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THE JUDICIAL RESPONSE TO TERRORISM IN LIGHT OF THE EU CHARTER OF FUNDAMENTAL RIGHTS:

"TERRORISM, 'RISKS' AND FUNDAMENTAL RIGHTS"

- FINAL CONFERENCE -

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SUMMARY

What future challenges will European judicial authorities face in dealing with modern terrorism? Thanks to this final conference, we have been able to tackle various issues common to European countries and gain some perspective on them.

What controls should be applied in regard to anti-terrorism legislation? First we turn to the build-up of legislation in all European countries. The adoption of more and more numerous laws and their political instrumentalization, and the action-reaction cycles between terrorist violence and state responses, has raised real questions about the balance of judicial power and given rise today to a permanent instability due to the build-up of new measures and criminal policy guidelines. Examples such as the inclusion of the "state of emergency" in the French constitution, or the progressive tightening of all European legislation in this area should lead us to examine the issue more closely. Not only in terms of the balance of rights, of course, but also in terms of efficiency. The issue of legislative control is thus a vital one. **(Part 1)**

"From the theatre of operations to European territory." Another major question facing our democracies is the judicial treatment of European nationals (men, women and children) still present in the Syrian zone. Those returning must be managed politically, but there is also the obligation to respect the legal rules requiring protection of national citizens, even if they are terrorists. Critical human, legal and political issues are at play that bring up several historical examples in which the question of extradition and its political dimensions has already been of central importance, yet subject to ambiguity **(Part 2).**

"Risk Society," Fundamental Rights and Anti-Terrorism. Lastly, this third session raised the question of the duration of penal sentences and their management. As the question of danger levels becomes central, it appears that it too is now a matter included in the increasingly proactive approach that anti-terrorism courts were already taking in investigation phases, and are now taking in sentence management. The goal of justice and of judges and prosecutors is thus becoming one of danger management. A presentation by several European prosecutors gave us an idea of the guidelines underlying current European practices in this area. With regard in turn to sentences and their judicial management, the issue is now being widely discussed, and European legal systems are undergoing profound changes. The current objective appears less and less to be the temporary removal of convicted persons from society in order to achieve their eventual reintegration, but instead the protection of society through long incarcerations. Though programs, experiments and declarations seeking to strengthen reintegration have been proliferating, it seems today quite a complicated matter, not only, first of all, to succeed in the ultimate task - "to disengage, or, more fundamentally, to deradicalize these people" - but also, secondly, to assess the real effectiveness of these programs, having had so little time to gain perspective. Faced with this uncertainty, the proactive approach of pre-emption is part of a process which, according to Christine Lazerges and Hervé Henrion Stoffel, is no longer consistent with a "monitor and punish" model, but rather with a "punish and monitor" model **(Part 3)**. These issues will doubtless raise questions for judicial institutions in regard to their practices, and pose a democratic challenge. In this context, it is vital for the judicial system to be able to propose transparent and effective controls for its actions. Such controls must of course originate with the national courts, but not only - control must also derive from the jurisprudence of the ECHR, which must be able to set common limits to anti-terrorism practice so that it will not be rendered simultaneously illegal and ineffective.

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EUROPEAN AND PARTNER PROJECTS

Maintaining the balance between security and fundamental civil liberties is a challenge European authorities face on a daily basis. This balance presupposes an escalation in the judicial treatment of terrorism, in which judges and prosecutors, as the protectors of individual liberties, have a central role.

By their signature of a common charter, the Member States of the European Union have guaranteed the protection of fundamental rights.

Faced with the emotional shock caused by terrorist attacks intended to spread fear, judges and prosecutors must successfully reconcile the security issues posed by violent terrorism with the protection of the fundamental rights of every European citizen.

The aim of the project "The Judicial Response to Terrorism in light of the EU Charter of Fundamental Rights," organized with financial support from the Justice Program of the European Commission, is to strengthen practitioners' knowledge in the field of fundamental rights in order to address terrorism-related cases in accordance with the requirements of the Charter.

Execution dates: 1 July 2016 – 31 May 2018

Activities - 4 seminars and 1 final conference:

- Seminar 1: Preventing violent radicalization and protecting fundamental freedoms *(Strasbourg, Council of Europe - 8 and 9 December 2016)*
- Seminar 2: Terrorism and fundamental rights: the investigation and intelligence phase *(Brussels, Judicial Training Institute - 23 and 24 February 2017)*
- Seminar 3: Media coverage of terrorist cases *(Paris City Hall - 15 and 16 June 2017)*
- Seminar 4: Terrorism and fundamental rights: trial and enforcement of sentences *(Sofia, National Institute of Justice - 12 and 13 October, 2017)*
- Final Conference: the protection of fundamental rights in the judicial response to terrorism *(Paris, National Assembly - 12 and 13 April 2018)*

Partnership - the ENM is the coordinator of the following group:

- The Judicial training institutes of Sweden, Bulgaria and Belgium;
- The Council of Europe;
- The European Judicial Training Network (EJTN);
- The Academy of European Law (ERA);
- Justice International Cooperation (JCI).

Target audience - Training provided to more than 350 magistrates from 16 European countries. 15 participants from prison administration, police, and journalistic agencies also attended the sessions.

Type and number of deliverables produced - 5 scientific reports available in French and English

Members	Functions
1 scientific advisor - **Cyril ROTH,** Chief Clerk of the Supreme Court of Appeals, France	- Overall scientific design of the project - Identifies presenters - Supervises seminar directors and rapporteurs - Participates in seminars - Validates seminar reports
1 project director - judge at the ENM **Nathalie MALET**, judge, International Department, ENM Replaced by **Marie COMPERE**, judge, International Department, ENM	- Handles educational engineering - Identifies and approves presenters - Supervises the entire project team - Validates seminar reports
1 ENM project manager, **Ségolène POYETON**, International Department, ENM	- Ensures the everyday management of the project - Coordinates the group's partners - Point of contact with the European Commission for contractual, administrative and financial issues
The scientific committee will be reinforced for each seminar by: - A seminar director - A rapporteur Seminar 1: **Vanessa PERREE**, Deputy Prosecutor, Appeals Court of Aix-en-Provence, France Seminar 2: **Anne KOSTOMAROFF**, Solicitor-General, Appeals Court of Paris, France Seminar 3: **Nicolas BONNAL**, Counsellor, Supreme Court of Appeals, France Seminar 4: **Sabine FAIVRE**, Primary Vice-President, Superior Court of Paris, France Rapporteur: **Antoine MEGIE**, Senior Lecturer at the University of Rouen, Director of the journal *Politique Européenne,* and Member of the editorial committee of the journal *Cultures et Conflits*, France	- Prepare the detailed program for the seminar - Identify the presenters or the presenter profiles to be requested from the partners - Moderate the seminar - Write the seminar report

Scientific Committee - The project was headed by a core team under the umbrella of the scientific committee

SEMINAR PROGRAMME

Thursday, April 12, 2018

8.30 **Participant welcome and registration**

9.30 **Keynote**
Didier PARIS, Member of Parliament from the Côte d'Or department, France
Olivier LEURENT, Director of the National School for the Judiciary (ENM), France
Cyril ROTH, Chief Clerk of the Supreme Court of Appeals, France

10.00 **Executive summary of the thematic seminars of the European project**
Antoine MÉGIE, Senior Lecturer at the University of Rouen, France

I. TERRORISM AND FUNDAMENTAL RIGHTS: AN EVOLVING LEGAL FRAMEWORK

10.30 **The European Directive of 15 March 2017 in light of the EU Charter of Fundamental Rights**
Pauline DUBARRY, Justice Advisor with the Permanent Representation of France to the European Union, France

11.00 *Coffee Break*

11.15 **Comparative perspectives on the oversight of terrorism legislation**
Max HILL, Queen's Counsel. Independent Reviewer of Terrorism Legislation, United Kingdom

François SUREAU, Attorney, France

12.15 ***Discussions***

12.30 *Lunch*

14.00 **The European Court of Human Rights and Terrorism: reaffirming the fundamental principles**
Françoise TULKENS, Honorary Judge of the European Court of Human Rights, Belgium

14.45 ***Discussions***

II. TERRORISM AND FUNDAMENTAL RIGHTS: FROM THE THEATER OF OPERATIONS TO EUROPEAN TERRITORY

15.00 **Principle of proportionality and the judicial management of returning foreign terrorist fighters: the vision of the Council of Europe**
Kristian BARTHOLIN, Deputy director of the counterterrorism division, Council of Europe
Avril CALDER, President of the International Association of Youth and Family Judges and Magistrates (AIMJF)
Sarah WILLIAMS, Legal Team Leader for the Social Services division, Tower Hamlets Borough of London, United Kingdom

16.00 ***Discussions***

16.15 *Coffee Break*

16.30 **Can the right to a fair trial be guaranteed in theaters of operation?**
Berta BERNARDO MENDEZ, Anti-terrorism Investigating Judge, Belgium
William BOURDON, Attorney at Law, France

17.15 ***Discussions***

17.30 *End of day 1*

Friday, April 13, 2018

8.30 **Participant welcome**

III. TERRORISM, RISK SOCIETY AND FUNDAMENTAL RIGHTS: THE CHALLENGES POSED BY DANGER MANAGEMENT

9.30 **Round table: Penal policy in danger management and the fight against terrorism**
Jesus ALONSO, Chief Prosecutor of the National Court, Spain
Federico CAFIERO DE RAHO, National Public Prosecutor, Italy
François MOLINS, Public Prosecutor at the Superior Court of Paris, France
Frédéric VAN LEEUW, Federal Prosecutor, Belgium
Frédéric BAAB, National member for France, Eurojust
Moderator: **Anne KOSTOMAROFF,** Director General of the Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC), France

12.30 *Lunch*

14.00 **Danger management after the completion of sentences - what threats could it pose to fundamental freedoms?**
François CORDIER, Head Public Prosecutor, Superior Court of Appeals, France
Fernando GRANDE-MARLASKA GÓMEZ, Member of the General Council of the Judiciary, Spain
Farhad KHOSROSKHAVAR, Research Director, School for Advanced Studies in the Social Sciences, France

15.15 ***Discussions***

15.30 *Coffee Break*

15.45 **Justice and the social contract in the face of terrorism**
Antoine GARAPON, Secretary General of the Institute for Advanced Studies in Justice, France
Stephen HOLMES, Professor of Law at New York University, USA

16.30 **Closing and thanks**
Magdalena HÄGG BERGVALL, Director of the Judicial Training Academy, Sweden
Olivier LEURENT, Director of the National School for the Judiciary (ENM), France
Raf VAN RANSBEECK, Director of the Judicial Training Institute (IFJ/IGO), Belgium

17.00 *End of day 2*

INTRODUCTION

More than just a synthesis of the four conferences and scientific reports of the European program, this final conference was intended to be a time for reflection, seeking, as **Cyril Roth** (program coordinator) put it in his introductory presentation, *"to turn our attention to what's to come,"* in particular by examining *"the foreseeable future of the judicial world"* in regard to the fight against terrorism. What are the challenges that European judicial authorities must now face or will need to face in the years to come? Already a strong presence on political and judicial agendas, these challenges involve the management not only of persons accused of terrorism and imprisoned on European soil, for example, but also men, women and children still in the war zone.

These issues have an impact on the judicial domain not only due to geopolitical developments, but also to the unique experiences of each European state in dealing with attacks and with the judicial management of returnees or other persons engaged in armed jihad. In security terms, these particular examples fall within a more general framework, probing the judicial response to terrorism in light of the EU Charter of Fundamental Rights and respect for public freedoms. It was along those lines that **Didier Paris (Member of Parliament- France)** explained the political dimension of this relationship of such central importance for our European democracies.

"(...) *Our rule-of-law responses must be strong and proportionate in order to ensure the security of citizens and maintain respect for our freedoms. We must make an effort to hear both sides; in this regard, there are two difficulties in particular:*

One difficulty is that we are responding to a threat increasing with the passage of time, and far from being eradicated. We need a sustainable common law response guaranteeing the rule of law. We need a capacity for accountability, control and action in the face of an evolving, diffuse and endogenous threat, presenting signs of radicalization that may be nearly imperceptible, and moving, as we have seen, from urban areas out into rural areas. Caught between a strongly traumatized public opinion and the need to guarantee civil liberties, we face what is often a paradoxical difficulty in imposing injunctions. The national consensus is no longer so solidly grounded, with the government being accused of dangerous leniency. Added to this, we face at this juncture a significant risk of the right of asylum becoming conflated with the stigmatization of certain communities, races, or religions. The scope of judicial action needs to be examined both in this specific context as well as in a longer-term perspective. We need to provide effective responses in order to guarantee the rule of law, to which we are committed (...)".

