

Balancing the Scales: Defending Fair Trial Rights in the Global Fight Against Terror

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Balancing the Scales: Defending Fair Trial Rights in the Global Fight Against Terror

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Abstract

This paper examines the intricate interplay between counterterrorism strategies and the essential rights to a fair trial. It addresses the prominent question of whether the legal regimes used to combat terrorism violate basic human rights. The study examines the effects of counterterrorism laws on procedural rights, including the independence of the judiciary, impartiality as well as the right to defense. Using a comparative analysis approach, the paper focuses on legal systems where derogations concerning violations of procedural rights have been identified and highlighted issues relating to special courts, emergency laws, and various security measures. Hence, this study offers a unique perspective to critique structural flaws based on the jurisdictions selected according to their relevant counterterrorism frameworks rather than by geographical location or legal similarities.

The results reveal an alarming tendency that in a significant number of jurisdictions, counterterrorism laws are already at odds with generally established human rights norms, thus hindering the procedural safeguards under the guise of national security. The postponement of access to legal services, closed trials, special courts and reliance on statutory instruments enacted during the state of emergency are contrary to the spirit of an open and impartial judiciary. Hence, these trends raise a number of concerns as to whether security needs should override basic human rights.

The research concludes that while there is no doubt as to the need to combat terrorism, the preventive measures should be closely monitored and based on firm procedural guarantees. The autonomy of the normal courts, transparency of the trial process, and encouragement of international control mechanisms are the cornerstones to ensuring the proper equilibrium between justice and security.

Keywords: terrorism, counterterrorism measures, procedural guarantees, military courts, human rights, fair trial.

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Equilibrar la balanza: defender el derecho a un juicio justo en la lucha mundial contra el terrorismo

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Resumen

Este artículo examina la compleja interacción entre las estrategias antiterroristas y los derechos fundamentales a un juicio justo. Aborda la importante cuestión de si los regímenes jurídicos utilizados para combatir el terrorismo violan los derechos humanos básicos. El estudio analiza los efectos de las leyes antiterroristas sobre los derechos procesales, incluida la independencia del poder judicial, la imparcialidad y el derecho a la defensa. Mediante un enfoque de análisis comparativo, el documento se centra en los sistemas jurídicos en los que se han identificado derogaciones relativas a violaciones de los derechos procesales y destaca cuestiones relacionadas con los tribunales especiales, las leyes de emergencia y diversas medidas de seguridad. Por lo tanto, este estudio ofrece una perspectiva única para criticar las deficiencias estructurales basándose en las jurisdicciones seleccionadas en función de sus marcos antiterroristas pertinentes, en lugar de por su ubicación geográfica o similitudes jurídicas.

Los resultados revelan una tendencia alarmante: en un número significativo de jurisdicciones, las leyes antiterroristas ya entran en contradicción con las normas de derechos humanos generalmente establecidas, lo que obstaculiza las garantías procesales bajo el pretexto de la seguridad nacional. El aplazamiento del acceso a los servicios jurídicos, los juicios a puerta cerrada, los tribunales especiales y la dependencia de instrumentos legales promulgados durante el estado de emergencia son contrarios al espíritu de un poder judicial abierto e imparcial. En consecuencia, estas tendencias suscitan una serie de preocupaciones sobre si las necesidades de seguridad deben prevalecer sobre los derechos humanos fundamentales.

La investigación concluye que, si bien no hay duda de la necesidad de combatir el terrorismo, las medidas preventivas deben ser objeto de un estrecho seguimiento y basarse en sólidas garantías procesales. La autonomía de los tribunales ordinarios, la transparencia del proceso judicial y el fomento de los mecanismos de control internacionales son los pilares para garantizar el equilibrio adecuado entre la justicia y la seguridad.

Palabras clave: terrorismo, medidas antiterroristas, garantías procesales, tribunales militares, derechos humanos, juicio justo.

Introduction

The enactment of counterterrorism legislation following the events of September 11th marked a pivotal shift in the balance between national security and individual rights.¹ Governments around the world have implemented frameworks aimed at countering terrorism, often leading to increased securitarian restrictions that challenge fundamental rights, including the procedural guarantees of a fair trial.² For instance, the United States (hereinafter, US) Patriot Act³ introduced extensive surveillance measures and curtailed procedural safeguards for individuals suspected of terrorism.⁴ Similarly, France's 2017 counterterrorism law integrated emergency measures into ordinary law, allowing broader use of administrative searches and house arrests without judicial oversight.⁵ While these measures were designed to address pressing security threats, they have sparked intense debates about their implications for the principles of justice, particularly the right to a fair trial.

The term “terrorism” remains without a universally agreed-upon definition, posing challenges to its precise legal characterization under international law.⁶ Originating from the French word *terreur* (meaning “to instill fear”),⁷ the concept initially referred to acts intended to provoke widespread fear and intimidation. Over time, its meaning has expanded to include politically or ideologically driven acts of violence targeting governments, civilians, or critical infrastructure.

Terrorism, as a legal and political concept, has evolved significantly over time. Its origins can be traced to the “Reign of Terror” during the French Revolution, where

¹ The September 11 attacks were a series of four coordinated terrorist attacks launched by the Islamic terrorist group al-Qaeda upon the United States in New York City and the Washington D.C on September 11, 2001. The attacks killed almost 3,000 people and caused at least \$10 billion in property and infrastructure damage. See: Julien Fragnon, “La gestion politique du 11 septembre en France”, Ph.D Thesis In Political Sciences, Lyon University 2009, p. 86.

² Tom Parker, *Avoiding the Terrorist Trap: Why Respect for Human Rights Is the Key to Defeating Terrorism*, Insurgency and Terrorism Series, Potomac Books, 2019, pp. 530-760.

³ Wanda Mastor, “L'état d'exception aux États-Unis : le USA Patriot Act et autres violations «en règle» de la constitution,” in *AJJC*, no. XXIV, 2008, pp. 461-478.

⁴ Benjamin Atkins and Nathan Moran, “Contemporary International and Domestic Terrorist and Security Threats,” in *Special Topics in Policing*, ed. James F. Albrecht and Geert den Heyer (Cham: Springer, 2024), pp. 3-10, available at: https://doi.org/10.1007/978-3-031-67943-8_1 (accessed on 15 November 2024).

⁵ Amnesty International, “Unjust Counter-Terror Measures Used to Persecute, Not Prosecute, in France,” 27 Nov. 2018, available at: <https://www.amnesty.org/en/latest/press-release/2018/11/unjust-counter-terror-measures-used-to-persecute-not-prosecute-in-france/> (accessed on 16 November 2024).

⁶ Carl Wellman, *Terrorism and Counterterrorism*, vol. 9, Springer in Law, Springer, Dordrecht, 2013, pp. 1-17, available at: https://doi.org/10.1007/978-94-007-6007-3_1 (accessed on 16 November 2024).

⁷ Gilbert Guillaume, “Terrorisme et Droit international,” in *RCADI*, 1989, pp. 296-360.

it described state-sponsored violence aimed at suppressing dissent.⁸ In the modern era, the term encompasses a broader spectrum of activities, including those by non-state actors, insurgencies, and transnational networks such as Al-Qaeda⁹ and The Islamic State of Iraq and Syria (hereinafter, ISIS).¹⁰ The global response to these threats has led to the proliferation of counterterrorism laws, which often prioritize security over individual freedoms. Procedural guarantees, such as the right to an impartial tribunal, access to legal counsel, and protection against self-incrimination, are central to any fair trial.¹¹ However, in the context of counterterrorism, these rights have frequently been subordinated to state security concerns.

