12 > 13 October 2017 - Sofia

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

Terrorism and fundamental rights: the trial and implementation of sentences

By Antoine MÉGIE

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With the financial support of
the European Union Justice programme

SUMMARY

European States are prosecuting, judging and sentencing the members of groups claiming to be part of the armed jihad, with an ever-growing conflict leading to a number of trials never previously seen by contemporary justice. These cases involve: returnees from the Iraqi and Syrian war zones, recruiters, people close to jihadists who have facilitated or funded their departure to Syria or the acquisition of weapons, authors of jihadist propaganda (glorification of the jihad) or calls to violence, as well as those consulting these messages. Although this unheard-of phenomenon results from an unprecedented social situation with the departure of 7,000 Europeans (men, women and children) to the Iraq/Syria zone, it is essential also to consider it as a consequence of European criminal policies. **This perspective is important to emphasise, for while certain countries such as France, Belgium and Great Britain have decided to hold trials, other States are taking a different direction, with socio-judicial paths not necessarily involving prison sentences.**

The debate around and the judging of participation in terrorist undertakings is now taking place in a context profoundly marked by the terrorist attacks committed on European soil since 2015. Thus as Sabine Faivre points out: "The time when the terrorist act takes place is different to that of the investigation of the terrorist act and even more so to that of the terrorism trial. But it is not unusual, in the trials of terrorism suspects that we are now seeing, for events that occurred after the terrorist act (attacks) being judged to dramatically throw light on mechanisms that drove the defendant or accused to commit the act".

Defined as the moment of "truth", the trial must be the time when all the individual and collective dimensions that contributed to the offences being judged are revealed to the court, but also to the media and public opinion. In this respect the adversarial court hearing is an essential part of the process. **The question of change then implicitly arises and the way the "war on terrorism" contributes to a concrete change in judgments, but also the meaning of the sentence and its enforcement.** As Cyril Roth emphasises: "*Are we really judging the path followed by a person or a context? Are we judging the past or the future? Do terrorism trials have a dissuasive effect? Should we be using specialist judges? How can we preserve their serenity and impartiality? Can the lawyer, who is both citizen and victim, commit fully to the defence?*" It is out of a desire to try and answer these questions that this seminar was organised as the fourth stage in the European programme "Judicial response to terrorism in the light of the EU Charter of Fundamental Rights".

CONTENTS

EUROPEAN PROJECT AND PARTNERS

The balance between security and fundamental freedoms is an issue faced by the European authorities on a daily basis. This balance supposes that there is a surge in the judicial handling of terrorism placing the judiciary at the centre of this exercise in their role as guardians of individual freedoms.

The Member States of the European Union have become guarantors of fundamental rights by signing a joint charter.

Faced with the alarm generated by terrorist attacks carried out with the aim of spreading fear, judges must manage to reconcile the security issues raised by the violence of terrorist attacks and the protection of fundamental rights for all European citizens.

With financial support from the European Commission Justice Programme, the "Judicial response to terrorism in the light of the EU Charter of Fundamental Rights" project aims to reinforce practitioners' knowledge in the area of fundamental rights so that they can handle terrorism-related cases in accordance with the requirements of the Charter.

Dates of implementation: 1 July 2016 – 31 May 2018

Activities - Kit includes 4 seminars and 1 final conference:

- Seminar 1: Fight against violent radicalisation and protection of fundamental freedoms (*Strasbourg, Council of Europe – 8 and 9 December 2016*)
- Seminar 2: Terrorism and fundamental rights: the investigation and intelligence phase *(Brussels, Institut de formation judiciaire – 23 and 24 February 2017)*
- Seminar 3: The media coverage of terrorism cases *(Paris, Hôtel de Ville – 15 and 16 June 2017)*
- Seminar 4: Terrorism and fundamental rights: the trial and implementation of sentences *(Sofia, national Institute of Justice – 12 and 13 October 2017)*
- Closing conference: protecting fundamental rights in the judicial response to terrorism *(planned in Paris in March 2018)*

Partnership – the ENM is the coordinator of the following consortium:

- 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 - The intention is to train approximately 270 members of the judiciary in 10 European countries. Furthermore, 40 participants from prison administrations, the police and journalism will also be taking part in the sessions.

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

Members	Duties
1 scientific advisor – **Cyril ROTH**, Auxiliary judge at the Court of Cassation, France	- Overall scientific design of the project - Identifies the contributors - Supervises the seminar leaders and rapporteurs - Takes part in the seminars - Validates the reports on the seminars
1 project director – judge at the ENM **Nathalie MALET**, judge, International Department, ENM Replaced by **Marie COMPERE**, judge, International Department, ENM	- Responsible for instructional engineering - Identifies and validates the contributors - Supervises the entire project team - Validates the reports on the seminars
1 ENM project coordinator, **Ségolène POYETON**, International Department, ENM	- Responsible for the day-to-day management of the project - Coordinates the partners in the consortium - Point of contact with the European Commission for contract-related, administrative and financial issues
The scientific committee will be reinforced for each seminar by: - A seminar director - A rapporteur Seminar 1: **Vanessa PERREE**, *Substitut général* (deputy public prosecutor), Court of Appeal, Aix-en-Provence, France Seminar 2: **Anne KOSTOMAROFF**, *Avocat général* (assistant public prosecutor), Court of Appeal of Paris, France Seminar 3: **Nicolas BONNAL**, Judge, Court of Cassation, France Seminar 4: **Sabine FAIVRE**, First Vice-President, Tribunal de Grande Instance of Paris, France Rapporteur: **Antoine MEGIE**, Associate professor at the University of Rouen, director of the journal *Politique européenne* - Member of the editorial committee of the journal *Cultures et Conflits*, France	- Prepare the detailed programme for the seminar - Identify the contributors or contributor profiles to ask of the partners - Moderate the seminar - Draw up the report on the seminar

Scientific committee – The project will be led by a restricted team who are members of the scientific committee

SEMINAR PROGRAMME

12 October 2017

8.30 **Arrival and registration of participants**

9.00 **Opening speeches**
Miglena TACHEVA, Director of the National Institute of Justice, Bulgaria
Elie RENARD, Assistant Director of the French National School for the Judiciary, France

9.15 **Presentation of the seminar programme**

Cyril ROTH, Auxiliary judge at the Court of Cassation, project coordinator, France
Sabine FAIVRE, former honorary Vice-President, *Tribunal de Grande Instance* of Paris, seminar director, France

9.30 **The judging of terrorism suspects in the case law of the European Court of Human Rights**
Paul MAHONEY, former judge at the European Court of Human Rights, Great Britain

10.30 ***Discussion***

10.45 *Coffee break*

I. JUDGING TERRORISM CASES: FUNDAMENTAL RIGHTS UNDER THREAT?

11.00 **Protection of the judicial actors: a condition of or a curb on impartiality?**
Maurizio ROMANELLI, assistant national terrorism prosecutor, Italy

11.45 ***Discussion***

12.00 *Lunch break*

13.30 **The fair trial, public opinion and the prosecution in terrorism cases**
Paule SOMERS, prosecutor, anti-terrorist section of the federal prosecutor's office, Belgium

14.15 ***Discussion***

14.30 **Normality in the conducting of a terrorism trial: reality or illusion?**
Céline NOIRHOMME, judge at the Brussels Court of First Instance (French-speaking), Belgium

15.30 ***Discussion***

15.45 *Coffee break*

16.00 **Is it possible to guarantee all the rights of the defence in terrorism trials?**
Françoise COTTA, barrister at the Paris Bar, France

17.00 ***Discussion***

17.15 **End of Day 1**

13 October 2017

8.30 **Arrival and registration of participants**

9.00 **Supporting and protecting victims, guaranteeing their rights during and after the trial**
Nathalia MORENO, coordinator of the psycho-social department of the *Asociación Víctimas del Terrorismo* (AVT) in Madrid, Spain

9.45 ***Discussion***

II. DETAINING TERRORISTS: A SPECIAL REGIME ON THE EDGE OF RESPECT FOR FUNDAMENTAL RIGHTS?

10.00 **The detaining of perpetrators of terrorist offences in the case law of the European Court of Human Rights**
Svetlana KOSTADINOVA-SCHALL, senior lawyer with the Registry of the European Court of Human Rights, Bulgaria

10.45 ***Discussion***

11.00 *Coffee break*

11.15 **Fundamental freedoms and the detaining of the perpetrators of terrorist offences: current state of play**
Adeline HAZAN, member of the judiciary, controller general of places of deprivation of liberty, France

12.30 ***Discussion***

12.45 *Lunch break*

14.00 **The Council of Europe guidelines on radicalised prisoners**
Nadya RADKOVSKA, Head of the international cooperation department on "Enforcement of sentences" - Ministry of Justice, Bulgaria

14.45 ***Discussion***

15.00 *Coffee break*

15.15 **Adjustment of terrorists' sentences: special cases**
Vincent LE GAUDU, anti-terrorist sentence enforcement judge at the *Tribunal de Grande Instance* of Paris, France

16.00 *Discussion*

16.15 **Conclusions and thanks**

16.30 **End of Day 2**

INTRODUCTION

Since the beginning of 2018, the judicial diaries of the European States have been full of the first stages of a long road of hearings that will lead to the judgments concerning the series of terrorist attacks in Europe that began in 2015 with the murders of the Charlie Hebdo journalists. The same week saw the trial in Brussels of Salah Abdelslam, while in Paris three people were appearing in court for having put up the two other perpetrators of the attacks on the Parisian café terraces on 13 November 2015. These two hearings were barely over when on 13 February 2018 another trial began, this time under even more hyper-secure conditions, that of Rakhmat Akilov, the terrorist responsible for the attack in Stockholm that resulted in 5 deaths in April 2017. The end of 2017 had seen another important terrorism trial in France with the trial of Abdelkader Merah (October 2017), brother of Mohamed Merah who committed several attacks in 2012 against soldiers and a Jewish school.

This multitude of trials shows a justice system facing political, social and media pressure on a daily basis, as it deals with the silence of the accused (Abdelslam trial), acknowledgment of the facts (Akilov trial) and untimely outbursts in court seen by some as provocation (trial of the "alleged 13 November accomplices", Merah trial). The judicial, media and political logics that have accompanied these trials have laid before the eyes of European public opinion some very singular scenes of terrorism-related justice. Over three hundred accredited journalists were present at the Abdelslam trial, around a hundred for the trial of the "alleged 13 November accomplices". Legal accusations that raise questions: "violence against police officers" or "terrorism" for S. Abdelslam, "harbouring a criminal" or "participation" in a terrorist group for the "alleged 13 November accomplices", "lone wolf" or "organised group" for A. Merah and R. Akilov? In the latter, Swedish case, there were over a hundred and fifty civil parties, whilst in the French trial of the "alleged 13 November accomplices", by the end of the hearing there were over six hundred civil parties, direct or indirect victims of the terrorist attacks or the arrest a few days later of two of the perpetrators, Abdelhamid Abaaoud and Chakib Akrouh.

