

Counter-Terrorism and Human Rights in the Courts

Guidance for Judges, Prosecutors and Lawyers
on Application of EU Directive 2017/541 on
Combatting Terrorism

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on Application of EU Directive 2017/541 on
Combatting Terrorism

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I. Introduction

On 15 March 2017 the European Union (EU) adopted [EU Directive 2017/541 on Combatting Terrorism](#) ("the Directive") with a deadline for transposition into domestic law of September 2018. The Directive aims principally to extend the scope of the application of the criminal law by Member States to terrorism related threats and activity within the EU. In so doing it covers an expansive range of terrorist offences, some previously recognized in international and (most) domestic legal frameworks, and others more innovative. These include crimes related to terrorist acts (Article 3), financing (Article 11) and providing terrorist training (Article 7), for example, as well as 'related' offences of 'public provocation' of terrorism (recital 10/Article 5), 'receipt' of training (article 8), 'travel for the purpose of terrorism' (Article 9); aiding and abetting, inciting, attempting or facilitating these offences (Articles 10, 14).

The words "terrorist" and "terrorism" here are used only to refer to and replicate their use in the Directive and other laws referred to. They are not necessarily used in a legal sense, since there is no universally accepted meaning of terrorism. An appropriate definition of terrorism has been proposed by the UN Special Rapporteur on Counter-terrorism and Human Rights Martin Scheinin, in his 2010 report, [UN Doc A/HRC/16/51](#):

"Terrorism means an action or attempted action where:

- (1) The action: (a) Constituted the intentional taking of hostages; or (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
- (2) The action is done or attempted with the intention of: (a) Provoking a state of terror in the general public or a segment of it; or (b) Compelling a Government or international organization to do or abstain from doing something; and
- (3) The action corresponds to: (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or (b) All elements of a serious crime defined by national law."

The Directive has been criticised for the hasty process of its adoption, its scope and human rights implications. It undoubtedly poses challenges for national systems - in the first instance for national legislatures, and in turn for prosecutors and investigative judges and the judiciary - in ensuring implementation consistently with human rights and the rule of law.

The obligation to ensure implementation consistently with States' other obligations under international human rights and humanitarian law is enshrined explicitly in the Directive:

"this directive has to be implemented in accordance with those rights and principles taking also into account the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other human rights obligations under international law (Recital 35)."

The Directive followed [UN Security Council Resolution 2178](#) (2014) (SCRes2178) and the [Additional Protocol to the Council of Europe's Convention on the Prevention of Terrorism](#) (2015) aimed at implementing SCRes2178 within the Council of Europe legal framework. It also reflects elements of earlier resolutions such as SCRes 1624, 1456, or 2462 (2019). Each of these resolutions and instruments also make explicit the need for implementation consistent with international human rights law. These UN Security Council resolutions provide that counter terrorism measures must "comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law."

The focus of this Guidance is on the appropriate judicial interpretation and implementation of the Directive in practice throughout the process of investigation and prosecution, consistently with international and EU human rights law and standards. The Directive raises many human rights issues, which pose complex challenges for judges, prosecutors and lawyers. The breadth and indeterminacy of many of the offences enshrined in the Directive raise fundamental concerns regarding compatibility with the principle of legality - enshrined in Article 49 of the EU Charter,

Article 7 of the European Convention on Human Rights (ECHR) and Article 15 of the Covenant on Civil and Political Rights (ICCPR) and across national systems, as discussed in section III.

The nature of particular Directive offences (see below in Section III) also raises tensions with a range of other rights, including freedom of expression, association, protest, movement and equality, as explored below. Moreover, associated or inchoate offences or modes of liability, such as facilitating, aiding and inciting, as transposed into domestic law, risk further undermining the exercise of human rights and raise serious concerns as to their limits and implications. Under the Charter of Fundamental Rights of the EU (Article 52.1), as well as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), which are binding on all EU Member States, certain of these rights are not absolute, and indeed may be subject to limitation or derogation. However, any restrictions on them must be prescribed by law which is clear and accessible, in pursuit of a legitimate purpose such as national security, and interpreted and applied to ensure that the interference is no more than necessary and proportionate to achieve that purpose (section II.5). The burden is on the State to demonstrate that these conditions are met, and that the onerous implications of resort to criminal law, and the particular penalties imposed, are justified in the particular case.

Multiple other human rights obligations arise in the context of the investigation and prosecution of the Directive crimes including, among others, the rights to privacy, liberty and fair trial, addressed in section II.6. As practice already makes clear, the investigation and prosecution of the Directive offences have multiple intersecting implications for the rights of particular groups, including children to whom special duties of care are owed. Careful attention is due to ensure that the criminal process is not discriminatory in law or in practice, including, for example, in the methods of investigation and in the gathering and use of evidence relied on. As the Counter-Terrorism Implementation Task Force (CTITF) recognizes, attention must be paid to the range of due process issues arising ‘in the context of the specific setting—whether concerning detention, trial or expulsion of a person—to ensure fairness, reasonableness, absence of arbitrariness and the necessity and proportionality of any limitation imposed on rights of the individual in question’ (CTITF Working Group on Protecting Human Rights while Countering Terrorism, *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, 2014, p. 4.).”

The first line of defence against overreaching criminal law is national legislatures, which must define criminal offences precisely and consistently with international law. It is, however, ultimately the responsibility of the judiciary to interpret and apply the law in line with human rights and rule of law principles, and to provide the oversight inherent in a rule of law approach to criminal justice. If in some instances the legislation is too inherently flawed to be interpreted in this way, it may be the role of the courts to declare certain laws unconstitutional, or incompatible with international legal obligations.

This Guidance focuses on the role of judiciaries in interpreting and giving effect to the Directive consistently with EU and international human rights law. The essential role of an independent judiciary and legal profession in the effective protection of human rights and maintenance of the rule of law, without discrimination, has been affirmed in, for instance, the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors. As experience over recent decades has shown, the judiciary has a crucial role as the guarantor of human rights and the rule of law in the counterterrorism context, including through judicial consideration of the constitutionality and legality of regulation, and assessing lawfulness and fairness in the particular case. Across diverse legal systems, in a range of ways, it is through independent and impartial judges interpreting national law consistently with international human rights law commitments that human rights are given effect in practice and that essential procedural safeguards are protected (*The Berlin Declaration*, International Commission of Jurists (ICJ), 2004).

In turn, prosecutors, in the way that they interpret criminal law, frame charges, implement investigative and prosecutorial policies and – to different degrees in some Member States – exercise their discretion whether and when to prosecute, will play a crucial role in determining whether the Directive is implemented consistently with human rights, or undermines those rights and the criminal justice process. “Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system” (*Guidelines on the Role of Prosecutors*, OHCHR, 1990, para. 12).

Other criminal law practitioners are also plainly indispensable in representing, in giving advice and ensuring that the rights of the accused, and the rights of victims of terrorism, are being respected throughout all stages of the process.

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The content of this Guidance has been derived in large part from the experience judges and lawyers shared during this series of consultations, as to the significant challenges of adopting a rule of law approach to criminal law in the counter-terrorism sphere, and their determination to meet them. The Guidance does not aim to be exhaustive, but rather to provide a practical document that highlights – through recommendations and supporting explanations – the most critical of the many human rights issues arising commonly from counter-terrorism law, procedures and practice in the context of the implementation and prosecution of offences under the Directive.

II. Applicable international law standards in law and practice

1. Respect and protection of the human rights of all affected by the criminal process

Guidance:

In the implementation of the Directive, the human rights of suspects, accused persons and victims must be respected and ensured throughout all stages of the process, including during investigation, prosecution, trial and punishment of all offences. Prosecutors and judges should take into account the full range of human rights implicated, directly and indirectly, by the prosecution of Directive offences.

Commentary: In accordance with article 23 and recitals 22 and 35 of the Directive, and broader international obligations, it is imperative that prosecutors and judges in their respective roles ensure that the Directive and implementing legislation is applied in conformity with all international human rights at each stage of the criminal process. The legitimacy and effectiveness of that process depends on respect for victims - whose rights may have been deeply affected by serious acts of terrorism, and who will also be impacted by the criminal process (*see section II.4*) - as well as for the rights of suspects, defendants and others which are implicated by the criminal process.

The rights at stake include most obviously the fundamental principle of legality, as well as freedom of expression, association, assembly, privacy, freedom of movement, and equality, which are all directly affected by the breadth and nature of Directive offences (*see further below section III*). They include also the multiple rights, including those arising under the right to fair trial and the right to liberty, which may be compromised during investigation and trial of terrorism offences (*see section IV*). However, a human rights approach also involves taking into account the indirect impact of the criminal process on a whole range of rights of others, including the civil, economic, political and social rights of children, family members, and communities who are victims of terrorism or are at risk of stigmatization by criminalisation. As noted, the criminal process may have knock-on effects for the adoption of other administrative measures, even for citizenship-stripping, with dire human rights consequences.

The broader impact of criminalisation requires awareness of the potential 'chilling effect' on for example free expression, democratic engagement and debate, and education, in the course of the investigation and prosecution of certain of the Directive offences. In turn, the negative impact of abuse of rights and injustice within criminal law should also be considered. It is by

now well established that violations of human rights, including in the criminal sector, undermine effective counter-terrorism and are counter-productive. While criminal process that meets high standards of justice can help to delegitimise serious crimes, an increasing body of evidence shows how wrongs by the state, including in the course of criminal justice processes, have been used as 'propaganda tools,' fomenting 'conditions conducive' to recruitment to, or support for, terrorist organisations (United Nations Development Programme (UNDP), 'Journey to Extremism in Africa: Drivers, Incentives, and the Tipping Point for Recruitment', 2017; Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters within a Human Rights Framework, OSCE (ODIHR), 2018). The legality and the effectiveness of the criminal justice system are therefore interlinked.

2. Investigating and appropriately charging serious violations and crimes under international law

a) States must carry out prompt, thorough, independent investigations of serious acts of violence, by non-State and State actors, and hold to account those responsible

Acts of terrorism often impair the enjoyment the rights of victims of terrorism, and may even amount to crimes under international law. States have international legal obligations to investigate serious violations of human rights effectively and to hold the perpetrators criminally accountable. As abundant case law of the European Court of Human Rights (ECtHR) makes clear, carrying out prompt, thorough, independent investigations of violations and serious abuses of human rights by non-state and state actors, and holding those responsible according to a fair criminal process, is a legal requirement, not merely a policy option (see *Tagayeva v. Russia*, ECtHR, Application No. 26562/07, Judgment of 10 April 2012). States have international law obligations to investigate and prosecute, which correspond to the right of victims to reparation, truth and accountability.

Judges and prosecutors have an important role to play in ensuring effective and fair processes that give effect to these obligations. While terrorism is not itself an established crime under international law, acts may constitute other serious crimes under international law, such as genocide, crimes against humanity or war crimes. The investigation and accountability of such crimes is an international priority, reflecting States' duties in respect of truth and accountability (see UN, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 2005; Guidelines on eradicating impunity for serious human rights violations, Committee of Ministers of the Council of Europe, 2011; Rome Statute of the ICC, preamble on the duties of States, 1998; *International Law and the Fight Against Impunity – A Practitioners Guide*, ICJ, 2015).

b) Offences should be appropriately charged, to ensure accountability for serious international crimes

Careful attention should be given to appropriate charging, to reflect the nature and gravity of the crimes in question. Priority should be given to the prosecution of the most serious crimes. So far as the conduct amounts to crimes under international law, such as war crimes or crimes against humanity, where possible they should be prosecuted as such. Practice in numerous states in recent years reflects a tendency to proceed with 'terrorism' rather than war crime charges. This tendency may partly be due to the fact that certain domestic terrorism offences may be easier to prove in contexts where access to evidence and to the scene of crimes is challenging (such as crimes allegedly committed abroad and/or in conflict zones). While these challenges cannot be under-estimated, there should be investment in overcoming them through effective investigations and international cooperation (see further below section IV. on evidence gathering). Where acts committed in the context of armed conflict involve directing attacks against civilians or inflicting terror on the civilian population, this will amount to a war crime – and not a terrorism offence – and should be so charged. In addition, participation in an armed conflict itself should not be charged as 'terrorism', where the conduct abides by the rules of international humanitarian law. In 2019, the Brussels Court of Appeal decided that when fighters were deemed a party in a non-international armed conflict with another State, the terrorism provisions of the Belgian

law did not apply and there was no need to analyse whether the group in question was a terrorist group (Court of Appeal, 8 March 2019, no. 2019/939, para. 36). Where acts of terrorism take place outside of a general situation of armed conflict as defined under international law, it will not be appropriate to charge them as war crimes.

Exposing and punishing the commission of serious international crimes serves multiple purposes, including victim reparation - which requires recognition, truth, accountability and steps to learn from the past and ensure non-repetition (UN, [Basic Principles and Guidelines on the Right to a Remedy and Reparation; The right to a remedy and reparation for gross human rights violations - A Practitioners Guide](#), ICJ, 2018). Terrorism prosecutions under the Directive should not be an easy alternative to the primary role of national courts in enforcing international criminal law in respect of the most serious crimes. A number of recent examples of national prosecutions for war crimes or crimes against humanity demonstrate the potential in practice to hold members of terrorist groups to account for serious crimes under established international criminal law ([Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences](#), Eurojust and Genocide Network, 2020; See cases in Germany: Oberlandesgericht Düsseldorf, 5 StS 2/19, Judgment of 17 December 2019; Oberlandesgericht Frankfurt 5, 3 StE 4/16, Judgment of 8 November 2016).

c) Criminal prosecutions on terrorism charges should be used sparingly for sufficiently serious criminal conduct and intent

'Terrorism' prosecutions should be brought only for sufficiently serious criminal conduct, and never for de *minimis* contributions or for conduct that is not 'genuinely terrorist' in nature. Criminal law is itself a weighty tool to be used sparingly in accordance with principles of criminal law (see below *ultimo ratio*). It must always respect the principle of proportionality under criminal law and human rights.

In practice, choosing to charge as a "terrorism" offence may bring with it a host of consequences across European States and beyond: special procedures, lesser standards of protection, automatic or frequent resort to administrative detention, sometimes in alternative detention facilities and subject to sub-standard conditions, and ultimately heightened penalties. The availability of lower standards of protection may create incentives or even pressure to use terrorism law instead of other criminal law. In practical and political terms, a terrorism investigation, charging or prosecution, may have weighty consequences beyond the criminal process itself, including stigmatization of the accused and others, administrative measures that may apply even following acquittal or sentences served, and even citizen-stripping.

Criminal law loses its authority and legitimacy if it is not directed and applied fairly and sparingly, constrained by principles of criminal law and human rights. Moreover, for the crime of "terrorism" to retain its distinct significance it is essential that the net is not so broad as to cover those offences which are adequately addressed as ordinary criminal law offences. While this should be safeguarded in law, it is also essential for prosecutors and judges to ensure that in the particular case, resort to criminal process is justified, that 'terrorism-related' charges are justified, and that the consequences for human rights are proportionate to the culpable conduct and intent of the individual (see II.6 below).

Considerations of efficiency in the use of specialized investigators, prosecutors or judges also favour limiting terrorism-related prosecutions to serious criminal conduct.

3. National judiciaries, trial and judicial scrutiny of counter-terrorism measures

Guidance:

National judges have a critical role and responsibility as guarantors of the rule of law and human rights in countering terrorism. The application of the judicial authority to ensure the State's compliance with international human rights law is critical. Judiciaries do so by interpreting and applying national law in accordance with EU and international human rights obligations, and by disapplying laws that are inherently incompatible with

these obligations. Judges may also be in a position to apply national law that exceeds the human rights protections of international law.

Commentary: As an organ of the State, an act (or failure to act) by the judge that is inconsistent with international law, will place the State in violation of its international legal obligations (Art 4 ILC Articles). In respect of human rights treaties, "All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State (...)" (UN HRC, [General Comment 31](#), UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, para. 4).

It follows that judges must be aware of the international human rights and EU law and standards applicable to the State and ensure that their decisions are consistent with those obligations ([Legal Commentary to the ICJ Geneva Declaration](#), ICJ, 2011).

When judges are confronted with an apparent conflict between national and international and EU law, they should use any judicial means and techniques or discretion at their disposal to avoid the potential violation, including interpretative techniques, constitutional doctrines, remedies or references. While processes for challenging and setting aside law vary between European systems, if the judge determines that a violation would be an unavoidable consequence of applying the national law, the law should not be applied. The judge should then make this clear to the individual, their lawyer, and the government, providing reasons.

4. Rights of victims

EU Counterterrorism Directive 2017/541

Recital 30

(30) Member States should ensure that all victims of terrorism have access to information about victims' rights, available support services and compensation schemes in the Member State where the terrorist offence was committed. Member States concerned should take appropriate action to facilitate cooperation with each other in order to ensure that victims of terrorism who are residents of a Member State other than that where the terrorist offence was committed, have effective access to such information. Moreover the Member States should ensure that victims of terrorism have access to long-term support services in the Member State of their residence, even if the terrorist offence took place in another Member State.