In a criminal trial, the rights of the accused are indispensable, encompassing protections such as the right to a public hearing before an independent and impartial tribunal, adequate preparation time for defense, and the ability to communicate freely with chosen counsel. Moreover, no concerns related to security or public order can justify violating the accused's right to remain silent or to avoid self-incrimination.¹² These principles are enshrined in international human rights instruments, including article 14 of the International Covenant on Civil and Political Rights (hereinafter, ICCPR)¹³ and article 6 of the European Convention on Human Rights (hereinafter, ECHR).¹⁴ However, when analyzing counterterrorism laws in certain countries, such as the US, France, and Turkey, one finds that these guarantees have been significantly curtailed. For instance, suspected terrorists are sometimes denied access to evidence against them under the guise of national security, and trials may be conducted in camera (behind closed doors), undermining the transparency required for a fair judicial process.

⁸ During the French Revolution, the Jacobin government instituted a “règne de la terreur” that entailed the killing of political adversaries and the seizure of their assets. Donald Kagan et al., *The Western Heritage*, 11th Edition, Pearson, 2012, p. 679.

⁹ Abdel Bari Atwan, *L'histoire secrète d'Al-Qaïda, les origines, les réseaux, la stratégie*, Paris, 2007, p. 461.

¹⁰ Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror*, 2nd Edition Regan Arts, 2016, p. 79.

¹¹ Carsten Momsen, and Marco Willumat, “Due Process and Fair Trial,” in *Elgar Encyclopedia of Crime and Criminal Justice*, 28 Nov. 2024, pp. 102-113, available at: <https://doi.org/10.4337/9781789902990.due.process.fair.trial> (accessed on 17 November 2024).

¹² European Court of Human Rights (ECtHR), *Heaney and McGuinness v. Ireland*, Application no. 34720/97, 21 December 2000, parag. 57.

¹³ The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations in 1966, which entered into force on March 23, 1976. It commits its signatory states to respect and ensure civil and political rights, including the right to life, freedom of speech, freedom of assembly, and the right to a fair trial, serving as a cornerstone for international human rights law.

¹⁴ The European Convention on Human Rights (ECHR) is an international treaty adopted by the Council of Europe in 1950, which entered into force on September 3, 1953. It aims to protect fundamental human rights and freedoms, such as the right to life, prohibition of torture, and the right to a fair trial, and is enforced by the European Court of Human Rights (ECtHR).

This article narrows its focus to procedural guarantees of a fair hearing in the context of counterterrorism laws, deliberately excluding other aspects of potential human rights violations, such as detention conditions or extrajudicial measures. By analyzing the experiences of select countries; particularly those with robust legal systems that have nonetheless adopted restrictive measures; this study will illustrate how procedural rights have been compromised. For example, in the United Kingdom (hereinafter, UK), special immigration appeals tribunals (hereinafter, SIAC) allow evidence to be withheld from the accused if deemed a national security risk.¹⁵ Similarly, in Turkey, emergency decrees following the 2016 coup attempt enabled the government to suspend several fair trial guarantees, particularly for individuals accused of terrorism.¹⁶

Methodology

For the purposes of this study, we have opted for a comparative analytical approach¹⁷ to scrutinize and evaluate the legal texts and practices concerning procedural guarantees in the context of counterterrorism. The research is centered on the protection of fundamental rights, particularly fair trial guarantees, within various legal systems that have implemented counterterrorism laws and measures. Instead of relying on conventional classifications of legal systems based on geographic location, historical ties, or commonly shared legal systems, the jurisdictions that were examined were chosen based on identified infringements introduced by their counterterrorism frameworks.¹⁸ By focusing on legal systems where significant procedural violations have been documented, this study aims to uncover systemic flaws and patterns of rights infringements. This methodological choice not only emphasizes the real-world implications of counterterrorism laws on procedural guarantees but also facilitates a nuanced understanding of how these measures interact with, and at times undermine, established legal norms across diverse jurisdictions.

¹⁵ Amnesty International, "Left in the Dark: The Use of Secret Evidence in the United Kingdom," 2012, available at: <https://www.amnesty.org/fr/wp-content/uploads/2021/06/eur450142012en.pdf> (accessed on 17 November 2024).

¹⁶ Human Rights Watch, "Turkey: State of Emergency Provisions Violate Human Rights and Should Be Revoked," 20 Oct. 2016, available at: <https://www.hrw.org/news/2016/10/20/turkey-state-emergency-provisions-violate-human-rights-and-should-be-revoked> (accessed on 18 November 2024).

¹⁷ Mark Van Hoecke, "Methodology of Comparative Legal Research," in *Law and Method*, June 2015, pp. 1-35, available at: <https://doi.org/10.5553/REM.000010> (accessed on 19 November 2024).

¹⁸ Marieke Oderkerk, "The Importance of Context: Selecting Legal Systems in Comparative Legal Research," in *Netherlands International Law Review*, vol. 48, no. 3, Dec. 2001, pp. 293-318, available at: <https://doi.org/10.1017/S0165070X00001340> (accessed on 19 November 2024).

For this reason, this article deliberately narrows its scope to focus on procedural guarantees, rather than addressing the broader spectrum of human rights issues related to counterterrorism. It aims to shed light on the effects counterterrorism measures have had on fair trial rights, with a focus on the denial of defense rights, limitations on public guarantees of a trial, and repudiation of judicial impartiality through the use of special tribunals. The comparative methodology¹⁹ ensures that these issues are not examined in isolation but are contextualized within the broader landscape of counterterrorism laws and practices globally.

This article is structured as follows: the first section focuses on the violation of defense rights, examining the extent to which counterterrorism measures impact the accused's ability to access fundamental legal safeguards. The second section addresses the infringement of public trial guarantees, analyzing how such violations intersect with counterterrorism legislation, policies, and practices, and evaluating their alignment with local, national, and international legal standards. Lastly, the third part discusses the erosion of unbiased and independent trials, specifically, the deployment of special tribunals to prosecute suspected persons of terrorists-related crimes.

The Right to Defense under Siege: A Critical Analysis of Procedural Violations in Counterterrorism Measures

The right to legal assistance in criminal cases, particularly in terrorism-related offenses, is a cornerstone of ensuring a fair and equitable trial. This principle extends beyond the mere presence of legal representation, especially lawyers, to ensuring that they can perform their duties within a lawful, practical, and reasonable framework.²⁰ The right to defend oneself is enshrined as sacred throughout all phases of investigation and trial. It is, in fact, a constitutional right that should not be infringed under any pretext.²¹

In this context, many counterterrorism laws explicitly restrict the ability of suspects to access legal counsel. For instance, under Australia's Criminal Code,²² if a

¹⁹ Van Hoecke, "Methodology of Comparative Legal Research," p. 8.

²⁰ Kasey McCall-Smith, "How Torture and National Security Have Corrupted the Right to Fair Trial in the 9/11 Military Commissions," in *Journal of Conflict and Security Law*, vol. 27, no. 1. Spring 2022, pp. 83-116, accessible at: <https://doi.org/10.1093/jcsl/krac002> (accessed on 22 November 2024).

²¹ McCall-Smith, "How Torture and National Security," pp. 109-113.

²² Parliament of Australia, *Australia's Criminal Code of 1995 as amended by Act No. 13, 2021, sec. 105.37*; see also prohibited contact orders in secs. 105.14A, 105.15 and 105.16, available at: <http://www.comlaw.gov.au/Details/C2012C00451> (accessed on 22 November 2024).

“prohibited contact order” is issued by law enforcement, individuals subject to a preventative detention order are barred from contacting or consulting with a lawyer. Furthermore, police officers may monitor any communication with attorneys and guests as part of the preventative detention order.²³ These regulations further state that detainees may only communicate with attorneys, family members, or employers in a manner that permits police surveillance. While the legislation prohibits such monitored conversations from being used as evidence in court,²⁴ the restrictions nonetheless undermine critical procedural rights.

In France, article 706-88 of the French Code of Criminal Procedure permits delays in legal assistance during police custody in cases involving terrorism. Specifically, access to a lawyer can be deferred for 72 hours when compelling circumstances arise, such as the need to collect or preserve evidence or to prevent serious threats to life, liberty, or physical integrity.²⁵ This exception clearly infringes on the right to legal counsel in terrorism-related cases. Moreover, a 2008 report by the Human Rights Committee (hereinafter, HRC) criticized France on this issue,²⁶ expressing its *“concern that in the case of persons in police custody suspected of terrorism, access to a lawyer is guaranteed only after seventy-two hours and can be delayed until the fifth day when custody is extended by a judge”*.