In his introductory remarks, **Olivier Leurent (director of the ENM)** covered the more specifically judicial challenges that have gradually taken shape, which probe the very concrete action of the judicial institutions of European governments:

"(...) *Faced with the horror of these acts, which have shaken us all, and over and above the responsibilities incumbent upon us as judges and prosecutors, not only in France and in Europe but throughout the world as well, it is also our duty, in order to ensure the safety of our fellow citizens, to question our function in regard to the protection of fundamental freedoms. In our daily practice, we are the constitutional guarantors of those freedoms, in all the duties we perform and in all the cases we handle.*

But we must be their guarantors all the more when we are dealing with terrorism cases, which unfortunately do tend to become mass disputes. (For France) *A look at the figures*

corresponding to the office of the liberties and detention judge of Paris perfectly illustrates the escalation in the judicial treatment of terrorism:

Nearly 15% of the pre-trial detention decisions pronounced by that office in 2017 involved terrorism cases;

- *Over 21% of ex parte injunctions, such as for extensions of police custody, night searches, certain seizures, or the imposition of monitoring, corresponded to such cases.*

There were a total of 2092 of these decisions in the year 2017. Such cases clearly require a great expenditure of resources. Fundamentally, the question here is: must effective judicial treatment necessarily involve a compromise, a renunciation of some of the rights granted to all persons? (...)"

This perspective, aligned with the operational reality and the broader issues of respect for fundamental rights, makes it possible to better grasp the factors to be weighed in the balance of the European legal struggle against terrorism, not only from a legal perspective, but from a political and operational perspective as well. We must examine "the Justice system under the test of terrorism" in order to better understand the permanent tension faced by judicial authorities between the need for enforcement and the need to protect freedoms. **Anne Kostomaroff** cast light on the issue in her introduction to our second seminar on the practices of judicial investigations in terrorism cases, asking: *"Has today's terrorism given rise to an anti-democratic state of mind? Do we have any choice other than to repress with ever-increasing severity those who threaten our lives?"*

The objective was to inquire into the issues in the balance over these two years of the European program, focusing particular attention on those practices and experiences where the law and the judiciary have been subject to tension or even divergence. **Questions then arise about what has changed, and how the "war on terror" has contributed to changes in judicial practice, whether in regard to prevention, investigation or decisions, as well as sentencing and sentence administration.** What has been observed in these areas of tension? What balances are being reconfigured today in what is known as "the war on terror"? Europe has seen a dynamic of **convergences**, but also of **divergences**, and even some **overstepping of limits**.

1. European Convergences

A first line of convergence has emerged in all the actions taken by European states: **civil liberties, and the importance placed upon them in the national legal systems, via, in particular, the European legal system and the limits gradually developed by the jurisprudence of the ECHR.** In a situation where the attacks, the emotional responses, and the political instrumentalization accompanying them have placed pressure on justice systems, the question, according to **Cyril Roth**, is how to *"fight back without losing our bearings."* Faced with political and social tension, judges and prosecutors must thus always account in their actions for civil liberties and their fragile nature. The indispensable balance between Liberty and Security is directly connected to the link between judicial approaches and the principles of fundamental rights. The jurisprudence of the ECHR appears to be the common standard in a European context marked by the unprecedented development of anti-terrorism legislation. The various freedoms - freedom of religion, expression, the presumption of innocence, privacy, freedom of movement, and freedoms in the context of systems of detention - are from this perspective central points of reference largely addressed by the ECHR and in its jurisprudence. Faced with these political and judicial questions, *"Each attack reminds us of our failure to stop an ideology that causes us to regress. Judges and prosecutors know that in this atmosphere of danger, violence, urgency, freedoms are fragile, and fundamental rights need to be fought for every day. How should we fight? What action should we take? To deal with these issues, beyond the diversity of our judicial systems, we share in common the principles of the ECHR*

and the Charter. The jurisprudence of the ECHR and the EU Court of Justice constitute our common language. Our duty is to be strong and effective, and we will be if we take the lead in respecting the principles we are fighting to uphold." (Cyril Roth)

A second point of convergence can be identified: the risk of confusion between radicalization and involvement in terrorist political violence. This is a question that arises for European judicial authorities as they apply their know-how and experience to handle religious radicalism and the acts of armed violence to which it may lead from time to time. Such a distinction is not only semantic; it directly impacts the legal approaches and the spectrum of measures taken, from prevention to law enforcement. Thus, in most European systems, this means that although terrorism falls under the responsibility of the judiciary, the handling of radicalization entails different treatment in terms of the social, educational and administrative measures to be taken. Although in discourse and procedures these phenomena are frequently decoupled, in practice on the ground such a separation may conflict with the complex nature of the personal and collective journeys of radicalized persons, or those who commit acts of violence. It is thus a porous boundary, one that is bound to unique social, cultural and political realities. As **Vanessa Perrée** explained in presenting the European programmes for measures to counter radicalization at the first conference, *"judges and prosecutors often face situations where their actions are limited, except in certain cases such as those involving minors or detainees."* Yet it is often justice that appears guilty when a series of preventive measures ends up leading to the commission of terrorist acts.

A third horizon of convergence between European countries emerges around the issue of the judicialization of intelligence. This theme clearly raises questions regarding the extent of the powers of judges and their relationship with security services, and in particular with intelligence agencies. The collection of evidence is a crucial juncture in a criminal investigation, both in regard to efficacy and respect for the rule of law. The presentation of the work of the French and Belgian antiterrorist sections at the Brussels conference illustrated the changes in criminal investigations, their characteristics, and convergences among European systems: judicialization has been taking place earlier in investigations, doubtless accompanied by a greater consideration of the rules regarding legal defence, but also by an ever greater dependence of the judiciary on the work of intelligence agencies and their constant changes and strategic reorientations, which may often be a source of conflict.

Lastly, there is a final element of convergence, one that is also important to emphasize in the context of the repeated jihadist attacks on European soil since 2015, namely **the increasingly central role of the judicial voice in the handling of terrorism vis-a-vis public opinion and the media.** Faced with a profound questioning of the political voice in European democracies, the voices of the judiciary and media have taken on significant dimensions. Though the speaking opportunities afforded to these professionals (judges and media) have continued to multiply, a degree of mistrust towards them is often the norm, since they may sometimes have very different or even conflicting interests and professional realities. The demand for a judicial voice to make itself heard in an environment saturated by instantaneous flows of information and the proliferation of "fake news" sites poses a major political and societal challenge for the justice sector, especially in the face of the propaganda of terrorist groups. Judicial actors must fulfil their share of responsibility to the public. In these circumstances, the challenge for judicial authorities is to draw upon transparent resources and show respect for democratic culture. This position is all the more useful and legitimizing for Justice, because contributors from the security sector in the antiterrorism field are most often more opaque.

Parallel to these convergences, significant divergences have also appeared, both on the operational and the legal levels.

2. Divergences and heterogeneities of European experiences

Contrasting national realities. The contrasting views of European judges highlighted the

importance of the different national situations, their individual stories and especially their specific characteristics. Though many European countries have been affected by the flows of persons departing to Syria and by the attacks and attempts, it is essential to underline the situational differences and recognize the specific characteristics of the differing national realities, not only in regard to the types of terrorist events they have gone through, but also in terms of their institutional contexts, their histories, and their particular natures. Because of its history, Spain has had unparalleled experience with victim management, and with social, legal and financial support systems. Germany and Denmark have been able to quickly reuse the experience they gained from the management of far-right extremism in the 1990s, adapting it more or less successfully to issues of jihadist radicalization. Belgium, France and Great Britain are facing a special situation, due to the numbers of persons who have left the country and returned since 2013.

These different situations have given rise to a heterogeneity of programmes and judicial responses (addressing individuals, radical discourse, or means of communication). Multifaceted responses are usually more effective, after all, if they cover the full spectrum of preventive and enforcement measures. Like these multiple judicial practices, European professionals managing measures against terrorism or radicalism themselves constitute a heterogeneous body of operators (judicial, social, police). Beyond the notion of common European standards, this multifaceted and therefore divergent dimension is a prominent characteristic in Europe today. These divergences do not necessarily have to be seen as a weakness; it would on the contrary seem essential to leverage them, especially for professionals who have to adapt their practices to their territory. On the other hand, gaining a familiarity with other European practices allows us to draw inspiration from them in our daily actions so as to better keep abreast of operational realities. Hybridizing approaches to national programmes can often offer better results, as well as greater commitment and understanding among the judges and prosecutors involved in their implementation and application. Issues concerning the allocation of resources to these programmes and promoting them raise in turn the question of institutional and political recognition and support.

A second point of divergence shows how in terrorism cases the justice sector must develop new and often complicated kinds of cooperation with new economic operators, such as Internet service providers - The issue of intelligence as an object of exchanges and as evidence is becoming vitally important. These exchanges occur in particular between national and European judicial entities (Eurojust and Europol) but also among private operators (online service providers). Where does the collection of legal evidence fit in this relationship between freedom, security, technology, and economic interests as well? European judges, when dealing with representatives of Internet access provider companies, have stressed the importance of a more effective handling of their requests, but faced with the increasing volume of such requests, the responses of these private companies have oscillated between close collaboration (especially in times of crisis, after an attack) and resistance or even incomprehension. Such divergence between judicial and economic operators is also found in the cooperation between the justice sector and the media.

The judiciary and the media. By virtue of the power of images it holds, the access to information it provides, and its role in managing the "theatre of terrorism," media coverage is not exempt from questions of a legal nature. More generally, a transformation has taken place over the past twenty years in regard to the use of the media by multiple actors of terrorist violence (violent organizations, political authorities, law enforcement authorities, and public opinion). Today, the routinization and globalization of our relationship with the media has led to new configurations, via a dual inter-penetration: media/terrorist groups and media/institutional authorities.

Terrorist actors no longer operate in anticipation of media coverage, which now occurs automatically and immediately. As **Nicolas Bonnal** pointed out at the Paris conference, *"the provision of information to the public regarding terrorist attacks raises specific and novel questions that need to be addressed by reflecting for example on the ways the communications of the IS organization are able to exploit the handling of these attacks in our*

own media.'" At the same time, the interaction among media operators and counterterrorism services has also grown into a stronger, yet still cautious cooperative relationship. There is thus a fragile balance in place between divergent interests, such as the right to information and the right to safeguard the effectiveness of judicial investigations. Though the public has a right to be informed, that right - especially in regard to anti-terrorist operations - must be squared with a guarantee of secrecy for investigations, or with preserving the presumption of innocence for persons under investigation. And, of course, it must not impinge upon the privacy and dignity of the victims. Furthermore, this is an example of a situation where the judiciary, in responding to terrorist violence, may come up against or even overstep the bounds imposed in the name of the confidentiality of investigations, or what is referred to as "State secrets privilege."

3. The challenge to basic legal principles

As the project's sponsors had anticipated, a consideration of the issues in the context of ECHR jurisprudence here takes on its fullest significance. The limits to which the judiciary and political authorities can be pushed in their fight against terrorism have become important elements in illustrating contemporary risks.

Precisely because of the specific nature of anti-terrorism systems and their progressive construction in conditions of legislative frenzy, **European democracies seem to constantly test and exceed their limits and their safeguards.** Numerous examples may be cited to illustrate this very unique relationship between state power and terrorist violence. In the more or less distant past or in modern times, many states that claim that they operate under the rule of law have nevertheless legitimated and practiced acts manifestly contrary to fundamental human rights (acts of torture, inhuman or degrading treatment), or committed acts without any legal foundation. Examples of this include extraordinary rendition and the use of secret prisons by the CIA and some European agencies in the 2000s. Italian judges are thus responsible not only for conducting proceedings against the terrorist actors but against their own government's intelligence services as well, and this indeed raises questions in regard to the effectiveness of counterterrorism measures. Such illegal practices have led to a questioning of the relations between judicial power and political power.

These limits also appear in the way **justice may be silenced.** Indeed, although, as we have emphasized above, the judiciary needs to have a voice in the crisis management context, highly contemporary examples may be cited to show that the voice of the judiciary may still face the risk of being silenced in Europe even today. As such examples contradict the various rules inherent to freedom of expression and information, they place tension upon core principles such as fair trial. The closed trial of two suspects in attempted terrorist attacks that was held in England in 2013 is a particularly important example, posing a challenge to the principle of "Open Justice." As such experiences illustrate, extraordinary justice still exists today, and often produces more legal and moral problems than effective results.

Lastly, there is another domain of the antiterrorism field that also appears subject to tension, despite the volume of ECHR jurisprudence on the matter: **detention systems and their management**. The examples of the American "CMU Units" (discussed in the 3rd thematic seminar held in Paris) illustrate the extreme case of extraordinary spaces located, unlike Guantanamo, within the territory of the United States, inside its largest federal prisons. These extraordinary prisons are not registered in the general directory of prisons, and government agencies do not disclose the names of the persons detained there. None of these units have been given legal approval, which is nevertheless required under US law. Prisoners are limited to a fifteen-minute phone call and a one-hour visit per month.

