THE INTERNATIONAL INSTITUTE FOR JUSTICE AND THE RULE OF LAW

Good Practices for the Judiciary in Adjudicating Terrorism Offenses in the Horn of Africa Region

Judicial Guidelines

ISS INSTITUTE FOR SECURITY STUDIES

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FOREWORD

Over the last two decades, the Horn of Africa and Eastern Africa region has seen a rise in transnational security threats, including terrorism. Many of the states in the Horn of Africa and Eastern Africa region face significant capacity gaps including the application of rule of law (RoL), human rights international standards, and a sound legislative framework to counter terrorism, and swaths of under-governed territory. This presents a growing concern for the region and the European Union and other stakeholders on the ground and outside the region are working in partnership with governments.

To meet this challenge, criminal justice institutions in the region recognize that developing more robust and efficient mechanisms for handling terrorism cases would benefit long-term efforts. Currently, trial court judges often handle tremendous caseloads resulting from case management workloads, delay tactics by advocates, insufficient eye-witness evidence and little to no forensic evidence. Additionally, judges handling terrorism cases experience serious threats to life and are often targets of terrorist attacks. Judges from all courts are being exposed to more complex transnational cases requiring knowledge of international legal principles and mechanisms. These challenges will benefit from appropriate strategies in line with human rights and rule of law principles.

To address these challenges, the International Institute for Justice and the Rule of Law (IIJ), launched with the generous support from the European Union, a series of workshops tailored to provide technical assistance to the judiciary in the Horn of Africa and Eastern Africa region. The workshops covered a range of issues and challenges faced by the judiciary while handling terrorism related cases with topics varying from structural and organizational challenges to operational challenges.

The present Judicial Guidelines on Good Practices for the Judiciary in Adjudicating Terrorism Offenses in the Horn of Africa Region, is the result of this capacity building program, and supports the implementation of further training activities. The Judicial Guidelines document is an analytical study identifying priority areas and specific challenges at the trial level based on input of the participating judges and criminal justice stakeholders working on similar cases – we applaud the commitment of our partners in the region. The Judicial Guidelines document shapes itself around nine (9) good practices that need to be established to enhance the legitimacy of judicial systems, minimise the risk of human rights violations, and promote the rule of law in accordance with international standards and principles.

The IIJ wishes to warmly thank the European Union for their generous support in the elaboration of this Judicial Guidelines, and the Institute for Security Studies (ISS) for developing this product.

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Executive Secretary

The International Institute for Justice and the Rule of Law

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INTRODUCTION

In the absence of universal consensus regarding the definition of terrorism, national legal systems instead define *acts* of terrorism in order to facilitate investigation, prosecution and trials in cases of terrorism. These acts are defined by national criminal justice systems guided by international standards under treaty law.

The African Union's (AU) definition of terrorism adopted in the 1999 OAU Convention on the Prevention and Combating of Terrorism is 'any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage'.

However the sensitivity involved in labelling a group a terrorist organisation as opposed to freedom fighters, or labelling criminal groups as terrorists for political purposes, has led to the lack of agreement among states regarding a universally accepted definition of terrorism. This is further complicated by the evolving nature of terrorism and terrorist tactics.

There are, however, three common elements generally included in definitions of terrorism: (1) the use of violence (2) directed at civilian or government targets, usually non-combatants (3) for the purpose of intimidation and coercion for political ends. National law remains the sole arbitrator of terrorism-related crimes and defines which acts are considered terrorism.

The high profile and sensitive nature of trials involving terrorism necessarily bring additional scrutiny and external pressure on judges assigned to adjudicate them. This poses challenges to impartial judiciaries determined to ensure fair, independent and transparent trials.

To help with this, the Global Counterterrorism Forum's Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses (Hague Memo) identifies nine good practices on the role of the judiciary in handling terrorism cases.

The practices are aimed at promoting strong judicial institutions capable of serving as an effective deterrent to terrorism. This means the development of capable adjudicators of terrorism cases and independent and fair institutions to ensure legitimacy and public confidence in the capability of the judicial system to adjudicate such cases.