The Constitutional Council has determined that such a derogation aligns with the constitution. According to the constitutional judge, respect for the rights of the defense generally requires that any individual suspected of committing an offense should not be subjected to questioning while in detention, without the effective assistance of a lawyer.²⁷ However, this constitutional safeguard does not exclude exceptions under certain circumstances. Specifically, in cases involving offenses characterized by exceptional seriousness or complexity, often committed

²³ Parliament of Australia, *Australia's Criminal Code of 1995 as amended by Act No. 13, 2021*. sec. 105.38.

²⁴ The Australian criminal code states in its section 105.38 that the contact the person being detained has with another person under section 105.35 or 105.37 may take place only if it is conducted in such a way that the contact, and the content and meaning of the communication that takes place during the contact, can be effectively monitored by a police officer exercising authority under the preventative detention order.

²⁵ French Business Law, “Article 706-88 of the French Code of Criminal Procedure,” available at: <https://french-business-law.com/french-legislation-art/article-706-88-of-the-french-code-of-criminal-procedure/> (accessed on 24 November 2024).

²⁶ Human Rights Watch, “Preempting Justice: Counterterrorism Laws and Procedures in France,” 1st July 2008, available at: <https://www.hrw.org/report/2008/07/01/preempting-justice/counterterrorism-laws-and-procedures-france> (accessed on 25 November 2024).

²⁷ François Desprez, “Conformité à la Constitution du report de l'intervention de l'avocat au cours de la garde à vue pour criminalité organisée,” in *La Revue des droits de l'homme*, 23 Dec. 2014, pp. 1-9, available at: <https://doi.org/10.4000/revdh.1035> (accessed on 26 November 2024).

by individuals acting within an organized group or network, the assistance of legal counsel for a detainee may be postponed. Such a postponement must be justified and authorized by a decision from the public prosecutor, the investigating judge, or the liberty and custody judge. The justification typically hinges on the necessity to facilitate the collection or preservation of evidence or to prevent potential threats to individuals' life, liberty, or physical integrity.²⁸

Notably, the Constitutional Council's ruling did not precisely define what qualifies as "*particular seriousness or complexity of certain offenses*," leaving significant interpretive discretion to judicial authorities. This lack of clear criteria raises concerns about the potential for broad or inconsistent application, which may inadvertently undermine the principles of legal certainty and procedural fairness. The decision reflects an attempt to balance the imperative of safeguarding defense rights with the practical challenges posed by investigating serious and organized crimes, though it also underscores the tension inherent in reconciling individual rights with collective security imperatives.²⁹

The Moroccan Code of Penal Procedure grants the defendant the right to contact a lawyer after 24 hours of police custody, up to a maximum of 36 hours if the prosecutor agrees to the extension. In terrorism-related cases, the prosecutor can prohibit access to a counsel for up to six days, as well as any communication with the outside world.³⁰ These rules, by limiting critical protections, contradict the right to basic assurances and undermine the right to a fair trial. In addition to the issue of delays, we must point out that in Morocco, the rights of defense are also violated by lawyers. According to the International Federation of Human Rights (hereinafter, IFHR), for fear of being considered by the public authorities as terrorist sympathizers, several lawyers have refused to defend some of those accused of terrorism. This has forced the Moroccan Bar Association to appoint new, inexperienced, or unmotivated lawyers in an emergency that has hardly allowed for a defense worthy of the name.³¹

²⁸ Desprez, François, "Conformité à la Constitution," p. 2.

²⁹ Desprez, François, "Conformité à la Constitution," p. 6.

³⁰ Association for the Prevention of Torture (APT), "Les Garanties Fondamentales," pp. 55-80, available at: https://www.apr.ch/sites/default/files/publications/Les%20Garanties%20Fondamentales%20web_fr.pdf (accessed on 26 November 2024).

³¹ FIDH, "Arbitrary Drifts in the Fight against Terrorism in Morocco," 7 July 2003, available at: <https://www.fidh.org/en/region/north-africa-middle-east/morocco/Arbitrary-drifts-in-the-fight> (accessed on 26 November 2024).

In the Saudi Arabia, the counterterrorism law of 2014 guarantees and establishes the right to be assisted by an attorney in article 10, which states: “*It is the right of any person charged with one of the crimes listed in this law to be assisted by an active lawyer who will defend him before bringing the charge before the court.*” The attorney must have the necessary and sufficient time set aside by the parties to the investigation.³² However, article 21 of the new counterterrorism law of 2017 tempers this principle.³³ In fact, this provision states that the prosecutor has the authority to prohibit attorneys from communicating with their clients at any time throughout the investigation, with no time limit.³⁴

On February 2, 2016, the Tunisian parliament enacted a significant revision to the Code of Criminal Procedure, granting suspects the right to legal representation from the very onset of detention. This marked a notable step forward in aligning Tunisian legal standards with international human rights obligations. However, the reform also included last-minute legislative amendments that diluted the initial protections. These amendments empowered the investigative judge and the prosecutor to postpone a suspect's access to a lawyer for up to 48 hours after the commencement of detention.³⁵

According to an analysis by Human Rights Watch (hereinafter, HRW), such provisions undermine the procedural guarantees of a fair trial, as the initial hours of detention are often critical for gathering evidence and shaping the suspect's defense. While the reform aimed to balance the need for effective law enforcement with the protection of fundamental rights, the delay in accessing legal counsel raises concerns about potential abuses during the early stages of detention, such as coerced confessions or unlawful interrogation practices.³⁶ This delayed access to legal representation

³² Sumanto Al Qurtuby, “Saudi Government and Counterterrorism,” in *Terrorism and Counter-terrorism in Saudi Arabia and Indonesia* (Singapore: Palgrave Macmillan, 2022), pp. 97-142, available at: https://doi.org/10.1007/978-981-19-1337-2_3 (accessed on 26 November 2024).

³³ Human Rights Watch, “Saudi Arabia: New Counterterrorism Law Enables Abuse,” 23 Nov. 2017, available at: <https://www.hrw.org/news/2017/11/23/saudi-arabia-new-counterterrorism-law-enables-abuse> (accessed on 30 November 2024).

³⁴ Alkarama Foundation, “Saudi Arabia's New Anti-Terrorism Law Makes the Same Mistakes as Its Predecessor by Abusing Human Rights,” available at: <https://www.alkarama.org/en/articles/saudi-arabias-new-anti-terrorism-law-makes-same-mistakes-its-predecessor-abusing> (accessed on 30 November 2024).

³⁵ Human Rights Watch, “Tunisia: Landmark Step for Detainee Rights,” 4 Feb. 2016, available at: <https://www.hrw.org/news/2016/02/04/tunisia-landmark-step-detainee-rights> (accessed on 30 November 2024).

³⁶ Gabriele Simoncini, “The Price to Be Paid: The Impacts of Counterterrorism on a New Democratic Polity,” in *Counterterrorism in Transition: Post-2011 Tunisian democracy and the war on terror* (Cham: Palgrave Macmillan, 2024), pp. 121-154, available at: https://doi.org/10.1007/978-3-031-54184-1_5 (accessed on 3 December 2024).

remains controversial, particularly in cases involving terrorism-related offenses. Critics argue that these exceptions provide a loophole that risks undermining the very rights the reform sought to protect. The provision has drawn criticism from international human rights organizations,³⁷ which have urged Tunisia to reconsider such measures to ensure full compliance with the principles of due process and the right to a fair trial, as enshrined in the ICCPR.

