices of using inhumane treatment to cause people to confess.

Confessions and the right to silence comprise one of the most complicated areas within the already complex arena of criminal procedure.¹³³ Pursuant to Article 14(3)(g) of the ICCPR, the accused cannot be compelled to confess guilt in the determination of any criminal charge against him or her. This principle must also be respected in the context of any criminal justice sector response to terrorism.¹³⁴

No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made. This does not contradict the rule that prohibits torture and confessions obtained through threat or subjugation to torture or cruel, inhuman or degrading treatment or punishment. Confessions obtained under such treatment or threats are

likely to cause untrue admissions of guilt. Judges have an obligation to ensure that appropriate safeguards are in place to guarantee the reliability of the evidence, to ensure the proper administration of justice and to protect the rights of the accused.¹³⁵

A confession shall be held to be involuntary if the court believes it was induced by any threat, promise or other prejudice held out by any member of the law enforcement authority or by any other person in a position of authority. This includes any confessions obtained under torture or under the threat of torture or cruel, inhuman or degrading treatment or punishment.¹³⁶

In making a determination regarding the admissibility of a confession, judges should also consider whether the accused was made aware of his or her rights, including the right to remain silent, the right to interpretation and the right to consult legal counsel and whether the accused was given an opportunity to exercise these rights.¹³⁷

When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, the court may take a confession by one of those persons, affecting himself and some other of those persons, into consideration against that other person if that confession is proven to be true.

E. Admissibility of Privileged Communications and Information

The attorney-client privilege aims to encourage open communications between attorneys and clients by protecting the confidentiality of such communications. This privilege facilitates the proper administration of justice and protects the accused's right to an adequate defence. In states with common law traditions, the attorney-client privilege is generally based on case law whereas, in civil law jurisdictions, the privilege is embodied in statutes.

Rule 73(1) of the ICC Rules of Procedure and Evidence provides that 'communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

- a. The person consents in writing to such disclosure; or
- b. The person voluntarily disclosed the content of the communication

¹³⁵ See Section on Admissibility of Evidence and Section 2.1.C on the Detainee's Rights

¹³⁶ See Section 2.1.C.8 on Evidence Obtained Through Torture or Cruel, Inhuman or Degrading Treatment

¹³⁷ See Section 2.1.C on The Detainee's Rights and Section 3.A on the Admissibility of Non-Oral Evidence

¹³³ For a discussion of the controversies within the English speaking world over such matters, please see David Hamer, et al., Submission on Exposure Draft: Evidence Amendment (Evidence of Silence) Bill 2012, <http://ssrn.com/abstract=2401445>.

¹³⁴ Rabat Memorandum n 25, Good Practice 5

to a third party, and that third party then gives evidence of that disclosure.¹³⁸

In addition to attorney-client privilege, the Chamber recognizes the privileged character of communications made between a medical doctor and a patient and those 'made in the context of a sacred confession where it is an integral part of the practice of that religion'.¹³⁹ The Chamber may also decide that other types of relationships are subject to protection as privileged communications, including:

- a. Communications made in the context of a 'confidential relationship producing a reasonable expectation of privacy and non-disclosure',¹⁴⁰ and
- b. Communications where confidentiality is essential to the nature and type of relationship.¹⁴¹

1. The Exclusionary Rule

Pursuant to the exclusionary rule, evidence that would otherwise be admissible will be inadmissible in court if it was obtained in violation of a law, rule or right. The specific violations that will lead to the exclusion of admissible evidence should be provided for by law. One of the most flagrant violations that will always trigger the exclusionary rule is evidence obtained through torture or cruel, inhuman or degrading treatment or punishment. Not only is it a grave violation of human rights, but evidence obtained through such treatment taints the reliability of the evidence and would damage the integrity of the proceedings. Other violations that could trigger the exclusionary rule also include, but are not limited to, breaching the accused's right to silence and right to privacy.¹⁴²

a. Evidence Obtained Through Torture or Cruel, Inhuman or Degrading Treatment

Since the prohibition on torture is a preemptory rule of international law, no act of torture can be lawful, in any circumstances.¹⁴³ It follows that any evidence obtained through torture will always be inadmissible in international and domestic courts. In other words, with regards to evidence obtained through torture, the exclusionary rule is absolute, non-derogable and binding on all states, even if they are not party to relevant human rights treaties such as the ICCPR and the UN Convention Against

¹³⁸ ICC Rules of Procedure and Evidence, Rule 73(1)

¹³⁹ ICC Rules of Procedure and Evidence, Rule 73(3)

¹⁴⁰ ICC Rules of Procedure and Evidence, Rule 73(2)(a)

¹⁴¹ ICC Rules of Procedure and Evidence, Rule 73(2)(b)

¹⁴² Petra Viebig, 'Illicitly Obtained Evidence at the International Criminal Court', International Criminal Justice Series 4 (2016) pp. 150-159.

¹⁴³ ICCPR n 16, art 7; UNGA Res 39/46 (10 December 1984) UN Doc A/RES/39/46 art 1 (Convention against Torture); UNGA Res 56/83 annex (12 December 2001) UN Doc A/RES/56/83 art 26;

Torture ('UNCAT').¹⁴⁴

Article 15 of UNCAT expressly states that '[a]ny 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'.¹⁴⁵ Several domestic terrorism-related cases have considered exclusionary rule (both civil and common law jurisdictions).¹⁴⁶

In addition to being a grave human rights violation, evidence obtained under torture is unreliable. Confessions made under torture or under threat of torture are likely to produce false information.

II. Witness Protection

While the issue of witness protection is generally in the province of the investigating and prosecuting authority, the court also plays an important role in protecting the rights of witnesses and victims in the trial process, thus encouraging their continued vital participation.¹⁴⁷ As a general good practice, the trial judge in cases involving terrorism or other national security offences should have a flexible approach to address the unique demands or needs related to victims and witnesses as they arise.

¹⁴⁴ Committee against Torture 'General Comment No. 2' CAT/C/GC/2, para.6; Committee against Torture 'Report of the Committee against Torture (2002) UN Doc A/57/44(Supp), paras. 17-18; N. Rodley, The Treatment of Prisoners Under International Law 74 (1999); Burgers and Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988) p. 1; Human Rights Committee, General Comment No.24, HRI/GEN/1/Rev.7, para.8; UNGA Res. 64/153, (18 December 2009) UN Doc A/RES/64/153, preamble.

¹⁴⁵ Convention against Torture n 169

¹⁴⁶ The decision of the UK House of Lords in *A and others v Secretary of State for the Home Department* [2005] UKHL 71 (which related to evidence obtained through torture in a third state, adduced in proceedings regarding the detention of suspected terrorists in the UK; Lords held unanimously that the common law, consistent with CAT15, required exclusion). The June 2005 ruling of the Higher Regional Court of Hamburg in *El Motassadeq*. The prosecution in this case related to the attacks of September 11th 2001, and the Defence argued that certain witness statements had been obtained under torture and so should be excluded pursuant to CAT15. The Hamburg Court found that CAT15 had legal effect, but that the allegation of torture had not been proved on the facts. In France, in the case of *Iraistorza Dorronsoro* the Pau Cour d'Appel blocked an extradition to Spain (of a suspected ETA terrorist) on the basis that the sole piece of evidence upon which the extradition request was based had been obtained (from a third person) through torture. Explicitly applying CAT15, the Court indicated that where there were serious reasons for believing that such mistreatment of a witness had occurred, the evidence of that witness had to be excluded. The Court refused the extradition request and the suspect was discharged (No. 238/2003, Arrêt du 16 mai 2003). The 2012 ECtHR Judgment in *Othman v UK*, in which the Court concluded that deportation to Jordan, to face trial on terrorism charges, would violate art. 6 ECHR on the basis that the trial in Jordan would be conducted partly on the basis of evidence obtained through torture. The deportation was blocked as a result.

¹⁴⁷ Hague Memorandum n 25, 4

There is perhaps no method of protecting witnesses that is more effective or simple than strong case management by the presiding judge.¹⁴⁸ This includes reducing undue delay of the court's pre-trial proceedings (including bond and bail decisions) and the trial itself. The importance of a speedy, efficient and continuous trial in terrorism cases cannot be overemphasized. Delay can lead to dangerous consequences for witnesses who have not yet testified. Delays in the presentation of evidence can cause witnesses to lose their confidence to testify, as well as permit fear or outside influence to cause personal accounts to change. Delay can be particularly challenging for victims who seek resolution for peace of mind. Every effort should be made to take each witness in the order requested by the lawyers on each side of the case and without extensive time between witnesses.¹⁴⁹

States can also adopt a number of procedural measures to better protect witnesses. For instance, States may adopt procedural reforms of the kind envisaged in Article 24 of the Organized Crime Convention, including implementing evidentiary rules that permit witness testimony in a manner that ensures the safety of the witness, such as allowing witnesses to testify through communications technology such as video links or other adequate means. It is the trial judge's role, in the exercise of his or her inherent jurisdiction to control the court proceedings, to determine when such special measures are warranted by the specific facts and circumstances of the case.¹⁵⁰ Judicial control in managing the speedy and continuous trials is an important foundation for creating an environment that protects witnesses. Respecting a witness' human dignity is also essential:

Treating witnesses with consideration, respect and in a gender sensitive and non-discriminatory manner not only ensures compliance with human rights standards, but also contributes to people being willing to help the police by coming forward to provide information.¹⁵¹

As a preliminary matter, courts should not disclose private, confidential information about a witness, including his or her address.¹⁵²

A. Witness Protection Programs and Alternative Measures

Even though all witnesses should receive assistance and support, witness protection programs are usually reserved for those extraordinarily important cases where the threat against the witness is so serious that

protection and support cannot be ensured by other means. To bridge this gap, a number of countries have developed schemes that are distinct from witness protection programs but still aim to make it more difficult to trace at-risk and intimidated witnesses. Those schemes apply to cases that do not warrant permanently relocating and changing the witness's identity. They may be ordered in the pre-trial or trial phase and provide either for a series of physical security measures implemented by the regular police or for evidentiary rules enacted by the courts. Such schemes are often referred to as 'alternative measures' to witness protection programs.

Depending on the facts of the case, as well as the perceived threat, it may be necessary to provide the witness or informant with a security guard when traveling to and from the court during trial or to relocate the witness or informant and immediate family members and give them a new identity.¹⁵³

As stated in the Rabat Memorandum, witness protection must extend beyond the trial; 'witness protection programs and other efforts to provide for the safety and security of witnesses, informants and undercover agents who may have participated in criminal activities are an important means of creating incentives for their cooperation.'¹⁵⁴ States must develop programs not only for the witness, but also with respect to his or her family, who are oftentimes in danger following witness testimony of this variety.¹⁵⁵ In extreme cases, courts may need to consider assisting the witness in changing his or her identity in order to ensure protection measures are successful. International cooperation efforts are often key in these contexts, as witnesses may need to leave the jurisdiction in which they provide testimony to avoid retaliation against them by members of the terrorist organization with which they were formerly involved.¹⁵⁶

B. Assessing a Witness's Need for Protection

When interviewing witnesses at the pre-trial phase, police investigators and attorneys should be trained to assess whether witnesses are subject to intimidation or threats and should make recommendations to the designated authority. The actions taken would require a high degree of confidentiality and the witness's consent. The obligations of the parties could be outlined in a memorandum of understanding and any breach by

¹⁵³ Organization for Security and Co-operation in Europe, 'Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers.

¹⁵⁴ Rabat Memorandum n 25.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁴⁸ See section 'Court and Case Management'; Hague Memorandum n 25, 3.

¹⁴⁹ Hague Memorandum n 25.

¹⁵⁰ Hague Memorandum n 25, 4.

¹⁵¹ Hague Memorandum n 25, 54.

¹⁵² Ibid.

the witness could be grounds for the termination of protection.

Upon the formal request of either party, the court may adopt special measures to ameliorate any specific threat or general threat that is identified, if it supports a secure trial environment and does not unduly infringe on the fair trial rights of the parties. In determining whether special measures are warranted, the trial judge, in the exercise of his or her inherent jurisdiction to control the court proceedings, should consider the specific facts and circumstances of the case as well as the special or relevant circumstances of specific witnesses that may diminish the quality of the evidence they give due to the fear of testifying. Upon determining that protective measures are warranted, the trial judge should apply protective measures that address the specific concerns of the witness or victim without unduly infringing on the fair trial rights of the opposing party.¹⁵⁷

C. Procedural Mechanisms For Protecting Witnesses

Policymakers and legislators should provide policy and legal frameworks within which the criminal justice system exercises its counter-terrorism function. A number of procedural measures can be considered to better protect witnesses and informants whose assistance is essential to the prevention, investigation and prosecution of terrorist crimes. These measures must ensure an appropriate balance between the need to protect the safety of witnesses and the obligation to safeguard the accused's right to a fair trial.

To protect witnesses, States may consider procedural reforms of the kind envisaged in Article 24 of the Organized Crime Convention, including implementing evidentiary rules that permit witness testimony in a manner that ensures the safety of the witness, such as allowing witnesses to testify through communications technology such as video links or other adequate means.

Procedural measures can be grouped into three general categories depending on their purpose:

1. Measures to reduce fear through avoidance of face-to-face confrontation with the accused, including: (i) use of pre-trial statements (either written or recorded audio or audio-visual statements) as an alternative to in-court testimony, (ii) removal of the accused from the courtroom and (iii) testimony via closed-circuit television or audio-visual links, such as video-conferencing;
2. Measures to make it difficult or impossible for the accused or

organized criminal group to trace the identity of the witness, including: (i) shielded testimony through the use of a screen, curtain, or two-way mirror and (ii) anonymous testimony; and

3. Measures to limit the witness's exposure to the public and psychological stress, including: (i) change of the trial venue or hearing date, (ii) removal of the public from the courtroom (in camera session) and (iii) presence of an accompanying person as support for the witness.

The elements typically taken into account by courts when ordering the application of procedural measures are: (i) the nature of the crime (organized crime, sexual crime, family crime etc.), (ii) the type of victim (child, victim of sexual assault, co-accused, etc.), (iii) the relationship with the accused (relative, accused's subordinate in a criminal organization, etc.), (iv) the degree of fear and stress of the witness and (v) the importance of the testimony. In the application of procedural measures, due consideration should be given to balancing the witness's legitimate expectation of physical safety against the accused's basic right to a fair trial.

In a number of countries, the court may decide to apply specific measures during the hearing of testimony to ensure that witnesses testify free from intimidation and fear for their lives. These measures can also be applied in sensitive cases (trafficking in persons, sex crimes, child witnesses and family crimes, among others) to prevent the re-victimization of victim-witnesses by limiting their exposure to the public and the media during the trial. They include:

- i. use of a witness's pre-trial statement instead of in-court testimony,
- ii. presence of an accompanying person for psychological support,
- iii. testimony via closed-circuit television or videoconferencing,
- iv. voice and face distortion,
- v. removal of the accused or the public from the courtroom and
- vi. anonymous testimony.

1. Use of a Witness's Pre-Trial Statement Instead of In-Court Testimony

In order to protect witnesses and informants, it is sometimes necessary to consider procedural means of recognizing pre-trial statements. In many European countries, pre-trial statements given by witnesses and

¹⁵⁷ Ibid.

collaborators of justice are recognized as valid evidence in court, provided that the parties have the opportunity to participate in the examination of witnesses.¹⁵⁸ In several SAARC countries, the accused must be informed of his or her rights, including the right to counsel, before a confession can be taken.¹⁵⁹ In other SAARC countries, the Rules of Evidence permit Magistrates to take confessions directly from the accused so long as the confession is voluntary.¹⁶⁰ A report by a Council of Europe group of experts suggests that one may assume that, in a system where pre-trial statements of witnesses or testimonies of anonymous witnesses are generally regarded as valid evidence, such procedures can provide effective protection of witnesses.¹⁶¹

In many justice systems, defense counsel has a right to obtain witness statements at the time of disclosure, but there is always a risk that this process may compromise the security of the witnesses or informants. However, allowing pre-trial statements could affect the accused's right to a fair trial, preventing him or her from directly challenging the witness's testimony and raising additional points other than those recorded during the taking of the statement. To address this problem, pre-trial statements could be permitted conditional on the accused's and/or defense counsel's opportunity to examine and challenge the credibility of the statement and the granting of its admissibility.