Articles 24-26 of the Directive cover Assistance and support to victims of terrorism, Protection of victims of terrorism and Rights of victims of terrorism resident in another Member State.

Judges and lawyers should ensure that victims of terrorism have access to justice, fair treatment and remedies.

Judges and lawyers should ensure that effective child- and gender sensitive information and procedures for seeking remedies are available to all potential victims of terrorism.

Commentary:

A victim of terrorism is that defined in Article 2 of Directive 2012/29/EU, namely a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, insofar as that was directly caused by a terrorist offence, or a family member of a person whose death was directly caused by a terrorist offence and who has suffered harm as a result of that person's death.

Recital 27 EU Directive 2017/541

States have the duty to respect and ensure respect for the rights of all those within their jurisdiction. This includes the positive obligations of states to take all feasible steps to protect from acts of violence, and where there are victims of terrorist violence, to respect their rights to truth,

justice and reparation. Criminal investigation and prosecution of those responsible for serious violations can be an important vehicle to give effect to these victims' rights. The rights of victims to access justice, is also recognized in human rights treaties (e.g. Article 6 ECHR). Victims of violations by states, whether through act or omission, also have the right to an 'effective remedy' against states responsible for violations of their rights (eg. Article 13 ECHR, Article 2(3) ICCPR).

Remedies include the victim's right to access to relevant information concerning violations and reparation mechanisms (*GA res 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International human rights law and Serious Violations of International Humanitarian Law, VII, 16 December 2005*).

The rights of victims of crime more broadly should also be respected. These are recognised in the **Victims Rights Directive (EU Directive 2012/29/EU)**, and other instruments such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. **The Victims' Rights Directive** sets out that it aims "to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. Member States shall ensure that victims are recognised and treated in a **respectful, sensitive, tailored, professional and non-discriminatory manner** (...). The rights set out in the Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status." (Article 1.1)

Victims should at all stages be treated with **compassion and respect for their dignity, and given the support necessary to give effect to their rights**. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms (UN, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34, 1985, para. 4-5).

Victims have the right to information in respect of investigations and trial, and UN standards on best practice indicate they should be permitted to participate in the process, to ask permission to speak, and to seek compensation for their loss. In practice, victims are often unable to access justice or to participate fully in the criminal justice process for various reasons, which may include lack of awareness of their rights, socioeconomic, cultural, linguistic or other local conditions. In order to address this issue, one of the primary goals of any effective legal and criminal justice system should be to identify all affected victims in a timely manner and to inform them of their right to access justice (UNODC, *Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework*, 2015, para 119-120).

See also *Human Rights of Victims of Terrorism A Compilation of Selected International Sources*, ICJ, 2019.

5. Counter-terrorism law in States of Emergency and Armed Conflict

- a) **Where offences under the Directive are applied in states of emergency and pursuant to derogation from provisions of international human rights treaties, judges must ensure that international human rights law is applied beyond the strict terms of the derogation. Non-derogable rights, such as legality (nullum crimen sine lege), freedom from torture and other ill-treatment, the core of fair trial and the basic procedural safeguards in detention, must be respected at all times. Limitations on other rights may be applied to the extent required by the emergency purpose, and any limitations must be interpreted narrowly. No right may ever be suspended in its entirety.**
- b) **In armed conflict, international humanitarian law (IHL) applies, alongside international human rights law, to govern the conduct of parties to the conflict. Conduct associated with an armed conflict, that is consistent with IHL, should not be prosecuted as 'terrorism.' Conduct amounting to war crimes should be prosecuted as such.**

Commentary:

a) Under international human rights law, derogations from certain human rights obligations are permissible only in officially proclaimed states of emergency, where war or other public emergency threatens the life of the nation (Article 4 ICCPR, Article 15 ECHR). Any such derogation must be exceptional and temporary, must be in conformity with national law and consistent with other international law obligations, and must be strictly necessary, proportionate and limited to meet a specific threat to the life of the nation (see further: [Legal Commentary to the ICJ Berlin Declaration](#), ICJ, 2008, pp. 28-32). “[T]he mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision (...), however validly derogated from will be entirely inapplicable to the behaviour of a State (...)” (CCPR, [General Comment 29](#), UN Doc. CCPR/C/21/Rev.1/Add.11, 2001, para. 4).

Derogations must not affect rights that are non-derogable under treaty or customary law and *jus cogens* prohibitions. Non-derogable rights include the right to life; freedom from torture or other cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; freedom from enforced disappearance; freedom from imprisonment for failure to fulfil a contractual obligation; the right to recognition everywhere as a person before the law; the right not to be convicted for acts which, at the time they were committed, were not offences under national or international law, or notably which were not prescribed in clear accessible law; and the right to freedom of thought, conscience and religion. Certain rights and obligations that are not expressly non-derogable under the ECHR and ICCPR, have been deemed to constitute essential guarantees applicable at all times: this includes the fundamental guarantees of the right to a fair trial, the right to challenge the lawfulness of one’s detention and more generally the prohibition on arbitrary detention, core procedural guarantees such as prompt access to lawyers and courts upon detention, and the right to an effective remedy (e.g. UN Human Rights Committee (UN HRC), [General Comment No. 29](#)).

It is essential to the legitimacy of the derogation that there is effective judicial oversight of the justification for ‘emergency’ provisions as well as of the nature of the rights derogated from. This involves an assessment of whether there is “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed” ([Lawless v. Ireland](#), ECtHR, Application No. 332/57, Judgment of 14 November 1960; [A and others v. United Kingdom](#), ECtHR, Application No. 3455/05, Judgment of 19 February 2009). Where the judicial role is often key, however, is in relation to assessing whether particular measures are justified as ‘strictly necessary and proportionate’ pursuant to that emergency, and non-discriminatory (see further, [Legal Commentary to the ICJ Geneva Declaration](#), ICJ, 2011, Principle 4).

Judges must ensure that non-derogable rights are protected at all times, including in respect of lack of clarity and specificity in criminal law, protection against torture or other inhuman or degrading treatment and protection against arbitrary detention and unfair trial.

b) International humanitarian law (IHL), alongside international human rights law and international criminal law (ICL), provides accepted international standards governing conduct carried out during, and in connection with, an armed conflict. Situations of terrorism should not be conflated with situations of armed conflict. An armed conflict exists only when there is use of force between states, or for a non-international conflict, sufficient intensity of hostilities and degree of organization of the parties to those hostilities ([Assessing Damage, Urging Action – Report on the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights](#), ICJ, 2009, pp. 53-56).

As UNSC Resolution 2178 (2014) and most other UNSC resolutions and treaties in the counter-terrorism field in recent years have made clear, States must interpret and give effect to their counter-terrorism obligations consistently with IHL. The interpretation and prosecution of terrorism should therefore not undermine the effective operation of IHL. This is reflected in Recital 37 to the Directive which stipulates that the Directive does not govern the activities of armed forces during periods of armed conflict, which are governed by international humanitarian law.

As the International Committee of the Red Cross (ICRC) and others have underscored, unlawful acts of terrorism must therefore be distinguished from participation in a conflict by persons abiding by the terms of IHL. It is violations of IHL that should be prosecuted, ideally as war

crimes (see further below section III.1 on Article 3 of the Directive). As a Belgian court found, “if participants in an armed conflict fight in the knowledge that they will in any case be subject to prosecution under common criminal law or under terrorism legislation, there is no incentive to comply with (at least) international humanitarian law” (Ghent Court of Appeal, Decision of Case 939/2019, 8 March 2019, 26-27).

6. Human rights principles implicated by Directive Offences

6.1 Principle of Legality: Nullum Crimen Sine Lege

The principle of legality, comprising multiple elements, set out below is rendered vulnerable in the implementation of Directive offences. It requires non-retroactivity (*lex previae*), legal certainty and clarity (*lex certa*) and the strict application and construction of criminal law (*lex stricta*). The principle is reflected across systems national and international (e.g. Article 7(1) ECHR, Article 11(2) Universal Declaration of Human Rights, Article 15 ICCPR, Article 49 EU Charter, Articles 22 (*nullum crimen sine lege*) and 23 (*nulla poena sine lege*) of the ICC Statute). It is therefore a right protected by international law, and one of the basic principles of criminal law, upon which the legitimacy of criminal justice responses depend.

Particularly in light of the breadth and susceptibility to abuse of some counter-terrorism offences, judges have a crucial role to play in guarding against the arbitrary application of criminal law. They must ensure that criminal law meets the stringent requirements of legality, including that enshrined in the fundamental principle *nullum crimen sine lege* and *nulla poena sine lege* – *no crime or punishment without law*). While it may be possible to prosecute a person in the absence of a completed act of terrorism, for instance in the case of an inchoate offence, a red line that should not be crossed is prosecuting individuals based solely on what they may have thought about doing, rather than what they have done. Judges must likewise guard against the erosion of the intent (*mens rea*) requirement as it relates to the conduct constitutive of the offence (*actus rea*), an essential element of criminal culpability. They should reject the introduction of presumptions of intent (e.g. that travel to a certain zone implies intent to engage in terrorism), which would erode the presumption of innocence and burden of proof in criminal cases.

6.1.1 Principle of non-retroactivity:

Judges and prosecutors must ensure that the principle of non-retroactivity is observed strictly, so that only crimes clearly established in law at the time of their commission are prosecuted.

Commentary: It is uncontroversial across domestic and international criminal law that crimes must be clearly established in law at the time of their commission. The UN Human Rights Committee, finding violations to arise from convictions for terrorist offences under legislation which did not exist at the time of the alleged offences, has noted that it is insufficient that the law in force at that time criminalised other relevant offences to which similar penalties applied. (UN HRC, Communication No. 981/2001, UN Doc. CCPR/C/78/D/981/2001). The manner that pre-existing law will be construed and interpreted in practice must also be foreseeable to not constitute, effectively, retroactive application of the law (*Jorgic v. Germany*, ECtHR, Application No. 74613/01, Judgment of 12 October 2007, para. 109-113).

Penalties must also be prescribed in pre-existing law, reflected in the related principle of *nulla poene sine lege*. A heavier penalty cannot be imposed than the one in force at the time of the commission of the offence. Measures to increase penalties retrospectively as policy imperatives shift, for example in the wake of a terrorist attack, are non-compliant with this principle and with the ECHR and the ICCPR (for instance see: *Welch v. United Kingdom* ECtHR, Application No. 17440/90, Judgment of 9 February 1995).

6.1.2 Clarity, precision, and foreseeability

- a) **Judges must ensure that the relevant offence is sufficiently clear and certain to allow individuals to ascertain with a reasonable degree of certainty how it will affect them. Laws must not be couched in a vague and overbroad manner that will lend itself to an arbitrary application by executive authorities. Judges should seek to ensure the consistent, predictable and fair application of the law, free from discrimination on any status grounds and that law is narrowly construed (see 6.1.4 below).**
- b) **In giving judgment in counter-terrorism cases, judges should aim to contribute to the predictability and foreseeability of the application of these offences by explaining the grounds for their decisions, drawing on human rights standards and developing jurisprudence. Case-law from EU Member States and other jurisdictions, as well as of the CJEU, European Court of Human Rights and UN treaty bodies, can serve as persuasive and in some cases obligatory guidance.**

Commentary: The principle of legality requires that the criminalised conduct be described in precise and unambiguous language that narrowly defines the punishable offence and distinguishes it from conduct that is either not punishable or is punishable by other penalties. The principle requires that the law is “reasonably foreseeable in its application and consequences...” (UN ECOSOC, *Report of R. Goldman, UN Independent Expert on The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc. E/CN.4/2005/103, 2005). As the ECtHR has repeatedly made clear, an offence must be clearly enough defined by law that ‘the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable’ (*Kokkinakis v. Greece*, ECtHR, Application No. 14307/88, Judgment of 25 May 1993 para. 52). All the essential elements of offences, comprising individual conduct and intent (see below), therefore need to be clearly provided for in law and foreseeable. A recent UNODC Report reflects that “both the support conduct (facilitating, preparing, financing, providing material support) and the conduct supported (the violent act) must be defined in a way that complies with the principle of legality” (UNODC, *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism*, 2019).

In some cases, judges will not be able to compensate for legislative deficits, without themselves engaging in unforeseeable law-making (*Jorgic v. Germany*, para. 109-113). At the same time, as the ECtHR noted: “There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances” (*Scopolla v Italy (no 2)*, ECtHR, Application No. 10249/03, Judgment of 17 September 2009, para. 100). Clear judicial reasoning that respects human rights law has an important role to play in safeguarding the principle of legality.

Limitations on public access to judgments of courts, including in counter terrorism cases in some European countries, raise problems of legal certainty, and of the right of access to information on matters of public interest concerning security and human rights. In Belgium, for instance, the relevant judicial decisions are not publicly available.

6.1.3 Strict construction of criminal law in favour of the accused

The law must be strictly applied and narrowly construed, and doubt regarding the scope of crimes must be resolved in favour of the accused. Judges should interpret the scope of the offence narrowly, in line with the human rights framework and principles of criminal law.

Commentary: Criminal law is intended to operate exceptionally, a weighty tool to be employed as a last resort (ultimo ratio). As the ECtHR has frequently made clear, the law must be interpreted and applied “in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment” (see *Streletz, Kessler and Krenz v. Germany*, ECtHR, Application No. 34044/96, Judgment of 22 March 2001, para. 50). Two important offshoots of this principle are that criminal law must be strictly applied and restrictively interpreted (lex stricta), and that any ambiguity should be resolved in favour of the accused. It must not therefore be extensively construed to an accused’s detriment, for instance by analogy (*Rome Statute of the ICC*, Article 22(b); *European Parliament, European Parliament resolution of 22 May 2012 on an EU approach to criminal law*, (2010/2310(INI))). This follows from the fact that only the law can define a crime and prescribe a penalty.

The 'principle of restraint' and of criminal law as a last resort (*ultima ratio*) mean that prosecutors and judges should exercise caution in resort to criminal law. This is recognized in, for example, the EU approach to Criminal Law (European Parliament, [European Parliament resolution of 22 May 2012 on an EU approach to criminal law](#), (2010/2310(INI)).

6.1.4 Criminal Responsibility must be Individual, based on Conduct and Intent

Judges should ensure that individuals are only prosecuted and punished commensurate with their own culpable conduct and intent, in line with basic principles of criminal law. While normally this will be based on their intentional or reckless contribution to harm caused, exceptionally it may cover contributions to foreseeable risk of harm. However, criminal law should not punish abstract danger, or where there is no proximate link between the offender and the ultimate harm.

Commentary: The Directive forms part of a trend in anti-terrorism towards an increasingly 'preventive' role for criminal law. While criminal law can play a crucial role in addressing conduct that contributes in various ways to acts of terrorism, the expansive scope of offences also poses serious challenges to basic criminal law principles governing the essential mental and material elements of offences, individual responsibility and the justification for resort to criminal law.

Intent and recklessness provide the basis for the moral culpability and legal responsibility of the individual for terrorism-related offences (EU Approach to Criminal Law recognizes 'intention' as general rule and 'serious negligence' as an exception; this may arise where there is a special duty of care under the law which has been breached). The essential role of criminal intent, and '*the principle of individual guilt (nulla poena sine culpa)*' must be safeguarded in the interpretation and application of all Directive offences. In turn, it is once an individual has moved from intention to action, and engaged in an 'external act,' that the intervention of criminal law can be justified.

Usually this arises once there is harm caused to a protected value (the 'harm principle' in criminal law). As an exception, criminal law also penalizes inchoate crimes, before the harm has arisen or crime taken place, on the basis that the conduct in question, committed with criminal intent, poses a significant risk of harm. The Directive in places explicitly reflects the requirement that '*danger*' must arise from the conduct of the accused to fulfil the objective dimension of a terrorism offence (Section III.3, Provocation.) Preparatory acts, which may include planning or conspiracy with a view to committing or contributing to a terrorist offence, may also be prosecuted if the relevant elements are met. It is essential, however, that the law does not prosecute abstract danger. It cannot punish thoughts, however dangerous society perceives an individual's ideas to be, until converted into concrete acts.