Access to a lawyer can be delayed for up to 48 hours according to UK terrorism act if the police believe it might tamper with evidence or lead to the alerting of additional suspects.³⁸ In 2008, the United Nations (hereinafter, UN) Human Rights Committee raised concerns about this aspect of the statute.³⁹ For the same reason, UK police officers may insist that a detainee communicate with a legal representation “only in the presence and hearing of a competent officer.”⁴⁰

In *Murray v. UK* case, the European Court of Human Rights (hereinafter, ECtHR) ruled that the UK violated article 6 of the Convention by denying a detainee access to a counsel during the first 48 hours of police interrogation. The court held that “The concept of fairness enshrined in art. 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defense may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under art. 6.”⁴¹

³⁷ Human Rights Watch, “‘You Say You Want a Lawyer’: Tunisia’s New Law on Detention in Paper and Practice,” 1st June 2018, available at: <https://www.hrw.org/report/2018/06/01/you-say-you-want-lawyer/tunisia-new-law-detention-paper-and-practice> (accessed on 3 December 2024).

³⁸ Parliament of United Kingdom, *UK Terrorism Act, 2000, as amended by the Terrorism Act 2006, schedule 8(8)*, available at: <http://www.legislation.gov.uk/ukpga/2000/11> (accessed on 5 December 2024).

³⁹ The Human Rights Committee has explained, “The Committee considers that the State party has failed to justify this power, particularly having regard to the fact that these powers have apparently been used very rarely in England and Wales and in Northern Ireland in recent years. Considering that the right to have access to a lawyer during the period immediately following arrest constitutes a fundamental safeguard against ill-treatment, the Committee considers that such a right should be granted to anyone arrested or detained on a terrorism charge.” The United Nations Human Rights Committee, “Concluding Observations of the Human Rights Committee for the United Kingdom,” 93rd Session, Geneva, 7-25 July 2008, UN Doc. ICCPR/C/GBR/CO/6, July 30, 2008, para. 19, available at: www.icj.org/IMG/CO_UK.pdf (accessed on 5 December 2024).

⁴⁰ The law also allows a delay in schedule 8, secs. 8(4), 7(1) if contacting a lawyer would serve to alert persons suspected of having committed an offense “thereby making it more difficult to prevent an act of terrorism,” even though the same law states that detainees have the right “to consult a solicitor as soon as is reasonably practicable, privately and at any time.”; See Parliament of United Kingdom, *Terrorism Act 2000, schedule 8, secs. 8, 9*.

⁴¹ European Court of Human Rights (ECtHR), *Murray v. United Kingdom*, Judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I, para. 66.

To conclude, the right to legal representation for individuals accused of crimes is a fundamental procedural safeguard.⁴² It ensures that defendants can either defend themselves personally or access legal counsel of their choice, with free legal aid provided if necessary. Nevertheless, many counterterrorism laws undermine this right by delaying or outright denying access to legal counsel, significantly weakening procedural guarantees and fair trial standards.⁴³

Behind Closed Doors: The Disregard for Public Hearings in Counterterrorism Trials

Lord Chief Justice Hewart once said, “Justice must not only be done, it must also be seen to be done”.⁴⁴ This is the purpose of the principle of publicity of the proceedings, which allows any citizen to check under which conditions the trial was conducted and how the court decisions were rendered. Thus, the debates shall be held publicly and the court decision shall be rendered in the presence of the public. These two elements are likely to foster transparency, protect litigants from the risks of secretive justice, and reinforce trust in judicial institutions.⁴⁵

The right to a public trial, a cornerstone of justice, has exerted profound influence across a wide array of international human rights instruments. For instance, it is explicitly affirmed in article 10 of the Universal Declaration of Human Rights (hereinafter, UDHR) and article 6 of the ECHR, both of which state that “Everyone has the right to a fair public (...) trial (...)”. We can also cite article 14 (1) of the ICCPR, which provides that “1. (...) Everyone shall be entitled to a public hearing by a competent (...) tribunal (...). The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

⁴² Gaëlle Deharo, “Restriction du droit d'accès à un avocat,” in *La lettre juridique*, 29 September 2016, available at: <https://www.lexbase.fr/article-juridique/34599451-jurisprudence-restriction-du-droit-d-acces-a-un-avocat> (accessed on 4 December 2024).

⁴³ Deharo, Gaëlle, “Restriction du droit d'accès à un avocat”.

⁴⁴ High Court of Justice (England and Wales), *R v Sussex Justices; Ex parte McCarthy*, 1924, 1 KB 256.

⁴⁵ European Court of Human Rights (ECtHR), *Helmers v. Sweden*, serie A No. 212-A, 29 October 1991, § 33 and 36; European Court of Human Rights (ECtHR), *Werner v. Austria*, Rec. 1997-VII, 24 November 1997, § 45.

The principle of public proceedings serves a dual purpose: deterring misconduct and safeguarding litigants' trust in the judicial system by ensuring transparency and protecting their interests against unchecked, secretive justice.⁴⁶ This principle also has a political dimension, aimed at involving the public in matters of shared societal concern. Allowing the public to witness courtroom proceedings fulfills their sense of justice, emphasizing that trials transcend the interests of the accused and the victim alone.⁴⁷ Moreover, the principle of publicity reinforces the necessity of abolishing exceptional courts, which often embody forms of political authoritarianism.

The right to a fair trial involves the right to a public hearing. Any restrictions on the public nature of a trial, including for the protection of national security, must be both necessary and proportionate, as assessed on a case-by-case basis. Any such restrictions should be accompanied by adequate mechanisms⁴⁸ for observation or review to guarantee the fairness of the hearing.

Numerous countries have adopted specific laws to limit public hearings in order to maintain their control over the proceedings of the trial. These laws include clauses that are broad and do not provide specific definitions of expressions such as “national security”, “public order” and “public morals”.⁴⁹

According to article 306 of the French Code of Criminal Procedure, the court of assizes may decide that the trial will be held in camera, when it considers that the content of the debates may be dangerous for public order or morals.⁵⁰ In this case, only the accused and the civil parties are allowed to attend. This decision must be taken only by the professional magistrates, without the jurors. Nevertheless, the

⁴⁶ Charles Lysaght, “Publicity of court proceedings,” in *Irish Jurist* (1966-), vol. 38, 2003, pp. 34-57. JSTOR, available at: <http://www.jstor.org/stable/44026525> (accessed on 20 December 2024).

⁴⁷ Tuomioistuimet.fi, “Publicity in General Courts,” available at: <https://tuomioistuimet.fi/en/index/asiointijulkisuus/oikeudenkaynninjulkisuus/publicityingeneralcourts.html> (accessed on 20 December 2024).

⁴⁸ UN Human Rights Council, “Report of the sub-commission special rapporteur on terrorism and human rights: specific human rights issues: new priorities, in particular terrorism and counter-terrorism, Kalliopi K. Koufa,” 3 August 2006, (A/HRC/Sub.1/58/30), parag. 45, available at: [pdf \(undocs.org\)](https://www.undocs.org/pdf/asiointijulkisuus/oikeudenkaynninjulkisuus/publicityingeneralcourts.html) (accessed on 20 November 2024); UN General Assembly, “Protection of human rights and fundamental freedoms while countering terrorism: note / by the Secretary-General, Martin Scheinin,” 6 August 2008, (A/63/223), parag. 30, available at: <https://www.refworld.org/docid/48dce822.html> (accessed on 20 December 2024).

⁴⁹ Dawood Ahmed, and Elliot Bulmer, “Limitation Clauses,” *International Institute for Democracy and Electoral Assistance*, pp. 6-10, available at: <https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf> (accessed on 21 December 2024).

⁵⁰ French Business Law, “Article 306 of the French Code of Criminal Procedure,” 3 November 2023, available at: <https://french-business-law.com/french-legislation-art/article-306-of-the-french-code-of-criminal-procedure/> (accessed on 21 December 2024).

judgment on the merits must always be pronounced in open court. Exceptionally, under the terms of article 306-1 of the same code, if the facts judged are related to terrorism, the court, without the assistance of the jury, may, by a decision rendered in open court, order the hearing of a witness to be held in camera for the duration of the hearing if the witness's public testimony is likely to seriously endanger his or her life or physical integrity or that of his or her relatives.⁵¹ This is the case when the facts are covered by article 706-73 of the Code of Criminal Procedure,⁵² including “*crimes and offenses constituting acts of terrorism provided for in articles 421-1 to 421-6 of the Criminal Code*”. The same principles are applied before the liberty and custody judge in matters of pre-trial detention.