The nine good practices are:

1. The use of specially trained judges
2. The use of continuous trials
3. The development of effective trial management standards
4. The establishment of measures to protect witnesses and victims
5. Maintaining the right of the accused to a fair trial with adequate legal representation

6. The establishment of a legal framework for the use and protection of evidence from intelligence sources and methods
7. The development of effective courthouse and courtroom security
8. The development of media guidelines regarding the court and parties to the trial
9. Ensuring victims of terrorism access to justice

Establishing these good practices will enhance the legitimacy of judicial systems, minimise the risk of human rights violations, and promote the rule of law. Judicial independence requires judges to serve as objective and impartial arbitrators in the application of the law, ensuring that the fundamental human rights of both the accuser and the accused are respected.

The nine good practices are designed to support the development of a strong and independent judiciary, and assist judges to more effectively preside over trials viewed as fair and legitimate, ultimately serving as a deterrent to terrorism.

These guidelines have been designed to help judicial officers assigned to terrorism cases in states located in the Horn of Africa, and were developed in close consultation with and validated by judicial authorities in Djibouti, Ethiopia, Kenya, Somalia, Somaliland, Tanzania and Uganda. Given the significantly different legal systems involved, this document is presented as a set of guidelines that may be generally applicable.

The document comprises six sections covering the nine good practices above. These sections are: Trial management standards; Admissibility and assessment of evidence; Juvenile justice in the terrorism context; Special measures to protect victims and witnesses; Sentencing guidelines; and Special trial challenges.

Understanding that states located in the Horn of Africa have varying degrees of experience handling terrorism investigations and trials, these sections aim to provide practical guidance to all judicial officers in the region charged with adjudicating terrorism cases, based on good and internationally accepted practices.

SECTION 1: TRIAL MANAGEMENT STANDARDS

Overarching Good Practices

Good Practice 1: Identify and assign specially trained judges.

Good Practice 2: Support the use of continuous trials in terrorism and other national security cases.

Good Practice 3: Develop effective trial management standards.

Good Practice 5: Support the right of the accused to a fair trial with adequate legal representation.

Introduction

This section addresses key issues covered in Good Practices 1 to 3 and 5 of The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses. Section 1 provides guidance to judicial officers in case management of terrorism cases at the pre-trial, trial and post-trial phases. It examines the use of specially trained judicial officers, the benefits of continuous trials and sound scheduling practices, and fair trial guarantees.

1.1 Case management (use of specially trained judges): pre-trial, trial and post-trial

The objective of effective trial management is for the judicial officer to ensure that the parties are prepared to proceed, and the trial commences as scheduled and moves forward without undue delays. Terrorism cases are often complex and high profile. Adopting and implementing consistent rules and procedures for terrorism trials helps in effective judicial management of these cases.

1.1.1 Identify and assign specially trained judges

The first step in the effective management of terrorism cases is to assign a judge specially trained to handle terrorism cases to the case at its inception. The Hague Memo's Good Practice 1 provides that states should 'identify and assign specially trained judges'. In many Horn of Africa states, certain divisions or judicial officers are designated to address terrorism cases.

Guidelines: Identify and assign specially trained judges

Ideally, jurisdictions should designate judicial officers to adjudicate terrorism cases. These officers should receive continuous and specialised training on the variety of complex challenges inherent in terrorism cases including updates on procedures and law relating to terrorism trials.

Continuous legal training for these designated judges is particularly important, as the law relevant to terrorism cases is constantly evolving, and regular and frequent training ensures that judges are capable of ensuring that trials are handled in a way that respects the human rights and fundamental freedoms of the accused.

Where jurisdictions are unable, for resource or other reasons, to designate judicial officers attending to terrorism cases, induction training of judicial officers should include basic training on handling terrorism offences. The Chief Justices of each country should take specific steps to ensure that there is a process, in conjunction with judicial training schools and institutions, of selecting judicial officers and providing relevant and continuous training to support national efforts to adjudicate terrorism offences.

The use of special sessions outside of normal court sessions to adjudicate terrorism offences could serve as alternatives. The use of judicial officers from other stations in the special sessions might also contribute to the security of judges.

Case practice: Identify and assign specially trained judges

In Ethiopia, the Federal High Court has designated benches handling terrorism cases. In Kenya, magistrates' courts are the trial courts for terrorism offences. In Uganda a specialised division of the high court, the International Crimes Division (ICD), is designated to adjudicate terrorism cases.

Although Tanzania has yet to adjudicate a terrorism offence, its high court is the court of first instance and has designated the Corruption and Economic Crimes Division to try these cases.

At present, jurisdiction over terrorism offences in Somalia is with the military court. As counter-terrorism legislation is adopted, terrorism offences will be adjudicated by civilian courts.