In practice, however, a number of terrorism offences in national law raise concerns as they are based on simple conduct, absent proof that the conduct had any effect or created even a foreseeable danger of harm, and may not require intent to contribute to acts of terrorism. Thus the 2016 French law that made "habitual" accessing of a website containing messages, images or representations deemed to "incite" or "glorify" terrorism an offence ([Law No. 2016-731 amending Article 421-2-5-2 of the criminal code](#), 4 June 2016 (Law No. 2016-731 du 3 juin 2016)) was repealed by the Constitutional Court in February 2017. The Court found that merely accessing such sites would not constitute a foreseeable contribution to a terrorist offence ([Décision n° 2016-611 QPC](#) du 10 février 2017): "*the contested provisions do not require that the individuals habitually accessing online public communication services intend to commit terrorist acts, nor do they require proof that this access is accompanied by the desire to adhere to an ideology expressed by these services.*" The Court noted that "*these provisions punish by a two-year prison term the simple act of accessing several times an online public communication service, no matter the intention of the individual...*"

As punishment must correspond to the individual's culpability, it is the *contribution of the individual* to that harm or risk, as measured by their conduct and intent, that can be punished. While harm may ultimately be caused by another person, there must be 'sufficient normative involvement of an individual in the wrongful act, or at the very least in the deliberate creation of risk of such a wrongful act taking place, to justify criminal intervention' ([Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters within a Human Rights Framework](#), OSCE (ODIHR), 2018). It is a fundamental principle of criminal law and human rights that "Nobody may

be held criminally responsible for acts in which he has not personally engaged or in some way participated" (*Appeals Chamber Judgment of 15 July 1999*, ICTY, Case of The Prosecutor v. Tadic, No. IT-94-1-A, para. 186). Where there is no meaningful proximate link between the individual and the harm or risk – in this context of acts of terrorist violence – the principle of 'remoteness' in criminal law may preclude prosecution.

6.2. Restriction on Freedom of Movement, Expression, Association, Assembly, Privacy, Private and Family Life, Right to political participation: Legitimate Aim, Necessity and Proportionality

Laws providing for criminalisation pursuant to the Directive may, on their face or in the manner in which they are implemented, serve to restrict the enjoyment of certain human rights and fundamental freedoms, such as the freedoms of movement, assembly, association, expression, right to political participation, privacy or private and family life. Limitation clauses in both the ECHR and ICCPR allow for certain restrictions, but this legal framework must be strictly applied so as not to "impair the essence of any of these rights." This requires legislators, but also prosecutors and judges to consider (a) whether the offence - on its face and as construed and expressed in the charging documents - is clearly prescribed in law, (b) whether prosecution genuinely serves a legitimate aim (such as national security in the case of most counterterrorism measures), (c) whether the prosecution of the individual can be justified as appropriate, necessary and proportionate to that aim in all the circumstances of the particular case and (d) whether the offence and any such prosecution is discriminatory in nature or the prosecution is being carried out with discriminatory intent or effect (see below). Prosecutors should consider whether prosecution for an offence that carries the special stigma of terrorism is justified or whether prosecution for another applicable offence, or measures 'less intrusive' on rights than criminal prosecution, are available to fulfil the aim.

Commentary: There are many ways in which Directive-related offences, including terrorism offences (eg. travel-related offences, incitement or 'provocation,' participation in proscribed groups, recruitment, financing, assisting or facilitating, among others) may serve to restrict human rights, such as freedom of expression, assembly, association, movement, the right to privacy and the right to political participation.

In certain circumstances, restrictions on these rights or others (the rights to private life (Art. 17 ICCPR, Art. 8 ECHR, Art. 7 EU Charter), manifesting religion (Art. 18(3) ICCPR, Art. 9.2 ECHR, Art. 10 EU Charter), free expression (Art. 19 ICCPR, Art. 10 ECHR, Art. 11 EU Charter), or assembly (Art.21 ICCPR, Art. 11 ECHR, Art. 12 EU Charter) and association (Art.22, Art. 11 ECHR, Art. 12 EU Charter)) may be lawful, and appropriate, or even required, under international human rights law. However any restrictions on these rights must be clearly set out in law, be necessary and proportionate, and have attendant safeguards. Criminal law by its nature will interfere with the enjoyment of human rights, and thus, needs to clearly prescribe the exceptional circumstances in which for example conduct of expression or association might be prosecuted. The extent of the interference must be justified as necessary (i.e., as a last resort), the use of criminal law, as well as the specific penalty, must be a proportionate response to the conduct and intent in question, and be non-discriminatory in intention and effect.

The broad framing and interpretation of 'preventive' offences in the anti-terrorism context have sometimes failed to meet this test. In one example, the UN Human Rights Committee has found over-broad definitions of terrorist offences in French law to fall foul of the requirements of clear prescription in law (UN HRC, *Concluding Observations: France*, 2015, UN Doc. CCPR/C/FRA/5., para. 10).

In deciding on counter-terrorism cases, in order to avoid arbitrary or disproportionate interference with human rights, careful attention is due to issues of proximity to a violent criminal act of terrorism, and in cases of ancillary or preparatory offences, whether and how the offence is linked to or may cause or contribute to such violent acts. In interpreting and applying the intent necessary, such as for the commission of offences preparatory or ancillary to terrorism, consideration is due to whether the accused intended to cause or contribute to causing harm through a violent act of terrorism, or to create a foreseeable risk of such harm. Judges should clarify to the greatest extent possible the nature of the intent required for the commission of the offence and how it is established in the particular case before them.

6.3 Non-discrimination

Judges should ensure that counter-terrorism offences, and their investigation and prosecution in practice, are not directly or indirectly discriminatory, and ensure equality before the law. Safeguards against discrimination need to be in place at all stages of the criminal process. Judges and prosecutors should be alert to the possibility of conscious or unconscious bias at all stages of the investigation, prosecution and trial process and should scrutinize proceedings and decisions for discrimination. Prohibited grounds of discrimination include race, colour, sexual orientation or gender identity, age, gender, religion, language, political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status, or the intersection thereof.

Commentary: Prohibited grounds of discrimination in international human rights law are protected against by Article 2 Universal Declaration of Human Rights (UDHR), Articles 2(1) and 26 ICCPR (including equality and equal protection of the law) as interpreted and applied by the Human Rights Committee, Article 14 ECHR and Protocol 12 Article 1; the Revised European Social Charter (article E); Article 20 (equality before the law) and Article 21 EU Charter; Article 14 of the [Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010](#); [1997 Convention for the Suppression of Terrorist Bombings](#) and [1999 Convention for the Suppression of the Financing of Terrorism.](#))

It should be underscored that Article 21 of the EU Charter and Article 26 of the ICCPR are free-standing provisions of non-discrimination, meaning they apply to all State laws and conduct, and are not confined to any other specific area of rights protection or international or domestic law. Therefore, all counter-terrorism laws will necessarily fall under their protective ambit.

Discrimination can be direct and indirect, intended and inadvertent – it may arise through the investigation, gathering, use or evaluation of evidence, during trial and/or sentencing. As the former UN Special Rapporteur on Counter-terrorism and Human Rights has noted, discriminatory investigative practices are unlawful, but also ineffective; it is essential that people are not treated as terrorist suspects on the sole basis of their ethnicity, religion, or other actual or perceived identity ([Assessing Damage, Urging Action – Report on the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights](#), ICJ, 2009, p.165). Although terrorism is ‘not related to any religion’, the disproportionate impact of many terrorism prosecutions on persons of the Muslim population in Europe is well documented (see for instance [Dangerously Disproportionate – The Ever-expanding National Security State in Europe](#), Amnesty International, 2017). Such discrimination takes many forms, but includes for example relying on evidence of religious practice or belief as indicators of terrorist intent.

Distinctions based on nationality have also raised serious concerns in several States in the counter-terrorism context in recent years. Judges have played a significant role in identifying diverse forms of discrimination against migrants, refugees, stateless person and citizens of foreign descent, recognising that there is no evidence-based ‘objective justification’ for distinctions based on nationality ([A & Others v UK](#)).

There is ‘*increased recognition of the need to examine how gendered experiences and practices should inform and shape the criminal justice response to terrorism*’ (UNODC, [Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism](#), 2019, (hereafter ‘UNODC 2019 Report’)). This begins with the nature and scope of crimes prosecuted and includes also available defences, investigation, fair trial, sentencing and mitigation. It is crucial to avoid gender stereotypes, including assumptions about the role of women as “victims”, that have characterised policy and prosecutorial errors in many States in the past few years ([Guidelines for Addressing the Threats and Challenges of ‘Foreign Terrorist Fighters within a Human Rights Framework](#), OSCE (ODIHR), 2018; UNODC 2019 Report). Denying women’s agency, and assumptions as to their role, or that of men, based on their sex, may also amount to unlawful discrimination. The disproportionate impact of certain crimes on women, such as financing and supporting family members, or harbouring or failure to report criminal behaviour which can accompany the Directive crimes, must also avoid indirect discrimination (UNODC 2019 Report).

In deciding to prosecute women or men, the complexity of individuals’ roles should be taken into account. An example cited in the 2019 UNODC Report on Gendered Dimensions to Criminal Jus-

tice and a 2017 UN report on the journey to extremism in Africa, is *'the disproportionately high percentage of women who are coerced into joining terrorist or extremist organisations, including Boko Haram, Al-Shabaab and Islamic State in Iraq and the Levant...'* (UNDP, *'Journey to Extremism in Africa: Drivers, Incentives, and the Tipping Point for Recruitment'*, 2017, p. 495). Care must be taken to avoid prosecution of trafficked women, as the "principle of non-punishment of victims of trafficking" is reflected in international standards (2019 UNODC Report).

In practice, across Europe and beyond, concerns arise as to equality in many aspects of the criminal justice process. Profiling has been defined as *"the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law-enforcement decisions"* (*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, para. 33).

Profiling based solely on a person's immutable characteristics, such as ethnicity, and not on individual behaviour and suspicion of criminality, are unlawful. In his report on the subject, the UN Special Rapporteur on Counter-terrorism and Human Rights describes the negative impact of profiling: "This stigmatization may, in turn, result in a feeling of alienation among the targeted groups."

The *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (para. 57-58) states that "the victimization and alienation of certain ethnic and religious groups may have significant negative implications for law enforcement efforts, as it involves a deep mistrust of the police [...] The lack of trust between the police and communities may be especially disastrous in the counter-terrorism context. The gathering of intelligence is the key to success in largely preventive law enforcement operations [...] To be successful, counter-terrorism law enforcement policies would have to strengthen the trust between the police and communities."

Although religion is typically not mentioned explicitly in counter-terrorism cases, participants in this project suggested that in practice religion is very often taken strongly into consideration, as noted by experts during one of the ICJ Roundtables. It was suggested that in some Member States, the way people practice religion sometimes serves as a supplementary element for judges to consider. In this respect, the other material facts taken together with the way religion is practiced may be misused to establish an "intent" to participate in terrorism or other terrorist offences. For instance, the judges or prosecutors might rely upon a signal that accused persons were "practicing radical Islam."

Such practices carry considerable potential for discrimination, which should be acknowledged and addressed. It was suggested by some participants in this project that when judges are assessing the case, certain types of evidence that have nothing to do with culpability may be cited as evidence. For instance: the length of a beard, or wearing a hijab, or wearing shorter trousers may be taken to form part of a picture of someone's criminality. Judges might not even be aware of all such small indications taking place throughout the trial, but these may influence the decision in a discriminatory way.

III. Offences under the Directive

1. Terrorist Offences

EU Directive 2017/541

Article 3 Terrorist offences

1. Member States shall take the necessary measures to ensure that the following intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, are defined as terrorist offences where committed with one of the aims listed in paragraph 2: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) illegal system interference, as referred to in Article 4 of Directive 2013/40/EU [...] and illegal data interference, as referred to in Article 5 of that Directive in cases where point (c) of Article 9(4) of that Directive applies; (j) threatening to commit any of the acts listed in points (a) to (i).
2. The aims referred to in paragraph 1 are: (a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

Guidance

Investigative measures, prosecutions or convictions for crimes of terrorism within the scope of Article 3 are likely to have serious rights implications under international human rights law as well as the EU Charter of Fundamental Rights. Depending on the circumstances of the case, this may include rights to privacy and respect for private life (Article 8 ECHR, Article 17 ICCPR, Article 7 EU Charter), rights to freedom of association (Article 11 ECHR Article 22 ICCPR, Article 12 EU Charter), freedom of assembly (Article 11 ECHR, Article 21 ICCPR, Article 12 EU Charter), freedom of expression (Article 10 ECHR, Article 19 ICCPR, Article 11 EU Charter), freedom of religion or belief (Article 9 ECHR, Article 18 ICCPR, Article 10 EU Charter), right to political participation (Article 25 ICCPR) and the right to liberty (Article 5 ECHR, Article 9 ICCPR, Article 6 EU Charter). Judges and prosecutors involved in such cases will therefore need to consider the extent to which the restriction on these rights is adequately clear and foreseeable so as to be prescribed by law; genuinely pursues a legitimate aim such as the protection of national security; is necessary and proportionate to that aim; and is non-discriminatory (Article 14 ECHR, Article 2.1 ICCPR, Article 21 EU Charter; CERD). In doing so, the particular seriousness and stigma attached to an offence of terrorism, as opposed to ordinary criminal offences which might also be applicable, should also be considered.

National law offences of terrorism should not be unduly broad in scope, and should not criminalise legitimate activities such as political protest, artistic expression or the defence of human rights. Judges and prosecutors should apply these offences restrictively, and should consider, in each individual case, whether the individual concerned could have reasonably foreseen that their conduct would fall within the scope of the offence, as required by the principle of prescription by law. Requirements of "intention" in national law should be interpreted as requiring a specific intention to commit the impugned act for a terrorist purpose.

Where the conduct in issue may raise questions of public interest, including political or artistic expression of the defence of the right of others, judges and prosecutors should scrutinise the necessity and proportionality of the investigation, prosecution or conviction particularly closely, in light of the right to freedom of assembly, freedom of expression, the right of political participation (Article 25 ICCPR), and the right to defend human rights (UN Declaration on Human Rights Defenders).

Judges and prosecutors should scrutinise investigations and prosecutions for offences within the scope of Article 3, for potential discriminatory intent and/or impact, in particular in contexts where counter-terrorism laws are disproportionately applied to particular religious, national, ethnic or racial groups, in particular minorities. Potentially discriminatory reliance on evidence (for example regarding dress or religious practice) must be avoided.

No one should be convicted of a crime of terrorism purely on the grounds of participation in an armed conflict to which international humanitarian law applies, or for acts committed in the conduct of an armed conflict (Recital 37 of the Directive). This is without prejudice to the prosecution of conduct that might be considered "terrorism" which also constitutes a war crime where it takes place during an armed conflict.

Commentary

The definition of terrorist offence under Article 3 of the Directive is broad, with an uncertain scope in several respects, including **the scope of the harm encompassed, the nature of the terrorist purpose, and the nature of the intention required** to commit the offence. Compliance with international human rights law principles of legality, prescription by law and necessity and proportionality requires both further specification in national legislation, and clear and restrictive judicial interpretation.

There is no agreed definition of terrorism in international law. Longstanding attempts at United Nations (UN) level to adopt a definition within the Draft Comprehensive Convention on International Terrorism have not borne fruit. Successive UN Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism have expressed concern at efforts to shore up preventive criminal law approaches to terrorism, absent a common understanding of the 'terrorism' being targeted.

For example the former UN Special Rapporteur on Counter-terrorism and Human Rights, Martin Scheinen, noted: "50. *The absence of a universal, comprehensive and precise definition of "terrorism" is problematic for the effective protection of human rights while countering terrorism. [...] It is essential, in the meantime, to ensure that the term "terrorism" is confined in its use to conduct that is genuinely of a terrorist nature.*" ([Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism](#)). See more above in Section I.

More recently, in 2019, the current UN Special Rapporteur on Counter-terrorism and Human Rights reiterated these concerns, and emphasized the impact of broad definitions on civil society:

"34. A defining trend in national implementation of the Security Council counter-terrorism framework is the global emergence of overly broad and vague definitions of terrorism. As foreseen, these carry the potential for unintended human rights abuses, and have been deliberately misused to target a wide variety of civil society groups, persons and activities. Such legislation is used to target, inter alia, civil society, human rights defenders, journalists, minority groups, labour activists, indigenous peoples and members of the political opposition." ([Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism](#))

The UN Human Rights Committee has regularly found over-broad definitions of terrorist offences in domestic law to fall foul of the requirements of legality, including in regard to France (UN HRC, [Concluding Observations: France](#)) and Belgium (UN HRC, [Concluding Observations: Belgium](#), 2004, UN Doc. CCPR/CO/81/BEL).

Although principal offences of terrorism in the national laws of many EU Member States predate the Directive, many are in similar terms to Article 3 of the Directive (Belgium, Article 137 Crim-

inal Code; the Netherlands, Article 83.a Criminal Code). Lawyers, judges and prosecutors consulted in six Member States considered in the preparation of this Guidance (Italy, Spain, Belgium, Netherlands, Germany, France), expressed concern at the breadth and lack of legal certainty in national definitions of the offence of terrorism. This was the case even in those Member States with narrower definitions than that in Article 3.

Some Member States have definitions of “terrorist offence” which are broader than Article 3 and which may need to be interpreted restrictively by national courts in light of the Directive. For example, the Italian (Art. 270 sexies of the Italian criminal code) definition of a “terrorist offence” is in line with that of the Directive in that it provides a list of offences that constitute a terrorist offence when committed with a terrorist aim. The intention required however, is somewhat less specific than that provided for in the Directive and requires only the intention to “*seriously to disturb the public order by intimidation or terror.*” In Spain, the terrorist purposes specified in Article 573 of the criminal code include “seriously disturbing the public peace” and “instilling fear among citizens”, aims capable of very wide interpretation which are not included in Article 3.