Similarly, article 187 of the Qatari Code of Criminal Procedure establishes that trials should generally be held in public, emphasizing transparency in judicial proceedings.⁵³ However, exceptions are permitted when the law mandates, the court deems it necessary, or one of the litigants requests a closed session to preserve public order, family morals, or individual dignity. This aligns with similar provisions found in many jurisdictions worldwide.

For cases involving terrorism, secrecy may be imposed to protect public safety and uphold the integrity of the judicial process. Additionally, the court may restrict audience presence if required and prohibit media coverage unless explicitly authorized by the presiding judge. Importantly, the term “*in camera*” refers to excluding the general public from the courtroom, while ensuring that the accused, their legal counsel, and witnesses remain present. This discretion allows the court to act without needing the consent of the litigants, particularly in cases where public exposure could disrupt societal order or violate moral standards, such as crimes involving adultery or indecency.⁵⁴

The decision to close a session lies solely with the court. In single-judge panels, the judge independently decides; in multi-judge panels, the presiding judge consults

⁵¹ Alexis Gaucher, “Pourquoi certains procès se déroulent à huis clos,” in *L'Yonne Républicaine*, 21 October 2024, available at: https://www.lyonne.fr/auxerre-89000/actualites/pourquoi-certains-proces-se-deroulent-a-huis-clos_14583428/ (accessed on 22 December 2024).

⁵² French Business Law, “Article 706-73 of the French Code of Criminal Procedure,” available at: <https://french-business-law.com/french-legislation-art/article-706-73-of-the-french-code-of-criminal-procedure/> (accessed on 23 December 2024).

⁵³ Amiri Diwan of the State of Qatar, *The Criminal Procedure Code issued by Law No. (23) of 2004, amended by Law No. (24) Of 2009*, art. 187.

⁵⁴ Ali Satan, “Les dispositifs juridiques de lutte contre le terrorisme et les garanties des droits fondamentaux, le cas de la France et des pays du Golfe,” Ph.D Thesis In Public law, Sorbonne University 2019, p. 345.

with colleagues before issuing the order. Such deliberation reflects the legal weight of these decisions, which are considered final and not open to appeal. If an appeal arises from a judgment in a closed session whether on grounds of procedural invalidity or lack of sufficient evidence, the Court of Cassation limits its review to ensuring consistency between the charges and the judgment. The reasons behind the decision to hold a closed session are presumed to stem from case-specific circumstances and are not subject to further scrutiny.⁵⁵

While the court holds the authority to deny requests for closed sessions if they lack sufficient justification, public hearings remain the foundational principle.⁵⁶ This ensures the transparency and fairness of judicial proceedings, maintaining litigants' trust and upholding the integrity of the legal process.⁵⁷

In the UK, there is a growing trend toward covert processes in national security and counterterrorism trials and hearings.⁵⁸ The concern is that such trials may be used to conceal wrongdoing, especially involvement in torture.

The Court of Appeal has denied an extraordinary attempt to stage the first totally secret criminal trial in the UK.⁵⁹ In their decision, the judges stated that the trial of the two men was of an exceptional nature and that its core should be held in private. However, they added that they had “grave concerns” about the cumulative effect of anonymizing the defendants and holding the hearings in secret.⁶⁰ Lord Justice Gross expressed his opinion in the famous case *Guardian News and Media Ltd v. Incedal*, emphasizing that open justice is a fundamental principle in trials. He stated: “*One aspect of the Rule of Law – a hallmark and a safeguard – is open justice, which includes criminal trials being held in public and the publication of the names of defendants. Open justice is both a fundamental principle of the common law and a means of ensuring public confidence in our legal system; exceptions are rare and must be justified*

⁵⁵ Satan, Ali, “Les dispositifs juridiques,” p. 346.

⁵⁶ Satan, Ali, “Les dispositifs juridiques,” p. 346.

⁵⁷ United Nations Rule of Law, “Qatar: Promotion and Protection of Human Rights,” available at: <https://www.un.org/ruleoflaw/blog/portfolio-items/qatar-promotion-and-protection-of-human-rights/> (accessed on 24 December 2024).

⁵⁸ Jill Lawless, “UK Court Says Terror Trial Can Be Partly Secret,” *Washington Examiner*, 20 Feb. 2016, available at: www.washingtonexaminer.com/news/2342896/uk-court-says-terror-trial-can-be-partly-secret (accessed on 24 December 2024).

⁵⁹ Dominic Casciani, “Fully Secret Terror Trial Blocked by Court of Appeal,” in *BBC News*, 12 June 2014, available at: www.bbc.com/news/uk-27806814 (accessed on 25 December 2024).

⁶⁰ England and Wales Court of Appeal (Criminal Division), *Guardian News & Media Ltd v Incedal*, EWCA Crim 1861, 24 September 2014, parag. 10.

on the facts. Any such exceptions must be necessary and proportionate. No more than the minimum departure from open justice will be countenanced.” From this, we can understand that exceptions are rare and must be justified on the facts, and in this case, that was not fulfilled.⁶¹

In ‘*Legal Defense and Assistance Project v. Nigeria*’ case, the African Commission on Human Rights stated that except for the opening and closing ceremonies, the trial was conducted in camera in contravention of article 7 of the African Charter. Indeed, due to mindful of developments in international human rights law and practice, “[...] *the Committee considers that a hearing must be open to the public in general, including members of the press [...]*”. The publicity of hearings is an important safeguard in the interest of the individual and the society at large.⁶²

The above-mentioned articles contain some explicit and clear provisions that allow secret hearings. This constitutes a breach of the right to fair trial since it intervenes with suspects’ rights to seek justice. Accordingly, holding terrorist suspects in closed doors trials cannot be justified as a proportionate measure to achieve one of the legitimate aims under article 14, paragraph 1, of the ICCPR.

A review of the counterterrorism laws of the above mentioned countries reveal that there is no provision for trials to be conducted in camera. However, it should be remembered that terrorist offences in some of these countries fall under the jurisdiction of special courts, such as state security courts. However, given their nature and jurisdiction, the sessions of these courts are not public. Therefore, it can be said that the introduction of the closed-door system in matters of terrorist offences constitutes a violation of the right of the accused to a fair trial.

⁶¹ Matthew Dyson, and Lorna Woods, *Criminal Records, Privacy and the Criminal Justice System*, Bloomsbury Professional, 12 September 2019, p. 136.

⁶² African Commission on Human Rights, *Legal Defence and Assistance Project v. Nigeria*, Communication No. 218/98, 6 March 2000, parag. 51.

Military Justice and the Violation of Impartiality: The Shift toward Special Courts in Counterterrorism Trials

It is a fundamental human right to be tried by a competent, independent,⁶³ and impartial tribunal.⁶⁴ Article 14 (1) of the ICCPR guarantees it, stating that “*in the determination of any criminal charge against him [...] everyone shall be entitled to a fair and public hearing before a competent, independent, and impartial tribunal established by law.*” Article 6 of the ECHR, article 8 (1) of the American Convention on Human Rights (hereinafter, ACHR), and articles 7 and 26 of the African Charter on Human and Peoples' Rights (hereinafter, ACHPR) all protect this right in similar ways.