These trials offer an important view of the judicial scene with regard to the guilt and origins of the terrorists' engagement, but also to the place of the victims, the defence strategies or the media and political coverage of this political violence. In parallel to these trials, other hearings are now taking place in Europe, this time concerning the returnees from, and aspiring departees for the Iraq-Syria theatre of war. **All these trials enable us to understand that the criminal justice system is in no way remote from the day-to-day practices of the fight against terrorism and that it remains central to how ideological and/or violent radicalisation is handled**. European States are prosecuting, judging and sentencing the members of groups claiming to be part of the armed jihad in an ever-growing flow of cases the like of which has never previously been seen by contemporary justice. These cases involve: returnees from the Iraqi and Syrian war zones, recruiters, people close to jihadists who have facilitated or funded their departure to Syria or the acquisition of weapons, authors of jihadist propaganda (glorification of the jihad) or calls to violence, as well as those consulting these messages. **Although this unheard-of phenomenon results from an unprecedented social situation with the departure of 7,000 Europeans (men, women and children) to the Iraq/Syria zone, it is essential also to consider it as a consequence of certain European criminal policies.** The legal proceedings against those accused of being members of terrorist groups in this war zone are the concrete manifestation of the political and judicial will to criminalise to an ever greater extent commitments to a form of Islam considered as radical and potentially violent. **This perspective is important to emphasise, for while certain countries such as France, Belgium and Great Britain have decided to hold trials, other States are taking a different direction, with socio-judicial paths not necessarily involving prison sentences.**

One of the points common to these different trials held in European countries since 2015 is the fact that the debate around and the judging of participation in terrorist undertakings is now taking place in a context profoundly marked by the terrorist attacks committed on European soil. Thus as Sabine Faivre points out: "*The moment when the terrorist act takes place is different to that of the investigation of the terrorist act and even more so to that of the terrorism trial. But it is not unusual, in the trials of terrorism suspects that we are now seeing, for events that occurred after the terrorist act (attacks) being judged to dramatically throw light on mechanisms that drove the defendant or accused to commit the act. The decision to commit an act of terrorism, however, always remains an individual one, and is a mix of circumstances and situations (religious and ideological context, methods of communication). A detailed knowledge of all these various elements is indispensable to analyse the alleged facts and assess their seriousness. Only the materiality of substantiated serious facts can justify finding an accused guilty; mere alleged dangerousness cannot be enough to convict. To decide otherwise would be to disregard the democratic functioning of society. Terrorism seeks to undermine democracy by attempting to weaken Fundamental Rights*".

Terrorism-related court cases provide a stage that presents the important elements we need to understand in the construction and then the fixing of the "judicial truth" in the face of a growing violent political commitment in the name of the armed jihad. These trials also offer a precise and hitherto unseen snapshot of the "terrorist scene",[1] since virtually all the players are gathered in one place (the courtroom) in a "pacified" albeit highly secured confrontation. The various components of the judicial authorities (judges, prosecutors, lawyers, court experts), but also society, the terrorist groups, the media and the security authorities are all confronted to define, according to the rules of the adversarial hearing, the "terrorist situation" and its judgment. The contextual and social logic behind this stage and its players (the accused, the judiciary and lawyers) is revealed as the proceedings advance and different questions are asked. In fact what is being questioned is the logic of the legitimation produced by the players involved. Indeed, as Van Hamme and Beyens emphasise with regard to the construction of court judgments, it is only possible to grasp the concrete and visible usages of the power of the criminal justice system if we "*look at how seriousness is assessed in the context of the action".*[2] Defined as the moment of "truth", the trial must be the time when all the individual and collective dimensions that contributed to the offences being judged are revealed to the court, but also to the media and public opinion. In this respect the adversarial court hearing is an essential part of the process. **The question of change then implicitly arises, and the way the "war on terrorism" contributes to a concrete change in the counter-terrorism system and in particular in the meaning of the sentence and its enforcement.** As Cyril Roth emphasises: "*Are we really judging the path followed by a person or a context? Are we judging the past or the future? Do terrorism trials have a dissuasive effect? Should we be using specialist judges? How can we preserve their serenity and impartiality? Can the lawyer, who is both citizen and victim, commit fully to the defence?".* It is out of a desire to try and answer these questions that this seminar was organised as the fourth stage in the European programme "Judicial response to terrorism in the light of the EU Charter of Fundamental Rights".

Within the context of the experiences shared over these two days, **Europeans practitioners have been able to consider the central issues that the criminal terrorism trial raises with regard to fundamental rights.** This sharing and comparing of points of view first led us to ponder the ***form of these trials*** in order to understand within what limits, under the political effects of terrorism, the conditions allowing for a fair trial may be strained **(Part 1).** The courtroom stage oscillating between the exceptional and normality, the question very

[1] Antoine Mégie, « Ancien » et « nouveau » terrorisme: réflexions autour d'une distinction théorique », *Revue Canadienne de science politique*, vol. 43, 2010.

[2] Françoise Vanhamme, Kristel Beyens "La recherche en sentencing: un survol contextualisé", *Déviance et Société* 2007/2 (Vol. 31), p. 204. See also on the ethnography of the Thomas Scheffer, Kati Hannken-Illjes and Alexander Kozin trials, *Criminal Defence and Procedure*. *Comparative Ethnographies in the United Kingdom, Germany, and the United States,* Palgrave Macmillan, New York, 2010.

clearly arose concerning ***the status and strategies of the different actors in the criminal trial*** **(Part 2)**. Finally, in order to give satisfactory consideration to the judgment, it became clear that it is essential to question ***the meaning of the sentences given*** in particular by hearing what the actors in charge of enforcing prison sentences have to say on the matter. The aim was therefore to complete the picture already sketched out in the pre-programme reports (Reports 1, 2, and 3) on the different European experiences in matter of detention and judicial supervision policies **(Part 3).**

PART 1. TERRORIST TRIALS: JUDICIAL SCENES BETWEEN THE EXCEPTIONAL AND THE NORMAL

In October 2013, two men were arrested by police in their car near Tower Bridge in London. Erol Incedal, from South-East London, and Mounir Rarmoul-Bouhadjar are said to have been planning to assassinate several famous people including the former Prime Minister, Tony Blair. The search for and possession of the addresses of these politicians as well as documents on how to make a bomb constituted the main items of evidence presented officially by the British authorities. This case quickly took an exceptional turn following the prosecution's decision to deal with the judgment phase of this case in total secrecy. In concrete terms, this involved the anonymity of the accused and the absence of the media or public during the hearings. The main argument put forward to justify such a position lay in the fact that possible unidentified accomplices could still be at large. In the face of this position of "silencing" the judicial discourse, the British media and their lawyers took different decisions. (For a full presentation of this case, cf. **Report 3**). The trial of Erol Incedal and Mounir Rarmoul-Bouhadjar, which is due to be held in camera in Great Britain, is, from this point of view, a particularly important example of how in certain cases terrorism cases can compromise the basic principles of due process.

The recent trials held in Paris, Brussels and Stockholm have also seen a particular form of militarisation of the courts, even affecting the organisation of courtrooms and the specific ways in which accused and defendants are treated. This type of exception linked to the terrorist qualification of these trials is no new phenomenon. The trials in the 1970s of the members of European revolutionary groups (Red Brigades, RAF, *Action Directe* for example) already featured this type of high security and "extraordinary" form.[3] Much more recently other trials have also marked a change in the way terrorism trials are staged.

[3] Audren, Frédéric and Linhardt, Dominique, "Un procès hors du commun ? Le procès de la Fraction Armée Rouge à Stuttgart-Stammheim (1975-1977)", *Annales. Histoire, Sciences Sociales,* 63rd year, no. 5, 2008, p. 1003-1034.

Trial concerning the murder plot against Commander Massoud, Brussels, 2003

By *Céline NOIRHOMME*, judge at the Brussels Court, Belgium

"This was the first real terrorism case in Belgium (trial of the perpetrators of the attack that killed Commander Massoud on 9 September 2001), and in addition, it took place against the backdrop of the aftermath of the 11 September 2001 attacks (…). Given that Belgium was taking its first faltering steps in this area, the Tribunal Correctionnel *and the court had to "create everything from scratch" and then adapt according to what they learned.*

Exceptional measures were taken for these trials. For reasons of security:
- this case was heard in the Brussels assizes court, as it had been adapted to try Patrick HAEMERS, that is, with a secure glass dock in which the accused appeared,

- measures were taken regarding the public, but also the lawyers (our mobile phones were confiscated by the police, briefcases searched by hand, we had to remove our shoes so that they could be examined, passed in a metal detector, etc.),

- the accused were brought into the dock blindfolded, in handcuffs and with their feet shackled,

- the judges were driven from their homes to the courthouse with large police escorts (…)

Guaranteeing the safety of the judicial actors is an unavoidable, sine qua non preliminary condition without which it is not possible to hold an impartial, independent trial. It is also the duty of the whole of the State to guarantee the latter (…)".

Under these conditions, the form of the trials becomes a crucial issue in itself with regard to the principle of the "right to a fair trial". From this perspective, ECtHR case law offers an important reference line, as several interventions underline. A reference that is even more relevant at a time when several States are having, in diplomatic, political and judicial circumstances that are far from clear, to decide whether some of their nationals can be judged by *ad hoc* courts overseas, such as in Kurdistan.

1.1. Composition of anti-terrorism courts in view of ECtHR case law

Article 6 of the ECHR - According to **Paul Mahoney (former ECtHR judge)**, *"The general philosophy of the ECtHR relating to the trial and the rights of the defence is recapitulated in the judgment of the Ibrahim and Others v. UK* case (For a comprehensive presentation of this case ***cf. Report 2***). (…) *The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. There can be no question of watering down fair trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration (...)* However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights".[4] Under these conditions, Article 6 guaranteeing the right to

[4] *Ibrahim and Others v. UK*, no. 4 above, §252.

a fair trial constitutes a fundamental limit. Several issues, such as the investigations or the forms the courts take, must be considered in order to assess whether Article 6 is really met. Indeed, "*Respecting the rights of an individual in accordance with Article 6 implies a fair trial, including in the way the prosecution is conducted*". In other words, for **Paul Mahoney** *"this does not only concern what happens in front of the judge or inside the confines of the courtroom - i.e. the "judgment" and the "trial" in the strict sense* (…)".

Special courts – As explained by judge **Paul Mahoney:** *"(…) as the status and composition of special courts are to a large extent legislative considerations, therefore linked to the organisation of the judicial system in each country, the Strasbourg court has therefore prudently stipulated that the examination in relation to the ECHR must not be done in the abstract, but be limited to a verification of the way the court works and whether this has undermined the principle of the fair trial. (…)"*

"A few States have attempted to use special courts, military courts in particular, to try terrorist crimes. It seems that such procedural frameworks are considered more suitable than those of the ordinary courts when dealing with problems of political violence. (…) And yet the ECHR outlaws such judicial systems. Important questions have arisen, in particular concerning the question of independence and impartiality with regard to the defence counsel in such courts. According to the terms of one British case dating from 1984 on prisoners' rights (members of the Irish Republican Army), certain conditions are necessary to determine whether a court is sufficiently independent on matters such as the rules of appointment, the duration of their duties and the existence of guarantees against outside pressure. In another case, dating from 1998 and concerning Turkey, a court martial with the power to judge civilians was declared contrary to Article 6 due to reasonable doubts about the independence of such a court made up of members of the armed forces. (…) Finally, the requirement for any court to be "established by law" means that a court should not be set up for ad hoc *reasons connected to the type of case (…)".*

Öcalan v. Turkey - *"The most important case judged on this matter by the Strasbourg court is unquestionably the Öcalan v. Turkey judgment in 2005. The trial of the PKK leader led to the impartiality of the special court being challenged on the basis of Article 6§1. Indeed, in the original composition of the bench there was a regular army officer belonging to the military legal service. Although he was replaced by a civilian during the course of the proceedings, the Strasbourg court considered that the impartiality requirement was not met, stating that such a composition must be effective throughout the entirety of the criminal proceedings"* **(Paul Mahoney)**.