Those standards are easier to maintain when the statement is taken with the exclusive purpose of being used in court in the place of live witness testimony. In such cases, at the request of the prosecutor, the pre-trial hearing of a witness can be conducted as an alternative to in-court witness testimony.

1. Accompanying Person

The court may allow a witness to be accompanied by another person during testimony if the witness is likely to feel considerable anxiety or tension. The presence of accompanying persons is particularly common with vulnerable witnesses, especially victims of sexual crimes or child witnesses. As with all support functions, the accompanying person must be someone who has only basic information about the witness's evidence and is not a party to the case. Accompanying persons may not disturb, hinder, or unduly influence the testimony and cross-examination; object to

particular questions; or offer advice to the witness. Accompanying persons may be in close physical proximity to or in contact with the witness during testimony; inform the court of the witness's condition; and/or recommend a recess, for example, if the witness is too distressed to continue.

2. Screens and Two-Way Mirrors

The use of screens, curtains, or two-way mirrors may be ordered by the court to shield witnesses and their identities from the accused, the public and the media as a means to reduce potential intimidation. Screens should not prevent the judge, magistrate, jury and at least one legal representative of each party to the case (prosecution and defense) from seeing the witness and the witness from seeing them. The use of screens affects the right to face-to-face confrontation when there is no opportunity for the accused to see the expression or attitude of the witness and to challenge the latter's credibility on the basis of such appearance.

3. Removing Accused From the Courtroom

In exceptional cases, the court may order the removal of the accused from the courtroom as a precautionary measure to prevent intimidation of the witness during his or her testimony or as a punitive measure in response to intimidation attempts by the accused, such as verbal threats or threatening gestures made towards the witness. This measure has serious implications for the accused's right to confrontation. To compensate, after the completion of testimony, the accused may be allowed back in the courtroom to read the transcript of the testimony and dictate questions to the witness. The accused would then be removed again from the courtroom to allow the witness to respond.

Article 18, paragraph 18 of the Organized Crime Convention calls upon States to introduce domestic legislation allowing testimony by videoconference or through other technological means, such as devices and software for image and voice distortion that prevent a witness's identity from being revealed to the accused and the public. Image and voice distortion techniques can be used to keep the witness's identity secret in situations where the accused and the witness know each other. Videoconferencing refers to the use of interactive telecommunications technologies for witness testimony via simultaneous two-way video and audio transmissions. Through this technology, the witness may testify from a room adjoining the courtroom via closed-circuit television or from a distant or undisclosed location through an audio-visual link. Hiding some or all of a witness's identity details from the defense and the public can

158 N. Piacete, 'Analytical Report', in Council of Europe, *Terrorism: Protection of Witnesses and Collaborators of Justice* (2006) 22..

159 The Evid. Act of Bhutan, Chapter 9 (2005), available at, <http://www.judiciary.gov.bt/html/act/Evidence%20Act.pdf>, (requiring a police officer to warn the accused of his or her rights for the confession to be valid).

160 See e.g.; Bangl. Crim. Proc. Chapters XIV, Sec. 164 (1898); Pak. Crim. Proc., Chapter XIV, Sec. 164 (1898).

161 Council of Europe 'Combating Organised Crime: Best Practice Surveys of the Council of Europe' (2004) p 22.

be an effective means of protection in the rare cases where the substance of the testimony itself does not identify the witness to the defense and the testimony is corroborated by other evidence. The measure is usually granted by the court at the witness's request and the ruling can usually be appealed and revoked.

4. Anonymous Testimony

Countries that permit anonymous testimony utilize various procedures. They include keeping records of the witness's identity separate from the trial transcript and in a secure location and sanctioning or prosecuting in accordance with the law any attempt to reveal an anonymous witness's identity.

Where partial or limited anonymity is granted, the witness may be cross-examined in court by the defense but is not obliged to state his or her true name or other personal details, such as address, occupation, or place of work. This measure is particularly useful when undercover agents and members of surveillance teams, who would be in danger if their real identities became known to the public, testify. Such a witness usually testifies in court under the assumed name that he or she was known by during the operation but states his or her true function (police officer, investigator, etc.).

When the court grants total or complete anonymity, all information relating to the identity of the witness remains secret. The witness appears in court but testifies behind a shield, is disguised or has his or her voice distorted. In practice, this measure is useful only in cases where witnesses were innocent bystanders of the crime. If the accused knows the witness, then maintaining complete anonymity would be unrealistic, as the accused can readily identify the witness through his or her testimony or the context of the information provided.

In view of the impact that the use of anonymous testimony has on the rights of the accused, its application should be established by law with strictly defined conditions that balance the need for protection with the accused's right to a fair trial.

The jurisprudence of the European Court of Human Rights on implementation of Article 6 (right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁶² has created a set of conditions for the use of anonymous witnesses that are incorporated into the respective legislation and court practices of the 46 States parties to the Convention and that limit the weight or probative value that may be placed on such evidence.¹⁶³

¹⁶² United Nations, *Treaty Series*, vol. 213, No. 2889

¹⁶³ *Kostovski v. The Netherlands*, App. No. 11451/85, Eur. Ct. H.R. (1989); *Windisch v. Austria*, App. No. 12489/86,

5. Material Support to Witnesses to Personally Secure Protection

There are occasions where, because of the lack of an established witness protection program, refusal of the witness to enter witness protection where such programs exist, or lack of eligibility criteria, witnesses may be offered support to secure their own protection. In cases of low threat, a lump-sum payment may be offered to witnesses to assist them in their own resettlement. That option will likely be within their own country and offers a viable alternative to a protection program. This option can be effective in large or heavily populated countries where people can easily resettle without raising much attention in their new environment. The respective police or witness protection unit may facilitate and assist with the move but does not assume any responsibility and there is no formal agreement or memorandum of understanding between the parties. The UNODC Model Witness Protection Bill provides a useful framework for States considering drafting legislation concerning witness protection programs.¹⁶⁴

6. Enhanced Witness Protection Techniques

Beyond that, even though all witnesses should receive assistance and support, witness protection programs are, for the most part, reserved for those extraordinarily important cases where the threat against the witness is so serious that protection and support cannot be ensured by other means. To bridge this gap, a number of countries have developed schemes that are distinct from witness protection programs but still based on the principle of making it more difficult to trace at-risk and intimidated witnesses. Those schemes apply to cases that do not warrant the permanent relocation and change of identity of the witness. They may be ordered in the pre-trial or trial phase and provide either for a series of physical security measures implemented by the regular police or for evidentiary rules enacted by the courts.¹⁶⁵ Such schemes are often referred to as 'alternative measures' to witness protection programs.

One such program is referred to as 'target hardening.' In the majority of cases, witnesses do not face a life-threatening situation. Instead, they suffer verbal threats, intimidation, harassment, assault, property damage, or simply fear of reprisal as a result of their cooperation with the police. To provide support and security to such witnesses, the police may put a

Eur. Ct. H.R. (1990); *Lüdi v. Switzerland*, App. No. 12433/86, Eur. Ct. H.R. (1992); *Doorson v. The Netherlands*, App. No. 20524/92, Eur. Ct. H.R. (1996).

¹⁶⁴ U.N. Office on Drugs and Crime 'Model Witness Protection Bill' http://www.unodc.org/pdf/lap_witnessprotection_commentary.pdf (accessed at 2 July 2015).

¹⁶⁵ Hague Memorandum n 25, 7.

security program in place. Depending on the legal system of the country involved, the program may be established either by law or as a policy. The program would generally provide for a series of 'enhanced' police measures to discourage criminals who want to harm the witness. The measures taken would be proportional to the threat and of limited duration. They could include:

1. temporary change of residence to a relative's house or a nearby town;
2. close protection, regular patrolling around the witness's house, escort to and from the court and provision of emergency contacts;
3. arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;
4. monitoring of mail and telephone calls;
5. installation of security devices in the witness's home (such as security doors, alarms, or fencing);
6. provision of electronic warning devices and mobile telephones with emergency numbers;
7. minimizing public contacts with uniformed police; and
8. use of secluded premises to interview and brief the witness.

The arrangement of temporary accommodation in safe houses for witnesses is among the most widely used measures. In some cases the accommodation is located in specifically designated housing units where witnesses can recover and where access is allowed only to support groups (such as non-governmental organizations, social workers and medical staff). Some countries have even constructed top-security facilities for the short-term protection of witnesses until they testify or are permanently relocated. Such designated units may be of limited usefulness since they are in locations known to the community and easily disclosed. For protection purposes, a safe house may not always be a static point (in other words, in a designated location), but rather any location not generally known as the usual residence of the individual under protection, where the police can monitor and control all access and communication. It can be as simple as an apartment or hotel room.

Court proceedings potentially expose the witness and the witness protection program to risk. Not only is the witness likely to be vulnerable to intimidation and threats while physically present in the courtroom to give testimony, but sensitive information regarding the program is liable to be exposed and tested by the parties (such as the identity and whereabouts of the witness or the security measures implemented). It is critical that any such risks be identified and addressed at the earliest

opportunity through timely and appropriate consultation and liaison with the prosecution. Additional procedural protection measures may then be requested from the court for the duration of the testimony, such as the use of pseudonyms in witness statements or suppression of the identity of the witness if permissible under applicable law and if it does not so undermine the weight of the witness's testimony as to be counterproductive.

Schemes such as those described above could be complementary to witness protection programs and could be used to provide initial support to persons who may later be admitted to a protection program. It may also be advisable to have the two programs administered by different authorities in order to avoid confusion and because the funding, personnel (including that of non-governmental organizations), standard operating procedures (including security and weapons training) and risks at issue between the two are very different.

7. Informants as Witnesses

In attempting to disrupt criminal and terrorist conspiracies and prevent terrorist crimes, police often need to rely on the testimonies of co-accused and accomplices willing to cooperate and provide evidence against their former associates.¹⁶⁶ As a result, various international agreements and conventions actively promote these methods. National laws are sometimes also necessary to authorize these practices and to determine how and when evidence obtained through such sources can be used against the accused.

Because of the importance of 'accomplice testimony' in cases involving terrorism, negotiated plea agreements and offers of immunity or leniency often play a crucial role in the gathering of evidence and the successful prosecution of these cases. Therefore, in practice, witness protection measures, as a means of eliciting cooperation from criminal informants, are intertwined with other measures such as negotiated plea agreements, immunity from prosecution and reduced sentences. Formal agreements are often struck between the informant and the police to clarify the obligations of both parties. In most countries, however, there remains a need to provide a tighter framework for the management of informants in the form of guidelines, statutory regulations and increased independent oversight. The same measures used to protect witnesses may be used to protect informants. The judge in the case must oversee the process to ensure voluntariness and competence.

¹⁶⁶ Combating Organised Crime: n 187; A. J. Schreiber 'Dealing with the Devil: An Examination of the FBI's Troubled Relationship with its Confidential Informants (2001) 34 Colum. J.L. & Soc. Probs. 301.

Some special safety and protection measures are necessary when a witness or an informant is being detained. Witnesses who are incarcerated can be particularly vulnerable, and their protection poses distinct challenges to the authorities, the most common relating to the presence of other inmates who want to prevent them from testifying or who may themselves intimidate or harm the witnesses. Co-mingling protected witnesses with the general inmate population is generally inadvisable because it creates opportunities for violence, threats, and intimidation. Co-mingling occurs not only during incarceration but also during transportation to court or in the court lock-ups.

Intimidation of protected witnesses who are detained can be very hard to detect, particularly indirect intimidation. There is often a need to take measures to protect the families of custodial witnesses. In some instances, corruption or the intimidation of prison personnel can introduce a major element of risk for the witnesses who are being detained. It is therefore often necessary to limit the circle of individual staff members who have access to the protected inmates and to information about them. In some instances, detained witnesses may be transferred to another province, state, or country for their protection, provided that the necessary agreements between the jurisdictions exist. In some jurisdictions, correctional authorities have established a special 'witness protection unit' with special security measures and better quality accommodation for inmates.

It is also possible to have alternative housing and transportation options for endangered witnesses. In addition, it may be possible to give witnesses a different name in prison.

It is often recognized that because protected witnesses must serve their sentence in harsher circumstances than would otherwise be the case, their situation should receive special consideration at the time of making parole or release decisions. Sometimes, special arrangements concerning their supervision on probation or parole must be made. Protected witnesses serving a prison sentence must be given clear assurance as to the arrangements proposed for their protection upon release. Following their release from prison, witnesses may be resettled to a new, secret location under a different identity if the threat to their life persists and other conditions are also fulfilled. Family members of witnesses, however, may be admitted to a witness protection program while the witness is still in custody.

Section 5. Sentencing and Incarceration

Key Principles

This section discusses issues arising from sentencing and incarceration of persons convicted of terrorist offences. Terrorism cases tend to generally be highly politicized. Nonetheless, the duty of the judge is to adjudicate in a manner that they feel is proportionate to the crime committed and the aggravating and mitigating circumstances.

I. Overview of theories of sentencing and punishment

After presenting some of the many theories of sentencing and punishment, Sentencing is one of a judge's most important duties in connection with a terrorism prosecution. There are numerous theories of sentencing and punishment. One theory is that of retributive justice which generally holds that a convicted accused should be punished as a consequence of his or her wrongful conduct. Other theories hold that deterrence of potential crimes is the key goal of punishment. Deterrence discourages convicted offenders from committing future crimes, as well as those contemplating criminal conduct who have not yet acted upon their thoughts. The rationale is that the threat of incarceration can deter crime; potential offenders weigh the consequences of their actions and arrive at the conclusion that the risks of punishment are too high. Research to date suggests that an increase in the certainty of punishment is more likely to produce deterrent benefits than an increase in the severity of punishment.¹⁶⁷

Another significant theory of punishment holds that its main goal should be to rehabilitate the offender so that he/she will not commit future offences. Incapacitation, meaning the removal of the offender from society, is another theory of punishment which prioritizes the protection of society from the offender.¹⁶⁸ A detailed discussion of these theories is beyond the scope of this Toolkit. However, they are noted here at the outset in order to convey a sense of the competing considerations and factors that a judge may be confronted with in sentencing a convicted terrorist.

By virtue of the nature of the crime, a sentence for a terrorism-related

¹⁶⁷ Valerie Wright, The Sentencing Project, 'Deterrence in Criminal Justice - Evaluating Certainty vs. Severity of Punishment' (2010) <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

¹⁶⁸ 168 Margaret M. de Guzman 'Harsh Justice for International Crimes?' (2014) 39 Yale Journal of International Law 1.

offence will almost invariably involve imprisonment, placement in a specialized rehabilitation program or some combination.

II. Aggravating and Mitigating Circumstances

There are numerous tools the judge should consider when imposing sentence. First, national law should be consulted to determine whether there are any applicable mandatory minimum or maximum sentences. After that inquiry, in order to determine a sentence of imprisonment, the judge should consider both aggravating and mitigating circumstances, including substantial cooperation with the prosecution.¹⁶⁹ Examples of aggravating factors include whether the accused has prior convictions and whether the accused assumed a leadership role in connection with planning the crime. A common mitigating factor in terrorism cases is substantial cooperation with the prosecution. Additional examples of mitigating factors may include whether the accused played a minor role in the offence, the lack of a prior criminal record, as well as a display of remorse. The judge has discretion to determine a sentence because of the obligation to 'individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime.'¹⁷⁰

It may also be useful to consult the sentencing framework of the International Criminal Court for some examples of aggravating and mitigating factors. Rule 145 of the ICC Rules of Procedure and Evidence provides:

1. In its determination of the sentence [...] the Court shall:
 - a. Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be,[...] must reflect the culpability of the convicted person;
 - b. Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;
 - c. In addition to [the gravity of the crime and the individual circumstances of the convicted person] give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the

age, education, social and economic condition of the convicted person.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:
 - a. Mitigating circumstances such as:
 - i. The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
 - ii. The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;
 - b. As aggravating circumstances:
 - i. Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;
 - ii. Abuse of power or official capacity;
 - iii. Commission of the crime where the victim is particularly defenceless;
 - iv. Commission of the crime with particular cruelty or where there were multiple victims;
 - v. Commission of the crime for any motive involving discrimination [on the grounds of gender age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status];
 - vi. Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.
3. Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.