These extreme situations constitute concrete examples of non-compliance with the rule of law, which should lead us in Europe to question ourselves at this juncture, when so many programmes and debates are underway in regard to the new systems for the detention of

"foreign fighters" or perpetrators of attacks; an example of course would be the detention of persons such as Salah Abdeslam, who is now kept under video surveillance 24 hours a day. On another level, the use of specialized centres and their benefit have also become a public policy issue for many European states; definitive answers regarding their effectiveness have still not been provided. The risk we face is that we may end up going ever further in seeking to neutralize as long as possible those persons who appear to still pose a danger even once their sentences have been completed. The issue of cooperation between enforcement police services and administrative police services is a very French example, but one that is essential to consider for the future. What challenges will be faced in the future by European judicial authorities? Thanks to the multiple contributions made at this final conference, we have obtained some preliminary responses and perspectives with regard to the avenues explored above.

What controls should be applied in regard to anti-terrorism legislation? (Part 1) - First we turn to the build-up of legislation in all European countries. The adoption of increasingly numerous laws and their political instrumentalization, and the action-reaction cycles between terrorist violence and state responses, has raised real questions about the balance of judicial power and given rise today to a permanent instability due to the build-up of new measures and criminal policy guidelines. Examples such as the inclusion of the "state of emergency" in the French constitution, or the progressive tightening of all European legislation in this area should lead us to examine the issue more closely. Not only in terms of the balance of rights, of course, but also in terms of efficiency. The issue of legislative control is thus a vital one.

"From the theatre of operations to European territory" (Part 2) Another major question facing our democracies is the judicial treatment of European nationals (men, women and children) still present in the Syrian zone. Those returning must be managed politically, but there is also the obligation to respect the legal rules requiring protection of national citizens, even if they are terrorists. Critical human, legal and political issues are at play that bring up several historical examples in which the question of extradition and its political dimensions has already been of central importance, yet subject to ambiguity... such as the position taken by the French authorities in regard to the former members of the Italian Red Brigades, and the British position on the terrorist attacks in France in the 1990s. These extraditions lead us to the question of judicial time and political time, as **Sabine Faivre** pointed out at the conclusion of our last seminar in Sofia on judgments and sentences: *"The sense of time attached to the terrorist act is different from the sense of time attached to the investigation of the terrorist act and, even more so, the sense of time attached to terrorism trials. Nevertheless it is not uncommon in contemporary terrorism trials for events (attacks) occurring after the terrorist act concerned in the trial to dramatically illuminate the mechanisms by which the defendant or the accused resolved to commit the offence."* This collision of the senses of time attached to terrorist acts and to the judicial process often leads not only the political sector, but also part of public opinion, to demand ever increasing pre-emption or neutralization, even if it oversteps legal bounds, and even if it produces problematic situations that endure over time.

"Risk Society", Fundamental Rights and Anti-Terrorism (Part 3) Lastly, this third segment raises the question of the duration of **penal sentences and their management.** As the paradigm of danger levels becomes central, it now appears to be a matter subject to an increasingly proactive approach. It is the kind of approach that anti-terrorism courts were already taking in investigation phases, and are now taking in sentence management. The goal of justice and of judges and prosecutors, now all too often the targets of blame, is thus becoming one of danger management. With regard in turn to sentences and their judicial management, the issue is now being widely discussed, and European legal systems are undergoing profound changes. The current objective appears less and less to be the temporary removal of convicted persons from society in order to achieve their eventual

reintegration, but instead the protection of society through long incarcerations. Though programs, experiments and declarations seeking to strengthen reintegration have been proliferating, it seems today quite a complicated matter, not only, first of all, to succeed in the ultimate task - "to disengage, or, more fundamentally, to deradicalize these people" - but also, secondly, to assess the real effectiveness of these programs, having had so little time to gain perspective. Faced with this uncertainty, the proactive approach of pre-emption is part of a process which, according to Christine Lazerges and Hervé Henrion Stoffel, is no longer consistent with a "monitor and punish" model, but rather with a "punish and monitor" model.

These issues will doubtless raise questions for judicial institutions in regard to their practices, and pose a democratic challenge. In this context, it is vital for the judicial system to be able to offer transparent and effective controls for its actions. Such controls must of course originate with the national courts, but not only - control must also derive from the jurisprudence of the ECHR, which must be able to set common limits to antiterrorism practice so that it will not be rendered simultaneously illegal and ineffective.

PART 1. WHAT CONTROLS SHOULD BE APPLIED IN REGARD TO ANTI-TERRORISM LEGISLATION?

An historical and political examination of post-attack periods (in Europe, North America, or internationally in particular) shows us that the dominant approach to acts of terrorist violence almost always falls under an "action-reaction" dynamic,[1] with an escalation of responses between authorities and terrorist groups.[2] The succession of attacks on French soil since January 2015 does not contradict this hypothesis, since there was a build-up and significant acceleration in the passage of anti-terrorist legislation, justified as a "necessary" response to the January and November attacks. For judicial authorities, these legislative measures are linked to the rules concerning the institutional dimension of these legal mechanisms (organization of judicial authorities handling terrorism cases), but also to the legal procedures that technically determine the conduct of the arrest, prosecution, and final sentencing decisions. These new norms thus encompass the competencies of the various enforcement jurisdictions, investigations and findings of violations (the public prosecutor's office and the investigating chamber), judgments and sentencing (the composition of the court), and the management of the sentences pronounced (enforcement judge and prison administration).

[1] Didier Bigo, "Les attentats de 1986 en France : un cas de violence transnationale et ses implications (Partie 1)" [the 1986 attacks in France: a case of cross-border violence and its implications], *Cultures & Conflits*, 04, Winter 1991; Antoine Mégie, "Le droit comme instrument de légitimation et de résistance à l'exercice de la violence étatique" [the law as an instrument for both the legitimation of and resistance to the exercise of state violence], *Champ pénal*, Vol. VII, 2010

[2] For historical examples, see Marc Sageman, *Turning to Political Violence. The Emergence of Terrorism*, University of Pennsylvania Press, 2017.

1.1. The European experience: agenda-setting and political decision-making in the face of attacks on European soil

The European Directive of 15 March 2017 in light of the EU Charter of Fundamental Rights

by *Pauline DUBARRY,* Justice Advisor with the PR of France to the EU, France

1. The directive of March 15, 2017: *"This directive is a classic example of harmonization law, i.e., it has the same structure as most other legislation in this field (43 recitals/31 provisions in the operative part of the text) - Objects and definitions:*

(1) List of acts constituting terrorist offences; (2) List of acts constituting terrorism-related offences; (3) Provisions on sanctions, complicity, attempts, aggravating or mitigating factors; (4) Liability of natural persons and legal entities and rules of jurisdiction; (5) Final provisions.

(...) Between the need to understand the legislation on new criminal phenomena and the risk of excessive strengthening of the enforcement arsenal, European and national legislators must refer to the major declarations of rights, when binding, to assist them in finding the appropriate democratic equilibrium. The following describes the driving idea behind all this, as asserted by the Israeli Supreme Court in 1999 when it was called to rule on the use of torture (Ruling of the High Court of Justice of the Supreme Court of Israel, on 26 May 1999, under the leadership of its then-president Aharon Barak (1995-2006) §39): "A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties (...)." Since the entry into effect of the Treaty of Lisbon, which gave it real legal force, the Charter of Fundamental Rights has been primary legislation, at the top of the hierarchy of European norms. Directive 2017/541, adopted on 15 March 2017, is secondary legislation, located 'in the middle' of the hierarchy of norms, assigned a priority lower than that of the Charter (...)"

2. Agenda-setting and decision-making: *"The attacks of November 2015 accelerated the work already underway at the European Commission, which presented its bill on December 3rd, 2015. The year 2016 was unfortunately also marked by several attacks in EU territory (Brussels on March 22, Magnanville in June, Nice on July 14, Saint Etienne du Rouvray on July 26, in Germany in July and in Berlin on December 19). This context has necessarily had an impact on the co-legislators, namely the European Parliament and the Council. The text of the bill explicitly refers to this particular context in two of its recitals (recitals 4 and 5): "The terrorist threat has grown and evolved in recent years. (...) foreign terrorist fighters have been linked to recent attacks and plots in several Member States.").*

The ambitious nature of this bill undoubtedly has to do with the substance and context of the terrorist threat within the EU. Recital 2 of the Directive is very clear "Acts of terrorism constitute one of the most serious violations of the universal values of human dignity, freedom, equality and solidarity, as well as the enjoyment of human rights and fundamental freedoms."

3. A terrorist context at the source of new legal definitions of offences: "*(...) the context ultimately led to the adoption of more ambitious legislation, promoted in particular by the French government, which considered it essential for all EU member states to have coherent legal definitions of offences to apply to the new behaviours and threats: foreign terrorist fighters (departing and returning), phenomena of radicalization, the role played by the Internet and social networks, the phenomenon of the so-called "lone wolves" (terrorists acting alone); links with organized crime, and in particular illicit trafficking in cultural assets (...) Thus, certain new definitions of offences are set forth in title III, concerning terrorism-related offences:*

(1) The act of receiving terrorist training (and no longer merely the act of providing such training) (Article 8), including self-study (see recital 11); (2) traveling for the purpose of terrorism (Article 9), a provision that breaks down into two parts in order to cover both travel to another country and return to the EU; (3)

organizing or facilitating trips abroad for purposes of terrorism (Article 10); (4) the act of financing terrorism (Article 11).

4. The rights of victims affirmed: *"The progressive affirmation of the rights of victims of terrorism is a new factor to be taken into account in seeking balance in a new class of fundamental rights (...). In the Directive's subject matter section (Article 1): the Directive establishes minimum rules providing 'measures of protection of, and support and assistance to, victims of terrorism.' A separate title of the directive is devoted to the victims of terrorism. This is a truly unique aspect of this text (with the notable exception of Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims). The directive thus contains three provisions aimed at ensuring complete and appropriate care for victims of terrorism. Established in light of the scale of the attacks carried out in recent years and the large number of victims of different nationalities (cf. the Barcelona bombing), Article 26 deals with the rights of victims residing in a Member State other than the one in which the attack took place. This is a provision that responds to a real need (cf. the Remembrance Day for the Victims of Terrorism, held in Brussels in March). The testimonies presented in this regard were striking, and much progress still remains to be made.*

The EU has entrusted Joëlle Milquet with a mission on this subject. Appointed EU Special Advisor for the Victims of Crime, she is expected to submit a report to the President of the European Commission by the end of 2018."

1.2. The British and French experience

Political approaches to the response to terrorism have led near-systematically to a build-up of legislation in most European countries. As the adoption of new anti-terrorist legislation has accelerated, their political instrumentalization is raising real questions about the balance of the judiciary. Examples such as the inclusion of the "state of emergency" in the French constitution, or the progressive tightening of all European legislation in this area should lead us to examine the issue more closely, not only, of course, in terms of the balance of rights, but also in terms of effectiveness. The issue of legislative control is thus a vital one.

Control of counter-terrorism legislation?

***Max HILL*, Queen's Counsel. Independent Reviewer of Terrorism Legislation, United Kingdom**:

"*The United Kingdom has appointed an Independent Reviewer of Terrorism Legislation to observe and monitor the legislation produced by the British Parliament in response to the various terrorist threats it faces, including in times of emergency. We have many years' experience in this field, in various forms. We have not limited ourselves solely to the Irish conflict, with dissident republican activity in Northern Ireland and on the continent; we have of course also dealt with the activity of far-right groups and Islamist terrorism. (...) We have four core laws on terrorism, and it's my job to review the judicial activities carried out annually based on these four texts. (*Terrorism Act 2000 and 2006 - Terrorism Prevention and Investigation Measures Act 2010 - Terrorist Asset Freezing Act 2011*)* (...) *My work is rooted in the jurisdictions of England and Wales, but the scope of these anti-terrorism laws also includes Scotland and Northern Ireland.* (...) *United Kingdom antiterrorism legislation has up to the present time been produced at a very consistent rate, in reaction to major events and in haste. The 1883 Explosive Substances Act is a good example. This law was passed by the Victorian*

Parliament in record time in response to a bombing campaign in England that lasted from 1881 to 1885. The 2006 Terrorism Act is another example, passed in response to atrocities committed on British soil (...) Subsequent legislation passed in 2010 and 2011 was also adopted in haste (...)".