The principle of Open Justice *– "This principle is highly dependent on the question of state secrecy and the publicising of criminal proceedings brought against persons accused of terrorist offences. Whilst Article 6 §1 guarantees "a public hearing", it is also expressly stipulated that the "press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society". The aim of the reference "to democratic society" is the application of the principle by which exceptions to rights are strictly interpreted. In other words, the interest in not following the usual rule on publicising criminal proceedings must be demonstrated. This must be objectively justified in the particular circumstances and be kept to a strict minimum" (***Paul Mahoney)**. UK (For a more comprehensive presentation of this issue ***cf. Report 3***).

1.2. Trials of "returnees" in the *Tribunal Correctionnel*: maintaining the ritual of the "*correctionnel*" trial?

Since 2015, faced with an unprecedented social reality, with over 7,000 Europeans on the ground in the Syrian war zone, the European countries have opted for different criminal policies concerning returnees, varying from automatic judicialisation, preventive internment and socio-judicial supervision in an open setting. Several States, including France and Belgium, because of their choice of the virtually systematic judicialisation of returnees and aspiring departees, have also had to cope with an unheard-of number of terrorist cases in their "*tribunaux correctionnels*" (lower criminal courts) since 2015.

This massive increase in the number of cases will have very concrete consequences on the existing forms of trial hearings, which are being squeezed between the need to preserve court ritual and political and media over-exposure. The repeated, daily occurrence of these judgments reinforces a certain image of normality, which in some cases is destroyed by the media and political coverage of these singular affairs. Cases which, unlike most of the other cases dealt with, then find themselves at the centre of public debate.

Trials of members of the Syrian networks in the *Tribunal Correctionnel* – The Belgian experience

By *Céline NOIRHOMME*, judge at the Brussels Court, Belgium

"*At the judgment stage, normality is the reality. It is not an illusion, in my opinion. I have been lucky enough to experience the change in the way terrorism cases are dealt with from the inside (…), it seems to me useful to look back at how Belgian justice "started out" in this area (cf. Trial concerning the murder plot against Commander Massoud). Indeed, I think that today, if we have arrived at a situation of normality in the judgment of "terror" defendants, it is due in particular to our experience, our history and the lessons that have been learned from them*".

The courts - "*In Belgium, the Penal Code divides offences into three categories, "*contraventions*" which are petty offences (dealt with by the police court (*tribunal de police*)), "*délits*" or misdemeanours (dealt with by the lower criminal court (*tribunal correctionnel*)) and "*crimes*" (dealt with by the assizes court (*cour d'assises*)). The law has provided for a system of "*correctionalisation*" of crimes which consists of reclassifying a "*crime*" as a "*délit*" and considering that there are mitigating circumstances. The crime having been re-interpreted as a misdemeanour, it then comes under the jurisdiction of the* tribunal correctionnel *and no longer that of the assizes court. Given the cumbersomeness of proceedings before the assizes court, the list of crimes that can be "correctionalised" has systematically been extended over the decades, and since 1 March 2016, all crimes, without exception, can be reclassified in this way. (…) In Belgium (in the first instance), legally almost all cases must be examined by a court consisting of a single judge. Indeed, only a defendant charged with a crime liable for a theoretical sentence of 20 years has to be tried by a bench of judges. When the President of a court considers that a particular case, when the sentences are not over 20 years, should nevertheless be examined by a court made up of three judges, he/she must issue a justified decision setting out the reasons why this case requires a bench of judges. In view of the sentences that can be imposed on defendants accused of participating in the activities of a terrorist group (5 or 15 years maximum), we are in the realm of cases that legally must be tried by a single judge (…)*".

Courts with a bench of judges - *"The fact that terrorism defendants are nevertheless tried by a bench of judges is therefore the first particularity, in the sense that they are treated differently from ordinary defendants. From what I have seen, this is not a Brussels exception, as it is also the case in all the legal districts of Belgium. I do not believe, however, that this difference constitutes a threat to suspects' fundamental rights. Quite the contrary in fact, our law considering that the bench of judges is an extra guarantee in favour of the accused.*

In terrorism cases, the main reason for this is so that it is not only one person who, in the eyes of the population and in those of the accused and their associates and relatives, is responsible for the convictions. In other words, there is a desire not to "personalise" the judge giving the verdict. In Brussels, these are not the only type of cases for which a bench of judges has been introduced whereas normally they would be tried by a court with a single judge. Sexual charges are also examined by a bench of judges, and this is explained by other reasons.

Terrorism charges - "*(…) Most "terrorism" proceedings concern individuals charged with having taken part in the activities of a terrorist group, either as a member or a leader. This is the charge that applies to all those concerned by departures to join a terrorist group abroad; those who went (or tried to go), but also those who have indoctrinated others or assisted departures in any way whatsoever, or provided assistance to jihadists in the places concerned, etc. (…) These are crimes punishable by 5 to 10 years and 15 to 20 years' imprisonment respectively. If the charges are "*correctionalised*", members of groups can be sentenced to a maximum of 5 years and leaders up to 15 years. Given the number of these types of cases (Brussels having to try the great majority of them), as soon as the new judicial year began in September 2015, the President of the Brussels Court of First Instance (French-speaking) created two chambers exclusively for these cases".*

Publicising cases and judgments: "Before the hearings begin, the case file is held at the court registry and can be consulted in accordance with the usual rules, and in Brussels, lawyers are even allowed to take photographs of the documents or to obtain a complete copy made by the registry staff. The exhibits

are similarly accessible to the parties without any more restrictions than in other cases. The date of the pronouncement of the verdict is announced on this occasion, at the most 6 weeks later. At the verdict hearing, we read out the entire judgment, which can vary in length depending on the case, and again, depending on the number of accused involved. Our longest judgment was over 300 pages long. The pronouncement of such a judgment can take all day. "Terrorism" cases are judged just like all the other cases.

Normality vs Exception - *"In conclusion, I believe that notwithstanding certain specificities and differences, normal treatment of terrorism defendants by trial judges is a reality in Belgium. I think that this normality has been made possible mainly by two things:*

- The application to these defendants of all the "ordinary" judicial rules, i.e. there is absolutely no exceptional procedure,

- and the number of these types of cases tried over the last fifteen years or so, which has led to them becoming banal".

Singular hearings: the image market and judicial specialisation This apparent normality is sometimes destroyed when terrorism trials are the subject of substantial media coverage, even over-exposure. In certain situations, such as the trial of the Strasbourg network in France (June 2016), the image market seems to be guided by a quest for the "ideal-type" of a jihadist. This type of situation sometimes leads to the production of misleading or stereotypical images.

In June 2016 in France, the press only reproduced a drawing of the dock of bearded defendants, when the second dock facing it contained three clean-shaven young men. Questioned about the absence of the close-shaven defendants in the images published, a journalist replied "It's sad to say, but it won't sell as well". A journalist was also overheard whispering to her colleague to join her on her side of the courtroom so that she would have a view of the "bearded ones".[5] This playing with image, however, does not seem to be all on one side, if the swaggering attitude and hyper-virile look favoured by some of the accused is anything to go by. This adaptation to the media's expectations reached its peak when certain accused asked for permission to pray during the hearing (April 2016) and during a break in proceedings in front of the cameras (December 2016). Although the television channels will only come out for the highest profile cases, the print media assiduously follow this particular kind of judicial news. Familiar with these hearings, they generally maintain direct contacts among the protagonists in the trial (prosecutor, lawyers, even families when the latter address them as "specialists" in these cases) (cf. **Report 3**).

The second element which, in our opinion, illustrates the singular dimension of these trials lies in the emergence of a specific social and judicial space, which has built up as cases and trials have multiplied. A constellation of actors indeed seems to be specialising in these terrorism cases, in particular defence lawyers, presiding and other judges and of course public prosecutors who often demonstrate a sophisticated knowledge of the geopolitical background to jihadism since the 1990s, but also of the interactions between networks and recruiters. This specialisation, which should be read through the prism of the national judicial organisations (cf. **Report 2**), is of course without consequences on the place of the different actors in the trial.[6]

[5] For an analysis of the media effects in terrorist trials, see in particular: Fanny Bugnon, "Quand le militantisme fait le choix des armes. A propos des femmes d'Action directe et des médias", *Sens public*, May 2009.

[6] For a more comprehensive study of the French case: Jeanne Pawella and Antoine Mégie, "Juger dans le contexte de la "guerre contre le terrorisme : Les procès correctionnels des filières djihadistes", *Les cahiers de la Justice*, 2017.

PART 2. PARTIES INVOLVED IN THE TRIAL

If the courtroom stage has oscillated between the exceptional and normality, the question very clearly arose concerning the status and strategies of the different actors in the criminal trial (Part 2). The different interventions of practitioners have each in their own way revealed issues of a practical, judicial and political nature concerning judges, defence lawyers or even civil parties. Certain issues are specific to the anti-terrorism context of these trials.

2.1. Judges faced with terrorist violence

The "terrorism trials" of returnees and aspiring departees are held following a ritual more or less identical to that of ordinary "*correctionnel*" cases. The particular ritualisation of the special assizes courts does not prevail in the *tribunaux correctionnels* (lower criminal courts), giving the hearings in the air of "normality", sometimes quite remote from what public opinion pictures for "terrorism cases". Hearings open to the public, the short distance between the public benches and the accused in the dock, or the direct contact that is possible with the lawyers or the defendants (when they are not held in custody) and their families reinforces this impression of non-exceptionality, in addition to the virtually daily repetition of these cases. Nevertheless, this maintaining of the rituals of a day-to-day justice is not without raising some questions relating to security, according to the members of the judiciary involved, who often place this important question at the centre of their concerns. As emphasised **by Céline NOIRHOMME (judge at the Brussels Court)** in the Belgian case**:** *"the security measures are decided, by the police and the executive, on a case-by-case basis according to the specific circumstances of the case concerned and not generally on the basis of the type of charges (…):*

- we sit in an "ordinary" courtroom at the tribunal correctionnel*, where all the accused, like any other defendants, sit on a bench rather than in a dock,*

- the lawyers can keep their mobile phones, do not have to take off their shoes and their briefcases are not manually searched,

- the defendants are brought into the courtroom "only" in handcuffs and these are removed as soon as the hearing begins,

- we (both judges and prosecutors) come to the courthouse by our own means and enter through the same door as the free defendants and the public (…)".

The closeness of all the actors in the Courthouse regularly leads to questions about the absence of importance given to the safety of the judicial actors, whether in the court (meeting defendants not held in custody or their families in the public areas, etc.) or outside (public transport, car parks).

"Judging in the context of terrorism" - The Italian experience

By *Maurizio ROMANELLI*, assistant national terrorism prosecutor, Italy

The safety of judges and prosecutors – *"How has Italy confronted the problem of the protection of judges and prosecutors? This does not only mean protecting prosecutors, but also judges, in other words all the judicial actors, and also lawyers. (...) Guaranteeing the safety of the judicial actors is an unavoidable preliminary condition without which it is not possible to hold an impartial, independent trial. It is also the duty of the whole of the State to guarantee the safety of all the judicial actors (…)"*.