The sentencing judge, while considering the facts of the individual case and the individual circumstances of the defendant, must also strive for fairness and consistency when imposing punishment. Accordingly, sentencing requires a judge to strike a delicate balance of many competing factors and has implications not only for the defendant, but also for the Court as it may impact the public's confidence in the judicial system. The

¹⁶⁹ Prosecutor v. Delalic, IT-96-21-A; Appeals Chamber, 20-2-2001, para. 716.

¹⁷⁰ Ibid, para. 717

Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has observed:

Public confidence in the integrity of the administration of criminal justice (whether international or domestic) is a matter of abiding importance to the survival of the institutions which are responsible for that administration. One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that such public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that the punishments imposed would, in justice, be expected to be also generally similar.¹⁷¹

In making a sentencing determination, the judge should feel free to consider written submissions from both the defence and prosecution, as well as from victims. In an appropriate case, the judge may wish to consider testimony from impacted parties such as victims or a defendant's family.

III. The Death Penalty Under International Law

At the international level, the most important treaty provision relating to the death penalty is Article 6 of the ICCPR, which is widely accepted to form part of customary international law. Under Article 6 there are a number of limitations on the imposition of the death penalty. Those limitations provide that the death penalty can only be invoked where the most serious crimes are committed and cannot be imposed where:

- a fair trial has not been granted;
- other ICCPR rights have been violated;
- the crime was not punishable by the death penalty at the time it was committed;
- the offender is not entitled to seek pardon or a lesser sentence;
- the offender is under the age of 18;
- the offender is pregnant.¹⁷²

¹⁷¹ Ibid, para. 756.

¹⁷² ICCPR n 16, art. 6

The UN General Assembly has announced a set of safeguards guaranteeing the protection of the rights of those facing the death penalty.¹⁷³ The document, in relevant part:

- Calls upon Member States in which the death penalty has not been abolished to effectively apply the safeguards guaranteeing protection of the rights of those facing the death penalty, in which it is stated that capital punishment may be imposed for only the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences;
- Encourages Member States in which the death penalty has not been abolished to ensure that each defendant facing a possible death sentence is given all guarantees to ensure a fair trial, as contained in article 14 of the International Covenant on Civil and Political Rights, and bearing in mind the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, the Guidelines on the Role of Prosecutors, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Standard Minimum Rules for the Treatment of Prisoners;
- Also encourages Member States in which the death penalty has not been abolished to ensure that defendants who do not sufficiently understand the language used in court are fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court;
- Calls upon Member States in which the death penalty may be carried out to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency, in order to effectively apply rules 5 and 8 of the safeguards guaranteeing protection of the rights of those facing the death penalty;
- Also calls upon Member States in which the death penalty may be carried out to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question;
- Urges Member States in which the death penalty may be carried out to effectively apply the Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners

¹⁷³ United Nations Economic and Social Council 'Safeguards guaranteeing protection of the rights of those facing the death penalty' (1996) <http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm>

under sentence of death and to avoid any exacerbation of such suffering.¹⁷⁴

IV. Solitary Confinement

Solitary confinement or separation from the general prison population is a potential method to prevent terrorism activities from within the prison. The use of solitary confinement does not per se violate international human rights law. Its lawfulness will depend on the aim, length and conditions of the confinement in each particular case. For example, in *Teresa Gomez de Voituret v. Uruguay*, the Human Rights Committee affirmed that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7 of the International Covenant on Civil and Political Rights (i.e., torture or cruel, inhuman or degrading treatment or punishment).¹⁷⁵ That case involved the detention of a prisoner in solitary confinement for almost seven months in a cell almost without natural light. The Human Rights Committee found that this violated Article 10(1) of the International Covenant on Civil and Political Rights which provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'¹⁷⁶ Similarly, in *Rosa Espinoza de Polay v. Peru*, it was held that the total isolation for a year and the restrictions placed on correspondence between the detainee and his family constituted inhuman treatment.¹⁷⁷

V. Sentencing for Children in Conflict with the Law

Juvenile sentencing should favor the promotion of rehabilitation and reintegration over more punitive outcomes. The growing body of research on adolescent decision-making, developmental biology and criminology have helped to distinguish juvenile policy and promote rehabilitation as a more effective means to achieve the interrelated objectives of lowering recidivism, protecting children and increasing public safety.

¹⁷⁴ *Ibid.* For further on the death penalty under international law, the reader is referred to International Bar Association's background paper on the death penalty and international law which can be found at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=5482860b-b9bc-4671-a60f-7b236ab9a1a0>.

¹⁷⁵ United Nations Office of the High Commissioner for Human Rights 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) <http://www.refworld.org/docid/453883fb0.html>.

¹⁷⁶ *Teresa Gomez de Voituret v. Uruguay*, Communication No 109/1981, UN Doc CCPR/C/21/D/109/1981, IHRL 2761 (UNHRC 1984).

¹⁷⁷ *Rosa Espinoza De Polay v. Peru* Communication No. 577/1994; UN Doc CCPR/C/61/D/577/1994, (2003) 10 IHRR 628, IHRL 2147 (UNHRC 1997).

Section 6. The Right to Appeal

Key Principles

This section discusses appeals from criminal convictions. The primary function of the right to appeal is to avoid miscarriages of justice that can arise in two ways: (i) by convicting an innocent accused and (ii) by not allowing a fair trial for the accused. Typically, the appeal requests the superior court to correct or reverse a final ruling of an inferior court. A panel of judges generally hears the appeal cases.

An appeal also may challenge any legal errors that the judge or the prosecution may have made during the trial. A sentence will be overturned if the appeal court finds that an error occurred and that this error affected the outcome of the trial.

Appeals can have the effect of providing consistency in trial courts and consequently public confidence in the administration of justice.

Applicable International Standards

The Human Rights Committee has made it clear that, regardless of the name of the remedy or appeal in question, 'it must meet the requirements for which the Covenant provides,' which implies that the review must concern both the legal and material aspects of the person's conviction and sentence.¹⁷⁸ Thus, in addition to pure questions of law, the review must provide for a complete evaluation of the evidence and the conduct of the trial.

The Human Rights Committee, however, has accepted that a system that does not allow for an automatic right to appeal may still conform to Article 14(5) of the International Covenant on Civil and Political Rights 'as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case.'¹⁷⁹

¹⁷⁸ RoCommunication No. 701/1996, *Gómez v. Spain* (Views adopted on 20 July 2000), in UN Doc A/55/40 (vol.II), para. 11.1

¹⁷⁹ Communication No. 662/1995, *P. Lumley v. Jamaica* (Views adopted on 31 March 1999), in UN Doc A/54/40 (vol. II), para. 7.3.

What is The Right to Appeal and What is Required to Ensure That Right?

The right to appeal is a right guaranteed by the International Covenant on Civil and Political Rights which provides that 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.'¹⁸⁰ The right to appeal is therefore not dependent on domestic law. In order to ensure the right to an appeal is an effective means of remedying lower court errors or injustices, states are under an obligation to present sufficient evidentiary material to allow for an effective review of one's conviction and a reasoned judgment at first instance. Courts must also advise a accused of his or her right to appeal or make sure the accused has actual notice of such right. The accused should be given enough time to file a notice of appeal and to prepare the formal brief. The accused should also be provided with appellate counsel; if he/she cannot afford counsel, then a procedure should exist for appointing *pro bono* counsel and/or for making resources available for paid appellate counsel.

The Human Rights Committee has repeatedly held that 'it is imperative that legal aid be available to a convicted prisoner under sentence for death and this applies to all stages of the legal proceedings.'¹⁸¹

¹⁸⁰ ICCPR n 16

¹⁸¹ Communication No. 554/1993, *R. LaVende v. Trinidad and Tobago* (Views adopted on 29 October 1997), in UN Doc A/53/40 (vol. II), p. 12, para. 5.8

International Judicial Cooperation in Terrorism Matters

Section 1. Gathering and Exchange of Information Between States

Key Principles

Terrorism often transcends national boundaries, and therefore timely and effective international cooperation is essential to a criminal justice response to terrorism. Mutual Legal Assistance ('MLA') is the mechanism that States utilize to cooperate with one another in order to obtain evidence required for criminal investigations and prosecutions. This cooperation includes formal international assistance, such as Mutual Legal Assistance Treaties ('MLATs') and letters rogatory and informal international assistance, such as mutual administrative assistance. This section describes these tools and procedures.

I. Gathering and Exchange of Information between States

A. Formal Mutual Legal Assistance

Terrorism often transcends national boundaries, and therefore timely and effective international cooperation is essential to a criminal justice response to terrorism.¹ Mutual Legal Assistance ('MLA') is the mechanism that States utilize to cooperate with one another in order to obtain evidence required for criminal investigations and prosecutions.² Requests for MLA are often based on bilateral and multilateral treaties entered into by States at the bilateral, regional and international level. Many of these treaties do not pertain specifically to the fight against terrorism, but they can still be used as the basis for requests for MLA in terrorism-related cases. A formal treaty is not essential for states to participate in MLA, although states generally prefer requests based on a treaty. A request for MLA may also be based on the principles of reciprocity and comity, which are supported by domestic legislation.

Examples of international cooperation include certain UN Conventions and regional conventions such as the SAARC Convention on Mutual Assistance in Criminal Matters (SAARC Convention)³ and the Commonwealth Scheme

¹ UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624

² UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 and UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178

³ SAARC Convention on Mutual Assistance in Criminal Matters, 3.8.2008 (SAARC Convention)

Relating to Mutual Assistance in Criminal Matters ('Harare Scheme').⁴

All eight SAARC Member States (Afghanistan, Bangladesh, Bhutan, India, The Maldives, Nepal, Pakistan, and Sri Lanka) have signed the SAARC Convention; however, only Bangladesh, Bhutan, India and Sri Lanka have ratified the SAARC Convention, so it so is not yet in force.

The Harare Scheme is not an official treaty or convention, but instead provides its 54 Member States with a framework with which to make requests for assistance. As evidenced by the Harare Scheme, the general trend in international MLA is to favor arrangements that provide for direct transmission between criminal justice authorities, without use of diplomatic channels. Such systems (i) expedite the sending and service of procedural documents; (ii) facilitate the cross-border use of technical equipment for observation purposes and the interception of communications; (iii) authorize controlled deliveries and allow covert investigations to take place across borders; (iv) encourage the establishment of joint investigation teams; and (v) permit, under certain circumstances, the hearing of witnesses by video or telephone conference or the temporary and lawful transfer of persons held in custody for the purposes of investigation. These arrangements all generally require compliance with the formalities and procedures of the state that is providing the assistance.

The following UN Conventions include provisions on MLA:

- 1970 Unlawful Seizure Convention (Hague Convention)
- 1971 Civil Aviation Convention (Montreal Convention)
- 1973 Diplomatic Agents Convention
- 1979 Hostage Taking Convention
- 1980 Nuclear Material Convention Extradition
- 1988 Maritime Convention/SUA Convention
- 1997 Terrorist Bombing Convention
- 1999 Terrorist Financing Convention
- 2005 Nuclear Terrorism Convention
- 2005 Amendment to the Nuclear Material Convention
- 2005 Protocol of SUA Convention
- 2010 Beijing Civil Aviation Convention

- 2010 Beijing Unlawful Seizure Protocol

In all of versions of formal MLA, judges play an important role. They may be called upon to review the request for MLA from another country's judiciary, to prepare their own state's request for MLA or a response to a request for MLA or to monitor an ongoing MLA response.

1. Mutual Legal Assistance Treaties

MLATs are formal mechanisms pursuant to which States exchange evidence and information in criminal and related matters.

The United Nations has provided a Model Treaty on Mutual Assistance in Criminal Matters.⁵ This treaty is a neutral template for States to use when considering entering into their own MLATs. The United Nations has also provided commentary and application regarding the model treaty and useful considerations for drafting a new MLAT. Key sections of the Model Treaty include:

Article 1. Outlining the scope of application of the treaty.

The model scope includes:

- Taking evidence or statements from persons;
- Assisting in the availability of detained persons or others to give evidence or assist in investigations;
- Effecting service of judicial documents;
- Executing searches and seizures;
- Examining objects and sites;
- Providing information and evidentiary items; and
- Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.

The model scope excludes:

- The arrest or detention of any person with a view to the extradition of that person;
- The enforcement of criminal judgments;
- The transfer of persons in custody; and

⁵ UNGA Res 45/117, annex (14 December 1990) UN Doc A/45/117 (Model Treaty on Mutual Assistance in Criminal Matters).

⁴ Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth 28.7-1.8.1986 (1986) 12 *Commonwealth Law Bulletin* 1118-24 (later amended in April 1990, November 2002 and October 2005).

- The transfer of proceedings in criminal matters.

Article 4. Describing when assistance may be refused, including:

- If granting the request would prejudice the state's sovereignty, security, public order, or other essential public interests;
- If the offence is regarded by the state as being of a political nature;
- If there are substantial grounds for believing the request has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality, ethnic origin, or political opinions, or that the person's position may be prejudiced for any of those reasons;
- If the request relates to an offence that is subject to investigation or prosecution in the requested state;
- If the assistance requested requires the state to carry out any actions that would be inconsistent with the state's law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction; or
- If the act is an offence under military law, which is not also an offence under ordinary criminal law.

Many MLATs follow the format of this Model Treaty.

2. Letters Rogatory

Letters rogatory are the primary method for States to seek and obtain formal international assistance in criminal matters. A letter rogatory is a request from a judge in one State to the judiciary of a foreign State requesting assistance. Letters rogatory are also sometimes used to gather evidence or to effect service of process, if permitted by the laws of the foreign State.

Letters rogatory should be written using simple language so as not to confuse the court in the receiving country. Local procedures should be respected and requests should be as specific as possible, with special care to follow any local customs so as not to offend the foreign court. Letters rogatory should generally contain the following information:

- a statement that a request for international judicial assistance is being made in the interests of justice;
- a brief synopsis of the case, including identification of the parties and the nature of the claim and relief sought to enable the foreign court to understand the issues involved;

- the type of case (e.g., civil, criminal, administrative);
- the nature of the assistance required (for example, to compel testimony, produce evidence, or serve process);
- the name, address, and other identifiers, such as corporate title, of the person abroad to be served or from whom evidence is to be compelled, and documents to be served;
- a list of questions to be asked, where applicable, generally in the form of written interrogatories;
- a list of documents or other evidence to be produced;
- a statement from the requesting court expressing a willingness to provide similar assistance to judicial authorities of the receiving State; and
- a statement that the requesting court or counsel is willing to reimburse the judicial authorities of the receiving State for costs incurred in executing the requesting court's letters rogatory.

3. Central Authorities

The SAARC Convention states that each Member State must designate a central authority to transmit, receive, examine, and process for execution requests for assistance under the Convention.⁶ Those States who have yet to designate a clear central authority that is entrusted with handling MLA requests include Afghanistan, Bhutan, Maldives and Pakistan. The States listed below have designated a central authority to which letters rogatory should be addressed.

Bangladesh. The Ministry of Home Affairs⁷

India. The Ministry of Home Affairs. Letters rogatory will be executed in accordance with a mutual legal assistance treaty, if one exists, or the evidence shall be shared in accordance with Indian law.⁸ Letters rogatory are received by the Under Secretary (Legal) Internal Security Division Ministry of Home Affairs.

Nepal. The Ministry of Law, Justice, Constituent Assembly and

⁶ SAARC Convention (n 5)

⁷ Agreement Between the Government of the Republic of India and the Government of the People's Republic of Bangladesh On Mutual Legal Assistance In Criminal Matters art 3.

⁸ Requesting Mutual Legal Assistance In Criminal Matters From G20 Countries: A Step-By-Step Guide 2012, pgs. 44-45.

Parliamentary Affairs⁹.

Sri Lanka. The Ministry of Justice and Law Reforms.¹⁰

4. Informal International Assistance

Informal channels of legal assistance are often faster and simpler than the formal channels; their relative speed (as compared to formal channels) makes informal channels a critical element of preventing imminent terrorist attacks before they can occur. Such informal assistance is also convenient when formal means are unavailable.