1.1.2 Continuity of trials and efficient scheduling of judicial proceedings

A second important step that the designated judicial officers should take as soon as the case is received is to ensure that the case proceeds expeditiously by scheduling a pre-trial or trial management conference. This is set forth in the Hague Memo's Good Practice 2: Support the use of continuous trials in terrorism and other national security cases, and Good Practice 3: Develop effective trial management standards.

Protracted delays in judicial proceedings harm everyone affected by the judicial system – the victim and their family who seek justice; the accused who is often detained pre-trial; the community that becomes disillusioned as a result of the slow process; and an overwhelmed court system. To ensure fair and expeditious criminal trials, judicial officers should move quickly to set a pre-trial schedule to manage the case effectively.

Guidelines: Continuity of trials and efficient scheduling of judicial proceedings

Judicial officers handling terrorism cases should develop standards as described below:

1. Set a pre-trial/trial conference and ensure that all parties appear promptly at the conference. A record of the conference should be made and shared with parties at the conclusion of the conference. The goal of the conference is to

set a schedule for the pre-trial process, agreed upon by all parties, that will ensure the trial proceeds without delay. A judge's authority to convene these conferences may not be expressly provided in a court's rules of procedure, but this power resides within a court's inherent authority over a case and is essential to effective case management. Send a list of issues to the parties ahead of the conference to assist the parties in preparing for the conference. Ask the parties to identify other issues that may need to be addressed pre-trial.

2. Ensure that all preliminary matters have been dealt with before the trial so that it can commence without delay, and once started will run smoothly and without breaks. At the pre-trial conference:

(i) Develop a timetable and deadlines for:

- disclosure of all evidence that parties intend to introduce at trial including lists of witnesses, names of expert witnesses and expert reports, as required by applicable law
- challenges to: the indictment/charge sheet; evidence-gathering methods; any foreign evidence sought to be introduced; forensic evidence; any expert testimony; reviewing of any confidential information

(ii) Discuss with the parties and develop a plan to resolve issues relating to:

- the details and timeline for acceptance of any plea offer and whether the case may resolve pre-trial through acceptance of a guilty plea
- witness availability and a means to secure witnesses' presence required for hearings and for trial
- witness security issues and courtroom security planning
- the need for and availability of qualified interpreters for trial
- court procedure rules that will govern trial proceedings
- the schedule of witnesses and nature of their testimony – to minimise introduction of repetitive or irrelevant evidence
- whether any facts that are not in dispute can be agreed upon through stipulation, thereby reducing the number of witnesses needed at trial

(iii) Set any necessary future pre-trial hearing dates to resolve legal issues before trial

(iv) Set a firm trial date

A trial judge is responsible for safeguarding the interests of the public in the administration of the criminal justice system. In all cases, the trial judge should:

- Seek to avoid delays, continuances and extended recesses, except for demonstrated good cause
- Be proactive in ensuring punctuality, the strict observance of scheduled court hours, and the effective use of working time to identify and resolve issues that may result in delays
- Permit full and proper examination and cross-examination of witnesses, but also require such examination to be conducted fairly, objectively and within reasonable time constraints
- Not permit unreasonable repetition or permit counsel to pursue clearly irrelevant or improper lines of inquiry

Case practice: *Support the use of continuous trials in terrorism and other national security cases*

Several jurisdictions in the Horn of Africa region have developed rules of procedure or laws for case management. For example, Tanzania's case management system for criminal cases is coordinated by a case management forum under the National Prosecutions Service Act. There may be a need to develop a case management strategy for terrorism cases that borrows from the existing framework.

Uganda has developed rules of procedure and evidence for the ICD, instructive for trial preparation. It might benefit the ICD to develop an accompanying document that speaks specifically to terrorism offences.

In Kenya, the Chief Justice has issued guidelines for active case management in which terrorism cases are classified as 'fast-track cases'. These guidelines are in the form of Practice Directions to Criminal Case Management in the Magistrates' and High Courts, under the Criminal Procedure Code. At the time of this writing, these practice directions were in the pilot phase at the Mombasa, Kibera and Naivasha Law Courts.

Ethiopia has implemented a court reform programme that's an electronic file handling system available to all parties throughout a case. This is an example of how the use of technology can assist in case management.