***François SUREAU*, Attorney at the Council of State, France**:

*"Extraordinary legislation has never really been extraordinary. One might cite cases from throughout French history, such as the 1893 legislation against the anarchists. These laws are never intended to last for the long term, but it turns out that (*at this point*) the state of emergency has been granted indefinite renewal for over 700 days now, and extended beyond its original scope. It has for instance been used to impose compulsory residence orders on Corsican independence activists. Such legislation always ends up being used for purposes other than those for which it was designed. My generation has in a way been surprised by terrorism, which has devastated everything in its path. The whole system has been radically and fundamentally swept aside, in the space of ten years, in response to what was really a relatively weak initial attack; after all, France has now suspended the declaration of the rights of man and citizen, not in response to the Wehrmacht parading down the Champs-Elysees, but in response to the murder of 200 or 300 people on the national territory. Remember that at the time when the 1958 Constitution was drafted, largely on the initiative of Michel Debré, France was at war with Algeria, and the dead were in the dozens each day. So for someone from a previous generation all this is quite astonishing. The amazement we feel is also due to the fact that this broader movement in fact began long before the current phenomenon of terrorism."* Examples of this might include: *"the issue of supervised confinement, where a convict could be kept in prison after the completion of his sentence; at the time this was applied to paedophiles, yet 'no crime exists before the commission of a criminal act.'" (...) "Judges have a perfect command of legal technique, which is why the real issue at hand is how to resist political pressure by holding firmly to our philosophy of law. To say that we uphold the rule of law is one thing, but to say that the foremost freedom is the right to security is false - lest we forget Moscow under Stalin, Palermo under Mussolini, etc. The notion of freedom is a somewhat ambiguous one. Our notion of the rule of law is defensible if we take the position put forth by Louis Brandeis in one of his dissenting opinions, in which he stated that freedom is a spiritual project for man and for society. This is a matter of fundamental importance."*

Two examples drawn from the French and British situations resonate with the various "fragilities" of the European democracies in their responses to terrorism.

Political influence on the legal qualification of terrorism

***François SUREAU*, Attorney at the Council of State, France**:

How does the repression "*of irregular stays by foreigners lead to an improvement in the fight against terrorism?" (...) "France is a Rousseauist country. The central idea behind the French approach thus obliges the Constitutional Council to resort to a contrivance in order to judge the law. The example of the crime of the individual consultation of terrorist sites is significant. Indeed, this is the first time we have seen a purely cognitive crime, based on the notion that a person who consults such a website will by nature eventually be led to commit a terrorist act. (...) More broadly, we in France have seen three applications brought for judicial rulings on constitutionality [QPC] in regard to compulsory residence orders, consultation of websites, and the crime of individual terrorist enterprise: "if I'm at home and I look at a certain website and if I am in possession of a knife, that combination of elements can land me in jail." The idea is that ultimately the criminal act begins in the criminal's mind. But behind this the question arises of whether criminal law even exists anymore after terrorism (...) In regard to compulsory*

residence orders, it would be possible to impose a compulsory residence order on any person whose activity might present an obstacle to the action of public authorities. That should give us an idea of how delusional the excesses into which we have fallen really are. (…)"

***Max HILL*, Queen's Counsel. Independent Reviewer of Terrorism Legislation, United Kingdom**:

"The issue of incriminating persons returning to England from Syria is an important one, and requires a response. There are two questions at play; one territorial and the other extra-territorial. We have a hybrid system in Great Britain. Under these conditions, the simplest charge that might be brought against such persons would be "murder," if it can be proved that they committed homicide in Syria. For extra-territorial issues, the situation is more complicated; in section 5 of the Terrorism Act, the maximum penalty is life imprisonment. But what if the individual was British, but has been stripped of his or her nationality by the government? In this case, there is no more responsibility for this individual, and if a trial is held, it will not necessarily be before an English court, but rather before an international court." (...) "Terrorism legislation is in reality used to assert guilt by 'association.' The situation is very worrisome in French law; we thus need to know what exactly is the nature of the anticipated infringement of the principles of the legislation. In Britain, guilt by 'association' does not exist, yet the mere fact of traveling to Syria to join a group of any kind is considered a terrorist act. The act of traveling is itself considered a crime; not by association, but rather a crime per se*."*

What judicial oversight should be applied to politics?

***François SUREAU*, Attorney at the Council of State, France**:

"(…) Our system was designed so that we do not have to choose between security and freedom." What we are seeing, then, is a *"permanent arbitration between the two notions by a judge independent of the executive branch. In France, counter-terrorism proceedings consist both in reducing the rights of defendants, and at the same time requiring that the public officials responsible for taking this liberty will not be independent judges but agents of the Ministry of the Interior. This all combines in a sense with a complete absence of parliamentary oversight. (...) we are seeing politicians who are ignorant of the conceptual grounds that influence them. Carl SCHMITT worked out the idea that no democracy is stable (...)"*

***Max HILL*, Queen's Counsel. Independent Reviewer of Terrorism Legislation, United Kingdom**:

"The status of the Independent Reviewer of Terrorism Legislation is entirely independent of the Government, the Ministries and the public authority. This may seem obvious, as it is the first word in my title. But it isn't actually so obvious to everyone. (...) I understand that my status attracts little trust from persons accused of crimes. I have thus had to endure flurries of criticism on social media. Critics quite often challenge my comments, probing the independence which I claim, and which they do not believe really exists. I have tried to provide a response for many of those persons and groups addressed by our legislation. (...) The second premise is that the Independent Reviewer of Terrorism Legislation has access to security services and sensitive information. This is entirely true, which leads some to question my independence once again. I have full access to the various services (...) including GCHQ, the Security Service, or MI5, and Secret Intelligence, or MI6 (...)."

Limiting the risk of exception

***François SUREAU*, Attorney at the Council of State, France**:

"(…) We will only be able to pull through if we demand stricter proportionality, and we can only succeed in that by going back to basics, i.e., to having criminal legislation and not terrorism legislation. (...)" Moreover, "(...) *the existence of an independent judiciary is a precondition for the existence of a free citizenry. In light of these objectives, I'd say the future looks grim. As for the body politic, I fear that in France not the government, but rather the Minister of the Interior is in charge. It seems we would rather limit the guarantees granted to citizens than enlarge our teams. Judicial bodies are busy with their boundary disputes, and the preservation of liberties is ensured by the Council of State and the Supreme Court of Appeals. In reality, the problem is how to determine who of the two has responsibility for doing the work (...)"*

***Max HILL*, Queen's Counsel. Independent Reviewer of Terrorism Legislation, United Kingdom**:

"Early twenty-first century laws, as have been implemented recently under Blair and Cameron, are the focus of my work. But although these laws were thought to be a remedy invented in the context of terrorism at the beginning of the century, other procedures already existed in our customary law. Those are known as general criminal law. When the Crown Prosecution Service decides how to class the charges to be brought upstream of trials, it is these procedures that are used, rather than the special texts of the anti-terrorism laws. Anyone who comes to trial hearings can observe this." According to Max Hill, that is the perspective from which many judgment decisions must be understood: *"Thus, the murderers of Lee Rigby in Woolwich in 2011 were found guilty of murder under Common Law. That is also how the murderer of MP Jo Cox in 2015 was convicted and sentenced for murder. The young man who tried to blow up a bomb on a train west of London last year was found guilty of attempted murder under the Common Law as well. And the man who ran over Muslim worshipers outside the Finsbury Mosque in north London last year was found guilty of murder in the same way. We have no doubt that these four appalling crimes were indeed acts of terrorism (...)."*

1.3. Where does the European Court of Human Rights fit in a "terrorized" political context?

"Affirming the Fundamental Principles"

By *Françoise TULKENS*, Honorary Judge of the European Court of Human Rights, Belgium

"It is our responsibility to see the issue of terrorism in the correct context. Security at the expense of human rights is an illusion. The obligation to fight against terrorism is inseparable from the obligation to respect human rights. There is a lot of talk about striking a balance, but rather what we need to talk about is how to reconcile these obligations (...)"

1. Security, danger and rule of law

Towards a right to safety? *In the ECHR, safety is not seen as a notion sufficient unto itself, and security is not an issue that is contemplated outside the penitentiary domain. The same applies for the Charter of Fundamental Rights, in which the notion of security is intended as a protection against arbitrary detention. Security is a matter discussed in the International Covenant on Civil and Political Rights (1966), in the Arab Charter on Human Rights (2004), the African Charter on Human and Peoples' Rights (1981), etc. The notion of security contains a social dimension; it postulates that freedom requires the state not only to protect everyone's liberties but also to ensure everyone's security."*

Danger and fear: *"Security is 'the state resulting from the absence of a sense of danger, or the actual absence of danger.' This implies a concept of danger with two dimensions, one subjective and one objective. In the current context, one of social crisis, we've been seeing a lot of people looking for a scapegoat. While in Hobbes' political philosophy, the State is "that which effectively brings an end to fear." In the Security State, "this schema is reversed: the State is durably grounded in fear and must at all costs maintain it, because it draws from it its essential function and its legitimacy." In this respect, I find it unfortunate that political authority is not, or is no longer, playing its eminent role as peacemaker.*

Rule of Law: *"This is something we need as an expression both of democracy and of human rights. The rule of law has been invoked over and over these days. It is to be feared that it may end up seen as a catchall notion. Some no longer even hesitate to argue that the rule of law is a legal illusion, and criticizing the rule of law has become normalized - these are disturbing developments. There are two aspects that characterize this model: the right to equal treatment under law, and the right of recourse to the courts. The right to equal treatment under law provides not only against arbitrary treatment and abuse of the law; it also means respect for rights and freedoms. The right of recourse to the courts expresses the need for a process of judicial appeal before an independent and impartial judge, who must serve as the 'keeper of the promises.' These things may seem obvious, but since they have been eroded by certain rulings, they must be reiterated and internalized. (...)"*

2. The paradoxical relationship between terrorism and human rights

"What does this paradox look like? On the one hand, it is an obvious and accepted fact that terrorism poses a threat to the enjoyment of human rights and the most fundamental values. The ruling in the case of Ireland v. UK of 18 January 1978 stresses that terrorist activities are manifestly contrary to human rights. In the ruling ***Ramda v. France of 19 December 2017****, the court returned once again to that theme, affirming that the State must firmly stand against terrorism, which constitutes a serious violation of fundamental rights. On the other hand, the fight against terrorism may itself lead to the erosion of a number of individual and collective rights and freedoms."*

3. The obligation to fight against terrorism

"This convention does not exist in a vacuum, but in a particular context: first and foremost, the right to life and the protection of the democratic system. The right directly impacted by terrorism is the right to life, enshrined in Article 2 of the Convention: both the justification and the limitations of the legitimacy of the fight against terrorism are to be found in the protection of the right to life, and this subtracts it from national security. The ruling of the case of ***Osman v. UK of 28 October 1998*** *specifies the extent of this obligation. It adds a very important dimension, namely that "Article 2 of the Convention may also in certain well-defined circumstances imply a positive obligation on the authorities to practical preventive*

measures to protect a threatened individual." In April 2017, in the case ***Tagayeva et al. v. Russia****, the applicants called into question the fact that there were no preventive measures taken in spite of the fact that the police services had been made aware of the presence of terrorism. The court did not elaborate on preventive measures, but it did find the facts to evince a violation. It was the first time that the court extended the right to life to situations involving the safeguarding of the population. The State's obligation relative to the need to protect life is not unlimited. The court did not find the State liable, but simply sought to show that the State should have paid attention. We must minimize the risk to life. For example, in the case* ***McCann et al. v. UK of 27 September 1995****, several suspected terrorists were killed during a security operation. The Court found that there had been a violation of Article 2 §2, not because the special police units had used lethal force, but because the authorities' planning of the operation was insufficient. Similarly, in the case* ***Finogenov et al. v. Russia of 20 December 2011****, the court held that the use of gas was necessary to save the hostages (no substantial violation of the right to life) but found a procedural violation of the right to life due to the poor planning and improper execution of the rescue operation and the failure to provide medical assistance to the hostages, as well as the ineffectiveness of the inquiry into allegations of negligence on the part of the authorities. Lastly, in the case* ***Armani da Silva v. UK of 30 March 2016*** *(death of a Brazilian national mistakenly shot by police officers who mistook him for a suicide bomber), the court found that authorities had not failed in their obligation to carry out an effective investigation. States must take measures that are useful and appropriate, and not unrealistic.*

Protecting the democratic system*: terrorist acts impact individual human rights; terrorist methods propose to provoke change through violence. Re-reading the preamble to the convention, it is clear that democracy must not be undermined in seeking to defend it (****United Communist Party of Turkey et al. v. Turkey of 30 January 1998; Klass et al. v. Germany of 6 September 1978)****."*

4. The obligation to respect human rights

There are two major grounds for the obligation to respect human rights. They have in common the need to ensure the legitimacy and therefore the effectiveness of operations.