1. Memorandum of Understanding and Informal Mechanisms

Informal channels of international legal assistance include direct contact between prosecutors, police, and government agencies, who work towards a common goal via an informal agreement regarding sharing information between or amongst countries in a simple and efficient manner (often called a memorandum of understanding, or “MOU”). MOUs can be regional or bilateral in nature.

To best use informal MLA channels, States should encourage those individuals with the power to engage in informal international legal assistance to try to build positive and collaborative relationships with key individuals in other States. Such relationships can be developed by arranging joint training courses, mutual exchanges of personnel, seminars, and regional information exchange sessions for people from different States.

Informal channels do present their own set of challenges. Some jurisdictions may refuse to provide information through informal or regulatory channels if the information is intended for use in a criminal investigation. Even if the State allows the information to be provided through informal channels some criminal courts may not accept information obtained via such informal channels as legally sufficient evidence. The information obtained informally may still be useful to the requesting party, however, if it can be used to narrow the scope of a subsequent formal request for MLA (which will speed up the formal process and provide for more effective sharing of information).

The following are examples of informal requests for legal assistance:

- Public records, such as land registry documents and papers relating to registration of companies, may often be obtained administratively.

Such documents might even be available as open source material.

- Potential witnesses may be contacted and asked if they are willing to assist the authorities of the requesting State voluntarily.
- A witness statement may be taken from a voluntary witness through an administrative request, particularly in circumstances where that witness’s evidence is likely to be non-contentious.
- Lists of previous convictions or of basic subscriber details from communications and service providers that do not require a court order may be dealt with in the same, informal way.

2. Mutual Administrative Assistance

Mutual administrative assistance is an informal process by which States both seek and provide assistance in gathering evidence for use in administrative cases. Administrative assistance should also be used when making evidence-gathering requests to a State where no coercive power (e.g., a warrant or court order) is required to obtain the evidence. It is good practice to exhaust informal channels before resorting to formal MLATs and legislation, or to utilize informal channels while waiting for results via the formal channels, as the informal channels generally take far less time to provide answers and results. When fighting terrorism, sharing information in a timely matter is often the difference between intercepting terrorists before an attack, and a successful terrorist attack.

⁹ The Government of Nepal, Law Justice and Parliamentary Affairs Ministry, <http://www.moljpa.gov.np/>. See also United States Treaties and Other International Agreements, Volume 30, Part 2, pgs. 2498-99.

¹⁰ Treaty Between the Republic of India and the Democratic Socialist Republic of Sri Lanka On Mutual Legal Assistance In Criminal Matters art 3.

Section 2. Extradition

Key Principles

Extradition involves the transfer of a person from one State to another for purposes of either carrying out a criminal prosecution or executing a criminal sentence. States must agree to cooperate with each other to extradite, usually by treaty. The UN Model Treaty on Extradition serves as a guideline for many extradition treaties.¹¹ In some cases, regional extradition treaties set forth commonly accepted norms and standards, allowing for simplified procedures between Member States.¹²

Most States divide extradition proceedings into two phases. In the first phase, responsibility falls on the judiciary to determine whether a person is eligible for extradition. If a court determines that a person is extraditable, the executive function of the State then makes the final decision as to whether to extradite. In the case of terrorism-specific offences, the seriousness of the crime requires most States to operate under the principles of *aut dedere aut judicare*, meaning 'extradite or prosecute.' Another fundamental concept is the universal prohibition of double jeopardy, also known as *ne bis in idem*. This rule prohibits trying or punishing an individual more than once in the same jurisdiction for a criminal offence if he or she has been finally convicted or acquitted of that offence.¹³

I. Extradition

The UN Model Treaty for Extradition provides that an offence is extraditable if it is 'punishable under the laws of both Parties by imprisonment or deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty...'¹⁴ In determining whether an offence is punishable under the laws of both parties, it does not matter whether the laws of both parties categorize or describe the offence in the same manner, or if the elements of the offence differ.¹⁵ Rather, it is

the totality of the acts or omissions that must be taken into account.¹⁶ Thus, a judge tasked with determining whether a person is extraditable must consider these requirements, even where the crime is so serious (e.g., terrorism-specific offences) that these rules are unlikely to prevent extradition.

A. Extradition Proceedings

Local law or a relevant treaty generally governs an extradition proceeding. The purpose of an extradition proceeding is not to determine guilt or innocence. Rather, the purpose of an extradition proceeding is to prove that an extradition request is genuinely for the purposes of prosecution or the execution of a criminal sentence. Because an extradition proceeding is not a criminal trial, the rights afforded an accused under Article 14 of the ICCPR are not necessarily afforded to the subject referred to in the extradition request.¹⁷ Nonetheless, a judge should ensure that the subject receives fair treatment in accordance with local law.¹⁸

The burden of proof in an extradition hearing varies from State to State and treaty to treaty. Nonetheless, one of three evidentiary tests will likely apply to determine whether an offence is extraditable:

1. The 'no evidence' test, which simply requires the requesting State to present a statement of the offence, the applicable penalty, the warrant for arrest, and the request for extradition;
2. The 'probable cause' test, which requires the presentation of evidence sufficient to create reasonable grounds to suspect that the person sought has committed the alleged offence; or
3. The 'prima facie' test, which requires providing evidence allowing authorities of the requesting State to form the opinion that the person sought would have been required to stand trial had the alleged offence occurred in the State receiving the request.¹⁹

It is typically the role of the judiciary to ensure that, no matter which standard is applied, the requirements of that standard have been met.

With respect to evidence, extradition hearings ordinarily apply a standard

¹⁶ Ibid.

¹⁷ For discussion of the rights afforded under the ICCPR, see Section 2(xii)(C)(2), page 159.

¹⁸ International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (International Convention for the Suppression of the Financing of Terrorism)

¹⁹ UN Office on Drugs and Crime, Manual on Mutual Legal Assistance and Extradition 19 (2012), available at https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf.

¹¹ UNGA Res 45/116 (adopted 14 December 1990, amended 12 December 1997) Doc A/45/49 (Model Treaty on Extradition)

¹² See e.g., the European Convention on Extradition (1957), Convention relating to the simplified extradition procedure between Member States of the European Union (1995); South African Development Community Protocol on Extradition (2002); Inter-American Convention on Extradition (1981); Arab League Extradition Convention (1952); and Economic Convention of West African States Extradition Agreements.

¹³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

¹⁴ Model Treaty on Extradition (n 14)

¹⁵ Ibid.

of admissibility more lenient than a criminal trial. For example, in the United States, the Federal Rules of Evidence do not apply to extradition hearings. Rather, the credibility of witnesses and the weight to be afforded to evidence falls within the discretion of the judge.²⁰

Another consideration for a judge is the type of evidence to admit. In the United States, an extraditee is only allowed to present 'explanatory' evidence to undermine the government's contentions, but is not allowed to present 'contradictory' evidence designed to undermine credibility.²¹ Consistent with this rule, a Judge has discretion to grant a discovery request from the extraditee, but such a request is limited to explanatory evidence.²² Other jurisdictions may impose different rules.

B. Human Rights Considerations

Historically, courts in common law jurisdictions applied a rule of non-inquiry regarding the motive behind an extradition request or the standard of criminal justice of the requesting State. As a result, the extradition hearing provided the subject of the request with little opportunity to present evidence concerning discrimination or other possible human rights violations that could result from extradition.

More recently, the judiciary has become more involved in issues of human rights relating to extradition. For example, as the result of human rights concerns outlined in the European Arrest Warrant, the United Kingdom and Ireland instituted rules requiring the judiciary to abstain from the rule of non-inquiry and review human rights issues as part of an extradition hearing.²³ Similarly, the UN Model Treaty on Extradition, which serves a benchmark for bilateral and multilateral extradition treaties, includes detailed rules with respect to human rights as do several of the international counterterrorism instruments.²⁴ Thus, as a Judge overseeing an extradition hearing, it is critical to consider whether local law or the treaty at issue requires the rule of non-inquiry, or whether the court has the authority to consider human rights concerns relating to the post-extradition behavior of the requesting State.

Courts in common law jurisdictions have increasingly considered allegations that extradition will result in a serious breach of human rights. This process is limited; however, as judges should be reluctant to make

difficult decisions with respect to complex political and legal systems, especially where the extraditee provides limited evidence. In practice, cases requiring such an analysis may be better suited for the executive phase of extradition, and could include a conditional agreement to extradite based on diplomatic assurances against violations of human rights.²⁵

As a final note on human rights, there may be times when a bilateral or multilateral treaty that requires the extradition of a suspect conflicts with international human rights laws. In such a case, international human rights laws should prevail if possible.²⁶ The UN Model Treaty on Extradition provides a guideline for judges with respect to the types of human rights concerns to consider as part of an extradition hearing (see Section 3(ii)(D) 'UN Model Treaty - Grounds for Refusal').

1. UN Model Treaty - Grounds for Refusal

Article 3 of the UN Model Treaty on Extradition provides that a State must refuse an extradition request in each of the following circumstances:

1. If the offence for which extradition is requested is a political offence;
2. If there are grounds to believe that the request has been made to prosecute or punish the person on account of race, religion, nationality, ethnic origin, political opinion, sex or status, or that person's position may be prejudiced for any of these reasons;
3. If the offence is an offence under military law and not also an offence under criminal law;
4. If final judgment has been rendered against the person in the requested State in respect of the offence for which the person's extradition is requested;
5. If the person whose extradition has been requested has, under the laws of either State, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;
6. If the person would be subject to torture or cruel, inhuman treatment or degrading punishment or if that person has not or would not receive the minimum guarantees in criminal proceedings as contained in Article 14 of the International Covenant on Civil and Political Rights; and

²⁰ See *In re Extradition of Trinidad*, 754 F. Supp. 2d 1075 (N.D. Cal. 2010).

²¹ See *In re Extradition of Sidona*, 450 F. Supp. 672 (S.D.N.Y. 1978).

²² See *In re Extradition of Handanovic*, 826 F. Supp. 2d 1237 (D. Or. 2011).

²³ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989) (holding that a German national arrested in the United Kingdom for possible extradition to the United States should not be extradited because the possibility of the death penalty violated his right to not 'be subjected to torture or to inhuman or degrading treatment or punishment' under Article 3 of the European Convention of Human Rights).

²⁴ See for example, e.g., *Hostages Convention*, para. 9(1).

²⁵ Such assurances are quite controversial, and some regional courts have on occasion given minimal weight to them when issued by States known to violate human rights on a regular basis.

²⁶ UNHCR, *UNHCR Guidance Note on Extradition and International Refugee Protection*, 5-17 (2008).

7. If the judgment of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial nor opportunity to arrange for a defense and has not or will not have the opportunity to have the case retried.

In the case of terrorism-specific offenses, the first exception listed above, known as the 'political offense exception,' is not applicable. According to paragraph 3(g) of United Nations Security Council Resolution 1373 (2001), States must ensure that 'claims of political motivation are not recognized as ground for refusing requests for extradition of alleged terrorists.' In fact, in 1997, the UN Model Treaty on Extradition was amended to include language that prevents use of the political offense exception in cases where the parties agree that the offence is not political in character. Specifically, the political offense exception is not a basis to refuse extradition where the conduct in question is violence committed under the guise of political goals.²⁷

The UN Model Treaty on Extradition also provides for the following eight 'optional' grounds for refusing an extradition request:²⁸

1. If the person whose extradition is requested is a national of the requested State;
2. If the competent authorities of the requested State have decided either not to institute or to terminate proceedings against the person for the offence in respect of which extradition is requested;
3. If prosecution in the requested State is pending for the same offence;
4. If the offence carries the death penalty under the law of the requesting State;²⁹
5. If the offence has been committed outside the territory of either State and law of the requested State does not provide for jurisdiction over such an offence committed outside its territory;
6. If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal; and
7. If extradition would be incompatible with humanitarian considerations in view of age, health, or personal circumstances of that person.

The UN Model Treaty on Extradition is a useful guide, but judges must be sure to consult local law and the applicable treaty in evaluating whether

²⁷ U.N. Office on Drugs and Crime, Revised Manual on the Model Treaty on Extradition, para. 42, available at https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf.

²⁸ U.N. Model Treaty on Extradition, *supra* note 329, art. 4.

²⁹ See Soerig, *supra* note 341.

there is a proper ground by which to refuse an extradition request.

C. Practical Tips for Judges

The first time a suspect comes before a judge in an extradition case, it is good practice for the judge to do the following:³⁰

1. Inform the extraditee that his or her extradition is being sought by country X to answer the charge of Y, which carries a sentence of Z;
2. Advise the extraditee of his or her rights;
3. Consider the appointment of counsel for the extraditee if indigent;
4. Consider bail pending the extradition hearing;
5. Set a date on which the government will advise the extraditee of the evidence it intends to introduce at the extradition hearing, including the names of witnesses and expected scope of the witness testimony, as well as copies of documents the government intends to introduce;
6. Set a reciprocal date for the extraditee to do the same;
7. Confirm that the extraditee and counsel understand the limited nature of the extradition hearing and clarifying any limitations on proof the extraditee can introduce; and
8. Set a firm hearing date and, if appropriate, dates for one or more interim conferences.

The extradition hearing will potentially look different from jurisdiction to jurisdiction. However, below is a list of issues a judge should consider addressing as part of an extradition hearing:³¹

1. The existence of a valid extradition treaty;
2. The identity of the extraditee;
3. Whether the crime for which extradition is sought is covered by the treaty;
4. Whether the requesting documents are complete and authenticated;
5. Whether the relevant evidentiary standard has been satisfied to believe the extraditee has committed the offence in question; and

³⁰ Ronald Hedges, Federal Judicial Center International Litigation Guide, International Extradition: A Guide for Judges, (2014), available at [http://www.fjc.gov/public/pdf.nsf/lookup/international-extradition-guide-hedges-fjc-2014.pdf/\\$file/international-extradition-guide-hedges-fjc-2014.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/international-extradition-guide-hedges-fjc-2014.pdf/$file/international-extradition-guide-hedges-fjc-2014.pdf).

³¹ *Ibid.*

- Whether other requirements under the extradition treaty have been met.

II. Recognition of foreign criminal judgments and enforcement of foreign sentences

The recognition of foreign criminal judgments and enforcement of foreign sentences provide an effective alternative if other means of cooperation do not work to achieve the punishment and rehabilitation of the offender. Unless a bilateral agreement or multilateral instrument is available, a jurisdiction does not have to recognize a foreign criminal judgment. For example, a national of State A convicted in State B leaves the latter before serving his or her sentence in order to avoid justice. State A does not grant extradition because he or she is a national. Further, State A cannot judge the offender due to the *ne bis in idem* principle, which generally holds that no legal action can be instituted twice for the same cause of action. Thus, the person remains unpunished unless the States reach an agreement on the recognition of the foreign criminal judgment. The recognition of foreign judgments will result from a bilateral agreement between the two States or a multilateral instrument entered into by both States.

For example, the United Nations Convention against Transnational Organized Crime provides that if extradition is sought for purposes of enforcing a sentence but refused because the person sought is a national of the requested State-party, the latter shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting party or the remainder thereof.³² As stated above, the Convention does not require a State to enforce the judgment, but only to consider such enforcement.

³² Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) Doc A/RES/55/25 (Convention against Transnational Organized Crime) available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

Section 3. Transfer of Criminal Proceedings

Key Principles

A State may transfer the prosecution of a terrorism-specific offence to another State if such a transfer promotes the interests of justice, improves the efficiency and effectiveness of trial, reduces conflicts between jurisdictions, and reduces pre-trial detention. States may request that criminal proceedings be transferred where the accused is already undergoing or is about to undergo proceedings against him or her for the same offence, where the crime takes place in whole or in part in the requested State, or where extradition is not practicable. In practice, because of the public nature of terrorism-specific offences, many States are reluctant to transfer a criminal proceeding over which they hold jurisdiction. More commonly, a State has an interest in carrying out the prosecution of a terrorism-specific offence for which it does not have jurisdiction. In those cases, the State must seek extradition from the presiding State.³³

Typically, a bilateral or multilateral treaty will govern the transfer of a criminal proceeding. The UN Model Treaty on the Transfer of Proceedings in Criminal Matters, established in 1990, serves as a guideline for determining how and when to transfer a criminal proceeding under international law. The decision to request or grant a transfer of criminal proceedings belongs to the relevant competent authority in each State. In some States, the relevant competent authority includes the judiciary.³⁴ In other States, the transfer of criminal proceedings is strictly an executive function.