1.1.3 Supporting the right of the accused to a fair trial with adequate legal representation

The Hague Memo's Good Practice 5: Supporting the right of the accused to a fair trial with adequate legal representation references the right to a fair trial in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Citing the ICCPR and the Convention Against Torture (CAT), The Hague Memo identifies the following individual rights related to a criminal prosecution:

1. The right to a fair hearing without undue delay

2. The right to a public hearing and pronouncement of judgment with limited exceptions
3. Presumption of innocence
4. Freedom from compulsory self-incrimination
5. The right to be informed promptly and in detail of the accusation
6. Adequate time and facilities to prepare a defence
7. The right to legal assistance
8. The right to examine witnesses
9. The right to an interpreter
10. The right to appeal the conviction and sentence
11. Freedom from ex-post facto laws
12. The inadmissibility at trial of any evidence based on information made as a result of torture
13. Redress of victims of torture

Judicial officers handling terrorism cases have a duty to ensure that these standards are met, particularly because of the high-profile nature of terror offences. Ideally, a public defender should be appointed to represent the accused in a terrorism case. Where there is no provision for this, courts can support the efforts of governmental agencies and non-governmental organisations (NGOs) to provide legal representation for those accused of terrorism offences.

Guidelines: Supporting the right of the accused to a fair trial with adequate legal representation

The judicial officer may adopt the following good practices to ensure effective legal representation for those accused of committing terrorism offences:

1. Inform the accused of his/her right to counsel and legal aid services that might be available
2. Secure lawyer services to represent defendants appearing in court without a lawyer, along with qualified interpreters as necessary
3. Ensure that defence counsel is assigned and notified of appointment, as soon as feasible after arrest, detention, or request for counsel as mandated by applicable law
4. Ensure that qualified defence counsel is provided access to the accused as needed, and sufficient time in a confidential space within which to meet with the client
5. Support the generally accepted principle that, where possible, the same defence counsel should continuously represent the client until the end of the case

6. Take appropriate steps to ensure that all aspects of the court's or judicial officer's interaction support equal treatment between defence counsel and the prosecution

Case practice: Supporting the right of the accused to a fair trial with adequate legal representation

In Kenya, Tanzania and Uganda, it is a constitutional right of an indigent accused person to be assigned counsel for offences that carry a sentence of life imprisonment or capital punishment upon conviction.

Conclusion

Restrictions and challenges may exist in the various jurisdictions in the region that could hamper the implementation of these practices. For example, there is currently no state office of a public defender in any of the Horn of Africa states. Judicial officers are encouraged to use the various forums available in their jurisdictions to discuss and adopt practices that would help with the efficient management of terrorism trials while supporting the right of the accused to a fair trial with adequate legal representation.

SECTION 2: ADMISSIBILITY AND ASSESSMENT OF EVIDENCE

Overarching Good Practices

Good Practice 6: Support the development of a legal framework or guidelines for the use and protection of evidence from intelligence sources/methods.

Introduction

As a general rule, all the jurisdictions in the Horn of Africa require that full disclosure of evidence, both incriminating and exculpatory, is disclosed to the accused through his or her designated legal representative.

Disclosure of evidence in terrorism cases follows this general rule and as explained above, the judicial officer managing the trial should schedule disclosure deadlines and ensure that parties disclose evidence as directed by the court and in accordance with the law.

The nature of terrorism offences is that they pose a threat to national security. While the general rule is that the government has a duty to disclose to the defence all relevant inculpatory and exculpatory evidence in its original form, there are exceptions to this.

Evidence intended for use by the prosecution at trial in a terrorism case may have been obtained from intelligence sources and methods and therefore may be classified or involve national security.

If the jurisdiction in which the case will be tried has a framework for protecting that evidence, the judicial officer can work with the parties to determine whether the evidence can be declassified or redacted in such a way that it can be used at trial while protecting legitimate national security interests.

Without such a framework, court systems lack the ability to properly balance the national security concerns of the government with the rights of the accused.

2.1 Identification of scope of use/access to classified evidence and intelligence-derived evidence

Terrorism offences after 9/11 have blurred the traditional distinctions between intelligence and evidence. Such new offences reflect an intelligence mindset that focuses on threats, risk, associations and suspicion as opposed to an evidence or criminal law mindset that focuses on acts, accomplices and guilt.

Intelligence is generally collected to inform government about security risks with the expectation that it would never be publicly disclosed beyond the narrow range of those who 'need to know'. In contrast, evidence is collected after a crime is committed. Evidence is gathered with the expectation that it will be subject to cross-examination and adversarial challenge and used in a public trial to prove guilt beyond a reasonable doubt.