Germany, by contrast, does not have a specific offence of terrorism equivalent to Article 3, but the provision on participation in activities of a terrorist group in section 129a (2) StGB covers the content of the definition in article 3 of the Directive. However, section 129a (2) StGB requires a heightened level of intent, namely to seriously intimidate a population or to unduly compel a government or international organisation to perform or abstain from performing any act or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The Italian criminal code at art. 270 sexies defines the purposes of every terrorist offense in the same way as provided for by paragraph 2 of art. 3 of Directive 2017/541: “to intimidate a population, to compel public authorities or an international organization to perform or abstain from performing any act, to destabilize or destroy the fundamental political, constitutive, economic and social structures of a country or an international organization. To these purposes the Italian law adds, as a closing clause, “the other conducts defined as terrorist or committed with the purpose of terrorism by conventions or other rules of international law binding for Italy.” This constitutes a guide and a limit in the implementation of counter terrorism legislation by Italian judges and prosecutors. Criminal offences supported by a different type of intentional element are dealt with as non-terrorism offences. This happens even when the supporting intention may be regarded as a “political” one. So many politically motivated crimes are dealt with as non-terrorist offences, but according ordinary rules and procedures.

2. Directing and participation in a terrorist group

EU Directive 2017/541 Article 2.3 **Definitions**

‘terrorist group’ means a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences;

‘structured group’ means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Article 4 **Offences relating to a terrorist group**

Member States shall take the necessary measures to ensure that the following acts, when committed intentionally, are punishable as a criminal offence:

- (a) directing a terrorist group,
- (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.

Guidance

In interpreting and applying national law offences of directing or participating in a terrorist group, judges should verify whether the designation of the group concerned as terrorist is clearly established in law according to publicly available, defined criteria and through fair procedures, sufficient to ensure the foreseeability of criminal sanctions for directing or participating in the group. Critically, in assessing individual culpability, judges should be presented with information to enable them to determine whether the group is appropriately designated as terrorist, as well as the individual's relationship with the group.

National jurisprudence should, to the extent possible and consistently with international legal obligations and rule of law principles, clarify the scope of "terrorist group" and "structured group" as they apply in national law, and the meaning of "participation" in a terrorist group, beyond the non-exhaustive list indicated in the Directive, in order to ensure legal certainty, and avoid excessive, arbitrary or discriminatory application of the offence. In particular, to fall within the scope of the offence, participation must be voluntary and with the actual knowledge that the action is reasonably likely to contribute actually to the commission of a principal terrorist offence.

Where the intent necessary to ground the offence is not clearly defined in legislation, it should be clarified through jurisprudence. Intent should be confined to specific intent to support the group in committing acts of terrorism, or disregard of knowledge that acts of terrorism are likely to directly result from the support.

Incidental or unintentional contributions to a terrorist group in direct support of non-terrorist conduct, such as cooking meals, providing other services or goods not directly linked with violent or terrorist acts, and the mere fact of association with other individuals, should not itself be considered to amount to participation without subjective intent to contribute to a crime of terrorism or disregard that such acts are likely to directly result from such support.

In order to prevent application of the offence in a way that disproportionately interferes with human rights, "contribution" should be narrowly interpreted as confined to contributions that have an actual effect on, and close proximity to, the commission of a principal criminal offence of terrorism.

Prosecutors, in initiating investigations or prosecutions for direction or participation in a terrorist group should consider, based on the facts of the case, the potential for interference with freedom of association, freedom of assembly, freedom of expression, the right to privacy and respect for private and family life, freedom of religion or belief, right to political participation and the right to liberty.

Provision of impartial assistance (including humanitarian assistance), such as food or medical supplies, should not, in the absence of specific intent to support terrorist activities, be interpreted as falling within the scope of the offence of participation in a terrorist group (recital 38 of the Directive).

Commentary

The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (Article 2.2) requires States parties to criminalise "participating in an association or group for the purpose of terrorism ... when committed unlawfully and intentionally." Under Article 2.1, such criminal participation is confined to "the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group." The Protocol therefore stipulates that there must be intention to contribute to the commission of terrorist offences, rather than only to support the wider activities of the group.

Investigation or prosecution of offences under Article 4, and in particular the offence of participation in a terrorist group, are likely to engage the right to freedom of association (Article 11 ECHR, Article 22 ICCPR, Article 12 EU Charter) and depending on the nature of the participation concerned, may also engage rights to freedom of expression (Article 10 ECHR, Article 19 ICCPR, Article 11 EU Charter) and assembly (Article 11 ECHR, Article 21 ICCPR, Article 12 EU Charter),

political participation (Article 25 ICCPR), or freedom of religion or belief (Article 9 ECHR, Article 18 ICCPR, Article 10 EU Charter). Any interference with these rights, through investigative measures or prosecution, must be justified as in accordance with law, necessary and proportionate to a legitimate aim, and non-discriminatory.

The designation of certain groups as “terrorist”, for example through inclusion on terrorist lists, itself engages freedom of association, assembly, and associated rights. As the UN Special Rapporteur on Counter-terrorism and Human Rights has pointed out, independent judicial oversight of such measures that limit freedom of association and assembly, is essential. ([Report of the SR on the promotion and protection of HR and FF while countering terrorism](#), para. 29, 39). The compliance of prosecutions for directing or participating in a terrorist group with principles of legal certainty, necessity and proportionality, is itself dependent on the quality of the law and safeguards, including judicial remedies, governing the designation of terrorist organizations ([Assessing Damage, Urging Action – Report on the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights](#), ICJ, 2009, pp. 113-115; On procedural safeguards in listing, *Al-Dulimi v. Switzerland*, EctHR, Application No. 5809/08, Judgment of 21 June 2016).

If broadly interpreted, offences under Article 4 may also have a damaging impact on legitimate activities of civil society, including activities aimed at protecting human rights through the provision of humanitarian assistance. As the UN Special Rapporteur on Counter-terrorism and Human Rights stressed in her [2019 Annual report](#) (UN Doc. A/HRC/40/52, para. 22, 43-44): “Qualifying a wide range of acts as impermissible ‘support for terrorism’ (...) results in harassment, arrest and prosecution of humanitarian, human rights and other civil society actors. ... material support provisions may also affect the work of civil society involved in supporting, inter alia, fact-finding and evidence gathering for the purpose of prosecution, promoting the right to development or providing assistance to migrants.”

The Special Rapporteur also warned, in the context of Belgium, of the impact on the right to family life of over-broad interpretation of offences of support for terrorist organisations (Report on visit to Belgium, para.18). She noted that “conduct criminalised as a terrorist offence must be restricted to activities with a genuine link to the operation of terrorist groups. (...) [C]onstruing support to terrorist organizations in an over-broad manner may effectively result in criminalizing family and other personal relationships.” The Special Rapporteur further stressed that “support related to ensuring that a person enjoys ‘minimum essential levels’ of economic and social rights, including the rights to food, health and housing, should not be criminalised as support to terrorism.”

Member State national laws on participation in a terrorist group have in some instances caused particular concern because of their wide scope (Belgium), while in others there is uncertainty as to how the definition of the offence applies to international terrorism (Spain). In Belgium, the offence of participation in the activities of a terrorist group under Article 140 of the Criminal Code is broadly defined. The offence requires knowledge that participation could contribute to the criminal activities of a terrorist organization rather than specific intent, and has a particularly broad application because it also applies where the person “should have known” of the nature of the group. However it is notable that Article 139 of the Code explicitly excludes from the definition of terrorist group any “organisation whose real purpose is solely of a political, trade union or philanthropic, philosophical or religious nature, or which solely pursues any other legitimate aim.”

In Italy, the scope of the offence of participation in a terrorist organization, under Article 270 bis of the Criminal Code, has been refined through judicial interpretation. For example, Italian case law requires an “effective integration” of the person in the association, meaning that the person should effectively take part in the activities of the association. Participation cannot be understood as the mere acquisition of a status, nor can it be inferred from the adherence to a criminal programme or common aspirations with the associates. It has also been clarified in the Italian case law that the “contribution” to the terrorist group must be “an efficient causal contribution to the existence, the survival or the operation of the association.”

3. Public provocation to commit a terrorist offence

EU Directive 2017/541

Article 5 **Public provocation to commit a terrorist offence**

Member States shall take the necessary measures to ensure that the distribution, or otherwise making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally.

Guidance

Judges and prosecutors, in cases concerning offences of provocation or similar offences of indirect incitement should consider whether and if so to what extent the investigative action, prosecution or conviction affects freedom of expression and to what extent the 'message' or the impugned expression amounts to an expression of political opinion, engagement with (democratic) debate, artistic expression or media freedom where a heightened degree of protection may be required.

Judges should reject vague definitions of provocation and associated offences. Prosecutions are permissible for clearly defined crimes of expression that incite violence, and are intended to result in, and do in fact create a danger of, such acts. The culpability of the individual, and the application of the criminal law, should be clear and foreseeable in the circumstances of the particular case.

Judges and prosecutors should consider whether the application of criminal law in the case before them clearly serves a public interest, such as the protection of national security, and, if so, whether it can be justified as necessary and proportionate in the particular circumstances of this case. They should also consider whether there has been direct or indirect discrimination in the application of investigatory measures, the decision to prosecute or in the evaluation of evidence in the case.

Commentary

Freedom of expression (Article 10 ECHR, Article 19 ICCPR, Article 11 EU Charter), even in respect of expressions of opinion that offend and disturb:

[Freedom of expression] embraces the freedom to express ideas and opinions that offend, shock, or disturb.... Such are the demands of ... pluralism, tolerance and broadmindedness without which there is no "democratic society" (*Handyside v. the United Kingdom*, ECtHR, Application No. 5493/72, Judgment of 7 December 1976, para. 49).

The UN Human Rights Committee, in setting out the nature and scope of freedom of expression under the ICCPR in its General Comment 34, has stressed that "Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression."

The basic test for permissible restrictions on free expression, as set out above and reiterated in the counter-terrorism context by the ECtHR, multiple UN Special Rapporteurs, and the UN Human Rights Committee (UNHRC), requires clear definition in law, necessity and proportionality, as the restrictions must be "the least intrusive instrument among those which might achieve their protective function and proportionate to the interest to be protected" (UN HRC, [General Comment No. 27](#), UN Doc. CCPR/C/21/Rev.1/Add.9, 1999, para. 14). Special Rapporteurs have noted that the strict adherence to the above set out test is more crucial when States decide to criminalize certain forms of expression ([Special Rapporteur on the right to privacy and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism](#), p. 4). While the free expression of all must be protected, particular caution is due given the impact of criminalisation of expression on political speech, or artistic expression, as free expression 'protects not only the substance of the ideas and information expressed but also the form in which they are conveyed' (*De Haes and Gijssels v Belgium*, ECtHR

Judgment, Application No. 19983/92, Judgment of 24 February 1997, para. 48; *Alinak v Turkey*, ECtHR, Application No. 40287/98, Judgment of 29 March 2005, para. 42), human rights defence (UN Declaration on HRDS), and the 'crucial role' of the media 'in informing the public about acts of terrorism' (UN HRC, [General Comment No. 34 on Article 19: Freedoms of opinion and expression](#), UN Doc. CCPR/C/GC/34, para. 46).

Account should also be taken of the impact of investigations on closure of websites and communication; in a number of States any website deemed to be promoting apology or provoking terrorism is now closed, in some cases absent judicial order. In France, the Central Office for Combatting Information and Communication Technologies Crime (a police body) may order a website to be blocked without going through a judge (French Penal Code: Article 421-2-5; Code of Criminal Procedure: Article 706-23 to 706-25-2; Administrative blocking of sites advocating terrorism Decree n ° 2015-125 of February 5th, 2015).

Various Directive offences (including training and indoctrination for example) also implicate free expression, but the provisions on 'provocation' (Article 5) and 'incitement' to other Directive crimes (Article 15) pose the greatest challenge by directly penalising expression.

International human rights law makes clear that expression may be subjected to prevention and sanction where it amounts to incitement to discrimination or violence (Article 20 ICCPR, Article 4 ICERD), and must be prosecuted in the case of incitement to violence. Jurisprudence reflects the need, however, to clearly distinguish between such incitement to violence (*Belek and Velioglu v. Turkey*, ECtHR, Application No. 44227/04, Judgment of 6 October 2015, paras. 24-27), and even "hostile", "negative" or "acerbic" comments and criticism (*Falakaoglu et Saygili v. Turkey*, ECtHR, Application No. 11461/03, Judgment of 19 December 2006, para. 35). The European Court has noted for example that expressions of general sympathy and support for a cause or a leader of a "terrorist organization" would be unlikely to justify criminal prosecution, while "a message of intransigence as to the objectives of a proscribed organisation cannot be confused with incitement to violence or hatred" (*Surek and Ozdemir v. Turkey*, ECtHR, Application No. 23927/94 & 24377/94, Judgment of 8 July 1999, para. 61).

International standards now make clear that crimes of justification, encouragement or *apology* for terrorism, that may not contribute to future criminal acts, but purport to justify prior acts or simply consist of expressions of opinion, are very difficult to reconcile with the requirements of necessity and proportionality under international human rights law. (UN Secretary-General Report on Human Rights and Terrorism, 2008, para. 61; [A joint opinion of UN experts on the freedom of expression](#); UN HRC, [Concluding Observations Human Rights Committee: United Kingdom](#), UN Doc. CCPR/C/GBR/CO/6, 2008; UN HCR, [Concluding Observations Human Rights Committee: Russian Federation](#), UN Doc. CCPR/C/RUS/CO/6, 2009, para. 3; *The State v Cassandra Vera*, Spanish Supreme Court (Tribunal Supremo, Sala de lo Penal), 26 February 2018; *Stern Taulats and Roura Capellera v. Spain*, ECtHR, Application No. 51168/15 & 51186/15, Judgment of 13 March 2018; Sylvia Ayuso, 'Strasbourg: Burning photos of Spanish king is "freedom of expression"', in *El País*, 13 March 2018; Amnesty International, 'Spain: Counter-terror law used to crush satire and creative expression online', 13 March 2018; Council of Europe Commissioner for Human Rights, [Misuse of anti-terror legislation threatens freedom of expression](#), 4 December 2018).

Therefore, so far as crimes of 'public provocation' amount to incitement to future violence, they may legitimately be prosecuted consistently with human rights law, though there will need to be proximate nexus between the expression and any ensuing violence (a passage written in an obscure publication is less likely to meet this test than a speech to a riled crowd in a public demonstration). A host of different factors may be relevant to an assessment of whether exceptional circumstances justify criminalizing expression. Jurisprudence and instruments, including the Rabat Plan of Action, point to some of these factors relevant to the judicial assessment, including 'context, position of the speaker, intent, content and form, extent of the speech act, and the likelihood, including imminence, of harm that may occur as a result of the speech.' (The so-called "[Rabat Plan of Action](#)" can provide useful (non-binding) guidance on what constitutes incitement. See: Appendix in UN High Commissioner for Human Rights, Report to the Human Rights Council (UN HRC, [Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred](#), UN Doc. A/HRC/22/17/Add.4, 2013; Helen Duffy and Kate Pitcher, "Inciting Terrorism? Crimes of Expression and the Limits of the Law", 2018).

Judges should ensure that criminal law does not prosecute expressions of opinion that have no (or negligible) effect, or which have no intent to contribute to terrorist violence. The Directive makes explicit the requirement that the provocation must at least cause a 'danger'. This is particularly important as the Directive covers preparatory / non-principal offences (membership of a terrorist group, travelling, financing, provocation, facilitating travel) that do not require a principal offence to be committed (Article 13). The UN Special Rapporteur on Counter-terrorism and Human Rights in his exposition of best practices has similarly noted that for crimes of expression, the conduct (speech) should increase the likelihood of a terrorist act being committed, and there should be personal and specific intent to incite a future terror offence (albeit this may be inferred from the circumstances) (Report of the [Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism](#), p. 29. Also see the example of Article 5, CoE Convention).

A number of national laws raise doubts as to these objective elements (of danger) and subjective elements (of intent to contribute to a terrorist act). On 15 March 2018, the Belgian Constitutional Court annulled broad-reaching Belgian provisions on "indirect" incitement (Loi 3 Aout 2016 portant des dispositions diverses en matière de lutte contre le terrorisme (III), [MB 11 Aout 2016](#), 50973), which had deleted the requirement of creating "a serious risk" of terrorist offences, on the basis that the deletion was not in accordance with the principle of legality, was "not necessary in a democratic society" or proportionate." ([Extrait de l'Arrêt No.31/2018](#) - En cause : Le recours en annulation de la loi du 3 août 2016 portant des dispositions diverses en matière de lutte contre le terrorisme (III), introduit par l'ASBL « Ligue des Droits de l'Homme », Case No.2018/201412 Belgian Constitutional Court, 15 March 2018; see also on safeguarding free expression on the internet Decision No.20202-801-DC - 'Loi visant à lutter contre les contenus haineux sur internet', French Constitutional Court, 18 June 2020).