I. Reasons for Transfer and Minimum Information

Whether the transfer of a criminal proceeding serves the interests of justice depends on the facts and circumstances. Generally, the transfer of a criminal proceeding is not a device for giving priority to one State over the other on jurisdictional grounds. Rather, the reason for transfer is that the

³³ Chapter 4, Section 2 'Extradition.'

³⁴ Council of the European Union, Framework Decision on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings, 2009/948/JHA, 30 November 2009 (providing that 'competent authority' means a judicial authority or another authority capable of carrying out the transfer process).

accused has ties to the requested State and a criminal trial in that State would be more convenient. For example, the accused may be a resident or national of the requested State, or critical evidence may be located in the requested State.³⁵

A judge tasked with overseeing a request for the transfer of criminal proceedings should ensure that the request includes the following minimum information:³⁶

1. The authority presenting the request, including contact information;
2. A description of the facts and circumstances that are the subject of the criminal proceeding, including the time and place of the offence;
3. All relevant details about the identity of the suspected person and about the victims, if applicable;
4. A statement on the results of investigations which substantiate the suspicion of the crime;
5. A description of the legal grounds for and stage of the criminal proceeding in the requesting State; and
6. Information about provisional detention or custody of the suspected person in the requesting State, if applicable.

From the perspective of the requested State, a judge reviewing a request for the transfer of criminal proceedings must ensure that the response satisfies certain minimum requirements. Notably, the decision on the request shall be prompt, even if no specific time frame is required. Further, the response should include a discussion of whether similar criminal proceedings are ongoing in the requested State.³⁷ If similar proceedings are ongoing, the competent authorities of each State should work together to reach a consensus for how to proceed.³⁸

II. Rights of the Suspected Person and the Victims

When a State requests the transfer of a criminal proceeding, a judge should ensure, if possible, that the State provides the suspected person with an opportunity to express his or her interest in the transfer of the

³⁵ See European Convention on the Transfer of Proceedings in Criminal Matters, art. 8 (1972), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/073.htm>.

³⁶ See Ibid art. 3; Framework Decision on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings (n 38) art. 8.

³⁷ Framework Decision on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings (n 38) art. 9.

³⁸ Ibid.

proceeding.³⁹ If practicable, this right includes an opportunity for the suspected person to present his or her views on the alleged offence and intended transfer.⁴⁰ The alleged victims of the crime also have rights with respect to the transfer process. Specifically, both the requesting and requested States must ensure that the victims of the crime, or the dependents of deceased victims, maintain their right to restitution or compensation.⁴¹

III. Jurisdiction

A transfer of criminal proceedings requires that the requested State have a jurisdictional basis to accept the transfer. The applicable treaty and/or local law will form the basis for jurisdiction. For example, the European Convention on the Transfer of Proceedings in Criminal Matters treats jurisdiction in two ways. First, Article 2 confers competence on the requested State as long as the requesting State issues a formal request. Second, Article 7 creates a legal fiction allowing the requested State to treat the offence as if it had been committed in its own territory under certain conditions, including if the offence was committed against a person, institution, or any thing of public status. Given the public nature of a terrorism-specific offence, treaty provisions like Article 7 should provide for jurisdiction in the requested State. Nonetheless, a judge should ensure that the applicable treaty or local law allows for jurisdiction in the requested State.

If the requested State refuses to accept a transfer of criminal proceedings, it should promptly communicate the reasons for refusal to the requesting State. Article 7 of the UN Model Treaty on the Transfer of Proceedings in Criminal Matters permits a requested State to refuse transfer of a criminal proceeding based on any of the following grounds:

1. The suspected person is not a national of or ordinary resident in the requested State;
2. The act is an offence under military law, which is not also an offence under ordinary criminal law;
3. The offence is in connection with taxes, duties, customs, or exchange; and

³⁹ Model Treaty on the Mutual Assistance in Criminal Matters (n 8).

⁴⁰ Ibid.

⁴¹ Ibid.

4. The offence is regarded by the requested State as being of a political nature.

The transfer of a criminal proceeding ends jurisdiction in the requested State and begins jurisdiction in the requesting State. Procedurally, this process includes the transfer of the then existing record, evidence, and anything pertaining to the requesting State's previous judicial proceedings. Notably, however, an agreement to transfer criminal proceedings does not automatically result in the transfer of the physical person of the accused, because most States and treaties require extradition for physical transfer.

After the transfer of a criminal proceeding, the governing law is that of the transferred State.⁴² At the end of the criminal proceeding, the presiding judge should ensure, if possible, that the transferring State is made aware of the transferred State's final decision.⁴³

⁴² Ibid.
⁴³ Ibid.

Section 4. Execution of Foreign Sentences

Key Principles

Due to the nature of transnational organized crime and terrorist activities, it is increasingly common for terrorists to be convicted and sentenced in States of which they are not citizens. There are several reasons why a State would want to transfer a prisoner to his/her home State for serving his/her sentence. These reasons include: the rehabilitation and resocialization of the person after the sentence ends; humanitarian concerns of both the prisoner and the prisoner's family; international cooperation in receiving the prisoner rather than through deportation at the end of the sentence without having information on the offence committed or the time and mode of the prisoner's arrival; and the freeing-up of resources of the transferring State.

There are two primary ways in which a State (the 'enforcing State') can recognize the sentence imposed on a person in another State (the 'prosecuting State'). These two ways are enforcement or conversion. For enforcement, the enforcing jurisdiction would carry out the sentence as imposed by the prosecuting State normally without alteration. For conversion, the sentence is converted into a sentence that is normally imposed on a person who has committed a similar crime in the enforcing jurisdiction.

I. Legal Instruments for the Transfer of Foreign Prisoners

There are four main types of legal instruments for the transfer of foreign prisoners to serve their sentence in their home States. These are: (i) initiatives by the United Nations; (ii) multilateral instruments; (iii) bilateral agreements; and (iv) national laws.

Initiatives by the United Nations

The international community has addressed in various contexts the questions of the transfer of prisoners and the treatment of foreign prisoners. In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the

Treatment of Foreign Prisoners.⁴⁴ The agreement provides a model for both bilateral agreements as well as multilateral agreements that can be adapted to each country's specific legal system.

The United Nations has continued to support the transfer of sentenced persons in other international initiatives. For example, Article 17 of the Convention against Transnational Organized Crime provides that:

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there.⁴⁵

Further, the United Nations Office on Drugs and Crime can offer technical assistance to a State wishing to implement new legislation or amend current legislation to assist in the transfer of prisoners.

A. Multilateral Instruments

The most prominent multilateral instrument has been the European Convention on the Transfer of Sentenced Persons, which took effect on July 1, 1985. Although the Council of Europe initiated the agreement, it is open to signature by States outside of Europe. The Convention has 64 signatories, including 18 from outside of Europe. This Convention has been modified by the Additional Protocol to the Convention, which has been ratified by 36 States as of 2015, all of which are Member States of the Council of Europe. There is also the Inter-American Convention on Serving Criminal Sentences Abroad, which entered into force in 1996 and provides for a similar model for the transfer of sentenced persons.

B. Bilateral Agreements

Bilateral agreements still play an important role in international prison transfers. Bilateral agreements provide for the transfer of prisoners between a State that is unwilling to accede to a multilateral instrument as well as provide for inclusion of provisions that deviate from multilateral conventions. Bilateral agreements can also provide for different avenues of prison transfers when a State is a party to a bilateral agreement as well as multilateral instruments.

⁴⁴ Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners, Seventh UN Cong. on the Prevention of Crime and the Treatment of Offenders, chap. I, sect. D1, annex I (26 August-6 September 1985) UN Doc. A/CONF.121/22/Rev.1 (Model Agreement).

⁴⁵ Article 45 of the Convention against Corruption contains a similar provision on the transfer of sentenced persons. UN Convention against Corruption (adopted 31 October 2003) UN Doc A/RES/58/422, available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (UN Convention against Corruption).

National Law

Some States require national legislation to implement a bilateral or multilateral agreement. National law may ensure that the process of transferring a sentenced person is subject to judicial control. The implementation of the bilateral or multilateral agreement may be more complicated in a federal State, in which laws may need to be amended at the State level to comply with the new agreements.

II. Requirements for Transfer

There are several requirements for a sentenced person to be eligible for transfer, as follows:

- i. the judgment of conviction and sentence against the person be final⁴⁶;
- ii. "there remains time to be served that meets a minimum threshold at the time of transfer request; for most multilateral instruments and bilateral agreements, the minimum period is set at six months to provide a sufficient time to complete the transfer procedure;
- iii. there is dual criminality, *i.e.*, the offence for which the person is sentenced in the prosecuting State is also a criminal offence in the enforcing State;
- iv. the sentenced person to be transferred must have some link or connection to the State to which he/she will be transferred; this usually requires that the person be considered a national of the State that will enforce the sentence
- v. the consent of both jurisdictions; the consent relates to each case and no state has an obligation to request a transfer or to grant a transfer at the request of another jurisdiction;
- vi. the consent of the sentenced person to the transfer, which ensures that transfers are not used as a method of expelling prisoners or a disguised extradition.

An additional requirement is that the human rights of the person to be transferred must be safeguarded. A State may be forbidden, either as a matter of national law or of binding international law, to transfer a sentenced person to another State where his/her fundamental human

⁴⁶ Model Agreement (n 48).

rights would be threatened. Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the transfer of a person to another State where there are substantial grounds for belief that the prisoner would be in danger of being subjected to torture. Additionally, in paragraph 12 of its general comment No. 31, the Human Rights Committee commented that article 2 of the International Covenant on Civil and Political Rights places an obligation on States not to:

extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [risk to life] and 7 [risk of being exposed to torture or cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

This requirement is more important in situations in which the consent of the sentenced person is not required for the transfer. Mental health should also be considered in determining whether a transfer should be initiated or denied for mentally disturbed offenders.

III. Procedure for Transfer

The sentenced person or a family member usually initiates the transfer request. Although they may initiate the process, the formal process for a transfer begins with the prosecuting State and the enforcing State beginning discussions, either of whom can request a transfer. The formalities of the relevant multilateral instrument or bilateral agreement under which the transfer is being made should be strictly followed.

A. Enforcement or Conversion

The execution of a foreign sentence may be limited by an international agreement between the two States or by the national law of the enforcing State. For example, under the European Convention on the Transfer of Sentenced Persons, the enforcing State is bound by the legal nature and duration of the sentence as determined by the prosecuting State.⁴⁷ If the sentence by its nature or duration is incompatible with the law of the enforcing State, or its law so requires, the enforcing State may, by a court or administrative order, adapt the sanction to the punishment or

measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall correspond with that imposed by the prosecuting State as much as possible. The enforcing State cannot increase the sanction imposed by the prosecuting State, nor exceed the maximum prescribed by the law of the enforcing State. Conversion of the sentence imposes a new sentence based on the factual findings of the court in the prosecuting State. The enforcing State is bound by these facts but imposes a new sentence within the terms of its national law. Some States will only administer sentences by enforcing the sentence imposed by the prosecuting State or will only administer sentences by converting them. Whether by enforcement or conversion, after the transfer of the prisoner, the governing law for the enforcement of the sentence is that of the enforcing State.⁴⁸

⁴⁸ Model Agreement (n 48).

⁴⁷ Council of Europe, Convention on the Transfer of Sentenced Persons, art. 10(1) (1985).

Section 5. Confiscation of Criminal Proceeds

Key Principles

For offences that impact more than a single jurisdiction, fair and efficient administration of criminal justice requires close cooperation regarding the confiscation of criminal proceeds. This section discusses possible sources of the duty to confiscate, and to cooperate to facilitate confiscation. The section describes various SAARC treaties that impose obligations on the Member States to cooperate in such matters.

I. Addressing Confiscation of Criminal Proceeds

A number of international conventions have charged States with the duty of enacting legislation addressing confiscation of criminal proceeds.⁴⁹ As per the Palermo Convention, ‘freezing’ and ‘seizure’ refer to the temporary prohibition of the transfer, conversion, or movement of property, whereas ‘confiscation’ refers to the permanent deprivation of property by order of a court or other competent authority once a conviction has occurred.⁵⁰ However, it should be noted that ‘freezing’ or ‘seizure’ in addition to ‘confiscation’ measures may be crucial for a confiscation to eventually take place. Both the 2005 UNODC and IMF *Model-Legislation on Money Laundering and Financing of Terrorism*, which is intended for States with national legal systems and administrative cultures, and the 2009 UNODC and IMF *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime*, which is intended for States using a common law legal system, present model provisions that generally may be helpful to any court that is carrying out a confiscation of criminal proceeds. Part VI of the 2009 UNODC and IMF *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime* is particularly comprehensive, as it contains numerous and detailed model provisions relating to confiscation, including rules for various types of orders and for appeals.

49 *Model Codes for Post-conflict Criminal Justice, Vol. 1, Section 13* (Vivienne M. O’Connor et al. eds., 2007) at <http://www.usip.org/sites/default/files/MC1/MC1-Part1Section13.pdf>.

50 United Nations Convention against Transnational Organized Crime (n 36); Part VI of the 2009 UNODC and IMF *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime* at https://www.imolin.org/pdf/imolin/Model_Provisions_Final.pdf.

A. International Conventions Addressing Legal Cooperation Among States For The Confiscation of Criminal Proceeds

Legal cooperation among States to facilitate the confiscation of criminal proceeds is strongly encouraged.⁵¹ Accordingly, numerous international conventions that contain provisions regarding confiscation of criminal proceeds also charge States with the duty of cooperating with one another both generally with regard to criminal matters and specifically when carrying out confiscations.⁵² As an example, the United Nations Convention against Corruption—one of the more comprehensive international conventions to address cooperation relating to confiscations—generally provides that mutual legal assistance may be requested for a number of purposes, including: (i) executing searches and seizures and freezing of assets; (ii) identifying or tracing criminal proceeds, property, instrumentalities, or other things for evidentiary purposes; and (iii) the recovery of assets.⁵³ Article 54 of the United Nations Convention against Corruption maintains that a State should adopt legislative and other measures to enable its authorities to return confiscated property upon the request of another State in accordance with the convention, while taking into account the rights of bona fide third parties. Article 54 further asserts that each State should take measures to permit its authorities to freeze or seize property upon a freezing or seizure order or request issued by a court or competent authority of a requesting State that provides a reasonable basis for the requested State to believe that there are sufficient grounds for taking such actions.

Article 54 of the United Nations Convention against Corruption provides that a request made by a State for the purpose of obtaining an order of confiscation in another State should include a description of the property to be confiscated, the location, and if relevant, the estimated value of the property and a statement of facts relied upon by the requesting State sufficient to allow the requested State to seek the order under its domestic law. By contrast, a request made for the purpose of giving effect to an order of confiscation issued by a court in the requesting State should contain ‘a legally admissible copy of the order of confiscation, ...a statement of facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State ... to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation

51 United Nations Convention against Transnational Organized Crime (n 36).

52 Model Codes for Post-conflict Criminal Justice, (n 54).

53 Convention against Corruption (n 49).

order is final.⁵⁴

Correspondingly, upon the request by another State that has jurisdiction over an offence established pursuant to the Convention, the requested State should 'identify, trace and freeze or seize proceeds of crime, property, equipment, or other instrumentalities... for the purpose of eventual confiscation to be ordered either by the requesting State Party or... the requested State Party.'⁵⁵ Such request should contain 'a statement of the facts relied upon by the requesting State and a description of the actions requested and, where available, a legally admissible copy of the order on which the request is based.'⁵⁶

The United Nations Convention against Corruption also provides for the return and disposal of assets between States.⁵⁷ Article 57 requires a State to return confiscated property to the requesting State when such State reasonably establishes prior ownership of the property or when the requested State recognizes damages to the requesting State as a basis for returning the property. Article 6.2.6 of the 2005 UNODC and IMF *Model-Legislation on Money Laundering and Financing of Terrorism* suggests another approach- the State that confiscated the property on its territory at another's request has the power of disposal of such property unless provided otherwise in an agreement with the requesting State, 'without prejudice to the return of the assets to their legitimate owner in good faith.'