The Hague Memo's Good Practice 6 is read together with Good Practice 6 of the GCTF Rabat Memorandum, which emphasises that governments have a duty to ensure that defendants receive a fair trial, including disclosing to the defendant both inculpatory and exculpatory evidence.

These Good Practices recommend that states develop an appropriate legal framework for the use and protection of evidence derived from intelligence that outlines the rights and responsibilities of the parties involved as well as the procedures that are to be followed in specific circumstances.

This framework may allow for the declassification or redaction of intelligence or national security information, without harm to the sources or methods involved in its collection. In developing these frameworks, states should recognise that classified intelligence and other sensitive national security information may also be relevant and necessary in criminal cases other than terrorism cases.

Guidelines: Support the development of a legal framework for guidelines for the use and protection of evidence from intelligence sources/methods

As most of the jurisdictions in the Horn of Africa don't have legislative frameworks or practices in this regard, it is instructive to reflect on the different approaches that have been adopted by some countries.

1. United Kingdom (UK)

In the UK, the use of closed material procedures (CMPs) in judicial proceedings is provided for in national legislation. CMPs allow sensitive intelligence material, to which only the judge and special advocates have access, to be introduced in secret hearings.

During a CMP, the judge has the power to decide, on request by the government, whether to present evidence to the court in secret without the defendant being granted access to that information.

The main rationale behind the introduction of CMPs to civil courts is to avoid threats to national security and disclosure of classified intelligence during court proceedings.

Case law:

In the 2010 Binyam Mohamed case, the former Guantanamo Bay detainee obtained compensation from the British government for having been subjected to cruel, inhuman and degrading treatment.

The case relied on evidence from the US Central Intelligence Agency (CIA), which showed the UK's knowledge of detainees' mistreatment. While the UK government insisted on keeping this evidence as closed material, the Supreme Court forced the government to disclose the documents during an open trial.

As a direct result of this case, UK legislators introduced the Justice and Security Act in 2013 to allow the use of CMPs during civil trials, and therefore prevent effective judicial scrutiny of intelligence gathered from foreign sources.

2. The Netherlands

Use of intelligence that can be relevant for the investigation and prosecution of criminal offences is at the discretion of the Dutch General Intelligence and Security Service (AIVD) and can be provided by the AIVD to the public prosecutor's office via an official written report.

The national public prosecutor has the right to look into all underlying documents of the official report. This is not merely a power, but in practice more or less an obligation for the prosecutor. The information in the official report may be used to initiate an investigation or as legal evidence.

According to the interpretation of the Dutch Supreme Court (HR, 5 September 2006, Eik) and a ruling of the European Court of Human Rights (ECHR, 16 October 2001, O'Hara v UK), the start of a criminal investigation must be based on a reasonable suspicion of guilt of a certain offence or on indications of a terrorist offence.

Traditionally there is a strict separation between the work of the security services and the prosecutor, who each fall under their own legal regime. One important feature is the obligation on the security services to protect their sources, working methods and current knowledge level.

On the other hand, during a court case, it is the task of the prosecutor and the judge to protect the elementary guarantees of a criminal procedure, namely to review the accuracy of information serving as evidence.

Despite the watertight separation between the tasks, powers and responsibilities of the organisations involved in combating violent political crimes, it is possible to have within the existing statutory provisions – if necessary and expedient – an intensive information flow between the various organisations. For instance, the Netherlands' 2006 Act on Shielded Witnesses offers the opportunity to have officers of intelligence services in certain protected modalities heard by the examining judge.

Under this act, the Netherlands has been able to 'shield' witnesses from intelligence communities in the interest of national security at an in camera (closed proceedings/ hearings) pre-trial stage. The act creates a special procedure in which members of the two principal Dutch intelligence services (the AIVD and the Military Intelligence and Security Service, or MIVD) may be heard before a special examining magistrate (located in Rotterdam) at a pre-trial stage.

The examining magistrate decides whether, in the interests of national security, particular information must remain secret and whether the witness should be 'shielded' (i.e. remain anonymous).

The procedure is in camera and ex parte, and the report of the hearing will only be submitted to the parties with the consent of the shielded witness. During the in-camera procedure, a list of questions for the witness is handed to the special magistrate by the counsel representing the suspect and the trial judge, for whom the hearing is shielded. It is possible, but not common, for the trial participants to be present when the examining magistrate assesses the value of the intelligence, but the witness is always shielded.