Human rights provide protection against abuses of power. *Following the attacks of September 11, 2001, several governments assisted the United States by handing suspected terrorists over to the Americans. Cf. for example the Macedonian case* ***El-Masri v. "The former Yugoslav Republic of Macedonia" of 13 December 2012*** *(an individual tortured then handed over to US authorities), the Polish cases* ***Al Nashiri v. Poland,*** *and* ***Husayn (Abu Zubaydah) v. Poland of July 24, 2014****, or the Italian case* ***Nasr and Ghali v. Italy, 23 February 2016****, as well as further cases pending before the court in 2018. Senseless abuses of power are always a possibility, and it is the role of human rights to observe and denounce them.*

To avoid any risk of arbitrary treatment *by ensuring control over the relevance and necessity of special prevention or prosecution strategies or measures in the Convention on Human Rights, the rule of law is of paramount importance. Rulings pronounced by the Grand Chamber eminently emphasize the compelling need for such control; examples might include the ruling in* ***Del Rio Prada v. Spain, 21 October 2013*** *(postponement of the release date of a woman sentenced for terrorism pursuant to new Supreme Court jurisprudence). States may modify their legislation, but Article 7 absolutely prohibits the retroactive application of criminal law when it occurs to the detriment of the person concerned. The ruling in* ***Sher et al. v. UK of 20 October 2015*** *(threat of imminent attack justifying restrictions on the right to adversarial proceedings for the prolonging of detention), in the interest of pragmatism, underscored a weakening of safeguards against the risk of arbitrary treatment: emphasizing that terrorism falls into a special category, the Court held that Article 5 §4 could not be applied in a manner that would cause authorities excessive difficulties in combating terrorism through effective measures. In the case at hand, the threat of an impending terrorist attack and national security considerations were used to justify restrictions on the applicants' right to adversarial proceedings in the context of the prolonging of their detention. Likewise, with regard to the procedure for issuing warrants for further detention, the Court found that the safeguards against the risk of arbitrary treatment were sufficient, in the form of a legal framework setting out clear and detailed procedural rules. On the other hand, in the case of* ***Mehmet Hasan Altan v. Turkey of 20 March 2018,*** *the court ruled that the continued detention of the applicant*

(a journalist imprisoned following the attempted military coup) that had been ordered by an assize court, reversing the ruling of the Constitutional Court, was unlawful."

5. Reconciling the obligations

Absolute rights: *States' obligations to combat terrorism may in certain circumstances justify restrictions on rights recognized under the Convention, but only in accordance with the principles of necessity and proportionality. There are however certain inalienable absolute rights under the convention to which no exceptions are permitted. These absolute rights include the right to life, the prohibition against torture and slavery, nulla poena sine lege, etc. Even in the most difficult circumstances, the convention prohibits torture. Why? All persons must respect human dignity:* ***Selmouni v. France, 28 July 1999; Saadi v. Italy, 28 February 2008; A. et al. v. UK, February 19, 2009.*** *The ruling in the case of* ***M.A. et al. v. France of 1 February 2018*** *is also consistent with this.*

Limitations, restrictions, authorized interference: *Terrorism puts the right to a fair trial to the test (rights of defence, right to silence, special investigative techniques, publicity of debates etc.). The use of evidence obtained through torture is a flagrant denial of justice, since it would legitimize that of victims and witnesses, aside from the fact that it is in no way reliable (ruling in the case of* ***Othman (Abu Qatada) v. United Kingdom of 17 January 2012****)*

The rights of defence are an essential part of a fair trial. The ruling in the case of ***Ibrahim et al. v. UK of 13 September 2016*** *concerning temporary restrictions placed on access to an attorney during the police interrogations of the 21 July 2005 London bombers was a definite step backward. The Court accepted that the police temporarily delayed access to an attorney by suspected persons due to an exceptionally serious and imminent threat, namely a risk of attack. This ruling does constitute a precedent, especially in this domain, where requirements are tightening, but it contains significant nuances that must be considered.*

The right to privacy must to be seen particularly in light of ***the issue of mass surveillance.*** *The question of mass surveillance is a crucial matter. A specific body of case law exists in regard to the protection of personal data. The preventive ability of the security services often depends on the quality of intelligence. Mass surveillance constitutes an indiscriminate monitoring of people who are not necessarily under suspicion; yet "no crime exists before the commission of a criminal act." Clearly, the monitoring of persons not under suspicion creates a dangerous environment where everyone is a suspect. Mass surveillance operations do not seem to have helped prevent terrorist attacks. Resources that could have been used to prevent attacks have been redirected to mass surveillance, and have left dangerous persons at large. The law must be clear and precise as to what kinds of personal activities are to be considered suspicious. The use and retention of data, even in an emergency situation, must always be supervised by an independent judge. Failing that, we have nothing left. Large-scale surveillance must meet criteria of necessity and proportionality. The ECHR expressed this philosophy in its ruling in the case of* ***Szabo and Vissy v. Hungary of 12 January 2016****, where the court very explicitly put an end to the monitoring of arbitrary masses of people (such as in Big Brother Watch et al. v. UK, Bureau of Investigative Journalism and Alice Ross v. UK, and 10 Human Rights Organizations v. UK). In this context, some ten petitions have been pending since the entry into force of the French Intelligence laws."*

"The fight against terrorism cannot take place outside the law, but within the law. The ECHR is not a suicidal convention; one cannot be faithful to fundamental rights while granting absolute power to the executive. We need a regular assessment process, one that must exclude other phenomena that might pervert it. In a reality as complex as that of terrorism, governments must be pedagogical, and not demagogical. In the words of Ch. Peguy, hardly a revolutionary or anarchist, "The triumph of demagogues is fleeting, but the ruins are eternal."

PART 2. THE POLITICAL AND JUDICIAL CHALLENGE OF FOREIGN TERRORIST FIGHTERS

The situations of the EU Member States in regard to the "*European foreign terrorist fighters*" constitute essential European realities today, as summarized by **Kristian Bartholin (Deputy Head of the Counter-Terrorism Division, Council of Europe):** *"(…) The precise total number of European fighters in Syria (and still alive) is unknown, yet the figure is unlikely to exceed 2.500. Approximately 1.500 fighters have meanwhile returned to Europe since the beginning of the conflict. Of the fighters still present in the Middle Eastern region only a small number are expected to return, many apparently seeking to go to other theatres of conflict (e.g. Afghanistan) instead, and others currently being unable to make the move as various factions hold them captive in the Syrian civil war fighting against Daesh. It should be noted that many European foreign terrorist fighters that have been known to play a prominent role in the structures of Daesh have been reported as casualties, thereby somewhat reducing the risk of terrorist attacks in Europe planned and co-ordinated from abroad by Daesh, but the risk of 'inspired' attacks carried out by sympathisers in Europe (the so-called 'home-grown' terrorists) has not diminished. If anything, the fall of the self-proclaimed "Daesh caliphate" in Syria and Iraq may likely spur a series of attacks in other regions, including Europe to show that Daesh is still able to project violence abroad.*

The foreign terrorist fighters who manage to return to Europe are not a homogenous, monolithic group of persons. They are likely to have had different reasons for joining Daesh in the first place, and while some will regret their involvement with the terrorist organisation, others will remain fully committed to the cause for which they have fought abroad and hence continue to pose a significant level of danger to public security. These returnees may thus themselves carry out solo terrorist attacks or inspire others to join Daesh or create new terrorist cells operating in Europe on behalf of Daesh. There are, at this stage, many unknown factors in the equation, but one thing seems clear already: There is no 'one-size-fits-all' solution to the problem of how to deal with the returnees and the serious risks they may pose to European States."

2.1 How should the principle of proportionality apply?

The principle of proportionality according to the Council of Europe

By Kristian BARTHOLIN, Deputy Head of Counter-Terrorism Division, Council of Europe

Legislation: *"In line with the UNSCR 2178 (2014), Article 4 of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217) prescribes that the act of travelling abroad for the purpose of terrorism be criminalised. Those who have joined Daesh either as fighters or in other key roles (primarily propagandists, recruiters, instructors and planners) will be covered by this obligation for Parties to criminalise. This crime is considered committed the moment you leave the territory of your State of origin or residence and attempt is also criminalised. Though the Additional Protocol itself only entered into force on 1 June 2017, many member States of the Council of Europe had already previously taken steps to criminalise the act of travelling abroad for the purpose of terrorism. Depending on the date and year they left Europe, returnees from Daesh are therefore likely to have committed this crime and can possibly be brought to justice on this account."*

Evidence: *"However we cannot and should not exclude, that during their stay in Syria and Iraq the returnees have also committed other terrorist offences than that of travelling abroad for the purpose of terrorism, and in some cases also crimes against humanity and war crimes. It is important that such serious crimes do not go unpunished. Yet, here we depend entirely on the quantity and quality of the evidence that can be admitted in court to prove beyond reasonable doubt that the accused has indeed committed such crimes. And this is far from easy. Essentially we are looking at three categories of evidence:*
(1) E-evidence, in particular derived from material posted by Daesh and individual members of that terrorist organisation on social media as well as evidence electronically stored in 'the cloud'; (2) physical evidence, such as lists naming fighters, be they on paper or on a portable electronic storage medium, and (3) evidence gathered in the form of intelligence.
Obtaining any of the three categories of evidence as a rule poses significant challenges to States. As regards E-evidence, the data are rarely stored in the jurisdiction of the prosecuting State, and for gathering physical evidence at the crime scene the situation is often even more difficult with very limited legal and practical possibilities of carrying out proper criminal and forensic investigations in the theatre of conflict. Turning intelligence into evidence is possibly the most difficult of all three scenarios due both to the way the information is gathered and the restrictions often put on the use of intelligence by both national and foreign intelligence services in order to protect their sources and working methods."

Proportionality: *"It appears that then all the odds are stacked against the judiciary when prosecuting and adjudicating cases against alleged foreign terrorist fighters, so what can be done? First of all, we need to emphasise that terrorism – though as grave a threat to public security as it is – is primarily a serious crime, and should, insofar as possible, be treated just like any other form of serious crime as regards police detection and criminal prosecution. Essentially this means that the measures applied by the competent authorities to demonstrate the guilt of someone accused of being a terrorist, and the manner in which he/she is prosecuted, should not differ noticeably in terrorist cases from those applied to other categories of dangerous criminals. Though this approach may, at first glance, seem to downplay the seriousness of terrorism as a crime, it has the distinct advantage of depriving the terrorist of any 'glamour' that may be attached to being a 'soldier' or 'fighting for a cause.' The terrorist should be seen for what he/she is: a criminal. It also sends the clear and calming signal to society, that we do not need to turn into a police state in order to efficiently prevent and suppress terrorism. The police and the judiciary, as a rule, already possess the tools and procedures necessary in a democratic society to deal with the threat and bring terrorists to justice. (…) In all of this proportionality is the key notion. The legal measures applied to terrorists (including returnees from Daesh) have to be proportionate and respect the rule of law and human rights. The law enforcement measures must similarly be proportionate, human rights compatible and necessary in a democratic society, and the judiciary must accord everyone accused of any crime a fair procedure. If not we end up harming the very democracy we try to protect."*

Bringing families returning from Syria to justice

The British experience

by Sarah WILLIAMS, Attorney at Law, United Kingdom

The UK context: *"Last year we were put on notice by the Home Office that there was a likelihood of a significant number of families or young people returning to the UK, as ISIS progressively lost territory across Iraq and Syria. Up to 700 were expected nationally, with a relatively high number due to return to our area. It is a tragedy that these numbers have not been realized, as many children are believed to have died, or may be orphaned or stranded, and who may never be located or repatriated to their home countries. However, the UK Home Office has been well prepared for those who have returned. My team collaborated with them to hold a national conference, to prepare local authorities that were likely to receive higher numbers of returnees and to provide information about the resources available to them. The Foreign Office outlined the procedure for alerting councils to children or families who were likely to return, giving as much notice as possible. This would enable us to obtain as much advance disclosure as possible from partner agencies, use this to determine a safety plan for the children, and ensure that any necessary court orders could be obtained immediately on arrival."*

A Special Unit: *"The Tavistock's Returning Families Unit has been commissioned by the UK government with the aim to support the highly unique circumstances of families returning from the conflict in Syria. The Unit has developed a programme of activity aimed at assessing, and treating as appropriate, the mental and emotional wellbeing of the children at the point of return, and as they re-integrate into the UK. This includes providing reports within court proceedings, with expert assessment tailored to returning families; from adult psychiatric, child and adolescent psychotherapeutic and systemic family psychotherapeutic perspectives."*

Court proceedings: *"The application of the evidential test in the UK to radicalization cases can be helpfully summarized from the 2017 judgment of Mr Justice Macdonald in A Local Authority v HB and Others: (1) The burden of proving the facts rests on the local authority, and the standard of proof is the balance of probabilities – the court must decide whether, on balance, that the event occurred; (2) Findings must be based on evidence, not suspicion. In radicalization cases, security agencies may hold more information, which cannot be disclosed, to the court for reasons of national security, but the court cannot speculate what further information may be held; (3) The role of the court is to consider the evidence in its totality, including the credibility of witnesses and inferences that can properly be drawn from the evidence; (4) The court must then form a view of the credibility of parents and carer. A witness may lie for many reasons such as shame or misplaced loyalty, and the fact they have lied about some matters does not mean they have lied about everything; (5) Finally, the facts relied on by the local authority must demonstrate why the child has suffered or is at risk of suffering significant harm. Allegations of extremism or involvement with terrorism must be shown to pose a risk to the child, which will include a risk of future harm.*

The court will use these principles to determine the parent, or where both have travelled, each parent's personal mind-set and motivation for travelling."