The Italian experience – "*Italy has been confronted with organised crime, firstly with the high-level Mafia contingent (Cosa Nostra, etc.) and secondly, with domestic terrorism (left or right-wing). These 2 serious criminal phenomena are still a very big problem, and they represent a threat to national security and the safety of judges and prosecutors. For many years, we have received threats against judges and prosecutors and attacks have been committed. Judges and prosecutors have suffered and died in the course of their professional duties... there is a long list of victims among the judiciary. At least 26 judges and prosecutors have been killed whilst doing their job. A university professor who was Vice-President of the High Council of the Judiciary was killed while he held this position. (…) Some were completely deprived of protection. Others were protected. Concerning those who were not protected, for me, this is a responsibility of the State. In many cases, the fact that the judges and prosecutors were protected did nothing to stop the work of the terrorists. I would mention the case of Judge Falcone, who benefited from maximum protection (exceptional measures including, for example, using a government plane to travel from Rome to Palermo). He was killed by an explosion on the motorway where his plane was landing. The problem of the protection of judges and prosecutors comes from experience, those who are threatened must be protected".*

Judging while under threat – "*I believe there are two reasons that explain the threats against judges and prosecutors: 1) The level of knowledge that a judge can have about the criminals he/she is fighting: a single judge can possess all this knowledge. Criminals can become aware that there is one person who knows what they are doing. In certain investigations, a judge can be the most important person. Which means that for the criminals, he/she is the main problem. In some cases, another aspect must be added: if this judge's work has led to particular results. To return to the fate of Judge Falcone: the fact that he was the first to obtain statements from within Cosa Nostra, enabled the 1st big Mafia trial to be held.*
2) Eliminating a judge can slow down the proceedings or delay the trial. This is a central aspect that tore the country apart during the period of extreme left-wing terrorism. It was difficult to put together a bench of judges. The danger also extended to lawyers: they refused to defend these people. Many lawyers refused to do their job, and the accused were defended in the end by the president of the Turin Bar, who said that the conduct of a trial had to be guaranteed. He was killed by the Red Brigades (they claimed responsibility for the murder). Judges and prosecutors are part of the State that must be overcome (according to the terrorists' vision); they must therefore be eliminated, according to them. The judges and prosecutors killed by the Red Brigades were the "best", the ones most open to the public, the ones most attentive to human rights. They were involved in plans to reform the system. I remember the pamphlets demanding the murder of the best examining judge in Milan, who had led several anti-terrorist trials. He was killed as he went to the university to give a lecture on criminal law. He was part of a fraction of the judiciary that guaranteed defendants' rights.

A response in terms of institutional organisation – *"The responses provided by the judicial authorities to limit the level of threats must take account of the type of organisation of the institutions. Each head of a judicial department must take charge of this problem. When I was coordinating the anti-terrorist department in Milan, I decided that all the investigations on IS would be conducted by all the judges and that all the judges would be able to conduct the trials. I decided to take part in these investigations because I enjoyed a high level of protection myself. I believe it is necessary to adopt organisational measures, for example when we were conducting very sensitive cases against Cosa Nostra, there were plans for a "spare" 2nd chamber: there was a deputy for each holder of a position, everyone took part in the deliberations: threatening one judge could not therefore have any repercussions on the conduct of the* trial".

2.2. The defence seen by judges and prosecutors

"An active defence" – According to **Sabine Faivre (Judge, France),** *judges expect "active defences". The rights of the defence must be exercised fully and the lawyer is always entitled to raise procedural incidents. Although the multiplication of incidents can be irritating, the fact remains that a response must be given to them, either during the hearing or in the judgment. In France, it is up to the judge to make a statement on the alleged facts that can be presented for and against the accused. It is important that the lawyer should seize upon the elements highlighted in this way and point out to the court the weak points in the statement, but also those in the case file. The hearing is the time when all questions can be raised. The defence has a duty to point out the weaknesses in any imperfect findings and contradictory statements. The construction of the judgment must respond to these weaknesses and draw the necessary consequences. The decision on the defendant's guilt is reinforced by this analysis. It will then be more readily accepted...*

It is intellectually stimulating to be obliged to engage in an examination of the evidence from both sides. "No argument raised is ever ridiculous, the most insignificant question will allow progress to be made on the merits of the case. The more questions a lawyer asks, the more he challenges the evidence in the case file, the better the decision will be (…). The court is obliged to respect this adversarial procedure".

In a similar approach, prosecutor **Guillaume Portenseigne (Prosecutor, France)** emphasises that *"For those who have already prosecuted terrorists, you often feel vested with a mission that goes beyond the usual job of the public prosecutor, with the defence of democratic values and the protection of citizens. (…) There is no good justice, one which repairs social ties, without an extremely strong defence in matters relating to the fight against terrorism. (…) It is fundamental that a defence should be able to exercise its rights in these matters, as in terrorist cases we will often be calling for and handing down very heavy sentences. In particular because there is the pressure of public opinion, from victims, successors, civil parties, as well as more diffuse political pressures. In addition, all the judicial actors apply a principle of absolute precaution in matters relating to terrorism, which means that, whatever your place in the criminal justice chain, you cannot socially accept any taking of risks. If all these elements are not brought together, it is possible to get a case wrong, to miss the essential factors in the defendant's character for example. Which will require the very particular attention of the defence*. "

Defence on the merits or rupture defence? For **Guillaume Portenseigne**: *"We expect a criminal defence to be able to exercise all the rights attributed to it. In France, there is no longer an exceptional regime as the law allows the lawyer to exercise all the defence rights, including control of the proceedings in terms of nullity and legal issues. It is not because these are terrorism-related cases that there is no risk of nullity, even if it's hard for a prosecutor to say. For example, in one case that we dealt with, two days before the trial of jihadist network, the lawyer asked a constitutionality question concerning the offence of "criminal conspiracy in view of a terrorist undertaking". This obliged us to analyse the law in relation to the French constitution. (…) I am very attached to the lawyer basing the defence on the merits, that is to say on the evidence of guilt. Every country's law has its specificities - in France we have the offence of "criminal conspiracy in view of a terrorist undertaking" (which makes it possible, for example, to take action against a planned attacked on the basis of the preparatory acts), for which the evidence can be thin. The role of the lawyers is to be able to challenge this evidence without us, the prosecutors, having to fear the debate. We come out of it stronger (…) Do I expect the lawyer to conduct a rupture defence? We have had them in Basque terrorism cases. And Carlos is also contesting the legitimacy of the tribunal. It seems to me that it is not effective as it has never prevented a court from giving a*

guilty verdict. The fact that it is a terrorism case must not prevent the defence from exercising its rights, they must all be guaranteed and exercised. The mission of terrorists' defence lawyers is an extremely complicated one (…). An example is the case of A. Merah, which raised the question of the anonymisation of the testimony of police who came to explain the investigation, the evidence against the accused, with a succession of investigating officers who refused to appear in court (they gave their evidence by video-conference). It can be considered that this prevents the lawyer from exercising his rights fully (…), but it enabled the lawyer to instil a doubt as to the truthfulness of this testimony, so in the end anonymisation, which could have been a curb on the defence's rights, was turned round and used against the prosecution. This is the nobility of the lawyer's profession, and the democratic requirement in matters relating to terrorism".

The defence and the character of the accused – On this point **Sabine Faivre** emphasised that: *"All the evidence relating to the defendant's character is important to the judgment (e.g. the defendant's past family life, the geographical and sociological origin of a network, how it is organised, the conditions of detention, whether or not the defendant has been sent to a special prison unit). Concerning the period of imprisonment on remand, the court must be provided with the reports from the prison in order to know how the accused has behaved since he was imprisoned, and in particular what the signs of radicalisation are. These documents, which are difficult to obtain from prisons, arrive at a late stage during the trial; like any other factor considered for the judgment, they must be subjected to adversarial discussion. Terrorism cases that come before the* tribunaux correctionnels *are often totally lacking in information about character, and this is a problem because the defendant's character cannot be properly assessed just through impressions. It must be documented with character reports, psychological and even psychiatric examinations. It is important to be assessing reality, the chaotic life pathway, evidence of family ties. This information is important to get a grasp of the mechanisms that led the individuals concerned to leave behind their normal environment and embark on a process of violent radicalisation. Character is important to understand the decision to commit acts and it is also an important factor in deciding on the length of the sentence".* For **Guillaume Portenseigne** *"the lawyer has a role to play in terms of the defendant's character, often the weak element in terrorism cases, as if understanding the terrorist was a way of excusing him, which is not the case. We need to understand, but sometimes psychological reports are ignored (although they are mandatory in criminal courts, they remain optional in the* tribunaux correctionnels*). People are not born terrorists, they become them, and it is important to understand this".*

The defence seen through the prism of the ECtHR - The question of the defence and its status is of course at the heart of ECtHR case law, as **Paul Mahoney** reminded us: "*The imperatives of the fight against terrorism are often invoked by States as reasons for imposing special restrictions on the suspect, in particular concerning his contacts with the outside world, with his lawyers, or even (on) his access to his case file. Such restrictions, if they are not minimal or accompanied by compensatory safeguards, encroach negatively on the defendant's rights, which are protected by Article 6 of the ECHR. (…) The Öcalan case*[7] *provides an instructive example of what can pose a problem and what the prosecution and the judicial authorities must not allow. The conditions of extreme security around the trial and the detention of Öcalan made his access to his defence counsel problematic. Thus his detention in a high-security prison on a very remote island added to his serious problem of entering into contact with his lawyers. He was therefore only able to communicate with them through a third party, and he and his lawyers were only able to access the case file at a very late stage. Finally when his lawyer did gain access to him, the length of the visits was very restricted. The overall effect of these difficulties led the Strasbourg court to say that in this affair the principle of a fair trial, as set out in Article 6, had been violated".*

[7] *Öcalan,* n. 22 above, §§130-148.

The defence's limited access to the case file – According to **Paul Mahoney:** *"In terrorism trials, it is common that certain items of evidence are not made available in accordance with normal procedure, due to the need to protect witnesses (including in particular under-cover agents and informers) or national security (namely the methods and techniques used by the intelligence services). National courts may decide, for example: 1) to keep certain witnesses anonymous, 2) to limit the questioning of a witness by the defence 3) to limit the defence's access to the case file because it contains confidential documents. Applying the case law that has developed in matters relating to serious crime*[8]*, restrictions on the "normal" rights of the defence must be objectively justified, both generally and in the particular circumstances of the case. This then means that a certain number of compensatory mechanisms or safeguards capable of counterbalancing, as far as possible, the limitations facing the defence must be included in the procedure*".

"The Special Advocate" – On the question of access to the case file, **Paul Mahoney** mentioned the system "*of Special Advocates, those in the British courts being the example of a technique deemed satisfactory by the Strasbourg court. Special Advocates are independent lawyers who have been granted special security clearance and are appointed by the court. The idea is to protect the interests of the defence whilst then giving access to secret and confidential evidence".*

2.3. Victims' rights: the trial is a singular phase

[8] See, e.g., *Rowe and Davies v. UK*, n. 37 above, §§60-62, and the earlier case-law authorities cited there.