Notwithstanding the foregoing, the United Nations Convention against Corruption also provides that cooperation may be refused or provisional measure lifted if the requested State does not receive sufficient and timely evidence or if the value of the property is de minimis.⁵⁸ However, prior to lifting a provisional measure, the requested State should give the requesting State an opportunity to present reasons for continuing the measure.⁵⁹ Additionally, the rights of bona fide third parties should not be prejudiced.⁶⁰

B. SAARC Conventions Addressing Legal Cooperation Among States

SAARC has adopted a number of conventions that address confiscation of criminal proceeds, including the SAARC Convention on Mutual Assistance in Criminal Matters, which is entirely devoted to legal cooperation among

Member States. The Convention goes further than the United Nations Convention against Corruption by charging the States to provide each other with 'the widest possible measures of mutual legal assistance in criminal matters...' Article 1 of the Convention also provides that States must render mutual assistance in:

1. Locating and identifying persons and objects;
2. Service of judicial documents;
3. Providing information, documents and records;
4. Providing objects, including lending exhibits;
5. Search and seizure;
6. Taking evidence and obtaining statements;
7. Making detained persons available to give evidence or assist investigations;
8. Facilitating the appearance of witnesses or the assistance of persons in investigations;
9. Taking measures to locate, restrain or forfeit the proceeds and instruments of crime;
10. Taking measures to locate, freeze and confiscate any funds or finances meant for the financing of all criminal acts in the territory of either State; and
11. Any other assistance consistent with the objectives of this Convention and the laws of the requested State as may be mutually agreed upon.

Similarly, Article VIII of the SAARC Regional Convention on Suppression of Terrorism mandates that:

1. Contracting States shall, subject to their national laws, afford one another the greatest measure of mutual assistance in connection with proceedings brought in respect of [terrorism-related offences], including the supply of all evidence at their disposal necessary for the proceedings.
2. Contracting States shall cooperate among themselves, to the extent permitted by their national laws, through consultations between appropriate agencies, exchange of information, intelligence and expertise and such other cooperative measures as may be appropriate, with a view to prevention terroristic activities through precautionary

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.

measures.

In addition, Article 6 of the Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism provides that the States take all practical measures at the national level, by adapting domestic legislation to prevent and eradicate the financing of terrorism, and for international cooperation with respect thereto, including in the following ways:

1. A comprehensive domestic regulatory and supervisory regime for banks, other financial institutions and other entities deemed particularly susceptible to being used for the financing of terrorist activities. This regime shall require banks and other financial institutions and other entities to utilize effective measures for the identification of customers, paying special attention to unusual or suspicious transactions and to report promptly to the competent authorities, all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose;
2. Measures to detect and monitor movements across national borders, of cash, bearer negotiable instruments and other appropriate movements of value. These measures shall be subject to safeguards to ensure proper use of information and should not impede legitimate capital movements;
3. Measures of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of any act constituting an offence within the scope of the international instruments listed in Article 4 of this Additional Protocol, including assistance in obtaining evidence in their possession, necessary for the proceedings; and
4. Establishing and monitoring channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of terrorism-related offences, within the conditions prescribed by domestic law.

Article 5 of the SAARC Convention on Mutual Assistance in Criminal Matters contains a list of reasons more extensive than the reasons provided in many international conventions as to why a request for cooperation may be refused.

II. Contents of Requests for Assistance and Requested State Action

Article 16 of the SAARC Convention on Mutual Assistance in Criminal Matters provides a list of contents for inclusion in a request for assistance that is much more comprehensive than those in many international conventions, while Article 14 sets forth required State action upon receipt of a request for assistance relating to criminal proceeds:

1. The requested State Party shall, upon request, endeavor to ascertain whether any proceeds or instruments of the alleged crime are located within its jurisdiction and shall notify the requesting State Party of the results of its inquiries. In making the request, the requesting State Party shall notify the requested State Party of the basis of its belief that such proceeds or instruments of crime are located within its jurisdiction.
2. Pursuant to a request made under paragraph 1 of the Article 14, the requested State party shall endeavor to trace assets, investigate financial dealings, and obtain other information or evidence that may help to secure the recovery of proceeds or instruments of crime.
3. Where, pursuant to paragraph 1 of the Article 14, suspected proceeds or instruments of crime are found, the requested State Party shall, upon request, take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of those suspected proceeds or instruments of crime, pending a final determination in respect of those proceeds or instruments by the requesting State Party.
4. Subject to the provisions of domestic laws of the requested State Party, property forfeited or confiscated pursuant to present Article `4 shall accrue to the requesting State Party unless otherwise agree in each particular case.
5. The requested State Party shall, to the extent permitted by its law, give effect to or permit enforcement of a final order forfeiting or confiscating the proceeds or instruments of crime made by the requesting State Party or take other appropriate action to secure the proceeds or instruments of crime following a request by the requesting State Party.
6. States shall ensure that the rights of bona fide third parties shall be respected in the application of Article 14.

Section 6. Access to Foreign Witnesses and Witnesses Outside the Jurisdiction

Key Principles

With the globalization of crime, national authorities increasingly need the assistance of authorities in other countries for the successful investigation, prosecution, and punishment of wrongdoers, in particular those who have committed international terrorist offences. In its Resolution 1373 (2001), the Security Council decided that all States should afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings. That provision is binding on all States, including States that have not ratified all or some of the universal counter-terrorism instruments.

To achieve that objective, States most frequently make use of bilateral and multilateral treaties on mutual legal assistance in criminal matters, in addition to existing informal cooperation mechanisms. Those instruments assist the work of criminal justice officials in several ways. For example, they enable the authorities to obtain evidence abroad, through a procedure that is admissible under their domestic law, in order to summon witnesses, trace individuals, secure the production of documents and other evidentiary items, and issue warrants.

The current trend in international cooperation mechanisms is to favor arrangements that do the following:

- i. allow direct transmission between criminal justice authorities, including central authorities, without use of the diplomatic channel, of requests for mutual assistance to expedite the sending and service of procedural documents,
- ii. require compliance with formalities and procedures indicated and deadlines set by the requesting State party,
- iii. facilitate the cross-border use of technical equipment (for observation purposes) and the interception of communications,
- iv. authorize controlled deliveries and allow covert investigations to take place across borders,
- v. encourage the establishment of joint investigation teams,

- vi. permit, under certain circumstances, witness testimony by video or telephone conference, and
- vii. permit the temporary and lawful transfer of persons held in custody for the purposes of investigation.

To ensure greater international cooperation in offering effective witness protection at home or across borders, law enforcement and prosecution agencies often need to develop arrangements with other jurisdictions for the safe examination of witnesses at risk of intimidation or retaliation.⁶¹

The international community has addressed in various contexts the questions of the transfer of prisoners and the treatment of foreign prisoners. In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners. In the context of the fight against terrorism, the question of the transfer of prisoners, as a means to support the investigation and prosecution of terrorist crimes, is also addressed.

The International Convention for the Suppression of Terrorist Bombings⁶² and the International Convention for the Suppression of the Financing of Terrorism deal with the transfer of persons who are being detained or serving sentences. Thus, '[a] person who is being detained or is serving a sentence in the territory of one State party whose presence in another State party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in [the relevant articles of the two Conventions] may be transferred,'⁶³ provided that the following conditions are met: the person must freely give his or her informed consent and the competent authorities of both States must agree to that transfer, subject to such conditions as those States deem appropriate.

For the purposes of this procedure, the State to which the transfer is made has the authority and obligation to keep the person concerned in custody unless otherwise requested or authorized by the State from which the person was transferred. It must also discharge without delay its obligation to return the person to the custody of the State from which the person

⁶¹ For some examples of what is usually covered in such arrangements, see UN Office on Drugs and Crime, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime 82-84 (2008).

⁶² International Convention for the Suppression of Terrorist Bombing (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256 (International Convention for the Suppression of Terrorist Bombing).

⁶³ *Ibid.*; International Convention for the Suppression of the Financing of Terrorism (n 22).

was transferred as agreed beforehand or as otherwise agreed by the competent authorities of both States. Further, it may not require the State from which the person was transferred to initiate extradition proceedings for the return of the person.

The person transferred has to receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred. Unless the State from which a person is to be transferred so agrees, that person, whatever his or her nationality, may not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred because of acts or convictions committed prior to his or her departure from the territory of the State from which he or she was transferred.

The transfer must always be lawful and provide the necessary procedural safeguards to protect the rights of the individuals involved. The obligations of States under Article 7 of the ICCPR prevent States from expelling, transferring, or otherwise removing a prisoner if that may expose him or her to the danger of torture, inhuman or degrading treatment, or punishment.

In the context of counter-terrorism, some States have made use of diplomatic assurances, memoranda of understanding, and other forms of diplomatic agreement to justify the return or irregular transfer of individuals suspected of terrorist activity to countries where they may face a real risk of torture or other serious human rights abuse.

An Overview of the Global Counter-Terrorism Regime & the International Human Rights Law Paradigm

Section 1. Global Counter-Terrorism Frameworks

This chapter begins by providing an overview of the global counter terrorism regime. Three sources of State obligations are discussed: (i) international custom, (ii) international agreements, and (iii) Security Council resolutions. These obligations are, however, not absolute; they must be met within the limits established by international human rights law. Thus, the remaining of the chapter discusses the basic structure and main components of the international human rights law regime.¹

I. Terrorism-Related Obligations

The international community has long been concerned with the problem posed by transnational terrorism. Over an eighty-year period,² numerous measures had been adopted aimed at eradicating this threat. This section summarizes the most salient of these developments.

A. The Definition of Terrorism

As a prefatory matter, a few words are in order regarding the definition of terrorism. It may seem paradoxical that although there is a clear prohibition on terrorism,³ there is no consensus as to what constitutes it⁴. While at first this might appear problematic, the international community has found a way around this hurdle by focusing, instead, on acts *related* to terrorism (e.g., hostage taking or hijacking). That is, most counter-terrorism instruments define a specific criminal offence, and require States to make that offence punishable under their domestic laws. The counter-terrorism regime is thus *sectoral* in form.⁵

¹ It should be noted that this chapter is unrepresentative of the remainder of the toolkit. Its focus is on the macro-structure of both, the global counter terrorism regime, and the international human rights law paradigm. Succeeding chapters will provide a more detailed discussion of State obligations insofar as they relate to best practices in the handling of terrorism-related cases. The objective of this chapter is simply to provide the foundations for the impending undertaking

² Arguably the first modern attempt to deal with the problem of transnational terrorism was the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism. However, this convention did not enter into force due to an insufficient number of ratifications. Christian Walter, 'Terrorism' (2011) Max Planck Encyclopedia Pub. Intl L, para 7.

³ See Section B(1)(i) on The Proscription on Terrorist Acts and the Duty to Criminalize their Commission.

⁴ For an excellent overview of the subject see Walter (n 2) paras 1-15.

⁵ That is, the global counter-terrorism regime is composed various separate obligations connected by a common thread—their closed association with terrorism.

B. The Global Counter-Terrorism Regime

The global counter-terrorism regime is, as previously noted, fragmentary. Such fragmentation arises not only from the need to elude the definitional quandary noted above, but also from the decentralized nature of international law. It is, then, not surprising that State counter-terrorism obligations also emanate from diverse sources, the most prominent⁶ of which are: international custom, international conventions, and Security Council resolutions⁷.

1. Customary International Law

Customary international law establishes two foundational pillars for the global counter-terrorism regime. It mandates States to: (i) criminalize the commission of terrorist acts, and (ii) to extradite or prosecute the alleged perpetrators. These are latent obligations underling the entire global counter-terrorism regime, and thus merit mentioning them first.

The Statute of the International Court of Justice refers to customary international law as: “evidence of [i] a general practice [ii] accepted as law.”⁸ It thus follows that in establishing the existence of a customary rule of international law a two-part test is applied. First, one must be able to establish the presence of a virtually uniform, widespread and representative State practice. This requirement is dubbed *usus*⁹. Second, one must ascertain that the practice is followed from a sense of legal obligation. This condition is commonly referred to as *opinio juris sive necessitates*¹⁰ or *opino juris* for short. The specific rules for meeting these twofold requirements are complex, and outside the scope of the present toolkit. There are, however, resources on the subject.¹¹ Having introduced customary international law, the remainder of this sub-section explores two cardinal counter-terrorism obligations emerging from it.

i. The Proscription on Terrorist Acts and the Duty to Criminalize their Commission

⁶ Two sources of counter-terrorism obligations are omitted: (i) case-law and (ii) general principles of law. The first one is omitted due to its voluminous nature, the second for its marginal importance to the subject. Subsequent chapters will discuss them insofar as they are relevant to the particular best practices under review.

⁷ It should be noted that Security Council resolutions are not, *per se*, a source of law—at least not in the sense of Article 38(1) sources. Security Council resolutions derive their binding force from the U.N. Charter, and thus are a species of treaty law. Nevertheless, for the sake of simplicity, they will be treated as if they were an independent source of obligations akin Article 38(1) sources.

⁸ Statute of the International Court of Justice, art. 38, para 1, <https://www.icj-cij.org/en/statute>.

⁹ *Usus* stands for “practice” in Latin.

¹⁰ *Opinio juris sive necessitates* stands for “an opinion of law or necessity” in Latin.

¹¹ For a comprehensive study of customary international humanitarian law, see Intl Committee of the Red Cross, *Customary International Humanitarian Law Database*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin (ICRC Guide). For an research guide on the subject, see GlobalLex, ‘Researching Customary International Law, State Practice and the Pronouncement of States Regarding International Law’, http://www.nyulawglobal.org/globallex/Customary_International_Law.html.

Customary international law proscribes the commission of terrorist acts.¹² As evidence of this prohibition, consider U.N. General Assembly Resolution 49/60 (1994), which provides that:

The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed...¹³

This language was later reaffirmed on the 2005 World Summit,¹⁴ and has since formed the basis of the United Nations Global Counter-Terrorism Strategy¹⁵. While General Assembly resolutions are not, *per se*, sources of law, they can—in the words of the International Court of Justice—“reflect customary international law.”¹⁶ That is, they serve an evidentiary function. Confirming this understanding (*i.e.*, the proscription on terrorism) are—although belonging to a different species of law—a number of Security Council resolutions adopted under Chapter VII of the U.N. Charter. These resolutions consistently hold terrorism, *in abstracto*,¹⁷ to “constitut[e] one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable.”¹⁸

More specifically, with regard to the duty to criminalize the commission of terrorist acts,¹⁹ there is a multiplicity of jurisdictions in domestic laws that penalize their commission.²⁰ As the International Committee of the Red Cross (ICRC), an authoritative commentator on customary international

¹² Rule 2 of the ICRC states that violence aimed at spreading terror among the civilian population is part of the corpus of customary international law. This conclusion applies to both, international human rights law and international humanitarian law. Intl Committee of the Red Cross, *Rule 2: Violence Aimed at Spreading Terror among the Civilian Population*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2 (ICRC Rule 2). For an interesting academic commentary on the subject see Thomas Weatherall, ‘The Status of the Prohibition of Terrorism in International Law: Recent Developments’ (2015) 46 *Georgetown J. Intl L* 590.

¹³ UNGA Res. 49/60 (10 December 1994) UN Doc 49/60 para 1.

¹⁴ UNGA Res. 60/1 (24 October 2005) UN Doc 60/1 para 81 (2005 World Summit Outcome).

¹⁵ Counter Terrorism Implementation Task Force *UN Global Counter-Terrorism Strategy*, <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>.

¹⁶ *Nicar. v. U.S.* [1986] I.C.J.14 181 (ICJ).