Evidence: *"Where possible, disclosure from counterterrorism police, Interpol or the Home Office will be necessary to establish mind-set, and clear information sharing protocols are essential to facilitate this. In my experience, when they become aware that an individual has travelled to a war zone, police will immediately obtain warrants to search the person's home, including any electronic devices. They will obtain phone details and available copies of emails, texts and WhatsApp messages. On-going surveillance will be undertaken of known social media sites.*

This evidence may be used to establish mind-set. Has the individual has been accessing websites with extremist content or contacting known jihadis or others with extremist views? Have they posted extremist

content or comments themselves, or posted messages of support for terror atrocities? Are they a member of a proscribed organisation, or have they attempted to radicalise others? They may even have attempted to buy weapons or posted pictures of themselves holding guns or in warzones. We've even had parents who have been featured in documentaries on violent extremism."

To protect the child: *"The final stage for the court is then to consider harm to the child. A child who has been lived in a warzone has inherently been exposed to the most grave of physical and emotional harm – risk of death, exposure to atrocities, hunger and a lack of medical treatment. If the parents intentionally travelled to a warzone, then this harm is attributable to their actions. But having returned to their home country, the court must determine that an order is still necessary to protect the child. An expert assessment of the parents' current ideology, together with the court's view on the evidence they give in the witness box, will be key to determining whether they may seek to indoctrinate the child in the future or attempt to travel to another unsafe location."*

2.2 A challenge to fair trials?

The principle of a fair trial

By Kristian BARTHOLIN, Deputy Head of Counter-Terrorism Division, Council of Europe

"In this context it should be underlined that whereas the minimum fair trial requirements contained in Article 6 of the European Convention on Human Rights cannot be lifted merely because of the threat posed by terrorism to society, useful detection measures, such as interferences with Article 8 of the Convention through the use of "special investigation techniques" may very well be legitimised by the threat of terrorism to democratic institutions, provided the measures are strictly necessary and carried out under the control of the courts. In order to provide guidance to member States on this matter, the Council of Europe last year adopted a revised recommendation of the Committee of Ministers to member States on the use of special investigation techniques in crime cases (including terrorism).

As regards how to turn intelligence into evidence we do already have many examples from Europe and around the world on how to carry out this difficult exercise without compromising the fair trial guarantees. This is an area, which certainly needs to be further explored and developed, but the groundwork has been done.

Secondly, the horror of terrorism and the need to show decisive leadership in crisis situations should not mislead us to take actions and measures which are not lawful or proportionate to the threat we face. Draconian legislation often defeats its own purpose by playing into the hands of terrorist propagandists and apologists. Unlawful measures inevitably backfire on those societies, which implement them. Only by staying true to the values upon which democracies are based – the respect of the rule of law, of the independence of the courts, of the procedures of democracy and of the rights of the individual – do we have a real chance of overcoming terrorism of whatever ideology."

Political and diplomatic positions of the European states

Berta BERNARDO MENDEZ, **Anti-terrorism Investigating Judge, Belgium**

"The dilemma faced by European governments has to do with their nationals detained in situ. France has been quite clear that it does not want to deal with them, as has Belgium. This is not a political issue, since the majority of public opinion does not want to see them brought back for security reasons; there is a fear of seeing these people come back. Domestic courts are overloaded with cases, and there is an unwanted overcrowding in the prisons, where major difficulties with incarcerating these people have arisen. In addition, since the scene of the crime is abroad, the investigation needs to be conducted there. Lastly, the accused need to be held accountable to their primary victims, who are not Europeans. We know that some detainees have already been handed over to national authorities, so these discussions are taking place in spite of the general position regarding the refusal of return."

William BOURDON, **Attorney at Law, France:**

"The Charter of Fundamental Rights is sorely tested by terrorism. Today, a new paradigm is emerging, with the issue of the women, mothers and children detained in Iraq. We have observed a universalization of the precautionary principle, which poses a permanent risk because it introduces a kind of restriction of due process. There are two very different thresholds in this restriction of due process; first, that which was authorized by the ECHR and used by France in renewing its state of emergency, removing judges' duty to prevent and replacing it with the retroactive decision-making of administrative judges. The other threshold is when there are no more judges at all: this was done in the United States with the torture of terrorists.

Every day, people sworn to uphold the right to a fair trial receive death threats. It requires political courage and judicial courage to resist this administrative and political mind-set, but also to resist a double aversion: a mind-set of absolute efficiency would give rise to the notion that the end can justify the means, that the end can justify the waiving of a certain number of principles. The appearance of hyper terrorism has now brought forth a new category: criminal or combatant. (...) These atrocious, dehumanized and dehumanizing characters challenge us not to become like one of them. What will European judges say in a few years if the state of emergency returns? Where will the bar be set? Anyone able to answer that today would be quite the prophet. It's a very serious question, and we don't have an answer. (...) There are still a good number of detainees being held at Guantanamo. What we see here is a risk of dehumanization, because extreme denial of due process is dehumanization."

What challenges are faced by the right to a fair trial in war zones?

Berta BERNARDO MENDEZ, **Anti-terrorism Investigating Judge, Belgium**

"(...) Already several NGO reports have denounced the lack of equity in the on-going trials. In regard to the rights of the defence, they have highlighted the lack of access to counsel, or where counsel is present, the ineffectiveness of the attorney's aid, his independence, his freedom of speech, the reliability of evidence, etc. All countries in the operating theatre have anti-terrorism legislation covering all the little details imaginable. (...) in the autonomous Kurdish regions of Syria, where some legal proceedings have already been held, judges are participating, but we are unaware of the degree of their independence; above all, these are summary trials held in a very small office (with three seats, one for the judge, one for the

prosecutor and one for the criminal). NGOs have already pointed out several unjust aspects of these types of proceedings. (...) The investigating judge serves as the guarantor of respect for fundamental rights and respect for legal procedure. If we are discussing the right to a fair trial, the same issues arise in the investigation phase. The question of the lawfulness and reliability of evidence is a matter of respect for the rights of the defence (...) In principle, while States may be justified in being extremely firm in response to acts of terrorism, they are also under an obligation to prosecute the perpetrators of these acts while strictly respecting procedural guarantees."

***William BOURDON,* Attorney at Law, France**

"(...) What we are facing in France today is the "Le Drian" doctrine, which says: "the children yes, but not the mothers." This is the current political doctrine. We would have plenty reasons not to question it, because our prisons are full. It is a Malthusian argument, one that devalues the work done by judges. Change is narrow, difficult, complicated, and the way judges judge may symbolically be considered a major and powerful element in the way this dilemma will play out. "When citizens are promised security and freedom, they usually wind up with neither," *said Benjamin Franklin (...) We must avoid the principle that the end justifies the means, because that leads to the waiving of a number of principles. That is a difficult proposal because terrorism has created new categories: non-combatant, non-criminal, or rather combatant and not criminal, or the converse, or hyper-combatant and hyper criminal (...) International Human Rights Law applies in times of peace. International Humanitarian Law applies in times of war and in war zones. This presupposes a certain order of events, a certain set of spatial and temporal boundaries. But terrorism presupposes the annihilation of all these boundaries, with only the helpless hope that terrorists will respect the laws of war. Terrorists challenge us to become collectively and individually dehumanized: that's their challenge!"*

How must "foreign terrorist fighters" be tried in Europe?

***Berta BERNARDO MENDEZ,* Anti-terrorism Investigating Judge, Belgium**

"(...) Belgium has held a handful of trials of persons handed over after being arrested and detained in the operating theatre. Very few rulings have been pronounced. Very few have to do with the most heinous acts committed in the operating theatre. Once again, then, we face difficulties in regard to proof; how reliable is the evidence provided to us? Here, we would open an investigation, and carry out the normal operations involved in organizing a trial, but the biggest difficulty is how to get the facts about specific acts committed in the operating theatre. Is it even possible for us to conduct cross-examinations? We can look at the issue in different ways, but the fact remains that the basic elements we will have will be whatever they want to give us. (...) Another problem is the issue of non bis in idem [double jeopardy] *when extremely heavy penalties were already imposed in the operating theatre. One might question whether the presumption of innocence is preserved here, but with the media coverage of current affairs that is a delicate matter. What impact would all that have on a jury of the people? Very recently, in view of the conditions faced by these detainees for the most heinous acts, these persons have invoked their right to remain silent. But if in a year or two these people decide to make a confession, what will we be able to gain from such statements?"*

***William BOURDON,* Attorney at Law, France**

> *"I am providing legal defence for four mothers in Syria, too many children (for acts committed in the operating theatre) and two mothers in Baghdad who risk being sentenced to death and hanged in Iraqi prisons. When their cases were brought to me, the French government was paralyzed about these time bombs coming back to French territory. When it came to the children, though, things were more relaxed. What it comes down to is that now the doctrine is: "the children yes, but not the mothers." The French system was spotlighted by the Minister of the Interior Gerard Collomb, with arrests on the tarmac and very heavy penalties. For myself, as an attorney, one of the issues that arises has to do with the individualization of penalties."*

(For a presentation of the trials and rulings concerning "foreign terrorist fighters" in Europe, see scientific report n° 4: "Terrorism and fundamental rights: hearings and sentence enforcement")

PART 3. TERRORISM, "RISK SOCIETY" AND FUNDAMENTAL RIGHTS

3.1 Danger levels from a legal perspective: defining crime and determining status

***François MOLINS,* Public Prosecutor at the Superior Court of Paris, France**

"In light of the inadequacy of ten-year prison sentences, the necessity eventually arose to resort to the designation of offences. The use of the charge of criminal conspiracy to commit unlawful acts has led to the prosecution of very diverse profiles, ranging from indecisive loners to actual combatants. We had to deal with a situation of compression of penalties, where a certain number of people had been imprisoned without the gravity of their act actually justifying such penalty. We also had to gain awareness of new elements, because of constant propaganda, changes in danger levels, and large-scale attacks carried out on behalf of the IS organization. It became imperative to reconsider our criminal policy, and to bring charges of criminal conspiracy against all the Islamists who had joined the IS organization prior to January 2015 and could be proved to have actively participated in the operations of the groups taking part in the fighting. This was done in 2016, with the consideration that joining a terrorist group means joining an organization that consistently promotes the commission of criminal acts. This judicially validated by the ruling pronounced by the Supreme Court of Appeal on 12 July 2016, subsequent to a legal dispute between prosecutors and judges concerning two men who had left to Syria and then returned in 2014, and were shown in a photograph, brandishing decapitated heads. The criminal chamber had not found this to constitute terrorism. We must use common sense and discernment. The goal is not to bring everyone before the Assize Court - we have to act in a manner consistent with the danger level of the accused."

***Frédéric VAN LEEUW,* Federal Prosecutor, Belgium:**

"It is consistent with the origin of terrorist offences that it is the level of danger they present that drives legislators to discuss this notion. There are criminal behaviours of less gravity that are also considered terrorism. This is a thorny issue, between political offences and terrorism offences. The problems we had to deal with in the beginning, when we were initiating investigations in 2012; a whole segment of public opinion held that what we were dealing with was unprecedented.
In Belgian law, certain acts that might be classed as terrorism have only recently been assigned specific criminal penalties. Separate offences have been introduced into law, but dangerousness does not necessarily imply the possibility of criminalization. Certain specific crimes are deemed to be either terrorist or not, and a distinction is made between the seriousness of a criminal act and the classification of terrorism. In Belgium, the procedural stage we are targeting is participation in the activities of a terrorist group. It must be proven

that there is a terrorist group and that an act of participation has been committed. This poses problems in respect of dangerous persons not considered to be part of a terrorist group, such as those referred to as lone wolves. There are a number of persons outside the purview of the penal code.
Judicial authorities must address the issue of danger levels, which leads to some jurisdictional creep. Danger level determination is an element that conflicts with the principles of the rule of law and fundamental rights. A ruling pronounced by the constitutional court in Belgium ratified a legislative amendment introduced by a 2016 law that instituted a change to the criminal classification corresponding to terrorist acts. This criminal classification was intended to be used to punish persons who spread terrorist propaganda; a line was also added concerning risk creation. It would have been too difficult to prove the link between speech and creation of a risk, so the line was removed. The constitutional court is very attentive to issues of criminal law. The difficulty lies in accounting for the danger level associated with an act described as an offence.
There is much less difficulty in terms of procedure. For terrorism, there is only one thing that needs to be proved: namely absolute necessity for purposes of public security. This is in line with the jurisprudence of the ECHR, which refers to the generation of social unrest due to the particular seriousness of the act and the public's reaction. From the penal point of view, the great difficulty is the semantic confusion that the concept implies: between criminal and terrorist."