The French offence criminalising "habitual consultation" of websites which make available messages, images or presentations which directly provoke the commission of acts of terrorism (art. 421-2-5-2 Crim. Code) was declared unconstitutional by the French Constitutional Council for the lack of intent in relation to the terrorist undertaking (Decision 2016-611). The Constitutional Council found the offence "jeopardised the freedom of communication in a way that is not necessary, appropriate and proportionate" (§16).

The Italian Supreme Court clearly states that "instigation to commit a crime, provided for by art. 414 cod. Criminal Code, is a crime of "specific danger" and not presumed danger and consequently requires for its configuration a behaviour that is considered specifically suitable, on the basis of an "ex ante" judgment, to cause the commission of crimes" (Corte di Cassazione Sez. V, 12/9/2019 n. 48247, PM vs De Salvatore).

In light of concerns expressed by international human rights authorities, such as the UNHRC in the past, such offences are difficult to reconcile with international human rights law and would need to be clarified and interpreted restrictively. A number of States have established as offences problematic conception of glorification and encouragement. For example German law, in Section 91 StGB includes "*encouraging the commission of a serious violent offence endangering the state*". Dissemination (e.g. Section 131 StGB covers 'Dissemination of depictions of violence' (...) "in a manner expressing glorification" as an indirect forms of incitement of terrorism). There are also problematic 'indirect incitement' laws (such as in Spain, Article 578 of the Criminal code), reflecting recital 10's reference to 'the glorification and justification' of terrorism, but this remains a minority of EU States. Jurisprudence by domestic and international courts and quasi-judicial authorities of such provisions has, in some cases, provoked reform (See Pierrick Gardien, '[Loi Avia: Ce qu'a censuré le Conseil Constitutionnel](#)' (Sisyphes Avocats, 18 June 2020), Aureline Breeden '[French Court Strikes Down Most of Online Hate Speech Law](#)' (New York Times, 18 June 2020)).

The Supreme Court of Spain narrowed the scope of application of its law on provocation (Tribunal Supremo (sala de lo Civil), 2 June 2017, Roj: [STS 2251/2017](#) - ECLI: ES:TS:2017:2251, Also see <https://verfassungsblog.de/passive-indoctrination-as-a-terrorist-offense-in-spain-a-regression-from-constitutional-rights/>). UN independent experts and others have expressed concern on the overbroad laws invoked to prosecute bloggers, performers and rappers for comments made in relation to 'historic terrorism' (see UN Office of the High Commissioner for Human Rights, '[Two Legal Reforms Projects Undermine The Right to Assembly and Expression in Spain](#)' UN experts say', 23 February 2015; Amnesty International, '[Tweet ... if you dare - How Coun-](#)

ter-Terrorism Law restrict freedom of expression in Spain', March 2018; Amnesty International, 'Spain: Counter-terror law used to crush satire and creative expression online', 13 March 2018), and is at the heart of an ongoing extradition dispute between Belgium and Spain (Valtonyc case - A Belgian court has rejected a European Arrest Warrant against a rapper accused of insulting Spain's royal family and other offences).

4. Recruitment for terrorism

EU Directive 2017/541

Article 6 **Recruitment for terrorism**

Member States shall take the necessary measures to ensure that soliciting another person to commit or contribute to the commission of one of the offences listed in points (a) to (i) of Article 3(1), or in Article 4 is punishable as a criminal offence when committed intentionally.

Guidance

In applying the offence of recruitment for terrorism, judges should apply careful scrutiny to ensure that wide definitions of terrorist act, and of participation, on which the offence of recruitment for terrorism depends, do not lead to unforeseeable, arbitrary application of the offence in the individual case before them. In applying offences under Article 6, the meaning of offences under Article 3(1) and Article 4 should be construed in accordance with the principles outlined in sections II.5 and II.6 above.

Judges and prosecutors should seek to ensure that investigatory measures, as well as prosecution and conviction for the offence of recruitment for terrorism, do not unnecessarily or disproportionately intrude on legitimate political, religious or social activity, exercised in accordance with rights to freedom of association, assembly, privacy, right to private life, right to political participation or expression. They should also consider whether application of the offence in a particular case may directly or indirectly discriminate, including on any grounds, including those of race, colour, sexual orientation or gender identity, age, gender, religion, language political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status, or the intersection thereof.

In particular, the offence of soliciting a person to participate in the activities of a terrorist group should be interpreted as requiring knowledge of the fact that the group is likely to carry out terrorist offences, and intent, not merely to solicit someone to, for example, provide goods or services, but also to thereby contribute to the terrorist activities of the group.

Commentary

The criminalisation of recruitment for terrorism is underpinned by the Council of Europe Convention on the Prevention of Terrorism, and by successive Security Council resolutions (2178; 2396). Article 6.2 of the Council of Europe Convention requires States parties to criminalise recruitments for terrorism "when committed unlawfully and intentionally." Recruitment is defined in Article 6.1 as meaning "to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group."

Security Council Resolution 2178 provides that "all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense: (c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training."

The rights to freedom of association (Article 11 ECHR, Article 22 ICCPR, Article 12 EU Charter), expression (Article 10 ECHR, Article 19 ICCPR, Article 11 EU Charter), freedom of assembly (Article 11 ECHR, Article 21 ICCPR, Article 12 EU Charter), rights to privacy and respect for private life (Article 8 ECHR, Article 17 ICCPR, Article 7 EU Charter), freedom of religion or belief (Article 9 ECHR, Article 18 ICCPR, Article 10 EU Charter), right to political participation (Article 25 ICCPR) and the right to liberty (Article 5 ECHR, Article 9 ICCPR, Article 6 EU Charter) are engaged by prosecution of offences of recruitment to terrorism, requiring any interference with these rights to be adequately prescribed by law, to pursue a legitimate aim, to be necessary and proportionate to that aim, and to be non-discriminatory.

National laws on recruitment for terrorism often predate the Directive, and vary in scope, sometimes including more specific delineation of the offence than Article 6 of the Directive. In Italy, for example, the offence of recruitment for terrorism was introduced in 2005, due to difficulties in gathering sufficient evidence to prosecute suspected cases of recruitment under the existing offence of acts preparatory to terrorism, suggesting a potentially wider scope than other preparatory offences. However, under Article 270 quarter Criminal Code, recruiting must aim to pursue an act of violence or sabotage with a view to terrorism. It is for the judge in the case to determine whether the organization concerned has a terrorist purpose.

The German criminal code prohibits the recruitment of members and supporters of terrorist groups (Article 129a subsections (5) S.2). Intent is required as part of the offence (MüKo-StGB/Schäfer §§ 80-185j, 3rd edition 2017, § 129a Rn. 60; § 129 Rn. 24.). Recruitment is further covered by the general provision on conspiracy, (Article 30(1)) which stipulates that a "person who attempts to induce another to commit a felony or to abet another to commit a felony shall be liable".

In Belgium, legislation is in one respect wider than Article 6 of the Directive: Article 140ter of the Criminal Code, criminalises the act of recruiting a third person to commit a terrorist offence, but does not explicitly require that the recruitment be committed intentionally.

In the Netherlands, recruitment for armed conflict is punishable by Article 205 of the Criminal Code. Intent - also in conditional form (voorwaardelijk opzet) - is required as part of the offence.

5. Providing and receiving training for terrorism

EU Directive 2017/541

Article 7 **Providing training for terrorism**

Member States shall take the necessary measures to ensure that providing instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1), knowing that the skills provided are intended to be used for this purpose, is punishable as a criminal offence when committed intentionally.

Article 8 **Receiving training for terrorism**

Member States shall take the necessary measures to ensure that receiving instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1) is punishable as a criminal offence when committed intentionally.

Guidance

In adjudicating the offences of providing and receiving training for terrorism, judges must ensure that the offences are applied in a consistent, predictable and foreseeable way and avoid unnecessary or disproportionate interference with rights and fundamental freedoms, including freedom of expression, freedom of association, and the right to respect for private life. National jurisprudence should in particular seek to clarify the scope of the offences as regards the type of training that is subject to criminal sanc-

tion, beyond the non-exhaustive list indicated in the Directive, in order to ensure legal certainty, and avoid excessive, arbitrary or discriminatory application of the offence.

Where the intent necessary to ground the offence is not clearly defined in legislation, it should be clarified through jurisprudence. Intent should be confined to circumstances where there is specific intent to provide or receive training that will contribute to commission of an act of terrorism, or at a minimum deliberate disregard of knowledge that it will do so.

Judges and prosecutors should interpret the offences restrictively, and ensure that the application of counter-terrorism offences of receiving or providing training are not applied in a discriminatory way, and be alert to conscious or unconscious bias at all stages of the investigation, prosecution and trial process.

In initiating investigations or prosecutions for offences covered in Articles 7 and 8, prosecutors should consider, based on the facts of the case, the potential for the prosecution or investigatory measures to violate the right to education, freedom of expression including on the internet, freedom of association the right to respect for private and family life, or other rights protected in EU and international law.

Commentary

As Articles 7 and 8 of the Directive make clear, “training for terrorism” or “receiving training” covers those who provide or receive instruction for the particular purpose of carrying out or contributing to the commission of a terrorist offence. Judges should guard against arbitrariness or discrimination in practice, given the extent to which the offence rests to a large extent on the subjective element of “terrorist intent.” As the offence does not by itself relate to any particular terrorist act, or even an attempt of or any preparatory steps in furtherance of such an act, the conduct may be unduly remote, or the wrongdoing too minimal, to justify the intervention of the criminal law as opposed to other responses. It should not be applied to e.g. inadvertently accessing websites.

Judges should ensure that Recital 11 of the EU Directive is given effect, which states that “(...) merely visiting websites or collecting materials for legitimate purposes, such as academic or research purposes, is not considered to be receiving training for terrorism under this Directive.”

The offences under Articles 7 and 8, raise issues of freedom of association and the freedom to receive information, and interference must be carefully justified in all the circumstances of the case, based on the conduct and intent of the individual.

The scope of these offences varies significantly between different EU Member States national laws, and have raised a number of human rights challenges.

- In Italy, with regard to the scope of Article 270 *quinquies* (training for terrorist purposes), in July 2011 a ruling of the Court of Cassation made it clear that training is not limited to providing and receiving information. The offence requires a **continuous and systematic programme of education**, including an assessment of the results by the trainer. However, the education programme needs only be “appropriate” to carrying out terrorist activities, and the causal link with the main terrorist offence remains weak.
- In Germany, as a result of the **broad categories** of section 89a StGB (German Criminal Code), there is concern that a number of **facially neutral acts that can be penalised**, such as flight training or buying a cell phone. Such laws might in principle allow for acquiring any skills to be punished, where there is a criminal intent. However, the highest federal court (BGH 3 StR 243/13) considers a restrictive interpretation of the subjective element of the offence in conformity with the Constitution to be decisive, according to which the perpetrator must already be firmly determined when carrying out the preparatory acts for the commission of the serious violent offence endangering the state, as regulated in section 89a (2) of the Criminal Code.
- In the Netherlands, training for terrorism is punishable by Article 134a of the Criminal Code and the intent of the accused is required as part of the offence. The intent needs to be aimed at ‘using the acquired knowledge or skills to commit a terrorist offense or a crime in preparation of or to facilitate it’ (Parliamentary Papers II 2007/08, 31386, 3, p. 9). The intent is

required for all subsequent components, including the goal of the training that is followed by the participants (Parliamentary Papers II 2008/09, 31386, 8, p. 6; Parliamentary Papers II 2008/09, 31386, 12, p. 4). The legislator makes a distinction between the intent of the person who follows the training and the person who gives the training. Conditional intent (voorwaardelijk opzet) is sufficient for the latter (Proceedings II 20 January 2009, 43, p. 3795). For the former, it does not necessarily have to be a terrorist intent as referred to in Art. 83a of the Criminal Code. However, the person following the training must have the 'intent' or 'malicious purpose' to acquire that knowledge or skills for the purpose of committing a terrorist offense or a crime in preparation for or facilitating a terrorist offense (Parliamentary Papers II 2008 / 09, 31386, 8, p. 8; Parliamentary Papers II 2008/09, 31386, 12, p. 3, 4). This indicates a heavier intent requirement than conditional intent.

- Some countries, including the Netherlands and Spain, have included '**self-training**' within the scope of the offence. As shared by one of the experts during the ICJ Roundtables, in Spain self-training to be able to commit terrorist offences is criminalised and this offence includes two presumptions of culpability: **regularly visiting certain websites and possessing documents** that might encourage terrorist activities. Intention is required for this offence, but its scope is not clarified in the text (Article 575 §1-2 Spanish Criminal Code).
- Some jurisdictions, including France, do **not specifically provide for intent** requirements in the legislation (Article 421-2-1 French Criminal Code (Code pénal). The lack of clarity and precision of the provision leaves it to the judges to look for the intent and try to materialize it.

6. Travelling for the purpose of terrorism

EU Directive 2017/541

Article 9 **Travelling for the purpose of terrorism**

1. Each Member State shall take the necessary measures to ensure that travelling to a country other than that Member State for the purpose of committing, or contributing to the commission of, a terrorist offence as referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving of training for terrorism as referred to in Articles 7 and 8 is punishable as a criminal offence when committed intentionally.
2. Each Member State shall take the necessary measures to ensure that one of the following conducts is punishable as a criminal offence when committed intentionally:
 - (a) travelling to that Member State for the purpose of committing, or contributing to the commission of, a terrorist offence as referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving of training for terrorism as referred to in Articles 7 and 8; or
 - (b) preparatory acts undertaken by a person entering that Member State with the intention to commit, or contribute to the commission of, a terrorist offence as referred to in Article 3.

Guidance

In applying offences of travel for the purposes of terrorism, judges and prosecutors should seek to ensure that the offences are applied in a consistent, predictable and foreseeable way and should ensure that the investigation, prosecution or conviction does not, in the particular circumstances of each case, lead to unnecessary, disproportionate or discriminatory interference with rights of freedom of movement, freedoms of association, assembly or expression, or rights to privacy and private and family life, or economic, social and cultural rights.

In case of people traveling to States other than the Member State, judges and prosecutors should apply the same principles to interference with the right to leave any country, including one's own (article 12 ICCPR, and Article 2 Protocol 4 ECHR).

In the case of Member State nationals, permanent residents, refugees or others with strong ties to the country returning there, judges and prosecutors should seek to ensure that where application of criminal sanction would amount to a de facto deprivation of the right to return to one's own country (Article 3.2, Protocol 4 ECHR, Article 12.4 ICCPR) this is reasonable and justified (GC 27, para.21).

Judges and prosecutors should also consider the risk of that investigation, prosecution or conviction for the crime of travel for purposes of terrorism may discriminate, directly or indirectly, against religious or other minorities engaging in legitimate activity, in particular to migrants and immigrant communities with close family and other ties to countries experiencing terrorism or regions controlled by terrorist groups.

Judges should interpret and apply the offences of travel for the purpose of terrorism so that travel only fails within the definition of the offence where it has a sufficient proximate connection to the principal offence of terrorism under Article 3 of the Directive, with a real and foreseeable risk that such an act of terrorism would take place.

Judges should interpret national law requirements of intention to travel for the purposes of terrorism to require not only intention to travel, but also a clearly demonstrated intent to do so for the purposes of contributing or actually committing the principal offence. Intention to travel to a particular country or region is not itself sufficient to ground the offence, or by itself give rise to a presumption that terrorist-specific intent is present.

The defendant should not in any circumstances bear the burden of proof in establishing that their travel is for a legitimate purpose.

Travel for humanitarian purposes, including to support rights to food, health, sanitation or housing should not be interpreted as falling within the scope of the offence, in line with recital 38 of the Directive, and with States' obligations under International Humanitarian Law and obligations to protect and fulfil economic, social and cultural rights (ICESCR).

Travel for the purposes of participation in a conflict governed by international humanitarian law, without evidence of specific intention to take part in acts of terrorism, should not be interpreted as falling within the scope of the offence, in accordance with recital 37 of the Directive, irrespective of whether it may be an offence in other provisions of domestic law.

Commentary

Recital 12 to the Directive underlines the need, particularly in relation to the situation prevailing at the time the Directive was enacted, to criminalise travel for the purposes of terrorism both from and to EU Member States, but acknowledges that this does not have to be done by specifically criminalising the act of travel:

"Considering the seriousness of the threat and the need, in particular, to stem the flow of foreign terrorist fighters, it is necessary to criminalise outbound travelling for the purpose of terrorism, namely not only the commission of terrorist offences and providing or receiving training but also the participation in the activities of a terrorist group. It is not indispensable to criminalise the act of travelling as such. Furthermore, travel to the territory of the Union for the purpose of terrorism presents a growing security threat. Member States may also decide to address terrorist threats arising from travel for the purpose of terrorism to the Member State concerned by criminalising preparatory acts, which may include planning or conspiracy, with a view to committing or contributing to a terrorist offence. Any act of facilitation of such travel should also be criminalised."