"Supporting, protecting and guaranteeing victims' rights during and after the trial" - The Spanish experience

By *Natalia MORENO*, coordinator of the psychological department of AVT, the victims of terrorism association (Madrid)

The victims of terrorism in Europe – *"Over the last few years, terrorist attacks in Europe have killed a lot of people. Spain, for example, has seen 1,300 deaths. If we take into account the friends and family of the individuals killed, over 22,400 people have been affected by terrorism in Europe. Is terrorism really any different from other traumatic event? According to the scientific literature, yes it is. The concept of terrorism is a violent form of struggle intended to create a climate of insecurity and terror; it concerns everyone and affects society as a whole, directly attacking the rule of law. The psychological consequences vary according to the victims: the terrorist act leads to a traumatic process, an event that creates chaos and turmoil, a feeling of terror, causing people to consider the world as a precarious place to live. Terrorism is different because of the unpredictable and especially deliberate nature of the events, which leads to very considerable psychological consequences (…)"*.

Terrorism as trauma – *"Not long after the 11/9 attacks, we began to develop studies on the psychological after-effects. These studies have shown that all victims of terrorism will develop trauma. Most people will manage to recover from the trauma, but some are unable to. Terrorism causes disorders and can lead to severe depression. These disorders can persist over time and may appear alongside other effects. There is what is known as post-traumatic stress, which manifests as a depressive disorder: feelings of fear/threat and loss. It is natural that after such a situation a feeling of fear should set in, but if no work is done on that fear, it can turn into anxiety. Victims therefore also have a real need for psychological therapy*".

Victim support – *"In Spain, 22,000 people have been affected. Some important legislation has been passed, such as the Law of 2012 which provides for full protection of victims in order to put them on an equal footing. The question of compensation is covered: if there is no spouse or children, the victims' compensation is given to relatives. When there is no judicial judgment, no identified perpetrator: 250,000 Euros. Some victims have received over 1 million Euros for the loss of their relatives, others 100,000 Euros. Spouses and children receive a passive pension, on an exceptional basis, which is granted only to the victims of terrorism. The law also provides that victims should receive 3,000 Euros to fund psychological support. My association is campaigning to remove the budgetary limits".*

Victims' memories – "*Recognition of memories is an important factor when we are talking about the issue of the victims of terrorism, like a certain number of factors, the greater the exposure in an attack, the greater the problems, the higher the number of deaths is, the greater the psychological trauma. In our research, we have found that when social support is minimal, the damage is greater. We must support victims. Social support is necessary for the "secondary victimisation" stage, which occurs when the trial takes place. Several years later, the victim relives what they lived through in the attack. The factors that influence recovery: immediate psychological support, immediate action protocols. Psychological support is important.*
What support must be given in the medium and long term? Until 2016, only 9 studies had been conducted on the effectiveness of psychological therapy for victims. It has been proven that the therapy that works is that which acts on the post-traumatic element (…). In Spain, the victims of terrorism see how the perpetrators of terrorist attacks go on living, some of them are even political leaders, for the victims that generates anger and depression".

What role can the trial play regarding the trauma? - "*The question of dignity and justice. Article 11 on the status of victims provides that each victim is entitled to file a legal claim against the perpetrators. (…) In Spain, there are two possible ways for victims to take part in the criminal trial: Specialised national court or Collective petition. The victim must always be kept informed of the progress of the investigation. There have been cases where people on trial were acquitted and the victims found out via the press. All citizens are entitled to free legal aid, especially the victims of terrorism.*

We support victims during the trial, when they relive the terror of the event. We can inform the victim on the day of the hearing, go with them to court. Before the trial, we are in permanent contact with the victim to detect anxiety. It is necessary to meet the victim before the trial. It is necessary to have a specially arranged place to meet all these people. It is essential that the victim be informed in advance about what will happen at the trial. During the trial, we accompany the victim right through until the judge's decision. During the trial, we inform him/her of any changes that occur.

The psychological state of victims evolves: once the judgment has been given, first some victims will be overjoyed that justice has been done, but this can be immediately followed by anxiety. We also observe "secondary victimisation", which occurs years later. The feeling of being a victim resurfaces and leads to different disorders. To avoid it, it is essential that victims are supported by their families or professionally. We check that they have people around them to support them".

PART 3. THE SENSE OF THE SENTENCE

Comprehension of the sentence is one of the fundamental principles of justice and its legitimacy. In terrorism cases, there is debate about the meaning of the sentence: political and social expectations of extreme severity since terrorist attacks have multiplied. On the other hand, this appears dubious to the accused, their families and even their lawyers. In the cases brought against returnees, in France, a lawyer may plead for the defendant, who has come back from a two-month stay in Syria, that "*This was self-assertion, not denigration of others. He did not kill or injure anyone. He was dazzled by a small part of history that he thought he could take part in*". The lawyer of another young man, aged about twenty, would demand during his speech for the defence "*Since when has the law provided for a sentence of elimination for fear? 10 years, that's half of their life so far*!". Thus, the length of the sentences being given in terrorist cases is often mentioned by families of jihadists as an obstacle to their return to Europe. Sentences are given based on the seriousness of the offence and the character of the perpetrator. For returnees, the assessment of the seriousness of the offence raises the question of the proof of the alleged facts. For the prosecutor's office, and the courts tend to agree with this, the seriousness of the facts is proven by the reality of the person having joined a terrorist undertaking glorifying its multiple acts of violence, by his/her participation in training camps, in particular to learn to handle weapons and then in armed patrols. In view of such facts, the character assessment of the accused must look at how solidly he/she is anchored in violent radicalisation and whether the return to the home country is explained more by disappointment compared to their expectations than regret for joining a terrorist organisation.

According to the accused and their families, the impossibility of repenting without receiving a long prison sentence encourages some of these jihadists to die as "martyrs", either in the Syrian or Iraqi war zones, or in Europe, as is suggested, furthermore, by a posthumous letter left by one of the terrorists involved in the Brussels Airport attack (2016), Ibrahim El Bakraoui. Some defendants weigh their brief stay in Syria against the prospect of a long prison term and find the latter unjustified, unjust even. One of them would declare on this subject when the sentence demanded by a French prosecutor was announced (10 years in prison - the maximum sentence - for 3 months spent in the zone): "*What's the most dangerous? Three months in Syria or eight years in prison?* ". The same defendant also made asides to the families: "*So what's planned for those who stay longer than 3 months in Syria? The guillotine?*". For defendants who still adhere to their commitment, this feeling of injustice tends to reinforce their positioning, and even more so in a prison environment where "terrorists are stigmatised by the authorities and by other prisoners", according to one lawyer.

This impression of powerlessness felt not only by the accused, but also by the judicial actors and the rehabilitation services, raises the question of how these individuals are dealt with both inside and out of prison, and even more so since the multiplication of experiments with different prison regimes. These concerns relate in particular to the partial visibility of the management of this type of prisoner, and the difficulties that exist now in thinking about the outcome and effects of these long sentences on these individuals, who very often do not see what they have done wrong. Certain countries are seeking to construct alternatives to the prison sentences and security measures taken in the great majority of cases in France. In a context of terrorist cases anchored in a social and political reality that is as singular as it is unstable, the sense of the sentence is all the more crucial as it raises the issue of society's position in the face of terrorist violence and its possible resilience.[9]

[9] Extract: Jeanne Pawella and Antoine Mégie, *Op.cit,* 2017.

Today the different European prison systems are faced with two very concrete questions. First, what influence can the prison regime have on the investigation and the quest for the truth, and secondly, how to organise the management of terrorist prisoners, juggling isolation, grouping together and the risk of indoctrination? **Isabelle PANOU (Judge, Belgium)** emphasised these two issues: "*we are realising that the conditions of detention have consequences for the investigation and preparation of the case for trial itself. They are in a state of nerves not because of the case against them, but because of the conditions of detention; it can take 2 hours to calm them down, and then you get nothing more out of them. The importance of the interview with the investigating judge means it requires better conditions, to improve the quality of these interviews. People talk after a certain number of hours, but in Belgian prisons there is no awareness of that. Everyone is fixated on their own job and takes no account of an overall logic. We try to follow these guidelines, but there is always a problem if we want to work safely with prisoners. As for the issue of deradicalisation, should prisoners be grouped together, isolated? This is a problem. (…)*".

Regarding the schemes implemented by European judicial authorities, this issue of specialised centres has become a matter of public concern in many European States. According to **Nadya RADKOVSKA, (Head of the international cooperation department - Ministry of Justice, Bulgaria):** "*this is a question that all the prison systems in Europe are asking themselves. I am not sure I have the right answer. Terrorist prisoners are more specific from the point of view of their motivation. Our task is work with them and help them to change attitudes and mentality. It is therefore indispensable that, as well as temporarily shutting away those who are convicted for acts connected to jihadism, our societies should think about what will happen to these individuals when they have completed all or part of their sentence*".

3.1. ECtHR case law

"The detaining of perpetrators of terrorist offences in the case law of the European Court of Human Rights

By *Svetlana KOSTADINOVA-SCHALL*, Senior Lawyer at the Registry of the ECHR, Bulgaria

"The fight against terrorism finds its place in ECtHR case law through the principle that the States who are parties to the ECHR are bound to take reasonable measures to protect people under their jurisdictions from attempts on their lives (Articles 1 and 2 ECHR). This is a positive obligation of prevention and protection – a principle that occupies an undisputed place in the spirit of the Convention. Its implementation involves actions on the part of the States that can clash with the individual rights of those suspected of preparing or carrying out terrorist acts. This is the test facing the Court – not to fuel a conflict that we can imagine arising between human rights and the need to defend the values of our democracies today. It sees itself as more invested in resolving, depending on the cases that come before it, a conflict internal to human rights. Our democracies must at once protect the people under their jurisdiction from the threat of terrorism and respect the essential rights of the individuals who, because of the allegations against them, will be subjected to measures that restrict their security and freedoms. (O. de Schutter).

The Court often talks of striking a fair balance: Judgment in the Klass and others v. Germany case dated 6 September 1978 (telephone tapping): Faced with the growth of terrorism in modern society, the Court has already acknowledged the necessity, inherent in the Convention system, of striking a balance between defending the institutions of democracy in the public interest and the safeguarding of individual rights. When this balance has to be sought the Court takes account of the margin of State discretion to decide on whether it is necessary to take measures that restrict rights and freedoms, including those of an exceptional nature.

I. The derogation in time of emergency provided for by Article 15 of the Convention

Article 15 of the ECHR allows the States Parties, in exceptional circumstances, the possibility of derogating temporarily, and in a limited and controlled way, from their obligation to uphold certain rights and freedoms guaranteed by the Convention. The use of this provision is governed by the following conditions relating to substance and form:

- the right of derogation may only be invoked in times of war or other public emergency threatening the life of the nation;

- a State may only take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation;

- derogations may not be inconsistent with its other obligations under international law;

- certain rights guaranteed by the Convention are not subject to any derogation: thus Article 15 § 2 of the Convention prohibits any derogation from the right to life, except in respect of deaths resulting from lawful acts of war, from the prohibition of torture or inhuman or degrading treatment or punishments, from the prohibition of slavery and forced labour and from the "no punishment without law" rule; similarly no derogation is permitted from Article 1 of Protocol no. 6 to the Convention which requires the abolition of the death penalty in peacetime, from Article 1 of Protocol no. 13 to the Convention on the abolition of the

death penalty in all circumstances, as well as from Article 4 (right not to be tried or punished twice) of Protocol no. 7 to the Convention;

- finally, from a formal standpoint, a State exercising the right of derogation is bound by an obligation to inform the Secretary General of the Council of Europe – this means full information on the measures taken, the grounds for doing so, as well as the date when these measures will cease to apply. Currently the provisions of the Convention are again being fully applied.