Case law:

The Piranha case is a key example of the admission of intelligence evidence in court. In this case, which started in 2005, eight individuals of Dutch-Moroccan descent were charged with constituting a terrorist network and planning terror attacks. The trial court in Rotterdam found that the accused were a part of the 'Hofstad Group' and that the group was a terrorist organization. On appeal, the lower court's finding that the Hofstad Group was a terrorist organization was overturned. The convictions of the lower court were upheld by the appellate court.

The case is particularly interesting for the way in which intelligence information constituted the central component of the evidence presented by the public prosecutor, which included a CD-ROM collected by the AIVD containing the video of a farewell message by one of the main suspects The AIVD had bugged the apartment where the accused persons allegedly held incriminating conversations related to the planning of terror attacks, which were recorded and used in the case. During the trial, the defence objected to the use of this information as being contrary to the European Convention on Human Rights. The lower court disagreed leaving the defence unable to receive the full transcripts of AIVD evidence or question all intelligence officers. The Rotterdam Court overruled many of these objections and quoted the most incriminating parts of the OVC-conversations in its decision.

2.2 Mutual legal/judicial assistance and international cooperation

Initiating mutual legal assistance (MLA) is the prerogative of investigators and prosecutors and is regulated by treaty, reciprocity or multilateral agreements between states. Most countries in the Horn of Africa region are member states of the Intergovernmental Authority on Development (IGAD), which has developed an MLA framework that could be instrumental in allowing states to obtain evidence from other national authorities.

This is particularly important in terrorism and cybercrime investigations and prosecutions that require quick action to secure evidence located in another country, that may be lost if not preserved in time. Establishing both the legal authority to obtain such evidence and the necessary institution within a government - a central authority to manage and respond to those requests is essential to successful prosecution in these types cases.

Case practice: *Support the development of a legal framework for guidelines for the use and protection of evidence from intelligence sources/methods*

In order for intelligence information to be admissible in the court of Djibouti, Kenya, Somaliland, Tanzania and Uganda, it must be presented by a witness to overcome a hearsay challenge, and it must be corroborated.

Admittedly, many of these jurisdictions have no faced admissibility challenges to intelligence-derived evidence. As law enforcement and intelligence agencies work closely with prosecutors in terrorism investigations and prosecutions, it is likely that intelligence agencies will share information derived from intelligence sources or methods relevant to an investigation. Without a clear framework guiding the use and protection of this evidence, prosecutors and judges will struggle with how to evaluate, use, and admit this evidence at trial. Therefore, Djibouti, Kenya, Somaliland, Tanzania and Uganda should develop and implement such a framework.

In Ethiopia, when a court receives an intelligence report, the court is legally bound to redact information deemed unsuitable for submission in open court, or disclosure to the accused.

Countries are more likely to face issues regarding how to handle intelligence-derived evidence, as intelligence agencies and criminal investigators work more closely to combat terrorism. If a framework is in place before judicial authorities begin grappling with these issues, prosecutors will likely be more successful in introducing that evidence in court and judges will be more comfortable accepting such evidence.

Case practice: *Mutual legal assistance and international cooperation*

The Kampala 2010 bombing case before the Uganda High Court demonstrates the importance of effective mutual legal assistance and international cooperation procedures. On 11 July 2010, two near-simultaneous explosions occurred in Kampala city.

The first was at an Ethiopian Village restaurant and the other at the Kyadondo Rugby Club grounds.

There were 76 confirmed fatalities and an unconfirmed number of serious injuries. Al-Shabaab claimed responsibility for the attack, their first outside Somalia. The Ugandan authorities set up a large investigation team and sought international support from the United States Federal Bureau of Investigation and Kenya and Tanzania's Central Intelligence departments to process the scene and the volumes of evidence collected.

The investigations led to terrorism charges against five Ugandans, a Rwandan, two Tanzanians and seven Kenyans. Testimonies from Kenyan and Tanzanian witnesses were essential to the prosecution's case.

Because of the lack of a formal MLA treaty with Kenya and Tanzania, the Ugandan authorities relied on international instruments like the Harare Scheme to obtain evidence from both States. Some of the evidence obtained was of a physical nature such as motor vehicles and documents. In addition, attendance of witnesses from both Kenya and Tanzania was sought.