Furthermore, principle 5 of the UN Basic Principles on the Independence of the Judiciary emphasizes that judicial decisions must remain free from influence or interference by other branches of government. Additionally, the ‘Basic Principles’ assert that every individual has the right “*to be tried by ordinary courts or tribunals using established legal procedures.*” The document further specifies that tribunals circumventing the standard procedures of the legal process must not be established to replace the jurisdiction of ordinary courts or judicial bodies.⁶⁵

Indeed, even in wartime or during emergency situations, the right to an independent, impartial and competent tribunal is absolute,⁶⁶ according to the HRC. As a result, “*any criminal conviction by a body that is not a tribunal is incompatible with the right to a fair trial.... The notion of a “tribunal”... designates a body... that is established*

⁶³ The independence of courts or tribunals handling criminal cases requires that they be free from influence by the executive, ensuring that neither political interference from the executive nor legislative pressure affects their decisions. This independence is safeguarded by establishing clear procedures for the appointment of judges, ensuring they meet appropriate qualifications, and providing guarantees related to their security of tenure. See: European Court of Human Rights (ECtHR), *Campbell and Fell v. United Kingdom*, Application Nos. 7819/77 and 7878/77, 28 June 1984, parag. 78, available at: <https://hudoc.echr.coe.int> (accessed on 26 December 2024).

⁶⁴ Impartiality requires numerous key components. Judges must avoid personal bias, prejudice, or previous views about the subject at hand, and make conclusions based entirely on the evidence provided and proved in court. Furthermore, impartiality necessitates that the tribunal not only be neutral, but also look unbiased to a reasonable observer. ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 1984.

⁶⁵ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, “Basic Principles on the Independence of the Judiciary,” 6 September 1985, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> (accessed on 26 December 2024).

⁶⁶ UN Human Rights Council, “Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka,” A/HRC/35/31/Add.1, 23 March 2017, parag. 55, available at: <https://www.refworld.org/reference/mission/unhrc/2017/en/116933> (accessed on 24 December 2024).

*by law, is independent of the executive and legislative branches of government, or enjoys judicial independence in specific cases in deciding legal matters in judicial proceedings.*⁶⁷

The UN Special Rapporteur on fair trial has unequivocally clarified that the principles of judicial independence and impartiality must remain non-negotiable, regardless of the context. Judges or individuals acting in a judicial capacity must be free from all forms of political influence in their decision-making. The use of military courts should be strictly limited to addressing offenses of a military nature committed by military personnel. Furthermore, the application of special or specialized courts in terrorism cases is strongly discouraged, as it risks undermining the integrity of judicial proceedings.

However, numerous nations have established special counterterrorism tribunals that fail to meet international standards of independence and impartiality or that impose significant restrictions on defendants' procedural rights under international law. While some of these special courts existed prior, their use expanded significantly following the September 11 attacks or other large-scale assaults by armed groups. In at least four countries, military courts have been granted jurisdiction over terrorism-related cases, while at least three dozen nations have implemented special procedures for terrorism suspects in ordinary courts. Many of these procedures violate international legal norms, including practices such as shifting the burden of proof onto the defendant, thereby eroding essential safeguards for fair trials.

HRW has consistently opposed the establishment and use of special courts for so-called national security crimes. These courts, HRW contends, are often exploited to prosecute peaceful dissidents under politically motivated charges. Moreover, they frequently lack essential due process protections for defendants, with evidentiary standards falling significantly below international human rights benchmarks. As such, these special courts pose a grave threat to justice, fairness, and the rule of law.

Several nations have resorted to trying terrorist suspects in tribunals that fail to meet international fair trial standards. In Egypt, for instance, a parallel system of emergency justice has been established, consisting of specially constituted "emergency courts" and military courts for civilian trials in national security cases. These courts frequently disregard fundamental fair trial safeguards, such as equality before the

⁶⁷ United Nations Human Rights Committee, "General Comment No. 32: Article 14, Right to Equality before Courts and Tribunals and to a Fair Trial," CCPR/C/GC/32, 23 Aug. 2007, paras. 18-19, available at: <https://www.refworld.org/legal/general/hrc/2007/en/52583> (accessed on 21 December 2024).

law, prompt access to legal counsel, and the prohibition against evidence obtained through torture. As a result of such grossly unfair proceedings, some defendants have been sentenced to death and executed.

The 2014 Egyptian Constitution, specifically article 204, grants military courts jurisdiction over civilians for certain offenses. This article states that civilians may be tried in military courts for crimes that represent a direct assault on military facilities, equipment, weapons, documents, secrets, public funds, or military personnel, among other specified areas.⁶⁸ In 2014, President Abdel Fattah al-Sisi issued a decree expanding military court jurisdiction to include crimes committed at public and vital facilities, effectively placing such facilities under military jurisdiction for two years.⁶⁹

Furthermore, Egypt's counterterrorism law No. 95 of 2015 includes broad definitions of terrorism and grants authorities expansive powers to combat terrorism, raising concerns about potential infringements on human rights and civil liberties.⁷⁰ These legal provisions have been criticized for undermining fair trial standards and expanding military jurisdiction over civilians, which may contravene international human rights norms.⁷¹ It is important to note that while the 2014 Constitution does not contain an article equivalent to the former article 179, which allowed the President to bypass ordinary courts,⁷² the current legal framework still permits the referral of civilians to military courts under specific circumstances.

In Nigeria, the government's response to a wave of deadly attacks by militant groups such as Boko Haram has raised significant concerns.⁷³ In 2012, President Goodluck

⁶⁸ Parliament of Egypt, *Constitution of the Arab Republic of Egypt of 2015 as amended in 2019*, art. 204, available at: <https://faolex.fao.org/docs/pdf/egy127542e.pdf> (accessed 24 Dec. 2024).

⁶⁹ Human Rights Watch, "Egypt: Unprecedented Expansion of Military Courts," 17 November 2017, available at: <https://www.hrw.org/news/2014/11/17/egypt-unprecedented-expansion-military-courts> (accessed 27 Dec. 2024).

⁷⁰ Human Rights Watch, "Egypt: Counterterrorism Law Erodes Basic Rights," 19 August 2015, available at: <https://www.hrw.org/news/2015/08/19/egypt-counterterrorism-law-erodes-basic-rights> (accessed on 28 December 2024).

⁷¹ International Commission of Jurists, "Egypt Constitutional Amendments: Unaccountable Military, Unchecked President and a Subordinated Judiciary", April 2019, available at: <https://www.icj.org/wp-content/uploads/2019/04/Egypt-Constitutional-amendments-advocacy-analysis-brief-2019-ENG.pdf> (accessed on 28 December 2024).

⁷² Amnesty International, "Egypt - Systematic Abuses in the Name of Security," 11 April 2007, MDE 12/001/2007, available at: <https://www.refworld.org/reference/countryrep/amnesty/2007/en/41557> (accessed on 15 December 2024).

⁷³ Jacob O. Fatile, and Ganiyu L. Ejalonibu, "Global Terrorism Networks and Boko Haram Insurgency in Nigeria," in *Managing Contemporary Security Challenges in Nigeria. Africa's Global Engagement: Perspectives*

Ebele Jonathan reportedly sought to amend the country's 2011 counterterrorism law to require that individuals designated as "enemy combatants" be tried by military panels instead of civilian courts.⁷⁴ This shift, according to local media, aimed to "curb the excesses of some attorneys" operating in civilian courts. Such measures, however, risk undermining the rule of law and jeopardizing the fundamental rights of defendants, further illustrating the tension between counterterrorism objectives and the preservation of international fair trial norms.⁷⁵

The US is one of the most well-known examples of a country where special courts undermine the right to a fair trial. Indeed, military commissions were established at the US military camp in Guantanamo Bay, Cuba, to prosecute individuals arrested in the "global war on terror".⁷⁶ They were first approved by then President George W. Bush in November 2001, and were reauthorized in a modified form by Congress in 2006 and 2009 after Barack Obama was elected president. Military tribunals have substantially less due process safeguards than federal courts in the US.⁷⁷ Furthermore, current military commission regulations allow the so-called "derived evidence"⁷⁸ obtained through torture, as well as forced testimony from someone other than the defendant, may be admitted.⁷⁹

from *Emerging Countries*, ed. A. A. Abdullahi, U. A. Raheem, J. Amzat, and K. C. Nwachukwu (Singapore: Palgrave Macmillan, 2024), pp. 217-240, available at: https://doi.org/10.1007/978-981-97-5296-6_10 (accessed on 26 December 2024).