II. The Court's control over counter-terrorism measures in connection with a detention

<u>The prohibition of torture and inhuman or degrading treatment or punishment (Article 3 CEDH – absolute right, not subject to derogation)</u>

For the Court, even in the most difficult circumstances, such as the fight against terrorism, the Convention prohibits torture and inhuman or degrading punishments. This is an absolute principle and it applies when the applicant, guilty of acts that are a negation of human rights, asks for the protection of a law that enshrines those rights (Ramirez Sanchez v. France [GC], no. 59450/00, CEDH 2006-IX).
Scope of application of Article 3. The scope of application of Article 3 is wide-ranging and covers the violence that may be exercised by the police during arrests or interrogations, the length and conditions of detention, the nature of the sentences applicable. To fall under Article 3, the ill-treatment must reach a certain gravity threshold. The suffering or humiliation must in any case go beyond those that inevitably result from any given form of legitimate treatment or punishment.

The appreciation of the gravity threshold is in essence relative and depends on the facts in the case in question, in particular the duration of the treatment and its physical or mental effects. In the Ireland v. United Kingdom case, the interrogation techniques (wall-standing, hooding, subjection to noise, sleep deprivation and deprivation of food and drink) used on detainees on remand for terrorism offences were judged to violate the Convention, "applied in combination and with premeditation and for hours at a stretch. They caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. Accordingly, they fall into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance". The suspending of an applicant suspected of aiding and supporting PKK terrorists, naked, by the arms, which were tied together behind his back ("Palestinian hanging") was a treatment so serious and cruel that it could only be qualified as torture under Article 3 (Aksoy v. Turkey, 18 December 1996, Reports of Judgments and Decisions 1996-VI).

*In the Frérot v. France case, the applicant, a former member of the organisation "*Action Directe*", an extreme left-wing armed movement, who was sentenced to thirty years in prison in 1995, for terrorism in particular, complained about the strip searches he was subjected to in prison. The Court held that there had been a violation of Article 3, noting in particular that the feeling of arbitrariness, the feelings of inferiority and anxiety often associated with it, and the feeling of a serious encroachment on one's dignity undoubtedly prompted by the obligation to undress in front of another person and submit to a visual inspection of the anus, added to the other excessively intimate measures associated with strip searches, led to a degree of humiliation which exceeded that which was inevitably a concomitant of the imposition of body searches on prisoners. Moreover, the humiliation felt by the applicant had been aggravated by the fact that on a number of occasions his refusal to comply with these measures had resulted in his being taken to a disciplinary cell.*

The Court further held that there had been a violation of Article 8 (right to respect for correspondence) of the Convention in this case, in respect of the refusal, on the basis of a ministerial circular, to forward a prisoner's letter to a fellow prisoner, and a violation of Article 13, in respect of the lack of domestic remedy enabling a prisoner to challenge a refusal to forward correspondence.

In its appreciation, the Court also takes account of the character or particular dangerous nature of the applicant to characterise a punishment as cruel or degrading. The authorities may impose legitimate restrictions on prisoners detained for terrorist activities, but these must be strictly necessary to protect society against violence. In the Öcalan v.Turkey case, "the general conditions in which the applicant, leader of a major armed separatist movement, having been kept in isolation for prolonged periods, had not reached the minimum level of severity required to constitute inhuman or degrading treatment within the meaning of Article 3", but the long-term effects of the relative social isolation imposed on the applicant should be attenuated by giving him access to the same facilities as other high security prisoners in Turkey, in particular television and telephone communications with his family.

In the Ramirez Sanchez v. France case, given the material conditions of his detention, his "relative" isolation, the authorities' wish to place him in normal conditions and his character and the danger he posed, the conditions in which the applicant was held had not reached the minimum level of severity necessary to constitute inhuman or degrading treatment within the meaning of Article 3 of the Convention. Stating that it was concerned, in spite of the specific circumstances of the case, by the particularly long period of time the applicant had spent in solitary confinement [i.e.; eight years], it noted the fact that since 5 January 2006, he had been held under the ordinary prison regime [...], which in the eyes of the Court, should no longer be challenged in the future. Nevertheless, in view of all the foregoing, it considered held that there had been no violation of Article 3 of the Convention.

Likewise, in the A. v. United Kingdom case, the situation to which the applicants were subjected due to their detention in high security conditions under a statutory anti-terrorist scheme could not be considered inhuman or degrading given that they were not deprived of any hope of release and the measures to which they were subjected did not amount to a permanent or irreducible sentence even if they were detained without knowing when they would be released or whether they would be freed.

III - Extraordinary rendition

The European Court prohibits secret "rendition" operations that take place outside the ordinary legal system and which involve kidnapping, detention without trial, disappearance and secret prisons with a real risk of torture or cruel, inhuman or degrading treatment.

El-Masri v. "The former Yugoslav Republic of Macedonia", 13 December 2012 GC.

In this case, a German national of Lebanese origin complained that he had been a victim of a secret "rendition" operation during which he was arrested, held in isolation, questioned and ill-treated in a Skopje hotel for 23 days, then transferred to CIA (Central Intelligence Agency) agents who brought him to a secret detention facility in Afghanistan, where he was further ill-treated for over four months.

The Court found the applicant's account to be established beyond reasonable doubt and held that "The former Yugoslav Republic of Macedonia" had been responsible for his torture and ill-treatment both in the

country itself and after his transfer to the United States authorities in the context of an extra-judicial "rendition".

The Court held that there had been a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention, on account of the inhuman and degrading treatment to which the applicant had been subjected while being held in a hotel in Skopje, on account of his treatment at Skopje Airport, which amounted to torture, and on account of his transfer into the custody of the United States authorities, thus exposing him to the risk of further treatment contrary to Article 3. The Court also found a violation of Article 3 on account of the failure of "The former Yugoslav Republic of Macedonia" to carry out an effective investigation into the applicant's allegations of ill-treatment. The Court further held that there had been a violation of Article 5 (right to liberty and security) of the Convention, on account of the applicant's detention in the hotel in Skopje for 23 days and of his subsequent captivity in Afghanistan, as well as on account of the failure to carry out an effective investigation into his allegations of arbitrary detention. Lastly, the Court found a violation of Article 8 (right to respect for private and family life) and a violation of Article 13 (right to an effective remedy) of the Convention.

Nasr and Ghali v. Italy, 23 February 2016: This case concerned the "extraordinary rendition" – the abduction by CIA agents, with the cooperation of Italian nationals – of Egyptian imam Abu Omar, and his transfer to Egypt, followed by his secret detention there for several months. The applicant complained in particular of his abduction with the participation of the Italian authorities, the ill-treatment endured during his transfer and detention, the impunity enjoyed by the persons responsible on grounds of State secrecy, and the failure to enforce the sentences passed on the convicted US nationals owing to the refusal of the Italian authorities to request their extradition. Lastly, he and his wife – the second applicant – complained of a violation of their right to respect for private and family life, given that the first applicant's abduction and detention had resulted in their forcible separation for more than five years.

The Court held, with regard to the first applicant, that there had been a violation of Article 3, a violation of Article 5, a violation of Article 8 (right to respect for private and family life) and a violation of Article 13 (right to an effective remedy) read in conjunction with Articles 3, 5 and 8 of the Convention. With regard to the second applicant, it held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment), of Article 8 and of Article 13 (right to an effective remedy) read in conjunction with Articles 3 and 8 of the Convention. Having regard to all the evidence in the case, the Court found it established that the Italian authorities were aware that the first applicant had been a victim of an extraordinary rendition operation which had begun with his abduction in Italy and had continued with his transfer abroad. In the present case the Court held that the legitimate principle of "State secrecy" had clearly been applied by the Italian executive in order to ensure that those responsible did not have to answer for their actions. The investigation and trial had not led to the punishment of those responsible, who had therefore ultimately been granted impunity. (…)".

IV - Right to private and family life

Article 8 lays down the principle of the right to respect for private and family life, home and correspondence which national authorities must guarantee to every citizen, whatever their activities. Interference by the authorities in the exercise of this right cannot be tolerated except such as it is in accordance with the law and is necessary for the prevention of disorder. The measures taken by States to fight terrorism must take account of this principle and be subject to appropriate control. (…)".

The notion of private life includes information concerning the identity of an individual as well as information on the person's private life. In order to reinforce the fight against terrorism, States have

extended surveillance procedures involving the collection and processing of personal data which are considered as an intrusion into people's private life.

In the Klass v. Germany case, the Court accepted that some legislation granting powers of secret surveillance was, under exceptional conditions, necessary in a democratic society in the interests of national security and/or the prevention of disorder or crime; but it demanded guarantees in order to prevent abuses.

ECtHR, 6 Sept. 1978, Klass and others v. Germany op. cit.

ECtHR, 26 March 1987, Leander v. Sweden, no. 9248/81.

ECtHR, 4 May 2000, Rotaru v. Romania, no. 28341/95.

ECHR, 28 August 1984, Malone v. United Kingdom, no. 8691/79; ECtHR, 24 Apr. 1990, Kruslin v. France, no. 11801/85 and Huvig v. France, no. 11105/84.

103 ECtHR, 4 Dec. 2008, S. and Marper v. United Kingdom, no. 30562/04 and 30566/04, § 112.

ECtHR, 12 Jan. 2010, Gillan and Quinton v. United Kingdom, no. 4158/05.

As far as the processing of personal data is concerned, the Strasbourg judges consider that Article 8 offers protection concerning such processing of personal data. Storing data on an individual's private life constitutes interference within the meaning of Article 8 and data of a public nature can be considered as relating to private life when they are systematically collected and stored in files kept by public authorities. Derogations can nevertheless be accepted in favour of intelligence services charged with the fight against terrorism. However, such derogations must be regulated by law and protected by procedural guarantees preventing abuse on the part of the authorities avoiding the establishment of discriminatory profiles. "The protection afforded by Article 8 would be unacceptably weakened if the use of modern scientific techniques in the criminal justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private life interests".

In order to facilitate the prevention of terrorist acts, various legislations give the police the power to arrest and search people in places considered as risk zones where terrorist acts may be committed. For the Court, "the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life", reinforced by the public nature of the search. Such search powers must be authorised by law in counter-terrorism situations and be limited in time. They must be controlled by a judicial authority in order to avoid abuses. However, when judicial control is not possible, it is possible to set up other control mechanisms, such as the authorisation of a prosecutor, not considered as a judicial authority within the meaning of the Convention.

The right to family life includes the maintaining of family ties which may sometimes be subject to restrictions for reasons of national security, public order and the prevention of crime. In the Öcalan v. Turkey case, the Court states that in the event of detention, the prison administration must help the prisoner to maintain contact with his close family.
In the case in point, due to the sentence of life imprisonment in a high security prison and the special regime applied to him, the applicant, the founder of the PKK, had had the number of visits from his family

limited under a Turkish law intended to minimise the risk of convicted prisoners maintaining contacts with their original environment. The Court held that the restrictions on the applicant's right to respect for his private and family life were necessary and did not exceed what is necessary in a democratic society for the defence public safety and the prevention of disorder or crime. The Court noted that the prison authorities had sought to help the applicant remain in contact with his family by organising more frequent visits, which no longer took place in a visiting room with a separation device.