The evidence obtained from said countries was pursuant to an MLA, however in general, the process of obtaining evidence was initiated in an informal manner and followed-up with a formal MLA request.

Without these testimonies and the cooperation from Kenyan and Tanzanian authorities, the Ugandan prosecution would not have been able to link crucial evidence, such as the extensive use of communication technology in the East African countries and the exploitation of weak border controls, to secure convictions against the accused.

Ten of the accused were convicted.

Conclusion

Since there is a mix of legal traditions (civil and common law) in the Horn of Africa, states are encouraged to adopt procedures and practices for handling classified and intelligence-derived evidence that would find support in their legal frameworks.

States are encouraged to examine lessons learnt from frameworks adopted as they begin to develop procedures consistent with their own legal traditions. These frameworks, together with the establishment of central authorities to handle mutual legal assistance requests between jurisdictions, will enhance the administration of justice in terrorism cases.

SECTION 3: JUVENILE JUSTICE IN THE TERRORISM CONTEXT

Overarching Good Practices

The GCTF's Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context supports the Hague Memorandum, providing guidance on managing cases relating to child suspects in terrorism-related matters. It offers the following good practices, among others:

Good Practice 1: Address children alleged to be involved in terrorism-related activities in accordance with international law and in line with international juvenile justice standards.

Good Practice 2: Assess and address the situation of children in a terrorism-related context from a child-rights and child-development perspective.

Good Practice 6: Apply the appropriate international juvenile justice standards to terrorism cases involving children even in cases that are tried in adult courts.

Good Practice 9: Apply the principle of individualisation and proportionality in sentencing.

Introduction

The international human rights regime provides for the special treatment of children in the context of criminal proceedings through the United Nations Convention on the Rights of the Child (UNCRC),[1] and a range of attendant instruments and guidelines.[2] The African Charter on the Rights and Welfare of the Child[3] strengthens this regime for African states taking account of the specific conditions and needs of children on the continent (this has been signed and ratified by 41 African states).

The UNCRC is the most widely ratified international convention (195 of the UN's member states have ratified it) and expresses widespread international consensus for its expansive child rights and protections, including in criminal justice proceedings.

Article 40 (1) of the convention states:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.[4]

Article 40 of the convention relates to matters of children that come into conflict with the law, and sets out standards relating to dealing with children in the criminal justice system.

National legal regimes and practices

States are expected to enact specific legislation and procedures that relate to children, and the term 'juvenile justice' collectively refers to the range of special provisions that should be applied (the term 'child justice' is also used in this regard).

The convention specifically recognises the risks for children in criminal justice proceedings. The international regime therefore promotes actions to protect children in the context of criminal justice proceedings and to ensure their continued well-being as they proceed to adulthood.

Importantly, even relating to criminal justice processes, the convention asserts as the primary principle and objective as serving 'the best interests of the child'. This is often difficult to navigate within the context of the criminal justice system, given its objective to administer justice.

However, the convention and its attendant instruments provide guidance on how this should be done. The Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context is an important instrument that provides guidance on the implementation of juvenile justice measures relating to children accused of terrorism-related offences.[5] It is important for national governments to assess progress in the implementation of laws, systems and practices that give effect to child rights.

Ongoing efforts should be made to monitor the effectiveness of these. Good Practice 13 in the Neuchâtel Memo promotes the design and implementation of monitoring and evaluation programmes to ensure the effective implementation of international juvenile justice standards.[6]

Specific challenges of juveniles in the counter-terrorism context

In the counter-terrorism context, special legislation or procedures may govern the investigation and adjudication of terrorism cases. These provisions may include a range of special procedures for terrorism suspects including longer periods of detention, restrictions on the accused's ability to communicate while detained, special interrogation measures, and others.

The Global Counter-Terrorism Strategy states that all such measures should be embedded in human rights protections and respect for the rule of law.[7]

Children should specifically be excluded where such measures are in place, and the rights afforded by the UNCRC should take precedence. This is not always the case in practice, and it is incumbent on judicial officers and others in the justice system to ensure that protections are afforded to children in this regard.

One of the most important challenges for judicial officers and courts in this context is to balance the need for the promotion of the rights of children while ensuring their accountability for any offences through appropriate criminal proceedings.