¹⁷ The U.N. Security Council has a long history of holding specific acts of terrorism as a threat to international peace and security. UNSC Res 748 (31 March 1992) UN Doc S/RES/748 (adopted against Libya for harboring suspected terrorists); UNSC Res 1044 (31 January 1996) UN Doc S/RES/1044 (adopted in response to the attempt assassination of President Mubarak). However, it was not until S.C. Resolution 1373 that terrorism, in the abstract, was considered for the first time to be a threat to international peace and security; S.C. Resolution 1373 allowed for abstract (or general) counter-terrorism measures. UNSC Res 1373 (31 October 2000) UN Doc S/RES/1373

¹⁸ UNSC Res 2322 (12 December 2016) UN Doc S/RES/2322pmb1. para 2.

¹⁹ Criminalization is addressed separately from proscription as a rejoinder to those who might argue that international law might proscribe acts of terrorism but that this obligation, by itself, is insufficient to create a duty to criminalize terrorism and related acts.

²⁰ ICRC Rule 2 (n 12).

law, explained:

*The prohibition of acts or threats of violence aimed at terrorizing the civilian population is set forth in a large number of military manuals. Violations of this rule are an offence under the legislation of numerous States. The prohibition is also supported by official statements...*²¹

It thus follows from the ubiquitous criminalization of terrorism, that it now forms part of the corpus of customary international law. The resulting widespread criticism has led some jurists to refer to terrorists as *hosti humanis generis*.²² This is a term traditionally reserved for universally abhorred acts on a par with piracy. The proscription on terrorism and the duty to criminalize its commission are thus unequivocal and binding on all States.²³

ii. The Aut Dedere, Aut Iudicare Principle

States have a duty to criminalize acts of terrorism. A closely related obligation is that emanating from the *aut dedere, aut iudicare* principle,²⁴ which mandates States to either extradite or prosecute suspected terrorists. Its effect is to render the criminalization condition operative by ensuring that no terrorist act is left unpunished. It is submitted that this principle forms part of the body of customary international law, and it is thus binding on all States.

It should be recalled that for a norm to qualify as customary international law, it must be able to meet the twofold requirements of *usus* and *opinio juris*. Practice and intent may be inferred from various sources—including treaties. As the ICRC explicated:

*Treaties are... relevant in determining the existence of customary international law because they help assess how States view certain rules of international law. Hence, the ratification, interpretation and implementation of a treaty, including reservations and statements of interpretation made upon ratification, are included in the study.*²⁵

²¹ Ibid.

²² *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 23 (D.C.C. 1998) (observing that, “terrorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era’s *hosti humani generis*--an enemy of all mankind...”).

²³ This statement is supported by an analogous obligation although rooted on a different source of law: Security Council resolutions adopted under Chapter VII of the U.N. Charter. UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 (mandates States to “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that... such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts”.

²⁴ This principle has an ancient pedigree dating back to Hugo Grotius, who in 1625 wrote: “The state... ought to do one of two things ... It should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal. This latter course is rendition ...” Hugo Grotius, *On The Law of War and Peace* (Stephen C. Neff ed., 2012).

²⁵ ICRC Guide (n 12).

This understanding is supported by the jurisprudence of the ICJ.²⁶ In short, treaties may serve as ontological proof of a rule of customary international law.

With regard to terrorism, the *aut dedere, aut iudicare* principle is found in a multiplicity of multilateral and regional treaties. For example, it is contained on Article IV of the SAARC Regional Convention on Suppression of Terrorism, Article 7 of the Council of Europe Convention on the Suppression of Terrorism, Article 3 of the Arab Convention on Combating Terrorism, Articles 8 and 9 of the International Convention for the Suppression of Terrorist Bombings, and Article 10 of the International Convention for the Suppression of the Financing of Terrorism. From the preceding, the following observation ensues: the *aut dedere, aut iudicare* principle vis-à-vis terrorism is universally accepted. As proof of this postulation consider the following observations. First, the cited treaties have been extensively ratified.²⁷ Second, reservations have been negligible.²⁸ Thus, one may conclude from the evidence presented²⁹ that all States have a duty, under customary international law, to either extradite or prosecute suspected terrorists.³⁰

It has been observed that the international community proscribes acts of terrorism. States have a duty to criminalize their commission, and to extradite or prosecute suspected terrorists. These twin obligations permeate the entirety of the global counter-terrorism apparatus. However, as previously noted, beyond these general obligations, lie various discrete imperatives. The remainder of this section discusses the most salient of these obligations.

2. Treaty-Based Duties

Treaties³¹, like contracts, are based on the principle of good faith, known

²⁶ The ICJ, for example, on the *North Sea Continental Shelf* cases, placed considerable weight on the degree of ratification of the Geneva Convention of 1958 on the Continental Shelf in determining the existence of customary international law.

²⁷ As a way of illustration, the International Convention for the Suppression of the Financing of Terrorism has, as of the date of publication of the toolkit, 188 parties. International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&clang=en.

²⁸ Ibid.

²⁹ That is, the multiplicity of treaties containing the *aut dedere, aut iudicare* principle, the States represented, and the limited reservations made.

³⁰ This line of reasoning is supported by an extensive use by the Security Council of the *aut dedere aut iudicare* principle on matters relating to terrorism, and the acquiescence by States with these mandates. Michael P. Sharf, ‘Aut Dedere Aut Iudicare’ (2008) Max Planck Encyclopedia Pub. Intl L.

³¹ Treaties are known by a variety of different names. Some common names are: conventions, international agreements, pacts, general acts, charters, declarations, and covenants.

in international law as *pacta sunt servanda*³². The rules governing their making, interpretation, termination, and withdrawal are complex and are largely, although not exclusively, governed by the Vienna Convention on the Law of Treaties. As a general rule,³³ treaties only bind those who had signed and ratified the particular instrument. Although it should be remembered that a signator, pending ratification of the instrument, is bound not to act contrary to the object and purpose of the treaty.³⁴ Treaties may be categorized in various forms (e.g., law-making treaties versus treaty-contracts). For our purposes, we will divide them into (i) multilateral, and (ii) regional.

i. Multilateral Treaties

Presently there are 19 multilateral counter-terrorism conventions. These may be sub-divided according to their subject-matter into: (1) civil aviation,³⁵ (2) the protection of international staff,³⁶ (3) the taking of hostages,³⁷ (4) nuclear material,³⁸ (5) maritime navigation,³⁹ (6) explosive materials,⁴⁰ (7) terrorist bombings,⁴¹ (8) the financing of terrorism,⁴² and (9) nuclear terrorism⁴³. Table 1 lists the aforesaid instruments, and provides a brief synopsis of their content.

Table 1

Treaty	Synopsis
1. 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft	<ul style="list-style-type: none"> Applies to acts affecting in-flight safety; Authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft; and Requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.

³² *Pacta sunt servanda* stands for “agreements must be kept” in Latin.

³³ Two exceptions to this rule are worth noting: (1) in an early ICJ case the Court held that the U.N. Charter, given its quasi universal membership and importance, is binding upon all States regardless of their status as parties, and (2) treaties that reflect customary international law.

³⁴ VCLT Article 18(a) provides that, “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when... [i]t has signed the treaty...” Vienna Convention on the Law of Treaties (23 May 1969) 1155 U.N.T.S. 331[hereinafter VCLT].

³⁵ See treaties 1 through 7 in Table 1.

³⁶ See treaty 8 in Table 1.

³⁷ See treaty 9 in Table 1.

³⁸ See treaties 10 through 11 in Table 1.

³⁹ See treaties 12 through 15 in Table 1.

⁴⁰ See treaty 16 in Table 1.

⁴¹ See treaty 17 in Table 1.

⁴² See treaty 18 in Table 1.

⁴³ See treaty 19 in Table 1.

2. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft	<ul style="list-style-type: none"> Makes it an offence for any person on board an aircraft in flight to “unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft” or to attempt to do so; Requires parties to the convention to make hijackings punishable by “severe penalties” Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; and Requires parties to assist each other in connection with criminal proceedings brought under the Convention.
3. The 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation	<ul style="list-style-type: none"> Makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts; Requires parties to the Convention to make offences punishable by “severe penalties”; and Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution.
4. The 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	<ul style="list-style-type: none"> Extends the provisions of the Montreal Convention to encompass terrorist acts at airports serving international civil aviation

<p>5. 2010 Convention on the Suppression of Unlawful Acts Relation to International Civil Aviation</p>	<ul style="list-style-type: none"> · Criminalizes the act of using civil aircraft as a weapon to cause death, injury or damage; · Criminalizes the act of using civil aircraft to discharge biological, chemical and nuclear (BCN) weapons or similar substances to cause death, injury or damage, or the act of using such substances to attack civil aircraft; · Criminalizes the act of unlawful transport of BCN weapons or certain related material; · A cyber attack on air navigation facilities constitutes an offence; · A threat to commit an offence may be an offence by itself, if the threat is credible. · Conspiracy to commit an offence, or its equivalence, is punishable.
<p>6. 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft</p>	<ul style="list-style-type: none"> · Supplements the Convention for the Suppression of Unlawful Seizure of Aircraft by expanding its scope to cover different forms of aircraft hijackings, including through modern technological means; · Incorporates the provisions of Beijing Convention relating to a threat or conspiracy to commit an offence.
<p>7. 2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft</p>	<ul style="list-style-type: none"> · The Protocol expands the grounds of jurisdiction by recognizing, under certain conditions, the competence of the State of landing and the State of the operator to exercise jurisdiction over offences and acts on board aircraft. The establishment of such jurisdiction over offences is mandatory if the criteria set out in the Protocol are met. · The Protocol extends legal recognition and certain protections to in-flight security officers. · It also contains provisions addressing such issues as coordination among States, due process and fair treatment, and the right to seek recovery under national law.

<p>8. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons</p>	<ul style="list-style-type: none"> · Defines an "internationally protected person" as a Head of State, Minister for Foreign Affairs, representative or official of a State or international organization who is entitled to special protection in a foreign State, and his/her family; and · Requires parties to criminalize and make punishable "by appropriate penalties which take into account their grave nature" the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act "constituting participation as an accomplice".
<p>9. 1979 International Convention Against the Taking of Hostages</p>	<ul style="list-style-type: none"> · Provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention".
<p>10. 1980 Convention on the Physical Protection of Nuclear Material</p>	<ul style="list-style-type: none"> · Criminalizes the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage.
<p>11. 2005 Amendment to the Convention on the Physical Protection of Nuclear Material</p>	<ul style="list-style-type: none"> · Makes it legally binding for States Parties to protect nuclear facilities and material in peaceful domestic use, storage as well as transport; and · Provides for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences.

<p>12. 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation</p>	<ul style="list-style-type: none"> Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation; and Makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships.
<p>13. 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation</p>	<ul style="list-style-type: none"> Criminalizes the use of a ship as a device to further an act of terrorism; Criminalizes the transport on board a ship various materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act of terrorism; Criminalizes the transporting on board a ship of persons who have committed an act of terrorism; and Introduces procedures for governing the boarding of a ship believed to have committed an offence under the Convention.
<p>14. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf</p>	<ul style="list-style-type: none"> Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation.
<p>15. 2005 Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf</p>	<ul style="list-style-type: none"> Adapts the changes to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation to the context of fixed platforms located on the continental shelf.
<p>16. 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection</p>	<ul style="list-style-type: none"> Designed to control and limit the use of unmarked and undetectable plastic explosives
<p>17. 1997 International Convention for the Suppression of Terrorist Bombings</p>	<ul style="list-style-type: none"> Creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

<p>18. 1999 International Convention for the Suppression of the Financing of Terrorism</p>	<ul style="list-style-type: none"> Requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or which also engage in illicit activities such as drug trafficking or gun running; Commits States to hold those who finance terrorism criminally, civilly or administratively liable for such acts; and Provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy is no longer adequate justification for refusing to cooperate.
<p>19. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism</p>	<ul style="list-style-type: none"> Covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors; Covers threats and attempts to commit such crimes or to participate in them, as an accomplice; Stipulates that offenders shall be either extradited or prosecuted; Encourages States to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings; and Deals with both crisis situations (assisting States to solve the situation) and post-crisis situations (rendering nuclear material safe through the International Atomic Energy Agency (IAEA)).

Source: <http://www.un.org/en/counterterrorism/legal-instruments.shtml>

ii. Regional Treaties

States, in addition to multilateral treaties, have enacted various regional concordats through the sponsorship of their respective regional organizations.⁴⁴ Notably, SAARC countries have enacted two main agreements on the subject. Table 2 lists them, and provides a summary of their content.

⁴⁴Walter (n 1) (contains a good overview of terrorism-related regional treaties).

Table 2

Treaty	Synopsis
1. 1987 SAARC Regional Convention on Suppression of Terrorism	<ul style="list-style-type: none"> It provides a list of acts that shall be regarded as terrorism offences It abolishes the political offence exception to extradition for the aforesaid offences It facilitates extradition Provides for the highest degree of mutual assistance
2. 2004 Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism	<ul style="list-style-type: none"> It provides for the criminalization of the provision, collection, or acquisition of funds for the purpose of committing terrorist acts It provides further measures to prevent and suppress the financing of such acts

3. Security Council Resolutions

States have conferred upon the Security Council primary responsibility for the maintenance of international peace and security.⁴⁵ To fulfill this mandate, it has been granted broad powers. When dealing with a matter likely to endanger international peace and security, it may make *recommendations* aimed at addressing the situation.⁴⁶ These *exhortatory* competencies are known as *Chapter VI powers*. Conversely, if the Security Council, in its discretion, determines that a situation constitutes a threat to the peace, a breach of the peace, or an act of aggression⁴⁷ it may: (i) "...decide what measures not involving the use of force are to be employed"⁴⁸, or (ii) "...take such action by air, sea, or land forces as may be necessary..."⁴⁹. That is, *its Chapter VII competencies are binding on all States*.⁵⁰

As previously discussed, the Security Council has adopted numerous resolutions in response to terrorism. Some deal with particular terrorist acts, others address the threat posed by terrorism in general. Table 3 presents an overview of the most salient of these instruments,⁵¹ and

45 United Nations, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI art. 24 para 1 [hereinafter UN Charter].

46 Ibid arts. 33, 36.

47 Ibid art. 39.

48 Ibid art. 41.

49 Ibid art. 42.

50 "The Members of the United Nations agree to accept and carry out the decisions of the Security Council..." Ibid art. 25.

51 This list is not meant to be comprehensive with regard to both, Security Council resolutions, and the provisions cited within each document. Other important Security Council resolutions are: UNSC Res 2242 (2015) UN Doc S/RES/2242 (regarding women on security related matters); UNSC Res 2309 (2016) UN Doc S/RES/2309 (regarding aviation security), UNSC Res 2341 (2017) UN Doc S/RES/2341 (regarding critical infrastructures); UNSC Res 2354 (2017) UN Doc S/RES/2354 (regarding countering

summarizes their core provisions.

Table 3

S.C. Resolution	Legal Basis	Provisions
1. S.C. Res. 1267 (1999) ⁵²	Chapter VII	<p><i>Synopsis: S.C. Res. 1267 mandates States to institute an asset freeze, a travel ban and arms embargo against individuals and entities forming part of or associated with ISIL (Da'esh) and Al-Qaida</i></p> <p>Principal State Obligations</p> <p>The Security Council, through the ISIL (Da'esh)-Al-Qaida Sanctions Committee, establishes a list of person/entities who are deemed to constitute or be linked to ISIL/Al-Qaida, and orders all States to:⁵³</p> <ul style="list-style-type: none"> Freeze the funds of the designated individuals/entities Prevent the entry into or transit through their territories by the designated individuals, and Prevent the direct or indirect supply of (i) weapons, (ii) technical assistance, and (iii) training to the designated individuals/entities <p>* Certain exceptions to the asset freeze and travel ban are provided for humanitarian reasons, and for the fulfillment of judicial processes.⁵⁴</p> <p>Monitoring Body</p> <p>Establishes the ISIL (Da'esh)-Al-Qaida Sanctions Committee as a monitoring body for State compliance with the aforesaid obligations⁵⁵</p>

terrorist narratives); UNSC Res 2370 (2015) UN Doc S/RES/2370 (regarding regulating small arms and light weapons, and improvised explosive devices). For a more comprehensive list of all present Security Council resolutions on the subject see Counter-Terrorism Committee, 'Resolutions' <https://www.un.org/sc/ctc/resources/security-council/resolutions/>.