The right to private and family life can have a wide interpretation and includes the right for a diseased prisoner's family to bury him. In the Sabanchiyeva v. Russia case, the applicants complained that the authorities had refused to return their the bodies of their relatives, Chechen separatist leaders, to them under terrorism legislation: "by automatically refusing to return the bodies to their families, the Russian authorities had not struck a fair balance between, on the one hand, the legitimate aim of preventing any disturbance which could have arisen during the burials as well as protecting the feelings of the relatives of the victims of terrorism and, on the other hand, the applicants' right to pay their last respects at a funeral or at a grave. In the absence of such an individualised approach, the measure had appeared to switch the blame from the deceased or their terrorist activities on to the applicants." In the Arkhestov v. Russia case, the cremation behind closed doors of the bodies of terrorist insurgents killed during an attack was judged to be contrary to the wishes and Muslim rites of the families, whereas no religious honours or ceremonies liable to cause public disorder were planned.

<u>The right to correspondence</u>

The right to respect for private life includes the right to correspondence.
The refusal to a prisoner's letter to another prisoner, on the basis of a ministerial circular, is a violation of Article 8. However, in the Öcalan v. Turkey case, the Court, in view of the Turkish Government's legitimate fear that the applicant might use communications with the outside world to contact members of the PKK, considered that the restrictions on his right to respect for private and family life had not exceeded what was necessary for the prevention of disorder or crime. ".

3.2. The experiment with dedicated units in France

As part of her mission **Adeline HAZAN (member of the judiciary and controller general of places of deprivation of liberty (CGLPL)** has directed enquiries into the dedicated units (UD) that were set up for individuals involved in terrorist proceedings.[10] This system of grouping prisoners was introduced on a trial basis in France from 2014, then adopted as a national programme in 2015, before being abandoned a few months later.

The dedicated units model: "*Defined by the Law of 30 October 2007 as amended, the mission of the Controller general of places of deprivation of liberty, (to be developed), an independent administrative authority, is to ensure that the fundamental rights of individuals deprived of their liberty is respected. It is against this background that it was decided to*

[10] **CGLPL report**: "La prise en charge de la radicalisation islamiste en milieu carcéral", 11 June 2015. Available from: http://www.cglpl.fr/wp-content/uploads/2015/06/rapport-radicalisation_final.pdf
CGLPL report: "Radicalisation islamiste en milieu carcéral - L'ouverture des unités dédiées", 7 June 2016. Available from: http://www.cglpl.fr/wp-content/uploads/2016/07/Rapport-radicalisation_unités-dédiées_2016_DEF.pdf T

examine the new measures introduced by the prisons administration as part of the counter-terrorism plan announced on by the Prime Minister on 21 January 2015, and mainly the principle of creating five dedicated units and grouping together prisoners held for Islamist radicalisation. (…) In autumn 2014, an experiment grouping Islamist prisoners together was organised at Fresnes prison, at the initiative of the prison governor, for whom the idea behind this measure was to curb proselytising by radicalised prisoners, whose growing influence was interfering with the life of the prison. This removal from the general prison population concerned only remand prisoners and those convicted on terrorism charges connected to a radical practice of Islam. The minister of justice, whose department was not consulted, stated that he had "very serious reservations" about this experiment and the prison service inspectorate issued a report that was very critical of its implementation".

The influence of the terrorist attacks on the choice of the dedicated units system: *"And yet, a very dramatic context would change the approach to this issue. Indeed, the shock of the terrorist attacks in January 2015 led the authorities to decide to take measures as a matter of urgency. It quickly became clear that the criminal career of certain perpetrators, the role prison had played in their radicalisation, the fact that individuals involved in acts of terrorism could have met when they were in prison for ordinary offences and have stayed in touch after they came out, caused a considerable stir, to which the public authorities then decided to respond, by partly taking up the experimental dedicated units scheme, even though until then it had been viewed with considerable reservations. And so the creation of five dedicated sections was announced as a "duplication" of the experiment (…). Some of these units would be places to assess and/or deal with detainees. Invitations to tender were put out to continue "research-actions" (in prisons, in open settings and for minors); Muslim chaplains were to be recruited; education modules in civics and history of religions and modules on citizenship and secularism were supposed to be set up. The questionnaires used to detect radicalisation were to be updated".*

Difficult implementation in prisons: "*In interviews with the different categories of staff involved with prisoners in the establishments visited, a deep sense of dismay was regularly expressed. The CGLPL's interlocutors explained that the question of radicalisation for them was not something new, reawakened by the terrorist attacks. They had been raising the alarm for years, they said, but nobody had listened. (…) Many of the people we met bemoaned an attempt to blame the flaws in the system for picking up radicalisation on an institution with limited resources, overwhelmed by rampant overcrowding*".

The principle of grouping terrorism prisoners together challenged: *"In his conclusion, the CGLPL, well aware that foreign experiences in no way allow the defining of a modelisable approach, as is shown by repeated changes of tack, often in response to events in the news, and whilst understanding perfectly the difficulty of the task, regretted that France had taken so long to take into account the question of Islamist radicalisation in prison. He criticised the fact the placing of prisoners in dedicated units, which is decided at the discretion of the governors or management of the prisons concerned, is not subject to any of the normal means of appeal, whereas it runs the risk of restricting the fundamental rights of the individuals held in prison and worsening the conditions of their detention. Indeed, according to the CGLPL's analysis, no existing legal provision corresponds to the status of a person held in a dedicated section, where the regime is not quite ordinary detention or solitary confinement. The lack of information - at this stage - on the modes of supervision and of details on the detention regime tend to suggest that it is more likely to slide into a form of unacknowledged solitary confinement. This is why the CGLPL considered that he could not approve the grouping of prisoners as it was presented by the authorities".*

Development of a controversy concerning prisons: "*Whereas the criticism of the absence of any legal framework for placing prisoners in a dedicated unit was rejected by the managers of the prisons administration, the CGLPL noted with some satisfaction that Law of 3 June 2016 and the resulting Article 726-2 of the Code of Criminal Procedure now provided the possibility for the prisoner sent to one of these units to appeal to an administrative judge.*

The CGLPL regretted that the "terrorist" qualification remained the only criterion for assigning prisoners to these units, even though a "second route" of entry for individuals imprisoned for other offences had in theory - but only in theory - been envisaged. The particular detention regime organised in the UDs led to some perverse effects. Thus, access to work and vocational training were rendered practically impossible. In contradiction with the stated objectives, the UDs were by no means totally sealed off from the other sections of the prisons. (…) Within the UDs themselves - and several prisoners have reported this - the coexistence between jihadists belonging to rival factions created tensions that were potentially extremely dangerous. It seemed paradoxical to the inspectors - and this view was raised by several interlocutors - that the authorities should group together people it was prosecuting for criminal conspiracy.

The CGLPL has been contacted on several occasions by lawyers with clients who are detained in UDs. Beyond the conditions of detention in themselves, they insist on the negative consequences that this has in the minds of the judiciary, for whom the fact that a prisoner is being held in an UD may constitute an element that appears to make him seem even more dangerous. The CGLPL considered these observations as legitimate".

The question of video-surveillance: the case of Salah Abdeslam - "*Salah Abdeslam, one of the alleged perpetrators of the 13 November 2015 attacks in Paris and Seine St Denis was arrested and remanded in prison until his trial. (…) At the time, no general legislation regulated the use of video-surveillance in non-collective areas of prisons, in particular the prisoners' cells.*

Only an Order dated 23 December 2014 provided for a video-protection system in emergency protection cells, in which individuals in custody are placed when their conditions seems incompatible with their being placed or continuing to be held in an ordinary cell due to an imminent risk of committing suicide or during an acute fit. The recording time was limited to 24 hours. (…) But in the Law of 21 July which prolonged the state of emergency after the 14 July attack in Nice, an article was added authorising the introduction of such a measure "if the suicide or escape of the prisoner could have a significant effect on public order, in view of the particular circumstances that led to imprisonment and their impact on public opinion. This measure is now legal, but to my mind shocking: first of all it can be clearly seen that it was taken for a particular person; but the criterion of the impact on public order poses a problem! Furthermore, it will enable it to applied to other cases, such as paedophile cases, where public opinion is impacted; furthermore, contrary to what was asserted by the Council of State in its decision of 28 July 2016, this provision totally fails to recognise the right to privacy of individuals held in custody, all the more so as this measure risks being maintained throughout the period until the judgment in this case, that is to say probably several years. (…) In addition, it is a provision that far from protecting the person actually risks increasing the risk of suicide due to the extreme violation of the person's privacy (no privacy whatsoever)".

3.3. Sentencing – the French experience

During a trial in France, faced with three returnees who had made ambiguous statements about their stays abroad, the presiding judge, in the introduction to his pronouncement of the judgement, declared: "*One very important dimension of these judgments is the future...*

especially in the context of the terrorist attacks".[11] This question of the future and what becomes of the convicted individuals is decisive in that it raises the classic issue of dangerousness and repeat offending, which in terrorism cases take on a singular social and political dimension. Another member of the judiciary would mention in an interview the lack of any room for error in this type of case.[12]

This assessment of the danger posed is intimately linked to the question of the indicators of disengagement, which remains a vast area ripe for study in the field of radicalisation. If some investigations have devised processual and configurational models of the processes of disengagement from radical organisations,[13] these models never include any methodology for the evaluation of the behavioural or ideological emergence from radicalisation at individual level. Only Kate Barrelle [14] ventures to put forward a few elements of evaluation of "psychological" disengagement based on studies of ethno-nationalist and Islamist extremists. She thus puts forward disillusionment (discrepancy between the ideal and the reality of the group frequented, or internal disputes in the organisation), or a possible burnout as the first steps towards a mental disengagement. Other researchers distinguish "emergence from radicalisation" (abandonment of values and attitudes) from "emergence from engagement" (behavioural changes, defection from militant or politico-religious groups, for example).[15] Such debates take us directly back to the issue highlighted by Michel Foucault of the construction of "power/knowledge" in penal practice. The numerous splits, evolutions and specialisations that exist today in the field of psychiatric and psychological studies on radicalisation phenomena are revealing.

During trials, the issue of committing a repeat offence, but also the issue of intentionality or the motives behind the engagement are at the heart of the adversarial debate. And so, concerning the case of the three young girls, the prosecutor would explain in his closing speech: "*The question that arises, and which you, Judge, raised, is that of the repeat offence… should we be afraid? (…) no previous record, how can we judge the evolution of her position? She acknowledges that a change occurred as soon as she was arrested, but this version does not stand up … we have the video and telephone tapping evidence that show that she maintained the contacts with her friend in Syria. When she was arrested, there was not even the beginning of any change. Has there been a change since she has been in prison? You should question the sincerity of it*".[16] Under these conditions, the attitude during the trial and the prison reports play an essential role. The accuseds' ability to explain the events and their engagement and especially to show a certain distanciation from their engagement is decisive: *"as we have seen during the hearings, it still persists today in what she says… that is what is the most frightening!* ". For a young woman imprisoned as soon as she returned from Syria at a time when few women are subjected to this judicial treatment, her attitude of repentance during the trial and her wish to demonstrate that she was no longer radicalised, "*I wear make-up now, I've stopped praying and wearing a veil...",*[17] will be used by the prosecution as evidence of her distanciation. Furthermore, in the grounds given for the

[11] Hearing, February 2017.
[12] Interview with judge, October 2016.
[13] Olivier Fillieule, "Le désengagement d'organisations radicales. Approche par les processus et les configurations", *Lien social et Politiques*, no. 68, 2012, p. 37-59.
[14] Barelle K., "Pro-integration: disengagement from and life after extremism", *Behavioral Sciences of Terrorism and Political Aggression*, vol. 7, no. 2, May 2015.
[15] Bjørgo T., Horgan, J., *Leaving Terrorism Behind: Individual and collective disengagement*, New York, Routledge, 2009. Sommier I., "Engagement radical, désengagement et déradicalisation. Continuum et lignes de fracture", *Lien social et Politiques*, no.68, 2012, p. 15-35. According to Isabelle Sommier, "It could be said that in a paradigmatic way that the individual who has "repented" is disengaged (but not necessary deradicalised), while with the individual who is "dissociated" it is the opposite (deradicalised but not necessarily disengaged) insofar as his detachment from the "warrior" role may not have been his isolated individual choice but that of his group in its virtual entirety" (p. 30).
[16] Hearing, November 2017.
[17] Hearing, Spring 2017.

judgment these elements of distanciation will be taken up by the judges as one of the factors justifying a sentence of 4 years with 1 year suspended, as the young woman had already spend two years in prison on remand.