Recital 38 also acknowledges that the Directive does not apply to humanitarian aid, which is particularly relevant to offences under Article 9: "The provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the case-law of the Court of Justice of the European Union."

Recital 37 stipulates that: "This Directive should not have the effect of altering the rights, obligations and responsibilities of the Member States under international law, including under international humanitarian law. This Directive does not govern the activities of armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of those terms under that law, and, inasmuch as they are governed by other rules of international law, activities of the military forces of a State in the exercise of their official duties."

The offence of travel for the purposes of terrorism has its roots in Security Council 2178, para 6.a of which required states to criminalise as a serious criminal offence "their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from 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."

The Protocol to the Council of Europe Convention on the Prevention of Terrorism, drawing on resolution 2178, required States parties to criminalise "travelling abroad for the purpose of terrorism, ... from its territory or by its nationals, when committed unlawfully and intentionally" (Article 4.2). The Protocol defines "travelling abroad for the purpose of terrorism" as "travelling to a State, which is not that of the traveller's nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism." (Article 4.1)

The offences of travel for the purposes of terrorism enacted under Article 9 carry particular risks of arbitrary, disproportionate and discriminatory interference with the right to freedom of movement, (Article 2.1 Protocol 4 ECHR, Article 12.1 ICCPR, Article 45 EU Charter) and the freedom to leave any country, including ones own (Article 12.2 ICCPR and Article 2.2 of Protocol 4 ECHR).

Particularly relevant to the offence of travel to a Member State for the purposes of terrorism, is the right not to be arbitrarily prevented from entering one's own country, protected by Article 12 ICCPR. This applies not only to nationals but also to permanent residents and others with close links to the country (general comment 27 of the UN Human Rights Committee (para.20)).

The broad terms of Article 9, and of related offences under both Articles 3 and 4 of the Directive, allow it a potentially very wide and uncertain scope of application which requires national legislative and judicial safeguards to render its scope of application sufficiently certain and foreseeable, and to prevent its arbitrary or discriminatory application. The UN Special Rapporteur on Counter-terrorism and Human Rights, in [her report following her visit to Belgium](#) (UN Doc. A/HRC/40/52/Add.5, 2019), drew attention to: "the difficulties of prosecuting 'travelling with terrorist intent' in a manner that is compliant with human rights standards, including the rights to freedom of movement, expression and association as well as the principle of legality, requiring a certain level of precision and foreseeability in legislation" (para. 23). She stressed "the importance of prosecutions being conducted on the basis of conclusive evidence of intent to commit terrorist offences" and warned that "expansive interpretation of support to terrorism may lead to an overly broad construction of the offence of travelling with the intent to commit terrorist acts" (para. 23).

The UN Human Rights Committee in its General Comment No. 27 on the Right to Freedom of Movement (UN Doc. CCPR/C/21/Rev.1/Add.9, 1999) has emphasised the role of judicial safeguards in ensuring the proportionality of restrictions on freedom of movement: "Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided" (paras 14-15).

National legislative frameworks vary between those that have enacted specific offences of travel for the purposes of terrorism, and those which rely on existing more general offences ancillary to terrorism, to criminalise travel. National legislation also varies as to the intention required to commit the offence.

For example, in the Netherlands, there is no specific offence of travelling for the purposes of terrorism. Instead, traveling for terrorism is already punishable as conduct of taking preparatory acts to participate in armed conflict or other terrorist offenses (Amsterdam Court of Appeal 27 July 2017, [ECLI:NL:GHAMS:2017:3041](#)).

Belgian law does establish the offence of travel, and emphasises terrorist intent, rather than knowledge of the contribution to the criminal activities of a terrorist group. Notably, Article 141 bis of the Belgian criminal code excludes from all terrorism offences “acts by armed forces in a situation of as defined in and subject to international humanitarian law” and “acts by the armed forces of a State in the context of their official tasks, insofar as those tasks are subject to other provisions of international law.” This restriction was welcomed as an important safeguard by the Special Rapporteur on Counter-terrorism and Human Rights in her report following her visit to Belgium (para. 24).

However, with or without such an exception, national courts may need to determine whether IHL is applicable to the conduct in question to decide whether prosecution is appropriate at all, to charge appropriately in manner that does not undermine IHL, in light of Recital 37’s stipulation that the Directive does not govern armed conflict.

7. Organising or otherwise facilitating travelling for the purpose of terrorism

EU Directive 2017/541

Article 10 **Organizing or otherwise facilitating travelling for the purpose of terrorism**
Member States shall take the necessary measures to ensure that any act of organisation or facilitation that assists any person in travelling for the purpose of terrorism, as referred to in Article 9(1) and point (a) of Article 9(2), knowing that the assistance thus rendered is for that purpose, is punishable as a criminal offence when committed intentionally.

Guidance

The principles set out in regard to Article 10, like Article 9, also apply to offences of organising or otherwise facilitating travel for the purposes of terrorism. However, this offence raises the risk of even greater remoteness and more egregious abuse, given that it is one further step removed from the principal criminal offence. In light of this, judges and prosecutors should seek to avoid the application of the criminal law to conduct which has no foreseeable risk of contributing, intentionally, to an act of terrorism.

As with offences under Article 9, judges and prosecutors should, interpret the intent requirement, not merely as intention to organise or facilitate travel, but as intention to contribute, albeit indirectly, to an act of terrorism, or at a minimum deliberate disregard of knowledge that one’s actions will do so.

Commentary

Article 10 of the Directive reflects provisions of Security Council Resolution 2178, (Paragraph 6). It also seeks to reflect the Protocol to the Council of Europe Convention on the Prevention of Terrorism. Article 5.2 of the Protocol requires the criminalisation of intentional “funding of travelling abroad for the purpose of terrorism” defined as “providing or collecting, by any means, directly or indirectly, funds fully or partially enabling any person to travel abroad for the purpose of terrorism, ...knowing that the funds are fully or partially intended to be used for this purpose” (Article 5.1).

Article 6 of the Protocol requires Member States to criminalise intentional “organising or otherwise facilitating travelling abroad for the purpose of terrorism” (Article 6.2), defined as “any act of organisation or facilitation that assists any person in travelling abroad for the purpose of terrorism, (...) knowing that the assistance thus rendered is for the purpose of terrorism” (Article 6.1).

The ambiguity and breadth of the ‘facilitation’ of travel, and its potential to cover conduct with no proximate link to terrorist acts, calls for a particularly stringent approach to the interpretation and application of this offence.

8. Terrorist financing

EU Directive 2017/541
Article 11 **Terrorist financing**

1. Member States shall take the necessary measures to ensure that providing or collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit, or to contribute to the commission of, any of the offences referred to in Articles 3 to 10 is punishable as a criminal offence when committed intentionally.
2. Where the terrorist financing referred to in paragraph 1 of this Article concerns any of the offences laid down in Articles 3, 4 and 9, it shall not be necessary that the funds be in fact used, in full or in part, to commit, or to contribute to the commission of, any of those offences, nor shall it be required that the offender knows for which specific offence or offences the funds are to be used.

Guidance

When applying the offences of terrorist financing, judges and prosecutors must ensure that the offences are applied in a consistent, predictable and foreseeable way and their interpretation must meet the requirements of legal certainty and prevent the arbitrary or disproportionate interference with rights including rights to privacy and private and family life, freedom of expression, freedom of association, and the right to political participation. Judges and prosecutors should interpret the scope of the offence narrowly.

Where the intent necessary to ground the offence is not clearly defined in legislation, it should be clarified through jurisprudence. Intent should be confined to specific intent to contribute, directly or indirectly, to the commission of the principal offence of terrorism, or at a minimum, deliberate disregard of knowledge that one's actions will do so.

Judges and prosecutors should not apply the offence in a way that restricts the legitimate activities of civil society, including the provision of humanitarian assistance or, the defence of human rights, or the provision of and access to basic services.

Judges and prosecutors should seek to ensure that investigatory measures, as well as prosecution and conviction for offences of financing of terrorism, do not discriminate, directly or indirectly, in particular on grounds of religion, nationality or race, including in regard to rights to respect for private and family life, and freedom of association.

Commentary

When Article 11 is applied concerning offences in Articles 3, 4 and 9, there is no requirement in the Directive that the funds in fact be used, in full or in part, to commit or to contribute to a terrorist offence, nor that the offender knows for which specific offence(s) the funds are to be used. It is not necessary that a principal offence be actually committed. This leads to risks of arbitrary or discriminatory application of the offence.

It is possible to question the ability of an individual to determine, by the wording of the provisions, whether their behaviour is wrongful or not and therefore, deemed by some experts interviewed by the ICJ, not in line with the principle of legality.

If broadly interpreted, offences under Article 11 may have a damaging impact on legitimate activities of civil society, including activities aimed at protecting human rights through the **provision of humanitarian assistance**. Recital 38 of the Directive acknowledges that the Directive does not apply to humanitarian aid: "The provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the case-law of the Court of Justice of the European Union." However, the Directive fails to apply the principle to other forms of public activity, including the work of human rights defenders.

According to the SR on counter-terrorism and human rights, local communities and those most vulnerable to and affected by "violent extremism", are often the communities most at risk of defunding and lack of support through the downstream effect of the risk-based approach to the

financing of terrorism and the lack of a comprehensive humanitarian exemption. (UN HRC, [Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism](#), UN Doc. A/HRC/43/46, 2020, para. 45)

Many of the international and national measures aimed at countering terrorist financing and criminalizing material support for terrorism have had the indirect effect of restricting the space in which humanitarian and human rights NGOs and other civil society organizations are able to operate. ([Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism](#), UN Doc. A/70/371, 2015, para. 10)

The Financial Action Task-Force has noted that non-profit organisations (NPOs), play a vital role in society, in particular their efforts in providing “essential services, comfort and hope to those in need around the world.” Consequently, “[m]easures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities.” Such measures should promote transparency and engender greater confidence that charitable funds and services reach intended legitimate beneficiaries. Actions taken by Governments should “to the extent reasonably possible, avoid any negative impact on innocent and legitimate beneficiaries of charitable activity” (the interpretative note to recommendation 8 of the Financial Action Task Force, set up in 1989 on an initiative of the Group of 7, as cited by Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/70/371, 18 September 2015, para 18).

In the Netherlands, under the offence of financing of terrorism, **conditional intent** (*voorwaardelijk opzet*) is already sufficient (The Hague Court of Appeal 10 March 2017, [ECLI:NL:GH-DHA:2017:642](#), par. 6.2.2.1). As a result, a person could be charged with financing terrorism in a situation where that individual only intends to send a family member money for benign purpose, such as for medication.

9. Aiding, abetting, inciting and attempting

EU Directive 2017/541

Article 14 **Aiding and abetting, inciting and attempting**

1. Member States shall take the necessary measures to ensure that aiding and abetting an offence referred to in Articles 3 to 8, 11 and 12 is punishable.
2. Member States shall take the necessary measures to ensure that inciting an offence referred to in Articles 3 to 12 is punishable.
3. Member States shall take the necessary measures to ensure that attempting to commit an offence referred to in Articles 3, 6, 7, Article 9(1), point (a) of Article 9(2), and Articles 11 and 12, with the exception of possession as provided for in point (f) of Article 3(1) and the offence referred to in point (j) of Article 3(1), is punishable.

Guidance

The same principles set out above in relation to offences under the Directive also apply to crimes of aiding, abetting, inciting or attempting those offences. These offences, since they are ancillary to already ancillary offences, which themselves may be broadly defined, should be applied with particular care to ensure that their application is foreseeable, and that the restrictions on human rights entailed in the investigation and prosecution is necessary, proportionate and non-discriminatory.

Judges and prosecutors applying offences of aiding and abetting in accordance with Article 14.1, should require a clear causal connection between the conduct of the suspect or accused, and the commission of a principal offence of terrorism under Article 3. Jurisprudence should confine the intent necessary to commit the crime of aiding and abetting, to intent to aid or abet a principal offence of terrorism, excluding intent to merely aid, for example, training, without the knowledge that such training had a terrorist purpose.

The offence of incitement under Article 14.2 must be applied so as to ensure that any interference with the right to freedom of expression entailed by the investigation or

prosecution of the offence is foreseeable, and that the causal connection with the principal offence, and the intent to incite the principal offence, are clear and sufficiently circumscribed to protect against arbitrary, disproportionate or discriminatory interference with freedom of expression (see further above, commentary on public provocation).

In order to meet standards of foreseeability under the principle of legality, and prevent arbitrary interference with human rights, judges and prosecutors applying the offence of attempt under Article 14.3, should require a close connection to the commission of the principal criminal offence, with a real and foreseeable risk that such principal criminal conduct would in fact take place. Mere expressions of motivation, without more concrete manifestation of any intent to actually carry out a principal criminal act, should not be sufficient to establish the offence of attempt.

IV. The rights of suspects in the criminal process: investigation, prosecution and trial

1. Investigation, and evidence gathering

Guidance:

The international human rights law and standards, practices and safeguards applied to the investigation of all criminal offences should also be applied to terrorism offences, including those under the Directive. Safeguards should not be weakened or disregarded in practice on the grounds of the “exceptional” nature of terrorism offences. Even where exceptional procedures are provided for in law, and/or during a lawfully declared and proclaimed state of emergency involving lawful derogations from international human rights obligations, they should be interpreted and applied so as to preserve the safeguards for human rights in ordinary criminal procedure to the greatest extent possible. They must at all times meet core non-derogable standards of fair trial.

Commentary: Some Member States have chosen to handle terrorist cases by centralising or creating specialisations within the system of investigation, prosecution and trial of cases. These specialised courts may apply ordinary rules of evidence and procedure, or may apply certain procedural modifications in terrorism cases. (On the establishment of special courts, see further, [Legal Commentary to the Berlin Declaration](#), pp.63-64.” Irrespective of the court hearing the case, national legislation applies special procedures in counter-terrorism cases in several member States, including as regards detention, surveillance and other investigatory measures. Such special procedures require careful judicial application and scrutiny to ensure their compliance with rights to liberty (Article 5 ECHR, Article 9 ICCPR, Article 6 EU Charter), fair trial (Article 6 ECHR, Article 14 ICCPR, Article 47 EU Charter), freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 3 ECHR, Article 7 ICCPR, CAT, Article 4 EU Charter), and the right to respect for private life (Article 8 ECHR, Article 17 ICCPR, Article 7 EU Charter). Obligations in regard to each of these rights are considered below. As noted above in section II.5, rights including freedom from torture and other ill-treatment, and core elements of the right to a fair trial are non-derogable and applicable at all times.

• Gathering of evidence

Guidance:

Effective evidence collection is necessary to international law obligations of investigation, accountability and reparation for crimes under international law, including for war crimes, crimes against humanity, slavery, torture, enforced disappearance, extrajudicial killings and violent crimes of terrorism. This is a particular issue as regards evidence from areas of armed conflict, severe internal disturbance or from areas where the rule of law has broken down. Gathering of evidence to support prosecution for the most serious offences, should be a priority, and all efforts should be made to ensure thorough and competent collection of evidence for these purposes.

For a prosecution to proceed, or for an investigatory action to be undertaken in a counter-terrorism case, sufficient corroborating evidence should be gathered to the same level as would apply to ordinary offences, in light of the presumption of innocence. Re-

liance on uncorroborated intelligence information, from either domestic or foreign intelligence services, should always be avoided. A single piece of indirect evidence should not be considered to be a sufficient basis for an investigatory measure, prosecution or conviction.

Evidence that may rely on discriminatory presumptions (such as evidence of religious practice or dress) should not be accorded any weight.

Inclusion on a “terrorist” list, national or international, including those compiled pursuant to UN Security Council Resolutions, or membership of an organisation included on such a list should not in itself be considered sufficient evidence of any offence. The merits of the listing must always be the subject of judicial scrutiny through access to justice by the listed person and their representatives.

Information obtained by torture, cruel, inhuman or degrading treatment, coercion, or other means which constitute a serious violation of the human rights of a defendant or third party, is never admissible as evidence and must not be relied on in any proceedings. Where allegations are made that information may have been obtained by such means, it is the judge’s responsibility to ensure that there is a thorough, impartial and effective investigation into the allegations.

Commentary: Article 15 of the Convention Against Torture provides: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings [...]” ([Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)). The UN Committee Against Torture has clarified this applies also in relation to inhuman and degrading treatment, and that no limitation may be placed on this prohibition in any circumstances (UN CAT, [General Comment No. 2 - Implementation of article 2 by States parties](#) (2008), UNDOC CAT/C/GC/2, para. 6). In addition, evidence obtained through other violations may also be inadmissible, and/or may give rise to obligations of non-cooperation with criminal processes.

The United Nations Guidelines on the Role of Prosecutors advise that: “[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable **grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights**, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice” (Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, [Guidelines on the Role of Prosecutors](#), 1990, Guideline 16).