3.2 Danger levels relative to gender issues and minors

***François MOLINS,* Public Prosecutor at the Superior Court of Paris, France:**

"(...) (women) will be prosecuted if they have played an active role (recruitment, logistics, etc.). The matter of prosecution is more difficult if (the person) simply remains in the role of wife and mother. Unlike the naive assumptions we had at first, we now believe that the role of wife and mother is considered essential to the construction of the caliphate. Some have also been trained in the use of weapons. The military defeat of Daesh has led the terrorist organization to become more pragmatic, broadening the scope of its recruitment of combatants and calling upon women and children to fight as well starting from the end of 2017, and in a February 2018 propaganda video. Even though they may present themselves as disappointed with their experience in the operating theatre, women are virulent in their radical commitment. Today, women are being placed in police custody as well as in preventive detention if necessary. Criminal policy has evolved. And as our policy changes again we will be able to study their judicial orientation on a case-to-case basis. We will always ask ourselves whether it is opportune to avoid separating husbands and wives. Consistency encourages us to keep spouses together, but such matters will all be examined on a case-by-case basis, depending on the level of danger posed by the couple."

***Jesus ALONSO*, Chief Prosecutor of the National Court, Spain:**

"There is a certain amount of information we make use of now, and we also have to consider the issue of women and minors. What response does this reality require? How can we carry out a successful inquiry in such a way as to achieve the ideological disengagement of these people? (...) As for minors and women, the surveillance we have been conducting has led us to discover that the IS organization has use social networks to lure in children, by providing

role playing games, songs, and readings so as to further develop their propaganda. (...) On the other hand, the prosecutor of the National Court, and the investigative courts and judges try not to make distinctions between women, men, and minors. What we want to do is determine whether they are criminally liable for jihadist terrorist acts. Women provide support for the family and education, but as jihadism has continued to lose combatants, women have come to play a leading role, so for our part we make no distinction between men and women."

***Frédéric VAN LEEUW,* Federal Prosecutor, Belgium:**

"As for the prosecutions, [the situation of] women poses a challenge because the motivations are different although the potential level of danger posed may be significant. Case law has shown some reticence on this head in some decisions. Recently, we argued that by making their husbands sexually happy, women provide support to combatants' courage; I think that goes too far. There are also issues with the choice of cases to be prosecuted, which has been challenged by attorneys in Belgium. The attorneys have objected that these armed conflicts are an internal matter and that the prosecutions should be conducted under humanitarian law. There is a certain confusion: the person in question may either be a combatant, or a terrorist, but cannot be both at the same time. We have dealt with this issue previously, in regard to the PKK. Significant arguments were presented before the Supreme Court of Appeals regarding a refusal of a referral for terrorism and classification under humanitarian law. This has sometimes led to cases being dismissed. Varying weight is assigned depending on the place in question, and that's a problem. Is a person a terrorist if he is in Europe, but a combatant when he happens to be in a war zone? Here again we face the issue of the gap between international humanitarian law and terrorism."

3.3 Danger levels relative to "intelligence"

***François MOLINS,* Public Prosecutor at the Superior Court of Paris, France**

"In order to better understand the level of danger presented by individuals and collect evidence, we need increased cooperation with intelligence services throughout the investigation process. Until now, the justice and intelligence sectors have functioned in a highly compartmentalized manner. While today's relationships are trusting and fluid, the fact remains that the various services are still reluctant to judicialize the elements they have in their possession. The evolution of the threat in France is leading to a desire to judicialize as far upstream as possible. Intelligence agencies can then save time, and the judicial sector can make advances in an approach oriented towards preventive judicial neutralization. The antiterrorist section of the prosecutor's office strives to reconcile the neutralization of dangerous individuals by anticipating their decision to take action."

***Frédéric VAN LEEUW,* Federal Prosecutor, Belgium:**

"The 1998 law targets actions involving the use of violence for ideological or political reasons in order to achieve one's goals through terror, intimidation or threat. The process of radicalization has now been added to that. In Belgium, we have a system where the judiciary has the initiative: as soon as intelligence agencies detect an offence, they are obliged to report it to a special commission, then the prosecutor and the head of the intelligence service work

together and in principle, a report is made. We then proceed directly to the judicial phase. This article also implies that intelligence does not have to disclose all the contents of its files; nevertheless, at the judicial level investigations get underway very quickly. While this judicialization takes place much more quickly than it does in France, [and] [?] in Belgium it led to the swamping of the judicial system.

The prosecution have opened criminal investigations in response to the slightest risk; that means massive judicialization. This poses a problem, as intelligence has no room to do its job. The psychosocial approach meant advancing directly to repression, thus disallowing any preventive action. To solve this problem, we made a recommendation so that the intelligence services could adapt. Now, investigation by the intelligence services is kept as the priority temporarily (a few months). This means a change in professional secrecy in Belgium because what was treated as confidential information has become shareable under certain conditions. It has thus become permissible, in some cases, to share professional secrets between organizations that do not have the same purpose. This is done so as to permit a more collective approach."

3.4 Danger levels relative to sentencing systems

***Frédéric VAN LEEUW,* Federal Prosecutor, Belgium:**

"In terms of the enforcement of sentences, terrorism prosecutors are not responsible for the prosecution of minors and the enforcement of sentences. Another prosecutor's office is responsible for that. There is no sentencing enforcement judge; rather, a sentencing court is in charge of such matters; it will pronounce its ruling and take a new look at the judicial inquiry, which may be biased and jeopardize a possible rehabilitation. The intelligence services still have responsibility, and monitor the individual."

***Jesus ALONSO*, Chief Prosecutor of the National Court, Spain:**

"Today, terrorist offences comprise 30% of all trials held before the court (...). The enforcement of sentences for terrorist offences falls within the jurisdiction of the National Court, which has a separate chamber presided by a judge in charge of the enforcement of sentences. Does this tell us whether the sentence was meaningful? How it was enforced? The condition of the sentenced person? Or their risk of re-offending? There is a legislative novelty in place now known as supervised freedom; this is a measure that restricts liberties and may last up to ten years. We use all the tools of social management available to the State to try to find out whether the danger has been eliminated or not after the sentence has been served. Supervised freedom is implemented after release. Another specific aspect of the National Court is that if a minor commits an offence, the prosecutor's office is able to judge such minors, from 14 to 17 years of age. There nevertheless remain certain fundamental specifics to this. The juvenile court seeks to achieve the re-education and rehabilitation of these minors so that they can be reintegrated into society. The aim of the supervision of terrorist minors is to take them out of the terrorist context, and give them the ability to accommodate themselves to society so that they no longer represent a danger to it.

With regard to the prison environment, the National Court (as well as Spanish politics in general) draws a distinction between domestic terrorism such as ETA and jihadist terrorism. For ETA, the terrorists are removed from their home city so as to prevent compartmentalization

and ideological clustering. We isolate jihadists so that they do not contaminate the other convicts. We also monitor Imams to prevent them from radicalizing prisoners in the penitentiary environment."

***Federico CAFIERO DE RAHO,* National Public Prosecutor, Italy**

"In the penitentiary environment in Italy, the treatment is different because it often happens that in this environment the radicalization worsens. A whole system has been set up within the prison police organizations with a unit dedicated to monitoring the detention of subjects who present a risk of radicalization. In some cases, detainees, supported by their ideology, have created prayer groups, which then would champion attacks carried out by IS, and would seek to spread their "gospel" to other detainees to such extent that they have sometimes been convicted on charges of criminal conspiracy within the prison environment. Sentence enforcement is monitored, re-education programs are provided in prisons, and this type of detainee is closely watched. An agreement was reached which makes it possible for us to have recourse to the services of 122 Islamic associations that assist police work in the prison environment by providing psychologists who help contribute to de-radicalization. Article 41bis provides legal grounds for the implementation of isolation in prisons so that the prisoner is kept out of contact with others. In particular when we observe that there are people who may be likely to initiate communications with the outside world. Lastly there are certain security measures that can be taken, for example the expulsion of non-Italian nationals, or continued monitoring after release from prison."

Danger management after the completion of sentences - what threats could it pose to fundamental freedoms?

The French experience

By François CORDIER, Head Public Prosecutor, Superior Court of Appeals, France

Preventive detention: (...) *"What is essential to remember here is that preventive detention, like security monitoring, is imposed on a person who has fully completed his sentence, based on a danger level characterized by a high risk of recidivism. These measures are indefinitely renewable. The proliferation of these post-sentence completion security measures in a way calls into question the meaning and purpose of prison sentences. It would seem they are no longer sufficient to fulfil one of the functions assigned to them, namely promoting the improvement, rehabilitation or reintegration of the convicted person. Preventive detention and security surveillance no longer constitute the repression of a criminal act, but the ratification of a dangerous status. This is a fundamental paradigm shift. As professor of law at Aix-Marseille III University Philippe Bonfils has written, the 2008 law illustrates the return of positivist penal philosophy. This movement, initiated by a doctor, Mr Lombroso, a judge, Mr Garofalo, and a law professor, Mr Ferri, as you know, proposed penal responses based on the dangerousness of an individual, and no longer as the consequence of an offence. Sentences were replaced by security measures, devoid of any moral connotation."*

The critics: *"In an opinion of October 5, 2015 made public, the Comptroller General of Prisons asserted that the concept of potential danger should be considered contrary to the fundamental principles of French criminal law, in particular the specific legal definition of crime and of sentences, and the proportionality of penal responses. The National Consultative Commission on Human Rights has been concerned about the introduction into our criminal proceedings of this concept of dangerousness, an emotional concept with no basis in science. It emphasizes that the French system is based on proven fact, and not on random predictions of future behaviour. As for Robert Badinter, former Minister of Justice and former President of the Constitutional Council, he lodged his protest against these measures in parliamentary debates, in his capacity as senator. I quote:*
'What this will lead to is the replacement of criminal justice based on the evidence of guilt, established according to the rules of law, and respecting the presumption of innocence as the basis of all criminal justice, at least in a democracy, with a justice based on danger levels, grounded in criminological presumptions established by experts, in particular psychiatrists, which is able to order, in successive decisions, a veritable permanent detention in the absence of any observed offence.
'A justice system grounded in liberty, and based on the proven liability of the perpetrators of criminal acts, will be replaced by a justice system grounded in security, and based on the diagnosed dangerousness of the potential perpetrator of a virtual crime!'"

"Implementation": *"By 2015, 49 security surveillance measures had been taken since the adoption of the law, and 5 people had been held in preventive detention, most often in emergency circumstances, and for relatively brief periods.*
It is undeniable that the monitoring of persons, their supervision via obligations, and their surveillance, may help stabilize certain convicts who suffer from personality disorders.
Like other post-sentence monitoring measures, dispositions providing for security surveillance allow convicts who have not been given early release or whose judicial supervision has been revoked to be subject to monitoring upon their return to freedom and the outside world, to which they have often not adjusted. I could easily describe to you a number of disturbing profiles I've encountered during appeal hearings at the national preventive detention court. Nevertheless, these security measures raise questions or create difficulties, some of which are specific to certain individuals, and others of which are common to all measures of supervision applied to convicts (...)"

"How reliable are the methods of assessing danger levels?": *"There are two means provided by law*

for such purpose, which overlap:
(1) Assessment by the national evaluation centre, organized within the prison administration. *"This assessment is conducted during sentence enforcement, prior to release, but possibly also before judicial supervision measures are ordered. Detainees are placed under observation for a period of six weeks, in order to conduct a multidisciplinary assessment of their dangerousness, conducted by four divisions: (a) a surveillance division, which contributes an investigation of the detainee's prison record, produced on the basis of a continuous observation of the detainee and such interviews as may be conducted. (b) an integration and probation division, which seeks to demonstrate the detainee's needs in terms of socio-educational intervention as well as protection factors. That division conducts an evaluation of the detainee's social, family and material situation. (c) A psychological division, composed of clinical psychologists, and (d) A psychotechnical division, composed of occupational psychologists. All these approaches are pooled in mid-stage and end-of-process meetings conducted under the director's supervision."*

(2) Assessment by medical experts: *Conducted most often by two experts, one a psychiatrist, the other a psychologist, this expert analysis must provide a description of the individual's personality and any psychiatric disorders from which they may suffer, as well as a description of any personality disorders. The assessment must therefore also give an opinion as to whether the person presents a specific danger or a persistent danger characterized by a very high probability of recidivism. The expert analysis thus conducted fundamentally differs from the pre-sentencing analysis, which consists of a determination as to whether the perpetrator can be considered criminally responsible, or whether his or her responsibility is impaired. Appointed before the judgment is pronounced, the expert's task is to inform the court as to whether at the time of their acts these persons were suffering from psychic or neuro-psychic disorders that paralyzed their discernment or control over their own action, or if disturbances of like nature had simply altered their judgment or impaired their control over their own actions.*

"What if such medical expert analysis were to become predictive?": *"It is also not certain that the analyses provided to judges are always based on instruments and methodologies that are perfectly reliable and indisputable. Time does not permit me here to discuss "unstructured clinical judgment," and evaluations based essentially on an interview between the expert and the person in question concerning their history, the acts, the subject's current condition, and their mental state. There are also actuarial scales, the scales used for structured clinical judgments, and, finally, tools used to list protection factors and strategies of care. Psychiatric experts in France have absolutely stressed that the use of these scales must be coupled with clinical examinations. Several studies have questioned the reliability of these various methods. Some have asserted that they are most reliable when they determine that there is no risk of re-offending. Daniel Zagury, one of the most renowned psychiatric experts in France, has written: 'This notion of dangerousness is a prospective notion, and one that cannot be determined with certainty; while psychiatrists have a place in the assessment of danger levels, they do not have an exclusive one. Predicting whether a subject presents a risk is no easy task.'*

(...) one of the difficulties specific to such measurement efforts is the borderline that may sometimes exist between behavioural disorders and psychiatric illnesses, which is extremely hard to demarcate. The national preventive detention court has thus ruled that once a person has been placed in hospital without consent for psychiatric care they can no longer be considered to be in preventive detention. It is well known, however, that long periods of detention may often cause a degradation of mental health.