Since 2015, as well as sentences for terrorism becoming longer and longer, the vast majority of them have also been accompanied by minimum tariffs of 2/3, which is leading certain lawyers to focus on this tariff, "*I ask you not to respond to the prosecution's demand, as usual, for a minimum tariff of 2/3! This automaticity is genuinely problematic for, as we all know… there is no longer any sentence adjustment for individuals charged with terrorism. There is no point to it except to make the possibility of reintegration into society even more difficult*".[18] In another case, the grounds for the judgment would emphasise for example*: "The sentence of two years' imprisonment was in theory capable of adjustment, but on the one hand, the Court has no evidence of rehabilitation and on the other hand, it is important to avoid any form of repeat offence".*

This judgment based on the notion of dangerousness is at the centre of the French Law of 3 June 2017 which creates, according to **Vincent LE GAUDU (anti-terrorist sentence enforcement judge, France), "***an exceptional and specific regime"* for terrorism cases with the stated aim of reinforcing the conditions for obtaining parole. Accordingly, this right *"can only be granted by the sentence enforcement court, and after a commission charged with multidisciplinary assessment of the dangerousness of the convicted person has issued an opinion. The sentence enforcement court may oppose the granting of parole if it is likely to cause serious disturbance of public order*".[19] Other specificities have also been introduced into the tariff system. The new regime, for example, excludes any examination of adjustments to a sentence for 30 years when a terrorist crime is punished by life imprisonment. The assizes court can also decide that no sentence adjustment at all will be possible for a life sentence.

This specialised regime was also reinforced on an institutional level by the confirmation in 2016 of the national and exclusive jurisdiction of the Paris courts over the enforcement of the sentences of convicted terrorists. Already opened up by the Law of 23 January 2006, the aim of this centralisation is to "*enable consistent and homogeneous case law in matters relating to sentence enforcement (…). It also allows for the development of a penal policy specific to the Paris courts in matters relating to sentence adjustment".*[20] Faced with a constantly growing flow of cases,[21] an extra judge has been appointed to this unit and a third one is expected to be appointed in 2018.

The granting of parole has, due to the new law of 2016, become stricter and stricter. Thus, all applications for parole are now examined by a sentence enforcement court (bench of 3 judges) and must also be the subject of an opinion issued by a commission charged with carrying out a multidisciplinary assessment of the dangerousness of the convicted person. If parole is granted, the law provides that it should be effective but only after a period of semi-liberty or placing under electronic surveillance for between one and three years. This restrictive regime leads to a complex probation system involving a transfer to a national assessment centre that takes a very long time to examine cases. This therefore renders any parole impossible as well as the expulsions that were previously used for foreign nationals

[18] Hearing, November 2017.
[19] Presentation of the legislation dated 3 June 2016, Ministry of Justice website.
[20] Senate report (France). Available from: http://www.senat.fr/rap/l15-491-1/l15-491-17.html#fn84
[21] On 31 December 2015, the office of the Paris sentence enforcement judge in charge of terrorism cases was tracking, alone, 240 individuals convicted for terrorism-related offences, an increase of 27% compared to 2014. In addition to this growing number of people being convicted, there has also been a considerable increase in applications for sentence adjustments on the part of prisoners (+23.6% from 2013 to 2014, + 47% from 2014 to 2015). The latter figures reflect the ever growing number of people now being convicted and imprisoned for terrorism.

who were the subject of a final expulsion order from French territory. This being the case, although sentence adjustment and parole remain a right for those convicted of crimes, even terrorism, today they are becoming more and more rare, leading to the constitution of a regime that derogates from ordinary law.

The sense of the sentence and its relation to society appear, under these conditions, to have been profoundly transformed. Indeed, the aim of sentencing currently no longer seems to be to temporarily remove convicted individuals from society, by imprisonment, so that they can make amends and be socially reintegrated, but now seems to be part of a desire to protect society by incarcerating those convicted based on a logic that Christine Lazerges and Hervé Henrion Stoffel have referred to as no longer "*monitoring and punishing, but punishing and monitoring*".[22]

[22] Christine Lazerges and Hervé Henrion Stoffel, « La mutation du droit pénal et de la procédure pénale sous le choc du terrorisme », *Cahiers de la sécurité et de la justice*, no. 35-36, 2016.

"Adjustment of sentences"

by *Vincent LE GAUDU*- Vice-President in charge of the enforcement of sentences in terrorism cases, France

"The difficulty of evaluating whether convicted terrorism prisons have made amends":

1 - this is due first of all to the intentionality that led to the conviction sometimes being very tenuous and in any case not always obvious. Indeed, arresting suspects at the intention stage (cf. explanations of the Paris Public Prosecutor's Office during a previous session) and sometimes at the very beginnings of the preparatory actions, and the criminalisation of aspiring departees (i.e. those who have not left for Syria, but have committed preparatory actions with a view to doing so) makes it very difficult, even impossible for the convicted individual to work on admitting the facts and in any case on recognising his/her participation in a terrorist action – when said action has not taken place and has only been prepared or even just sketched out.

The effort of making amends and questioning themselves that judges consider as a prerequisite for any adjustment of the sentences of convicted individuals, is in these cases extremely difficult: defining oneself as the perpetrator of a terrorist offence when in the end all you did was prepare for a potential departure – is a path that is intellectually difficult for the prisoners we are dealing with to take. Very often, aspiring departees feel guilty about something quite diffuse, but not of an act of terrorism as such, and at sentence adjustment hearings they can repeatedly be heard saying that "they have not killed anyone or planted any bombs anywhere". This is the first stumbling block to any adjustment of the sentence.

2 - it also results from Taqiya – dissimulation of opinions or faith – which the Muslim religion allows in the face of persecution or danger, and the difficulty judges have in overcoming jihadists' dissimulation strategies. Many individuals convicted for jihadism-related in fact adapt very well to detention and commit to positive activities – taking classes, vocational training, university degrees, psychological treatment whilst in prison - without it being possible to appreciate the sincerity and authenticity of their behaviour.

3 - it also results from the difficulty the psychiatric experts appointed by the courts have in answering certain questions relating to the criminological dangerousness of the prisoner after X years of detention and relating to the risk, recognised or otherwise, of repeat offending. (The same applies to questions about the prisoner's feelings of guilt)

4 - this results generally in France from the difficulty social workers and psychologists in particular have in working during detention on the acts committed and their genesis rather than on the prisoner's often chaotic personal history."

***New methods of evaluation have been found to be necessary**:*

"Since 2015/2016, new ways of assessing radicalisation have emerged. In open settings, the prison rehabilitation and probation services have begun to use more significant assessment tools for individuals convicted of terrorist offences, who are free, but subject to court control either on probation or on parole. These services now operate in teams of three people to monitor convicted terrorists (a rehabilitation and probation officer, a so-called "PLAT" (anti-terrorism plan) pair consisting of a support worker and a psychologist), who will see convicts together or separately or on home visits. This system allows for a better quality multidisciplinary assessment of the social situation and character of the convicted individual. Concerning those in prison, the prisons administration department of the Ministry of Justice, after finally having abandoned the disastrous idea of grouping together individuals convicted of jihadism-related crimes - except for the Netherlands, which has I believe developed the grouping together of terrorist prisoners in special units, no European country has opted to group together radicalised prisoners – backtracked and opted to spread these prisoners across suitable establishments all over the country after assessing them in one of the 3 establishments equipped to do so.

*Four radicalisation assessment sections ("*quartiers d'évaluation de la radicalisation*", QERs) each with about 20 places have been set up in French prisons (…); individuals imprisoned for terrorists acts go to these sections for a period of multidisciplinary assessment lasting 4 months after which an assessment report is produced so that they can be moved either to ordinary sections of prisons or a special section for violent prisoners ("*quartier détenu violent*", QDV) or into solitary confinement. In practice, these QERs have proved themselves to be a good tool for judging the character of the prisoners even if they inevitably remain a snapshot of a given moment.*

"Sentence adjustments "revisited" and made firmer":

"This reflection conducted with the prisons department led to the creation, at the initiative of the Ministry of Justice, of a multidisciplinary processing platform. The RIVE scheme (developed with the APCARS association) for this prison population: this is a scheme that can be ordered by the judicial institution concerning sentence adjustment whenever a new specific obligation is involved (Art. 132-45 22° of the Penal Code: obligation to respect health, social, educational and psychological measures to facilitate rehabilitation and the acquisition of the values of good citizenship);

The RIVE platform is strongly inspired by the Danish experience. Denmark, which has chosen not to imprison individuals returning from Syria, has prioritised prevention and psycho-social support by setting up open centres where these individuals are dealt with according to a global approach, involving in particular help with finding a job and accommodation, on the one hand, and with restoring family and community ties on the other, under the control of a mentor who develops a very close relationship with the convicted person, which is accompanied by a discourse and measures to facilitate reintegration in every municipality, working with schools, town hall departments, the police and centres providing psychological support.

The RIVE scheme, which is only just beginning, today covers about fifteen measures. It is intended that it will be rolled out across all of France and in particular to regions that have seen a high number of departures for Syria. Individuals are placed on the RIVE scheme by the probation service, after a court decision ordering particular measures (Art. 132-45 22° of the Penal Code), under a court supervision order, or a compulsory residence order with electronic tagging, or a suspended sentence with probation or an electronic tagging order or parole.

The scheme involves intensive, individualised monitoring intended to increase the individual's level of personal responsibility, with the RIVE staff adopting a mentoring-type approach (the mentors are required to support the convicted person and motivate him/her to get involved in positive networks, working with the family in particular). The scheme, which involves contact time of at least 6 hours a week, is multidisciplinary and takes the form of intensive support for at least a year with individual interviews, help with formalities, activities, interventions involving the family and social environment (…)

The team consists of social workers, a psychologist, a psychiatrist, a cultural support worker – a French specificity, it would seem - with the aim of disengaging the person from violence and distancing them from radical opinions whilst encouraging social reintegration and the acquisition of the values of good citizenship, insofar as these individuals, according to the studies done by sociologist Farad Khosrokhovar, are or perceive themselves to be excluded from society and they are therefore exposed to boredom, isolation and discontent, which is liable to make them vulnerable. Eventually, the aim of the scheme is to set up "technical platforms" in the different large urban areas concerned by the phenomenon of radicalisation".