52 As amended by UNSC Res 1899 (2011) UN Doc S/RES/1899 and UNSC Res 2253 (2015) UN Doc S/RES/2253.

53 For an overview of the ISIL (Da'esh)-Al-Qaida Sanctions Regime see *Sanctions*, Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015), <https://www.un.org/sc/suborg/en/sanctions/1267>.

54 *Exceptions to Measures*, Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015), <https://www.un.org/sc/suborg/en/sanctions/1267/travel-ban>.

55 Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) (n 53).

<p>2. S.C. Res. 1373 (2001)</p>	<p>Chapter VII</p>	<p style="text-align: center;">Principal State Obligations</p> <p><i>Synopsis: S.C. Res. 1373 aims at preventing and punishing the financing of terrorist acts</i></p> <p>States are, inter alia, mandated to:</p> <ul style="list-style-type: none"> · Criminalize the willful provision/collection of funds to carry out terrorist acts · Prohibit the provision of funds to or for the benefit of persons who commit, attempt to commit, participate, or facilitate terrorist acts · Freeze the financial assets of persons who commit, attempt to commit, participate, or facilitate terrorist acts · Deny safe haven to those who finance, plan, support, or commit terrorist acts · Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice · Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts <p>States are, inter alia, called to:</p> <ul style="list-style-type: none"> · Become parties to all terrorism-related conventions <p style="text-align: center;">Monitoring Body</p> <p>Establishes the Counter-Terrorism Committee, as aided by the Counter-Terrorism Executive Directorate, as a monitoring body for State compliance with the aforesaid obligations⁵⁶</p>
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<p>3. S.C. Res. 1540 (2004)</p>	<p>Chapter VII</p>	<p><i>Synopsis: S.C. Res. 1540 aims at curtailing the illicit traffic of nuclear, chemical or biological weapons by non-State actors</i></p> <p style="text-align: center;">Principal State Obligations</p> <p>States are, inter alia, mandated to:</p> <ul style="list-style-type: none"> · Prohibit the manufacture, acquisition, possession, development, transport, transfer of nuclear, chemical, or biological weapons by non-State actors · Refrain from providing any form of support to non-State actors that attempt to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical, or biological weapons · Establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery <p style="text-align: center;">Monitoring Body</p> <p>Establishes the Counter-Terrorism Committee, as aided by the Counter-Terrorism Executive Directorate, as a monitoring body for State compliance with the aforesaid obligations⁵⁷</p>
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⁵⁶ For an overview of the Counter-Terrorism Committee's work see *About the Counter-Terrorism Committee*, Security Council Counter-Terrorism Committee, <https://www.un.org/sc/ctc/about-us/>

⁵⁷ For an overview of the 1540 Committee see *Frequently Asked Questions on Resolution 1540 (2004)*, 1540 Committee, <http://www.un.org/en/sc/1540/faq/facts.shtml>.

<p>4. S.C. Res. 2178 (2014)</p>	<p>Chapter VII</p>	<p><i>Synopsis: S.C. Res. 2178 aims at addressing the foreign terrorist fighter phenomenon. Foreign terrorist fighters are defined as individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetuation, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities.</i></p> <p style="text-align: center;">Principal State Obligations</p> <p>States are, inter alia, mandated to:</p> <ul style="list-style-type: none"> · Criminalize the travel or attempt to travel of their nationals or other individuals within their territories to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training · Criminalize the willful provision or collection of funds by their nationals or in their territories to finance the travel of foreign terrorist fighters · Criminalize the willful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of foreign terrorist fighters <p style="text-align: center;">Monitoring Body</p> <p>The Counter Terrorism Committee—among other U.N. bodies—is charged with monitoring functions.⁵⁸</p>
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<p>5. S.C. Res. 1624</p>	<p>Chapter VI</p>	<p><i>Synopsis: S.C. Resolution 1624 aims at restraining the incitement to commit terrorist acts</i></p> <p style="text-align: center;">Main Provisions</p> <ul style="list-style-type: none"> · Prevent and criminalize the incitement to commit terrorist acts
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<p>6. S.C. Res. 2322</p>	<p>Chapter VI</p>	<p><i>Synopsis: S.C. Res. 2322 builds upon a pre-existent state obligation to cooperation in preventing, investigating, and prosecution terrorists.</i></p> <p style="text-align: center;">Main Provisions</p> <p>States are, inter alia, called to:</p> <ul style="list-style-type: none"> · Enact or amend legislation to facilitate international judicial & law enforcement cooperation. · Enact extradition & mutual legal assistance agreements and to simplify them. · Designate mutual legal assistance and extradition central authorities. · Consider, with regard to mutual legal assistance, the use of electronic transfer of requests. · Cooperate to prevent violent extremist propaganda and incitement on the internet and social media. · Make use of INTERPOL's I-24/8 global communication system, and databases
<p>7. S.C. Res. 2395</p>		<p><i>Synopsis: S.C. Res. 2395 renewed the mandate of the Counter Terrorism Committee Executive Directorate (CTED) until December 2021</i></p>

⁵⁸ UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 para 24

8. S.C.Res 2396	Chapter VII	<p><i>Synopsis: S.C. Res. 2396 builds upon S.C. Res. 2178 aims at addressing the foreign terrorist fighter phenomenon. Foreign terrorist fighters</i></p> <p style="text-align: center;">Main Provisions</p> <p>States are, inter alia, called to:</p> <ul style="list-style-type: none"> • Strengthen their efforts to stem the threat through measures on border control, criminal justice, information sharing and counter extremism • Strengthen measures to prevent the transit of terrorists • Cooperate and support each other's efforts to establish serious criminal offenses in regard to the travel, recruitment, and financing of foreign terrorist fighters • Take appropriate action in regards to suspected terrorists and their accompanying family members, including by considering appropriate prosecution, rehabilitation, and reintegration measures in compliance with domestic and international law
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As previously noted, the global counter-terrorism regime imposes various obligations upon States. These duties are, however, not absolute. States are required to fulfill them within the confines of international human rights law. The following section⁵⁹ introduces international human rights law as a limit on the exercise of State powers.⁶⁰

⁵⁹ As previously noted, other chapters will discuss particular obligations insofar as they relevant to the specific best practices under review. The aim of this section is merely to familiarize the reader with the structure and basic obligations of the international human rights law regime.

⁶⁰ International human rights law creates obligations not only upon States but on all subjects of international law.

Section 2. Human Rights Obligations

The international human rights law paradigm, emulating the piecemeal constitution of international law, presents a fractional configuration. That is, obligations are found in concordats, customs, general principles of law, and court opinions. This section presents an overview of its (i) bifurcated structure, and (ii) most salient obligations.

A. The Hierarchical Structure of International Law: The Preeminence of *Ius Cogens* or Peremptory Norms of International Law

At the apex of State obligations lie what are known as peremptory norms of international law or *ius cogens*. These are defined as: "... norm[s] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same-character".⁶¹ Peremptory norms are thus *not a source* of international law but a *status* conferred upon them in light of their importance to the international community. Their effect is to render conflicting international laws/obligations—regardless of source—void.⁶² Few international obligations undisputedly qualify as *ius cogens*.⁶³ Consensus exists on, inter alia, the prohibition on (i) torture,⁶⁴ (ii) genocide,⁶⁵ and (iii) slavery⁶⁶. The remaining international obligations, irrespective of source or subject-matter, are subordinate to *ius cogens* norms.

B. Treaty Obligations

Concordats constitute the bedrock of the international human rights law regime. Beginning in the 19th century with a series of agreements adopted for the protection of Christian minorities in territories under the dominium of the Ottoman Empire,⁶⁷ the concept of the State as holding absolute

⁶¹ VCLT (n 34) art. 53.

⁶² Ulf Linderfalk, 'The Effects of Jus Cogens Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?' (2007) 18 Eur. J. Intl L 853, 854 (citing to a study by the International Law Commission titled "Fragmentation of International Law") available at http://www.repositoriocdpd.net:8080/bitstream/handle/123456789/676/Inf_KoskenniemiM_FragmentationInternationalLaw_2006.pdf?sequence=1.

⁶³ For an overview of *ius cogens* norms see Jochen A. Frowein, 'Ius Cogens' (2013) Max Planck Encyclopedia Pub. Intl L.

⁶⁴ Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law' (2004) 15 Eur. J. Intl L. 97.

⁶⁵ Frowein (n 63).

⁶⁶ Ibid.

⁶⁷ Thomas Buergenthal, 'Human Rights' (2007) Max Planck Encyclopedia Pub. Intl L.

dominium over its subjects began to erode. This ideological transmutation reached its zenith at the conclusion of World War II, where the peoples of the world jointly declared respect for human rights to be a foundational pillar of the new world order—the United Nations system.⁶⁸ In pursuance of this desideratum, States pledged to take joint and separate action to secure their observance.⁶⁹ Thenceforth numerous multilateral and regional concordats have been adopted for the promotion and safeguard of human rights. Table 4 catalogues and summarizes the most important of these instruments.

Table 4

Treaty	Synopsis
1. The International Covenant on Civil and Political Rights (ICCPR)	<ul style="list-style-type: none"> It commits its parties to respect basic civil and political rights of individuals Among the protected rights are: <ul style="list-style-type: none"> The right to life. ICCPR Art. 6 The prohibition on torture and on cruel, inhuman and degrading treatment or punishment. ICCPR Art. 7 The right to liberty and security of person. ICCPR Art. 9 The right to a fair and public hearing. ICCPR Art. 14(1) The right to be presumed innocent until proven guilty. ICCPR Art. 14(2) Other due process guarantees. ICCPR Art. 14(3)-(7) The prohibition on ex post facto laws. ICCPR Art. 15 The right to privacy. ICCPR Art. 17 The right to freedom of thought, conscience, and religion. ICCPR Art. 18 The right to freedom of expression. ICCPR Art. 19
2. The International Covenant on Economic, Social and Cultural Rights (ICESCR)	<ul style="list-style-type: none"> It commits its parties to respect basic economic, social, and cultural rights of individuals and peoples

3. The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)	<ul style="list-style-type: none"> It commits its signatories to the elimination of racial discrimination
4. The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT)	<ul style="list-style-type: none"> It commits its parties to take all appropriate steps to prevent and punish the torture of persons Torture is defined as: <ul style="list-style-type: none"> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. CAT Art. 1 Amidst the contracted obligations are: <ul style="list-style-type: none"> To ensure that all acts of torture constitute criminal offences. CAT Art. 4 To prohibit the extradition of an individual to a State where there are substantial grounds for believing that he/she would be subjected to torture. CAT Art. 3 To conduct a prompt and impartial investigation upon an allegation of torture. CAT Arts. 12, 13 The duty to exclude evidence obtained through torture except to prove the commission of torture. CAT Art. 15 The right to obtain adequate redress for the commission of torture. CAT Art. 14
5. The Convention on the Elimination of Discrimination of Discrimination against Women (CEDAW)	<ul style="list-style-type: none"> It commits its parties to exhaust all possible resources to eliminate the discrimination of women
6. The Convention on the Rights of the Child (CRC)	<ul style="list-style-type: none"> It commits its signatories to respect the rights of children (<i>i.e.</i>, persons under the age of 18). It also elaborates on the content of these rights in light of the specific needs of children.

⁶⁸Article 1(3) of the UN Charter states that “[t]he Purposes of the United Nations are...promoting and encouraging respect for human rights and for fundamental freedoms...” UN Charter (n 53) art. 1, para. 3.

⁶⁹Ibid arts. 55-56.

<p>7. The International Convention for the Protection of All Persons from Enforced Disappearance (CPED)</p>	<p>· It provides, inter alia, that:</p> <ul style="list-style-type: none"> · Under no circumstances no person shall be subject to enforced disappearance. CPED Art. 1 · Enforced disappearance is "...considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. CPED Art. 2 · Enforced disappearances shall constitute a criminal offence. CPED Art. 4
<p>8. The Convention Relating to the Status of Refugees</p>	<p>· It specifies who qualifies as a refugee under international law, defines their rights, and the resulting State obligations</p>

The ICCPR, ICESCR,⁷⁰ CEDAW, CRC, CERD, and CAT provide for the creation of expert committees, to promote and monitor State compliance with their provisions.⁷¹ In addition, some of these conventions—often through additional protocols—provide for inter-State and individual complaint mechanisms.⁷²

C. Customary International Law

Parallel to treaties, international customs aimed at limiting State competencies vis-à-vis individuals began to emerge. A catalyst to their development was the adoption of the Universal Declaration of Human Rights (UDHR), an exhortatory document proclaiming common standards for the promotion of human rights. This document served as the blueprint for the drafting of the ICCPR and the ICESCR, and are together referred to as the *international bill of human rights*. While, as previously stated, the UDHR was adopted as an aspirational document only, its widespread acceptance by States has elevated some of its provisions to the status of customary international law. Examples of these are the proscriptions on arbitrary detention, torture, as well as the right to a fair trial.⁷³ In the

70 ICESCR itself does not provide for the creation of a monitoring body. Instead, such an organ was created through the agency of the United Nations Economic and Social Council (ECOSOC)—the so-called Committee on Economic, Social and Cultural Rights. See 'Committee on Economic, Social, and Cultural Rights', <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx>.

71 Buergenthal (n 67), para 11.

72 Ibid 21.

73 For an extensive treatment of the subject see Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995-1996) 25 Ga. J. Intl & Comp. L. 290, 340-351.

succeeding chapters we will explore in further detail specific norms of customary international law. Suffice it to say on here that customary international law is an important limit on State powers. This is because, unlike treaties, customary international law excuses the need for explicit⁷⁴ State consent. Thus, rendering it of broader application.

D. General Principles of Law

Another important source of international human rights norms are general principles of law. These are described as principles common to all civilized nations.⁷⁵ General principles of law are exceptionally important in the absence of both, international agreements and customary international law. Thus, they are considered to exercise a gap-filling function. Notable examples are the principles of *res judicata*,⁷⁶ proportionality,⁷⁷ and *non bis in idem*⁷⁸ or double jeopardy⁷⁹. A more detailed discussion of specific provisions, insofar as they relate to counter-terrorism cases, will follow in successive chapters.

E. Judicial Decisions

Although strictly speaking judicial decisions are subsidiary means for determining rules of law,⁸⁰ considerations of fairness⁸¹ and predictability confer upon them de facto precedential value. Thus, it has not been uncommon for the International Court of Justice (hereinafter ICJ), and other international tribunals, to follow their previous judgments.⁸² Given the number of adjudicatory bodies⁸³ competent to address human rights issues an overview of their jurisprudence is outside the scope of the

74 Customary international law still requires consent but it allows for implicit consent which may be inferred, for example, from the failure of a State to protest to an emerging general practice.

75 It should be noted that not all principles common to all civilized nations are general principles of international law. The aforesaid requirement only means that for a norm to qualify as a general principle of law it must meet the universality requirement (i.e., it must be common to all civilized nations). In other words, it is a necessary but not a sufficient condition. Giorgio Gaja, 'General Principles of Law' (2013) Max Planck Encyclopedia Pub. Intl L..

76 Ibid.

77 This principle demands that the severity of punishment must be proportionate to the seriousness of the crime. Christopher Michaelsen, 'The Proportionality Principle, Counter-Terrorism Laws and Human Rights' (2010) 2 City Uni. of Hong Kong L. Rev. 19.

78 *Non bis in idem* stands in Latin for "not twice in the same thing".

79 Michele N. Morosin, 'Double Jeopardy and International Law: Obstacles to Formulating a General Principle' (1995) 64 Nordic J. Int'l L 261.

80 Malcolm Shaw, *International Law* (7th ed., 2014) 78.

81 A cardinal principle of justice demands that like cases be treated alike. Its pedigree is ancient and may be traced back to Aristotle. See Aristotle, *Nicomachean Ethics, Book V* (Terence Irwin trans., 2010).

82 Shaw (n 80).

83 These range from international tribunals to monitoring bodies such as the Human Rights Committee, which interprets and oversees compliance with the ICCPR.

toolkit. Instead, previous chapters focus on selected cases based on their relevance to the subject under discussion.