⁷⁴ Chuks Okacha, and Michael Olugbode, "FG to Amend Anti-Terrorism Act," *Thisday*, 6 May 2012, <https://oladapokolawole.com/2012/05/06/nigeria-fg-to-amend-anti-terrorism-act/> (accessed on 18 December 2024).

⁷⁵ Maike Knoechelmann, "Why the Nigerian Counter-Terrorism Policy toward Boko Haram Has Failed: A Cause and Effect Relationship," in *The International Institute for Counter-Terrorism (ICT) Working Papers Series 32*, October 2014, pp. 1-26, available at: <http://www.jstor.org/stable/resrep09448> (accessed on 27 December 2024).

⁷⁶ Jean Clause Paye, "Le «Patriot Act Reauthorization»: Un état d'urgence permanent," *multitudes.net*, available at: <https://www.multitudes.net/Le-Patriot-Act-Reauthorization-un/> (accessed on 22 December 2024).

⁷⁷ USA Secretary of Defense, "US Manual For Military Commissions," 2010, Rule 304(a)(5)(A) and (B) and Rule 304(a)(2)-(4), available at: https://www.mc.mil/portals/0/2010_manual_for_military_commissions.pdf (accessed 22 December 2024); Kenneth Roth, "Justice Cheater," *The International Herald Tribune*, 6 May 2012, available at: <http://www.hrw.org/news/2012/05/06/justice-cheater> (accessed on 28 December 2024); Human Rights Watch, "U.S. Military Commission Trials for 9/11 Suspects a Blow to Justice," 4 April 2015, available at: <http://www.hrw.org/news/2011/04/04/us-military-commission-trials-911-suspects-blow-justice> (accessed on 28 December 2024).

⁷⁸ Known as "fruit from the poisoned tree," derivative evidence is evidence that ordinarily would be subject to exclusion in a common law court because it is obtained by illegal or improper conduct, but that a court admits anyway on grounds that it would inevitably have been discovered by lawful means.

⁷⁹ Detlev F. Vagts, "Which Courts Should Try Persons Accused of Terrorism?," in *European Journal of International Law*, vol. 14, no. 2, 2003, pp. 313-326, available at: <https://doi.org/10.1093/ejil/14.2.313> (accessed on 9 December 2024).

In Chile,⁸⁰ Peru,⁸¹ Venezuela,⁸² and elsewhere,⁸³ human rights organizations have consistently asserted that prosecuting civilians in military tribunals infringes upon fundamental due process rights.⁸⁴ The Working Group on Arbitrary Detention is concerned that “almost none of them” adheres to the “guarantees of a fair trial.”⁸⁵

In Brazil, a notable example of the ongoing debate around military tribunals occurred in 2022, when the Attorney General filed ADI 5032 before the Supreme Federal Court. The case challenges laws that expanded military jurisdiction to include civilian cases, especially those involving human rights violations. As the trial continues, human rights advocates have raised concerns about the ability of military courts to impartially handle cases involving crimes against civilians. These critics argue that military jurisdiction should remain focused on maintaining discipline within the armed forces, not on investigating and prosecuting human rights abuses.⁸⁶ This case highlights a critical clash between Brazil's domestic laws and international human rights standards, especially those outlined by the Inter-American Human Rights System. Over the years, the Inter-American Court of Human Rights (hereinafter, IACtHR) has consistently ruled that military courts should only address issues directly related to the military, as emphasized in cases such as *Castillo Petruzzi v. Peru*,⁸⁷ *Durand Ugarte v. Peru*,⁸⁸ and *Herzog v. Brazil*.⁸⁹ The Court's stance is clear:

⁸⁰ Rachel Blair, “Military Justice in Chile: Exploring Its Ongoing Violation of the American Convention on Human Rights,” in *Jackson School Journal of International Studies*, Spring/Summer 2023, pp. 19-34.

⁸¹ Human Rights Watch, “Peru: Egregious Abuses by Security Forces,” 26 Apr. 2023, available at: <https://www.hrw.org/news/2023/04/26/peru-egregious-abuses-security-forces> (accessed on 29 November 2024).

⁸² Amnesty International, “Venezuela: Use of military courts against civilians undermines rule of law,” 10 May 2017, available at: <https://www.amnesty.org/en/latest/press-release/2017/05/venezuela-uso-de-tribunales-militares-contra-civiles-pone-en-jaque-al-estado-de-derecho> (accessed on 29 November 2024).

⁸³ Ivette Castañeda García, “Military Justice in Latin America: A Comparative Analysis,” in *Military Justice in the Modern Age*, Ed. Alison Duxbury and Matthew Groves. Cambridge: Cambridge University Press, 5 July 2016, pp. 196-217, available at: <https://doi.org/10.1017/CBO9781107326330.011> (accessed on 7 December 2024).

⁸⁴ Federico Andreu-Guzmán, *Military jurisdiction and international law*, International Commission of Jurists, Bogota, 2003, p. 57.

⁸⁵ United Nations Commission on Human Rights, “Report of the Working Group on Arbitrary Detention,” UN Doc. E/CN.4/1996/40, 15 Dec. 1995, p. 107, available at: https://digitallibrary.un.org/record/228235/files/E_CN.4_1996_40-EN.pdf (accessed on 25 December 2024).

⁸⁶ Sebastian Abad Jara, and Daniel Pereira Campos, “Military Courts and Human Rights Violations in Brazil: From the Perspective of the Inter-American Human Rights System,” *EJIL: Talk*, 15 Sept. 2022, available at: <https://www.ejiltalk.org/military-courts-and-human-rights-violations-in-brazil-from-the-perspective-of-the-inter-american-human-rights-system> (accessed on 29 November 2024).

⁸⁷ Inter-American Court of Human Rights (IACtHR), *Castillo Petruzzi and others v. Peru*, 30 May 1999, paras. 130-1.

⁸⁸ Inter-American Court of Human Rights (IACtHR), *Durand Ugarte v. Peru*, 16 August 2000, parag. 117.

⁸⁹ Inter-American Court of Human Rights (IACtHR), *Herzog and others v. Brazil*, 4 July 2018, parag. 247.

military jurisdiction must be exceptional and narrowly applied, particularly when it comes to human rights violations, which must fall under civilian court jurisdiction.

Various independent intergovernmental authorities and non-governmental organizations have voiced concern that the use of military tribunals jeopardizes basic fair trial rights under human rights law in the case of the Guantanamo detainees'.⁹⁰ Accordingly, the Special Rapporteur on the independence of judges and attorneys raised reservations about the military order and its proposed use of military tribunals.⁹¹ The lack of independence of such commissions from the executive branch and the military is a major source of concern.⁹² Lord Steyn, a British law lord, characterized the scenario as a "*monstrous miscarriage of justice*," saying, "*The military will serve as interrogators, prosecutors, defense counsel, judges, and, when death sentences are issued, as executioners.*"⁹³

Yemen's Specialized Criminal Court, established in 1999 to address cases related to terrorism and piracy, continues to fall short of meeting the ICCPR's criteria for a "fair and public hearing." The court intensified its activity post-September 11, prosecuting hundreds of suspected terrorism cases. Yemeni defense attorneys frequently report systemic violations, including denial of full and timely access to clients' case files, severely hampering their ability to provide effective legal representation. Procedural irregularities often lead to convictions based on scant or unreliable evidence, raising significant concerns about the fairness of these proceedings.⁹⁴ Recent trends indicate that Yemen's judicial system remains heavily influenced by ongoing conflict, further undermining its capacity to uphold international fair trial standards.