Consequently, “it is ... also the duty of judges to be particularly alert to any sign of maltreatment or duress of any kind that might have taken place in the course of criminal investigations or in detention and to take the necessary measures whenever faced with a suspicion of maltreatment” (UN, [Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers](#), 2003, p. 231).

National/EU/international “blacklists” of individuals or organisations compiled by national governments or inter-governmental organizations should not be determinative for the purpose of investigations, and the case always needs to be investigated regardless of the list. Where such listings are presented as evidence in a criminal case, the merits of the listing must always be subject to judicial scrutiny, to avoid executive decisions being determinative of the judicial process (see also [Assessing Damage, Urging Action – Report of the Eminent Jurists Panel](#), pp. 113-117).

The **EU terrorist list** has previously been challenged judicially. It contained the LTTE (Sri Lanka Tamil Tigers) which then had to be removed following a [decision of the Court of Justice of the EU](#) (CJEU). The Court held that with a decision placing a person or group on the list relating to frozen funds, the Council must, **at regular intervals**, and at least once every six months, be satisfied that there are grounds for continuing to include the party concerned in the list at issue. The Court also said that a placement on such a list must always disclose in a clear and unequivocal fashion **the reasoning** followed by the institution which adopted the measure in such a way as to enable the **review of its lawfulness**.

According to the Italian Supreme Court (Sez. V n. 31389, 11/6/2008, Bouyahia) the inclusion of an organization in the lists of terrorist associations drawn up by the UN Security Council, following resolution no. 1267, can only be used as an investigative starting point. It must not be used in itself as proof of the terrorist purpose carried out by the association itself, which must necessarily be formed according to the rules prescribed by the procedural law.

The powers of criminal justice officials, from preliminary situation analysis and identification of targets, to search and seizure, surveillance or arrest, must be exercised in a non-discriminatory manner.

Obligations to investigate and prosecute international crimes arise under international criminal law, as well as under international humanitarian law and international human rights law (e.g. Articles 4, 5, 7, 12 CAT, Articles 3, 12 CPED, *McCann v UK*; ICCPR Article 2(3) UN HRC General Comment 31 para.18). These obligations are closely related to the rights of victims of international crimes to an effective remedy and reparation, including the right to truth (concerning international law obligations to investigate and prosecute, and provide remedies and reparations, see further: [The Right to Remedy and Reparations for Gross Human Rights Violations – A Practitioners’ Guide](#)). In practice, failure to gather evidence of crimes under international law, including in situations of armed conflict, and the relative ease with which evidence may be obtained for ancillary offences of terrorism may lead to a prosecution of those suspected of war crimes or crimes against humanity for lesser ancillary offences, such as travel for purposes of terrorism, or membership of a terrorist group, leaving victims without justice or truth for the crimes against them. The existence in national law of ancillary offences of terrorism cannot provide an adequate substitute for prosecution for international crimes.

• Search, surveillance and interception of communication

Guidance:

Judges, in their oversight of investigatory measures as well as at trial, and prosecutors, must ensure that the right to privacy and respect for private and family life is respected during all stages of the procedure, including investigation and collection of evidence, prosecution and trial. They must consider whether any interference with these rights is adequately prescribed by law (including through a law that is clear as to its scope and the applicable procedures, and the application of which is reasonably foreseeable), is necessary and proportionate to the legitimate aim it pursues, and is not directly or indirectly discriminatory.

The respect for the right to privacy and private life should be central to decisions on, and judicial oversight of, surveillance or interception of communications, and national security considerations should be carefully weighed against privacy and private and family life rights, in light of the particular offence and the individual circumstances of the case.

Any such measures should be targeted in their scope and be time-limited. In particular such investigatory measures must not be used disproportionately against any group, including particular national, ethnic, national or religious groups.

Independent judicial review of surveillance and interception of communications is crucial to ensuring that it complies with human rights obligations. In reviewing or authorizing surveillance or interception of communications for counter-terrorism offences, judges should not automatically accept claims by State authorities that the measures are necessary for purposes of national security, but should assess whether they are necessary, proportionate and non-discriminatory in the particular circumstances of the case.

Receipt, retention and use of information or evidence from other States may also violate international law obligations where the material has been obtained in violation of human rights, including torture and ill-treatment. Before relying on such information or evidence, prosecutors should establish that it has not been obtained in violation of human rights, and should work to ensure that systems are in place to assess such violation, and where established reject, information on these grounds.

Commentary: The right to privacy is protected under Article 17 of the ICCPR against unlawful or arbitrary interference. Interferences that do not conform to the principles of legality, necessity, proportionality and non-discrimination are arbitrary and unlawful.

The European Court of Human Rights has accepted that, while constituting an interference with human rights, covert surveillance may be permissible, but only under exceptional conditions (*Klass and Others v. Germany*, ECtHR, Application No. 5029/71, Judgment of 6 September 1978, para. 58). The Court requires that in case of covert surveillance schemes there be effective safeguards, for example, an independent monitoring body (*Klass and others v. Germany*, para. 55 et seq).

Surveillance measures are almost invariably considered by the ECtHR as interferences, albeit with varying degrees of gravity, with the right to respect for the private life, home or correspondence of the individuals concerned (*Amann v. Switzerland*, ECtHR, Application No. 27798/95, Judgment of 16 February 2000; *Kennedy v. the United Kingdom*, ECtHR, Application No. 26839/05, Judgment of 18 May 2010, *Klass and Others v. Germany*, *Bărbulescu v. Romania*, ECtHR, Application No. 61496/08, Judgment of 5 September 2017).

UN Security Council Resolution 2396 (2017) places particular emphasis on gathering and sharing of information, intelligence and evidence, including from conflict zones, and on judicial measures and international co-operation to ensure that anyone who participates in the planning, preparation or perpetration of terrorist acts is brought to justice. However, in doing so, the resolution make clear that States must comply with international human rights law. Issues may arise both as regards the receipt and use of information gathered pursuant to human rights violations by foreign States, and the human rights implications of information and evidence sharing with those States.

The current UN Special Rapporteur on Counter-terrorism and Human Rights has noted that “[...] the principle of human rights and rule of law based information sharing between states is not per se objectionable. But the principle of sharing assumes that all states value privacy equally; do not misuse information to target individuals outside of the rule of law; and that information practices including integrity, anonymity, destruction as appropriate are rule of law based” (*The UN Security Council, Global Watch Lists, Biometrics, and the Threat to the Rule of Law*, Just Security, 17 January 2018).

2. Detention in counter-terrorism cases

Guidance:

Prompt, independent and effective judicial review of detention is a right guaranteed by international law at all times, and is crucial to protect against arbitrary deprivation of liberty (Article 5 ECHR, Article 9 ICCPR (UN HRC General Comment 36), Article 6 EU Charter) as well as to protection against torture or other ill-treatment in detention (Article 3 ECHR, Article 7 ICCPR, Article 4 EU Charter, CAT). In addition to the right to be promptly before a court pursuant to detention, all persons detained have the right at any time while they are subjected to deprivation of their liberty to have access to a court to challenge the lawfulness of their detention through habeas corpus or similar proceedings (Article 9(4) ICCPR, Article 7 ECHR).

In authorizing or reviewing pre-trial detention on counter-terrorism charges under the Directive, in particular for ancillary offences that are not directly related to violent acts of terrorism, judges should scrutinize the legal basis for the detention, as well as its necessity and proportionality. Judges should consider alternatives to detention, and in all cases, should impose detention only as a last resort. In counter-terrorism cases, as with other offences, pre-trial detention should be regarded as an exceptional measure. Administrative detention will not be lawful in the absence of a valid derogation to Article 5 ECHR and Article 9(4) ICCPR pursuant to a declared and notified state of emergency.

Judges reviewing detention should assess whether the detainee has been afforded prompt, regular and confidential access to competent, independent legal assistance of their choice, including free legal assistance where necessary. They should also assess whether the detainee has access to family members, and to any necessary medical

attention. They should review any allegations or evidence that the detainee has been subjected to torture or other ill-treatment, or held in conditions that are cruel, inhuman or degrading.

Prosecutors and judges should ensure that detainees are informed promptly of the reasons for the arrest and of any evidence against them.

Prosecutors and judges should be alert to the potential discriminatory impact of pre-trial detention measures including on grounds of ethnicity, nationality or religion.

Commentary: Everyone has the right to liberty and security of person (Article 9 ICCPR, Article 5 ECHR, Article 6 EU Charter). Deprivation of liberty must never be arbitrary, and must be in accordance with a procedure prescribed by law, on one of the grounds permitted under Article 5 ECHR. In the counter-terrorism context these are: following conviction by a competent court (Article 5.1.a), for non-compliance with a lawful order of court or in order to secure the fulfillment of a legal obligation (Article 5.1.b), following lawful arrest for the purpose of bringing the arrested person before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent the person committing an offence or fleeing after having done so (Article 5.1.c), and to prevent unauthorized entry into the country or pending deportation or extradition (Article 5.1.f). Administrative detention is not permitted without a valid derogation from Article 5 ECHR.

Article 9(1) ICCPR states that “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” As interpreted in the UN Human Rights Committee’s General Comment No. 35 (covering Article 9, liberty and security of the person) “the notion of 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, as well as elements of reasonableness, necessity and proportionality” (para. 12).

International human rights law and standards recognize that anyone who is deprived of liberty by arrest or detention on any grounds has the right to challenge the lawfulness of the detention before a court and to be released if the detention is found not to be lawful (e.g. ICCPR, Article 9(4)). Additionally, those arrested on criminal grounds have the right to be brought promptly before a judge or other judicial officer (e.g. ICCPR, Article 9(3)). *See also the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Articles 4, 11, 32, 37, and Human Rights Committee, General Comment No. 36, Article 6 (Right to Life).*

Every deprivation of liberty must be subject to prompt and automatic judicial review of the lawfulness of detention, with guarantees of fair and effective process in each individual case. The judicial authority must be able to make a prompt and effective order for release if it finds that the detention is unlawful under national law or international human rights or EU law. Review of the lawfulness of the deprivation of liberty should include consideration of the legal and factual basis asserted to justify the detention, as well as its necessity, reasonableness and proportionality. In assessing the impact of detention, judges should take into account the age, gender, state of health and other relevant personal circumstances of the individual (*Cruz Varas and Others v. Sweden*, 46/1990/237/307, para 83).

Judges should, in each individual case, as part of determining whether the detention is lawful and non-arbitrary in relation to the facts and law, fully consider all available alternatives to (pre-trial) detention, ensure such alternatives do not in practice amount to detention by another name, and ensure that detention is only ordered as a time-limited measure of last resort when no alternative is available (*Ambruszkiewicz v Poland*, ECtHR, Application No. 38797/03, Judgment of 4 May 2006, para. 31; *Ladent v Poland*, ECtHR, Application No. 11036/03, Judgment of 18 March 2008, para. 55; *Idalov v. Russia*, ECtHR, Application No. 5826/03, Judgment of 22 May 2012, para. 140; *Recommendation Rec (2006)13 of the Council of Europe*).

International law and standards emphasize the importance of the promptness of the detainee’s access to the court, of the hearing and deliberation by the court, the issuance of a decision, and execution of any order for release. Judges should therefore do their utmost to avoid any undue delay at all stages of the process. In general, judicial review should take place no later than 24 to 48 hours after the decision to detain the person ((*Recommendation Rec(2006)13 of the Council of Europe*, par. 14(2)).

Detainees in pre-trial detention should be separated from those already convicted of crimes. This practice is not generally applied, for example, in France, where terrorist suspects and accused are all put in a special area of prisons, where there are already convicted prisoners. They are usually isolated in individual cells. Article 10 of the ICCPR provides for a specific obligation to separate accused juvenile prisoners from adults and bring them to trial speedily (See also Article 37(c) Convention on the Rights of the Child, Rule 11 [The United Nations Standard Minimum Rules for the Treatment of Prisoners](#) (The Nelson Mandela Rules)). Solitary confinement is prohibited (Rule 45 of the Mandela Rules).

Good practices of (1) releasing suspects on conditions and (2) having more possibilities for alternatives to pre-trial detention have been shared by experts during the ICJ Roundtable in September 2019, as these practices often remain more limited or in some countries absent in terrorism cases.

3. Fair trial before an independent and impartial court

Guidance:

All persons have the right to a fair trial before a competent, independent, and impartial court established by law. Respect for the right to fair trial is essential to rule of law based criminal law responses to the crimes enshrined in the EU Directive 2017/541. The right to fair trial applies equally in counter-terrorism cases and should not be eroded through special procedures or weakening of safeguards, in law or in practice.

At all times and in all circumstances, alleged offenders should be tried only by an independent and impartial tribunal established by law and be accorded full fair trial guarantees, including the presumption of innocence, equality of arms between the prosecution and defence, the rights of defence, especially the right to legal advice and effective legal counsel, the right to interpretation and translation where necessary, and the right of judicial appeal. Judges must ensure that the accused has the opportunity to access and test evidence that is presented in their case and to challenge the lawfulness of the evidence and oppose its use.

If anonymous witnesses are used, the defence must have an opportunity to challenge them.

Security measures taken in court and during transfer of suspects to court in counter-terrorism cases (including handcuffs or other restraints), can affect perceptions of a defendant and therefore the presumption of innocence. Such measures should be kept to the minimum necessary in the circumstances of the case. Judges should question such measures, and seek to reduce them where possible.

Military courts should not be used to try persons in counter terrorism cases, but instead must be limited to trying military personnel for military offences.

Judges trying and lawyers defending those accused of terrorist offences must be able to perform their professional functions without intimidation, hindrance, harassment or improper interference (UN Basic Principles on the Independence of the Judiciary; UN Basic Principles on the Role of Lawyers).

Commentary: In addition to the general statement of respect for human rights standards in recital 35, recital 36 of the Directive specifically states that: "This Directive is without prejudice to the Member States' obligations under Union law with regard to the procedural rights of suspects or accused persons in criminal proceedings."

The right to fair trial protected under Article 6 and 13 ECHR, Article 14 ICCPR and Article 47 EU Charter must be respected in all criminal proceedings for offences related to terrorism, at all stages of the criminal process, including during the pre-trial investigative phase. The UN Global Counter-Terrorism Forum has described the fair trial or "due process" principles as the: "process that is due to be respected in the context of the specific setting—whether concerning the detention, trial or expulsion of a person—and required to ensure **fairness, reasonableness, absence of arbitrariness and the necessity and proportionality of any limitation imposed on rights**

of the individual in question” (CTITF Working Group on Protecting Human Rights while Countering Terrorism, [Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism](#), p. 4).

‘Fairness’ as reflected in Paragraph (1) of Article 14 ICCPR refers to the rights to: ‘a fair and public hearing’; ‘within a reasonable time’; ‘by an independent and impartial tribunal established by law’; and which pronounces its judgment publicly except in defined and narrowly construed circumstances. In addition, a person accused of a criminal offence acquires further minimum rights conferred by paragraphs (2) and (3), including the rights: to be presumed innocent until proven guilty; to be informed of the charge against them; to have adequate time and facilities to prepare their defence; to defend himself or have legal assistance; to examine (and have examined) witnesses; and to the free use of an interpreter. Whether particular measures or practices violate fair trial or privacy for example will depend on a holistic assessment of whether the trial as a whole guaranteed sufficient fairness.

Access to sufficient information to defend oneself is a requirement (Article 6.3.a ECHR) upon which a fair trial depends. At least from the point when an individual is charged, or notified that they would be prosecuted, they have the right to be informed promptly of the nature and basis of the accusations.

The Human Rights Committee’s General Comment No. 32 states that the right to be given information on the nature of the charges “promptly” requires that: “information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such” (UN Human Rights Committee, General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, [UNDOC CCPR/C/GC/32](#), para. 31).

“Adequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory (UN HRC, General Comment No. 32, para 33).

While certain details may be able to be withheld- though subject to judicial review- in narrow circumstances such as where strictly required on security grounds or protection of witnesses for example. The ECtHR has referred for example to the right of the accused to be told of: “the material facts that form the basis of the accusation against him” and that he/she “must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence” (*Mattoccia v. Italy*, ECtHR, Application No. 23969/94, Judgment of 25 July 2000, para. 59-60).

The ECtHR makes clear crucial factors of fair trial will include: “whether the applicant was **given an opportunity to challenge the authenticity of the evidence** and to oppose its use... the quality of the evidence ...[and] the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy. The Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings [...]” (*Gäfgen v. Germany*, ECtHR, Application No. 22978/05, Judgment of 1 June 2010, para. 164).

The ECHR has emphasized in particular that “the use of [secret] evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings” (*Gäfgen v. Germany*, para. 165).

Tschwane Principles on National Security and the Right to Information

Principle 27: General Judicial Oversight Principle

- (a) Invocations of national security may not be relied upon to undermine the fundamental right to a fair trial by a competent, independent, and impartial tribunal established by law.
- (b) Where a public authority seeks to withhold information on the ground of national security in any legal proceeding, a court should have the power to examine the information in determining whether the information may be withheld. A court should not ordinarily dismiss a challenge without examining the information.