Conclusion: *"Security measures taken on the basis of a specific persistent level of danger may undeniably be useful in limited cases. However, their implementation raises legal, philosophical and practical questions. Although judges are basically guaranteed an effective right of access in order to review these security measures, the fact remains that they undermine the presumption of innocence and the subject's freedom of movement.*
Security surveillance and preventive detention were not designed to prevent recidivism among persons convicted for acts of terrorism, in particular those claiming allegiance to radical Islamism. Nevertheless, in order to tailor suitable post-sentencing measures, a detailed knowledge of the multi-faceted mechanisms that led to those persons committing criminal acts is necessary. New instruments need to

be set up to identify the development of the perpetrators of such crimes, their possible rehabilitation, and the persistent risks they may pose. What seems essential to me in view of the proliferation of proceedings on charges of criminal conspiracy for terrorist ends is above all that sentencing must be used to undertake, in one way or another, a thorough work of education and socialization. It should not just be about their removal from society. It requires ambition, an objective, and the means of achieving it."

CONCLUSION

« The risk society and societies' acceptance of the phenomenon of terrorism »

Antoine GARAPON, Secretary General of the Institute of Advanced Studies in Justice, France
Stephen HOLMES, Professor of Law at New York University, United States

The contrasting perspectives of two philosophers of law, one European and one American, offer as a final synthesis a possible path beyond the sole judicial dimension of the fight against terrorism. Opening the debate to theoretical as well as historical reflections, Antoine Garapon and Stephen Holmes illustrate the extent to which terrorist violence transforms our democracies, both in terms of their political contracts and their functioning.

1- Democratic societies tested by the challenge of terrorism

Antoine Garapon (IHEJ): *Terrorism now exists almost everywhere: not a day goes by without news that some terrible attack has occurred in Kabul, Pakistan, Baghdad, Europe or elsewhere. It would however be wrong to think of this situation in too general terms, because its impact on democratic societies is quite specific. It's not that the situation has a more serious impact in democratic societies than in others; after all, human life has the same value everywhere in the world, but it does pose a greater threat of destabilization in those societies. The cause of this specific power of destabilization (which achieves a great impact with a smaller number of victims compared to "classical" wars) is to be found in the modern political contract, which lies at the symbolic foundation of these societies.*
For Hobbes, that most pivotal of philosophers, who is considered the father of political modernity, it is the fear of violent death that characterizes the state of nature and drives men to associate with one another. Fear, the mainspring of their political association, leads them to enter into a "social contract" with the sovereign, under the terms of which they give up their natural right to live to a sovereign who will protect them. Fear is a personal feeling that builds up a collective one, a natural law that originates in a feeling. The contract of political association is the political device that converts a negative affect into a positive force. Fear is not a noble affect that confers upon the government a universal and uplifting mission; rather, it is instead a shameful one. Such is the reason we constantly conceal it, because it is difficult to conceive that "an edifice as complex and sophisticated as the modern political order could be based on a foundation as simple and banal as fear" (p. 50).

The task of the sovereign is thus entirely objective: the important thing is the result of his action, not his intentions. The rule of law is a kind of peace treaty entered between these two relationships to fear: experiencing fear on the one hand and instilling it on the other...

in order to prevent any real, tangible damage to bodies. Which is just what terrorism causes. The risks it faces are more easily understandable if it fails to achieve this objective and violent deaths result. (...)

Fear and terror

Whereas fear was the motive that drove people to make the rational choice to seek the protection of a sovereign in exchange for rights, terror (which must be distinguished from fear) drives the archaic reaction of clinging together around the leader. It is no longer a rational calculation but a vital reflex. We thus transition from the fear of violent death to the archaic survival instinct. Such perceptions exert influence on the security expectations of our contemporaries.
This kind of political contract thus contains in itself the seeds of the excesses that come out in the context of terrorism. This has major consequences for our subject, because it suggests that what is expected of the sovereign above all is in fact neither the right action of good government, nor the collective salvation of the nation if it is attacked. Deterritorialized terrorism attacks and invalidates original and personal consent. This in turn forces the invalidated contract to deny itself and return to the state of nature, whether by self-defense, or by the demand that the state defend itself by denying equal rights to fellow citizens. Terrorism also incites the sovereign to ignore the law in order to preserve his primary justification, which it has objectively failed. Such a depiction of the political contract thus contains the seed of the reason for its transcendence when terrorist attacks occur: the sovereign is enjoined to take an action that flouts the law because of the exceptional circumstances at hand, and passions are so inflamed that the law is forgotten. (...) Terrorism brings a deep moral and political isolation to the surface, evoking to all the precarious nature of their natural condition, the very condition that drove them to give up some of their natural rights in order to be protected. This feeling is then reinforced by the impossibility of understanding what could possibly have justified this turn of fate. The State thus suffers a loss of recognition, because its failure to protect the people, and thus its violation of the contract of political association, thus contributed to their fatal misfortune. More so than in a war, where from the outset it is the collective body of society that is attacked. Here it feels the pain in its own body. (...)"

2- The political response to "emergency": an American story

From his work seeking to demonstrate the extent to which the American post-September 11, 2001 political and security response deliberately sidelined the judiciary, Stephen Holmes has drawn several conclusions, including that the concept of emergency needs to be subjected to stricter controls.3

[3] For an exhaustive presentation: Peter Holmes, "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," California Law Review, Vol. 97, April 2009, No. 2

Stephen Holmes (New York University) *"Osama bin Laden's lethal attack on America was seen not so much as an act of war, but rather as the globalized reenactment of an archaic form of revenge. It was seen as the collective punishment of random Americans for the alleged crimes of their government. To refrain from using Al Qaeda's primitive logic of eye-for-an-eye revenge would have been a prudent response."*

Executive power against the power of the judiciary

Was it really necessary, right after the attacks, to arbitrarily round up so many Muslim persons for no real reason other than fear, and out of concern that new attacks might take place? An effective public and political response would have been to release them quickly and decently. Similarly, it would have been a good strategy to refrain from torturing Khalid Sheikh Mohammed and the others who were responsible for the attacks of 9/11. It would likewise have been better not to use gratuitous acts of torture on detainees, even those considered to have high-level positions in the Al Qaeda organization, but on the contrary to prosecute them in public trials, respecting the rules of criminal justice. (...) Yet some were of the opinion that, self-evidently in their view, the use of public trials would have risked diminishing the American public's political support for foreign wars.

Administrative lawyers such as John Yoo and Julian Ku promptly came out in defense of a doctrine of counterterrorism, invoking military necessity to justify departures from the usual evidentiary principles of legal process. Along similar lines, John Yoo and Julian Ku have further claimed that decisions about how to treat enemy combatants should be made on the basis of the discretionary authority of the Commander-in-Chief, i.e., the President. They justify this doctrine not only in light of the comparative institutional incompetence of the courts in national security cases, but also on the grounds that due process would only serve the interest of the liberties of the prosecuted individual. Security interests, on the other hand, would apparently be less safeguarded by legal proceedings.

(...) The rules of criminal procedure have grown and survived over time as instruments with the dual objective of both preventing violence and limiting its impact. Relatively isolated from political pressures, the courts are the institutional guardians of proven rules such as the presumption of innocence, inter partes proceedings, and the right to call witnesses. Nevertheless, for those who advocate judicial deference to extralegal process: "The application of the rules of criminal justice to Al Qaeda terrorists [i.e., terrorism suspects] would seriously impede the killing or capture of those enemies..." According to the proponents of this doctrine of extralegality, the historical role of the courts would suggest that the rules of criminal justice have significantly impeded efforts to combat the threat of terrorism. Those who downplay concerns about this trend often believe that the United States is "over-invested in criminal law as a weapon against terrorism." However, the history of American national security policy between 2001 and 2008 strongly demonstrates the opposite, indicating instead a serious underinvestment in criminal law.

The legal emergency of politics

Far from providing a carefully calibrated response to the terrorist threat, the agenda developed by the executive branch of the United States government sought above all to override judicial authority, without clearly considering the disadvantages of such a strategy, which calls for a dominant executive branch with no framework or procedures in place to check its power. The counterterrorism "game plan" cannot be successful if it is guided by ad hoc decisions made in defiance of all rules and outside of all institutionalized procedure. A counterterrorism approach that follows the rules, on the other hand, is not only feasible but also desirable, for a number of reasons.

First of all, civil servants achieve better results, even during emergencies, when they are required to justify their actions. Secondly, there is the risk that it will be impossible to resist the temptation of a visceral and mimetic response to the killing of innocent civilians, as opposed to a strategic response, if no firm guidelines have been established in advance. Thirdly, the spectrum of threats that national security agencies must monitor and manage is so broad and complex that counterterrorism decisions need to account for a wide range of dimensions if they are to be effective. To opt for a single scenario, as did the Bush administration, unavoidably leads to serious errors.

The risk often lies in making choices and seeking solutions in haste, without considering all the diverse aspects of the evidence, and without consulting real experts who are well informed but may also at times hold differing points of view. The difficulty and the seriousness of security issues often obscure the relationship between security and liberty, particularly in a political environment where decisions are made on a discretionary basis by a small number of individuals operating inside a kind of bunker isolated from external criticism and dissent.

For these and many other reasons, it is essential to have rules and protocol in place for ordinary emergency situations. These must serve as a crucial guideline and point of reference for theorists of counterterrorism and strategic doctrine. Rules such as the individualization of guilt and legal proceedings are key elements that can help keep counterterrorism policies unaffected by partisan political issues and reactions. Of course, these rules and protocols cannot guarantee successful outcomes, but far from erecting obstacles such proceedings instead provide us with resources that can help give pragmatism and flexibility to our approach as we face these dark minds and the growth of a threat that remains deadly serious."

3- Redefining the political contract in a new context

Antoine Garapon (IHEJ): *"(...) I would like to stress the real and novel difficulties that terrorism poses to the political contract. Let's imagine that an intelligence report is provided to the courts that a given individual is the primary contact for Al Qaeda in France but that this information has been provided only on condition that its source not be revealed. To disregard this intelligence would be criminal, because it risks the lives of innocent people; to imprison this individual without evidence debated inter partes would be equally so. How should this dilemma be resolved?*

The cause of this contradiction lies in the hybrid and deterritorialized nature of this kind of terrorism. We cannot fight this as if we were dealing with enemy forces at war, because these are French nationals, and we cannot restrict their rights as our fellow citizens simply because they are our enemies. It is impossible to fight terrorism except in the framework of the rule of law and in respect for the rule of law. But we cannot simply stop at this principle, because the rule of law itself must not adapt, but rather build upon the resolution of a political problem: the problem posed by terrorism, which is an illustration of our own issues.

The solution of this dilemma is not of a judicial nature, and the only thing judges can do about it is to enforce the law ("the rule of law is not our guardian, rather we are the guardians of the rule of law" says Bernanos). The solution is to strengthen political amity among our fellow citizens - all our fellow citizens - so that terrorists appear and truly become simply misguided citizens, to see them instead as criminals, who have committed acts in violation of the law, and who have no serious political pretext for their attitude and madness. The definition of this political amity, this philia, is both constitutional and sociological. Constitutionally, it is incumbent upon jurists and politicians subject to the approval of the public; sociologically it is a responsibility we all share. It is up to all citizens, wherever they may be, to build bridges and to stimulate this political amity with newcomers, who may not yet be accepted. ***In Conclusion: the judge is the "keeper of the promises," but he can only succeed in this role if a suitable political contract is implemented.*** *In closing, I refer back to the above judge's dilemma; the judge must respect the rule of law, but this will be all the more simplified a matter under a State that has understood the message of terrorism. And no such understanding is possible in a State that reduces freedoms for strictly utilitarian purposes; that would be a trap, because it is a futile pursuit: the State can never guarantee maximum and total security to its citizens, except by suppressing all freedom - and perhaps not even that would suffice."*