In Turkey, special aggravated felony courts, restructured in 2004, handle cases involving terrorism, crimes against state security, and organized crime. These

⁹⁰ Amnesty International, "USA: UN Special Rapporteur's Findings Reinforce Urgent Need to Close Guantánamo and Provide Redress for Past and Present Detainees," 26 June 2023, available at: <https://www.amnesty.org/en/latest/news/2023/06/usa-un-special-rapporteurs-findings-reinforce-urgent-need-to-close-guantanamo-and-provide-redress-for-past-and-present-detainees/> (accessed on 29 November 2024).

⁹¹ Amnesty International, "USA: Trials in error," 16 July 2009, p. 22, available at: <https://www.amnesty.org/ar/wp-content/uploads/2021/07/amr510832009eng.pdf> (accessed on 29 November 2024).

⁹² European Court of Human Rights (ECtHR), *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 147.

⁹³ Johan Steyn, "Guantanamo Bay: The Legal Black Hole," in *The International and Comparative Law Quarterly*, vol. 53, no. 1, Cambridge University Press, 2004, pp. 1-15.

⁹⁴ Human Rights Watch, "Report on Human Rights in Yemen: Submitted by Human Rights Watch to the UN Human Rights Committee on the Occasion of its Review of Yemen in March 2012," February 2012, p. 10, available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HRW_Yemen_HRC104.pdf (accessed on 4 January 2025).

courts diverge from standard criminal procedures in ways that frequently restrict defendants' rights. Notable issues include extended police custody and pretrial detention periods, with remand detention limits set at twice the duration permitted for similar offenses in ordinary courts. Additional concerns include restricted access to case files and evidence, as well as expanded powers for state surveillance under counterterrorism laws.⁹⁵ Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, has expressed worry over the access to a lawyer in these courts and the "*possible establishment of a two-track legal system*".⁹⁶

From the analysis above, it becomes evident that the right to an independent and impartial tribunal faces significant challenges, and in many instances, is severely compromised or even non-existent. This is particularly evident in countries that rely on special courts to prosecute terrorist offenses. These courts often disregard the fundamental rights of the accused, conducting closed-door sessions and expediting trials without adequate consideration of procedural fairness. Such practices undermine the essence of justice and diminish public confidence in the rule of law.

Moreover, this issue is not confined to special courts alone but extends to broader systemic factors, including the structural organization of the judiciary and the limitations imposed on the principle of the separation of powers as theorized by Montesquieu.⁹⁷ These challenges highlight the urgent need for reforms. Governments must abolish the jurisdiction of special courts for terrorism-related cases and instead, bring such cases before ordinary courts. This approach would uphold the principles of a fair and equitable trial while ensuring that human rights and freedoms are protected. Whatever the reason, and even if it is a matter of trying cases as thorny as terrorist offenses, the rushing of the trial by the special courts, should not be at the expense of the acquired principles of law and freedom.

Furthermore, the expedited nature of trials in special courts does not provide judges with the necessary environment of impartiality and reassurance to deliver

⁹⁵ Parliament of Republic of Türkiye, *Türkiye's Law on Fight against Terrorism*, No. 3713 of 1991, arts. 10(d) and 10(f).

⁹⁶ Council of Europe: Commissioner for Human Rights, "Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 10 to 14 October 2011: administration of justice and protection of human rights in Turkey," 10 January 2012, CommDH (2012)2, pp. 20-22, available at: <http://hdl.handle.net/20.500.12389/21220> (accessed on 27 December 2024).

⁹⁷ There is no freedom if the power to judge is not separate from the legislative and executive powers, Charles Louis de Secondat, baron de La Brède et de Montesquieu, *The Spirit of Laws*, Book XI, London: Printed for J. Collingwood, 1823, §6.

just verdicts. However, transitioning cases to ordinary courts would be a hollow gesture unless accompanied by robust measures to reinforce and guarantee the independence and impartiality of these courts. Only through such comprehensive reforms can the judicial process align with the principles of justice, fairness, and respect for human rights, even in the face of pressing national security concerns.

Conclusion

In conclusion, this article has illuminated the profound challenges that counterterrorism measures pose to the procedural guarantees of fair trial rights across various legal systems. The analysis demonstrates how the pursuit of national security often results in deviations from fundamental principles such as judicial independence, impartiality, and the right to a public hearing.⁹⁸ Special courts, military tribunals, and emergency measures frequently erode procedural safeguards, prioritizing expediency over justice. This trend not only undermines the foundational principles of justice and liberty but also diminishes the credibility of legal institutions, perpetuating cycles of distrust, violence, and instability.⁹⁹

The comparative study underscores the pressing need for a balance between security imperatives and human rights obligations, as articulated in international conventions like the ICCPR, the ECHR and the ACHPR.¹⁰⁰ While the global threat of terrorism demands a robust legal response, this response must uphold the principles of justice that are the bedrock of any rule-of-law-based society.¹⁰¹ The politicization of the judiciary, the conduct of secret trials, and the denial of legal representation to defendants have emerged as recurring issues that transcend national boundaries, highlighting systemic vulnerabilities that require urgent attention.

⁹⁸ United Nations Office of the High Commissioner for Human Rights (OHCHR), "About Protecting Human Rights While Countering Terrorism and Preventing Violent Extremism," available at: <https://www.ohchr.org/en/terrorism/about-protecting-human-rights-while-countering-terrorism-and-preventing-violent-extremism> (accessed on 1 January 2025).

⁹⁹ United Nations Office of the High Commissioner for Human Rights (OHCHR), "Rampant Abuse of Counter-Terrorism Laws Threaten Human Rights Globally, Warns UN Expert," March 2024, available at: <https://www.ohchr.org/en/press-releases/2024/03/rampant-abuse-counter-terrorism-laws-threaten-human-rights-globally-warns-un> (accessed on 3 January 2025).

¹⁰⁰ Maria Giulia Amadio Viceré, and Giulio Venneri, "Counter-Terrorism Policies," in *The European Union's Engagement with the Southern Mediterranean*, European Administrative Governance, (Cham: Palgrave Macmillan, 2023), pp. 135-162, available at: https://doi.org/10.1007/978-3-031-31205-2_6 (accessed on 26 December 2024).

¹⁰¹ Amadio Viceré, and Venneri, "Counter-Terrorism Policies".

To advance this discourse, future research could focus on the impact of international oversight mechanisms in mitigating procedural violations,¹⁰² particularly through bodies like the UN Human Rights Council and regional courts such as the ECtHR. Additionally, exploring innovative legal frameworks that ensure the prosecution of terrorism-related offenses while safeguarding fair trial rights could provide valuable insights.¹⁰³ For instance, hybrid models that integrate international and domestic judicial expertise may offer practical solutions to addressing complex terrorism cases.¹⁰⁴

Ultimately, the findings of this article emphasize that counterterrorism efforts must not compromise the principles of justice and fairness. By fostering a legal system that respects human rights, societies can ensure not only the effective prosecution of terrorism but also the long-term legitimacy and stability of their judicial institutions.

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¹⁰² Jake Sherman, and Agathe Sarfati, "Reflecting on the UN's Role in Counterterrorism Twenty Years After 9/11," *IPI Global Observatory*, 8 June 2021, available at: <https://theglobalobservatory.org/2021/06/reflecting-on-the-uns-role-in-counterterrorism-twenty-years-after-9-11/> (accessed on 1st January 2025).

¹⁰³ Anne Pauwels, "EU Counterterrorism Cooperation with the MENA: Optimal or Suboptimal?," in *Transnational Security Cooperation in the Mediterranean*, edited by Robert Mason, (Cham: Palgrave Macmillan, 2021), pp. 59-74, available at: https://doi.org/10.1007/978-3-030-54444-7_4 (accessed on 1st January 2025).

¹⁰⁴ Katarzyna Maniszewska, "Countering Terrorism: Key Challenges and Proposed Solutions," in *Towards a New Definition of Terrorism, Contributions to Security and Defence Studies* (Cham: Springer, 2024), pp. 65-82, available at: https://doi.org/10.1007/978-3-031-58719-1_4 (accessed on 2 January 2025).

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