- (c) The court should ensure that a person seeking access can, to the maximum extent possible, know and challenge the case advanced by the government for withholding the information.
- (d) A court should adjudicate the legality and propriety of a public authority's claim and may compel disclosure or order appropriate relief in the event of partial or full non-disclosure, including the dismissal of charges in criminal proceedings.
- (e) The court should independently assess whether the public authority has properly invoked any basis for non-disclosure; the fact of classification should not be conclusive as to the request for non-disclosure of information. Similarly, the court should assess the nature of any harm claimed by the public authority, its likelihood of occurrence, and the public interest in disclosure, in accordance with the standards defined in Principle 3.

Principle 29: Party Access to Information in Criminal Proceedings

- (a) The court may not prohibit a defendant from attending his or her trial on national security grounds.
- (b) In no case should a conviction or deprivation of liberty be based on evidence that the accused has not had an opportunity to review and refute.
- (c) In the interests of justice, a public authority should disclose to the defendant and the defendant's counsel the charges against a person and any information necessary to ensure a fair trial, regardless of whether the information is classified, consistent with Principles 3-6, 10, 27 and 28, including a consideration of the public interests.
- (d) Where the public authority declines to disclose information necessary to ensure a fair trial, the court should stay or dismiss the charges.

Global Principles on National Security and the Right to Information"
("the Tshwane Principles"), endorsed by PACE Resolution 1954 (2013)

"In any fair trial, the accused must **have access to the evidence presented against them and a meaningful opportunity to refute it**. It is impermissible under international human rights standards to withhold information that is exculpatory [...] Withholding information is only permissible if strictly necessary and sufficiently counter-balanced by adequate procedural guarantees to ensure an overall fair trial. [...] Furthermore, states must exercise caution to ensure that the presumption of innocence is not jeopardized in the context of foreign terrorist fighters offences" ([Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters within a Human Rights Framework](#), OSCE (ODIHR), 2018, and UN reports on foreign terrorist fighters).

On the right to fair trial in counter-terrorism cases, see further the [Legal Commentary to the ICJ Berlin Declaration](#), pp. 68-71.

In Italy, no anonymous witness is admissible. Only in case of undercover operations the Law allows police officers to declare before the Court their cover identities. This impacts the right of the defendant to a fair trial in a less serious way than a witness that is fully anonymous.

4. Sentencing

Article 15 Penalties for natural persons

1. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 12 and 14 are punishable by effective, proportionate and dissuasive criminal penalties, which may entail surrender or extradition.
2. Member States shall take the necessary measures to ensure that the terrorist offences referred to in Article 3 and offences referred to in Article 14, insofar as they relate to terrorist offences, are punishable by custodial sentences heavier than those imposed under national law for such offences in the absence of the special intent required pursuant to Article 3, except where the sentences imposed are already the maximum possible sentences under national law.
3. Member States shall take the necessary measures to ensure that offences listed in Article 4 are punishable by custodial sentences, with a maximum sentence of not less than

15 years for the offence referred to in point (a) of Article 4, and for the offences listed in point (b) of Article 4 a maximum sentence of not less than 8 years. Where the terrorist offence referred to in point (j) of Article 3(1) is committed by a person directing a terrorist group as referred to in point (a) of Article 4, the maximum sentence shall not be less than 8 years.

4. Member States shall take the necessary measures to ensure that when a criminal offence referred to in Article 6 or 7 is directed towards a child, this may, in accordance with national law, be taken into account when sentencing.

Article 16 **Mitigating circumstances**

Member States may take the necessary measures to ensure that the penalties referred to in Article 15 may be reduced if the offender:

- (a) renounces terrorist activity; and
- (b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:
 - (i) prevent or mitigate the effects of the offence;
 - (ii) identify or bring to justice the other offenders;
 - (iii) find evidence; or
 - (iv) prevent further offences referred to in Articles 3 to 12 and 14.

Guidance

Judges must ensure that penalties are proportionate to the crime and the individual's role in it.

Commentary: As anticipated in Article 15 of the Directive, heightened penalties attach to terror-related crimes in many States globally (including mandatory penalties in some) due to the gravity of terrorism offences. Article 16 lists a number of mitigating circumstances in which judges may reduce penalties.

Across Europe, in several States the same conduct with 'terrorist' intent can give rise to sharp increases in penalties. Systems vary as to the flexibility afforded to judges to determine penalties, and restricting judicial discretion to ensure onerous, "dissuasive penalties" (UNSC 2178) has been a feature of anti-terrorism criminal law and practice in some States.

Judges must however ensure the proportionality of resort to criminal law, and of penalties, in line with basic human rights principles. General assumptions as to the gravity of terrorism-related offences may not be appropriate in light of the expanded reach of such offences, which practice shows can embrace minor forms of contribution, and/or conduct without clear criminal intent, as well as very grave crimes. Furthermore, if the conduct in question is remote from eventual or planned terrorist acts, to the extent that prosecution is appropriate at all, harsh sentences may not be proportionate to the gravity of the offence. The judicial evaluation of all facts and circumstances must ensure that punishment is commensurate not only with the crime, but also with the individual's role in the crime.

5. Children in the Criminal Process

Guidance

In matters relating to children, judges should make the best interests of the child a primary consideration, including when children are indirectly affected by proceedings related to terrorism, such as proceedings relating to family members.

Children must be treated as children and primarily as victims and not perpetrators. Child soldiers should not be prosecuted for criminal offences including war crimes.

Children should not be tried as adults but treated in accordance with the rules of juvenile justice. In prosecutions or trials of children for offences related to terrorism, prosecutors and judges must take all possible steps within their power to support the adaptation of the proceedings to ensure that the child is able to participate effectively in the proceedings, that their specific needs are addressed and that the best interests of the child are upheld.

Commentary: In practice, as noted by the United Nations Interregional Crime and Justice Research Institute (UNICRI), in counter-terrorism the focus appears to have shifted towards children being potential threats. This approach risks neglecting the “best interest of the child” (“Children and counter terrorism”, United Nations Interregional Crime and Justice Research Institute (UNICRI), 2016, p. 77, cited in: [Guidelines for Addressing the Threats and Challenges of Foreign Terrorist Fighters within a Human Rights Framework](#), OSCE (ODIHR), 2018).

Article 3(1): the best interests of the child as a primary consideration in all actions concerning children. The article refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

Article 12: the child’s right to express his or her views freely in “all matters affecting the child”, those views being given due weight. This principle, which highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights, applies equally to all measures adopted by States to implement the Convention.

UN Committee on the Rights of the Child, General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child, para 12

Article 9(1) CRC provides that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...” Article 9(2) specifies that “all interested parties shall be given an opportunity to participate in the proceedings and make their views known.” Article 9(3) notes the importance of maintaining personal relations and direct contact with parents and Article 9(4) the importance of information being provided to parents, the child or, if appropriate, another member of the family.

The UN Committee on the Rights of the child has stated that “(...) every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of Article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.” (CRC, General Comment No. 10, para 37).

Proceedings should be conducted in an age-appropriate manner and without intimidation. “Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of courtrooms, clothing of judges and lawyers, sight screens, and separate waiting rooms” (CRC, General Comment No. 12, para 34).

A child associated with an armed force or armed group refers to any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes ([Paris Principles on the Involvement of Children in Armed Conflict](#) 2007). Regardless of how children are recruited and of their roles, child soldiers are victims, whose participation in conflict bears serious implications for their physical and emotional well-being. They are commonly subject to abuse and most of them witness death, killing, and sexual violence (see: [The Six Grave violations](#)).

Whereas Article 38 CRC (in line with international humanitarian law and criminal law) applies 15 as the minimum age for recruitment and use in hostilities, the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) applies the age of 18 (in line with international labour law). The juvenile justice approach is characterized by additional safeguards as well as the establishment of a minimum age of criminal responsibility (Liefwaard T. Juvenile justice from a children’s rights perspective. In: Vandenhoele W, Reynaert D, De Smet E, Lembrechts S, editors. *The Routledge International Handbook of Children’s Rights Studies*. London: Routledge; 2015).

Article 39 CRC provides for “measures to promote physical and psychological recovery and social reintegration of a child victim” of, inter alia, armed conflicts. Article 6 OPAC stipulates more narrowly that those children who were recruited or used in hostilities in violation of the Protocol (so not just any child victim) may benefit from “assistance for their physical and psychological recovery and their social reintegration.”

The EU Victims Directive 2012/29/EU provides that, where the victim is a child, the child’s best interests shall be a primary consideration and shall be assessed on an individual basis. A child-sensitive approach, taking due account of the child’s age, maturity, views, needs and concerns, shall prevail. (...)

Non-national children such as those in camps in Syria/Iraq are not a homogenous group, and there is a risk that in practice they are misleadingly labeled as “foreign fighters” / child soldiers, children of “foreign fighters”, trafficking victims, or victims of international crimes. All these children find themselves in a vulnerable situation, living in dire conditions, and are often traumatized. SC Resolution 24/27 stipulates that children recruited in situations of armed conflict should be treated primarily as victims.

6. Judicial cooperation

By Article 22 of the Directive, Article 2.6 of Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences is amended to state:

“6. Each Member State shall take the necessary measures to ensure that relevant information gathered by its competent authorities in the framework of criminal proceedings in connection with terrorist offences is made accessible as soon as possible to the competent authorities of another Member State where the information could be used in the prevention, detection, investigation or prosecution of terrorist offences as referred to in Directive (EU) 2017/541, in that Member State, either upon request or spontaneously, and in accordance with national law and relevant international legal instruments.

7. Paragraph 6 is not applicable where the sharing of information would jeopardise current investigations or the safety of an individual, nor when it would be contrary to essential interests of the security of the Member State concerned.

8. Member States shall take the necessary measures to ensure that their competent authorities take, upon receiving the information referred to in paragraph 6, timely measures in accordance with national law, as appropriate.”

Guidance:

Judges or prosecutors should not permit or support expulsion or extradition of a person for whom there are substantial grounds to believe that they may be at real risk of a serious violation of their human rights (such as torture, cruel, inhuman or degrading treatment or punishment, right to life, flagrant denial of justice, flagrant denial of the right to liberty), or whose life or freedom would be threatened on grounds of race, religion, nationality, membership of a particular social group or political opinion under the Refugee Convention.

No exception is allowed to the prohibition of “refoulement”, including for reasons of national security, public order, public health, public policy or terrorism. Judges and prosecutors must verify the existence of the “substantial grounds to believe” that the risk exists and not the effective existence of the risk itself.

The duty to ensure that rights are not being violated through cooperation applies even in cases where there is mutual trust between the two countries.

Judges and prosecutors dealing with extradition or expulsion procedures must assess the existence of the risk of refoulement by their own initiative without requiring that it be raised by the concerned person.

Judges and prosecutors reviewing requests for extradition should take into account that diplomatic assurances cannot serve as an effective protection when there are grounds to believe that the person may be at real risk of being subject to serious violations.

When considering an extradition request, it is important that adjudicators assess its potential impact on the right to family life of the concerned person and of their family members, and pay particular attention to the impact on children. The best interest of the child – if any person under the age of 18 is concerned in the case – must be the paramount guiding principle in consideration of all decisions affecting the child.

Information should not be provided to the law enforcement, prosecutorial or judicial authorities of another State where it may be used in violation of human rights, including to secure a conviction through an unfair trial. Allegations that this may be the case should be scrutinized in light of the general human rights situation in the country as well as the particular circumstances of the case. Information should not be routinely exchanged by law enforcement, intelligence agencies, prosecutors or investigating magistrates without safeguards that ensure a prior assessment of the risk of the information being used in violation of human rights in each case.

Commentary: The EU Directive 2017/541 on combating terrorism encourages a strong coordinated response and cooperation within and between the Member States to counter terrorism (reinforced in recitals 24-26). In carrying out this cooperation, whether through extradition, mutual legal assistance and information exchange, states are however bound by their human rights obligations.

The principle of *non-refoulement* is well established in international human rights law, where it applies to all transfers of nationals or non-nationals, as well as refugees (Article 33 1951 Refugee Convention). The Convention against Torture explicitly states in Article 3: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.... For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The principle of *non-refoulement* has been found by international courts and tribunals to apply to risks of violations of a range of different rights. The European Court of Human Rights has clarified states' obligations in ECtHR jurisprudence, which makes clear the obligation not to transfer persons to States where there is a real risk of torture or other inhuman or degrading treatment (ECtHR, *Chahal v. UK*), flagrant denial of justice in terrorism trials (ECtHR, *Othman v. UK*) and prolonged arbitrary detention (ECtHR, *Abu Zubaydah v Poland/Lithuania*). Among the factors to take into account is where there is a particular risk for the category of persons associated with terrorism (ECtHR, *Chahal v. UK*). The rights entail the opportunity to meaningfully challenge extradition; in face of risks to non-derogable rights, this right is itself non-derogable.

The principle of double criminality generally requires an equivalence of the criminal offences in the criminal systems of the two countries (receiving and sending), which need not be in the precise name or definition of the offence, but in the conduct criminalised. Prosecutors and judges should be aware that, as a recent Belgian/Spanish extradition dispute makes clear, charging for innovative - and as noted above controversial - offences such as glorification of terrorism may contribute to extradition difficulties when other States do not have these offences in domestic law. Human rights concerns regarding the scope of offences and the principle of legality or other rights create impediments to cooperation for such offences.

In the case of Valtòny, a Spanish rapper, a Belgian court of first instance refused extradition on the grounds that the glorification of acts committed more than 40 years ago does not constitute a criminal offense under Belgian law, and does not fall within the definition of "terrorism" under the European Arrest Warrant Framework Decision. On 3 March 2020 it was confirmed by the CJEU, to which the Belgian court had asked a preliminary question, that the executing judicial authority must consider the law of the issuing Member State in the version applicable at the moment of the facts, and not a later more severe version of the law.

Within the European Union, the European Arrest Warrant (EAW) establishes a legal framework for extradition between its Member States, to facilitate extradition and direct communication between national courts for this purpose. The EAW is based on mutual confidence or, as characterized in the Framework Decision, a “high level of confidence” among Member States with regard to their criminal justice systems’ compliance with human rights obligations under national and international law.

The EAW, and the concept of mutual confidence, does not supersede international human rights law obligations, set out above. In 2016, the Grand Chamber of the Court of Justice of the EU rejected the automatic application of the mutual confidence principle and held that its blind application does not comply with the EU Member States’ obligations under the Charter of Fundamental Rights ([Pál Aranyosi and Robert Căldăraru](#), CJEU, para. 94, [ICJ, Transnational Injustices: National Security Transfers and International Law](#), p.33).

Moreover, on 25 July 2018, the CJEU ruled that when a state receives a EAW request and has material indicating that there is a real risk of breach of the fundamental right to a fair trial (Article 47 EU Charter), on account of systemic or generalised deficiencies in the independence of the issuing Member State’s judiciary, that State must determine whether there is a risk of an unfair trial. The CJEU delivered its judgment, on the non-execution of European Arrest Warrants (EAWs) in cases of systemic deficiencies regarding the independence of the judiciary ([Case C-216/18 PPU \[“LM”\]](#)), following referral by the Irish High Court, which doubted whether surrender of a Polish national to Poland complies with the EU’s fundamental rights in view of ‘judicial reform’ in Poland and the Article 7(1) procedure initiated by the European Commission (for the case, see [eucrim 1-2018](#), p. 31).

Serious human rights risks in other states in the context of terrorism should also inform approaches to other forms of cooperation, such as mutual legal assistance or information sharing. Information sharing is crucial to the effectiveness of criminal law enforcement, and Recital 25 states that: “Member States should ensure that relevant information gathered by their competent authorities in the framework of criminal proceedings, for example, law enforcement authorities, prosecutors or investigative judges, is made accessible to the respective competent authorities of another Member State to which they consider this information could be relevant. As a minimum, such relevant information should include, as appropriate, the information that is transmitted to Europol or Eurojust in accordance with Decision 2005/671/JHA.”

Any such exchange of information is however, as with other provisions of the Directive, subject to the EU Charter of Fundamental Rights, to international human rights obligations of the State (Recital 35) and to the rights of suspects or accused persons under EU law (Recital 36) including the procedural rights directives (see EU Directives on the [right to information](#), the [right to interpretation and translation](#), the [right to have a lawyer](#), the right to be [presumed innocent and to be present at trial](#), special safeguards for children suspected and accused in criminal proceedings and the [right to legal aid](#)). It is also, as recital 25 specifically acknowledges, “subject to Union rules on data protection, as laid down in Directive (EU) 2016/680 of the European Parliament and of Council, and without prejudice to Union rules on cooperation between competent national authorities in the framework of criminal proceedings, such as those laid down in Directive 2014/41/EU of the European Parliament and of the Council or Framework Decision 2006/960/JHA.” It should also be borne in mind that the provision of evidence or other direct and concrete support for flagrantly unfair terrorism trials may amounting to aiding and assisting wrongs by other States (Article 16 ILC Articles).

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October 2020 (for an updated list, please visit www.icj.org/commission)

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