This becomes more difficult where legislation is unclear on how child suspects of terrorism offences should be handled, or makes no distinctions between child and adult suspects. In such cases, courts and judicial officers become central to the protection of children from counter-terrorism measures that are harmful to their well-being.

The risks for children in all criminal justice proceedings have been well documented internationally. Physical harm, psychological trauma, social stigma and association with, and learning from, other criminal suspects are just some of the risks associated with contact with the criminal justice system. Therefore juvenile justice emphasises principles relating to protection, diversion from the criminal justice system and other such measures.

The counter-terrorism context also creates the unusual circumstances relating to children suspected of terror-related offences. That is, children seldom make a direct and easily discernible decision to become involved in terrorism, and the lines between victims and offenders are unclear.

Boko Haram is known to kidnap children and force them into actions such as suicide bombings.[8] The Islamic State in Syria (ISIS) is known to coerce children into training camps, and has publicised these activities.[9] In these cases children are neither willing participants nor collaborators in terrorism, but may be victims or coerced into actions. This creates the additional obligation for judicial officers, and the justice system more generally, to delve into the often complex circumstances relating to child suspects of terrorism, and ensure that all proceedings take account of these circumstances.

Trained social service professionals, including social workers, psychologists and probation officers, may provide helpful information to support court proceedings at various stages.

The UN Committee on the Rights of the Child oversees states' progress towards the implementation of obligations in terms of the convention, and reviews periodic reports from countries relating to progress. The committee also issues guidance to countries relating to implementation, as well as 'General Comment' notes on specific matters, including juvenile justice.

Many national governments have enacted legislation to give effect to their obligations relating to juvenile justice, including Kenya, Uganda, Tanzania and Ethiopia.

Where no legislation exists, guidance for dealing with children in criminal proceedings may be sought in the principles and practices relating to child-protection legislation that may be in place at a national level, as well as in the UNCRC, its attendant instruments, and the UN Committee's General Comments and reports. General Comment No. 10 of 2007 offers specific guidance relating to juvenile justice.[10]

Guidelines for juvenile justice

The following guidelines are suggested for addressing juvenile justice in the context of adjudicating terrorism cases at the pre-trial, trial, sentencing, rehabilitation and reintegration stages.

3.1 Important considerations for juvenile justice

3.1.1 Promote prevention and early intervention

This is one of the central principles relating to juvenile justice, and equally applies when children are suspected of committing terrorism offences. Good Practices 3 and 4 of the GCTF's Neuchâtel Memorandum promote actions to reduce children's

vulnerability to radicalisation and recruitment, and support networks for children at risk.

For the judiciary, these principles could apply in the pre-trial phase, e.g. where decisions are made as to diversion, and regarding sentencing. Diversion is also a means of early intervention, and is promoted by the Neuchâtel Memorandum (see Good Practice 7).[11]

3.1.2 Adequate child protection, social service and welfare systems

Juvenile justice systems should be accompanied by strong systems for child protection and the delivery of social services. Such systems provide procedures and personnel to determine the background, development and family support for children, and also provide programmes for prevention and early intervention.

These systems would also deal with children who cannot be prosecuted due to the minimum age of criminal capacity.

Also in terms of the UNCRC, states should establish systems to support children and families. Some countries (e.g. Tanzania) have chosen to adopt legislation that addresses both juvenile justice and child-protection/family-law matters, but often decide that that specific legislation is needed to comprehensively address all the considerations required for child who come into conflict with the law.[12]

3.1.3 Gender

This is an important consideration as both boys and girls could be charged with terrorism offences. Throughout the child's contact with the justice system, consideration should be given to the gender of the child, and whether adequate protections and services are available. Girls could be exposed to additional risks due to their gender, and given limited services.

3.2 Pre-trial phase

The pre-trial environment is broad, and covers a child's entry into the criminal justice system (usually through arrest), investigation, and pre-trial detention. A number of matters arise in this period.

3.2.1 Does the suspect meet the legal definition of a 'child'?

An important early decision for criminal justice officials relates to the age of a suspect and whether she or he should be dealt with in terms of special juvenile justice procedures. The UNCRC is clear that children are defined as those from 0 to 18 years. National legislation may also guide what age group is defined by the term 'child', and this could vary across countries.

3.2.2 How old is the child?

The practical problem of age determination may arise at this stage. Criminal justice agencies may be faced with the situation where suspects may not have the requisite documentation to confirm their age.

The most reliable means through which this may be done is an assessment by a medical practitioner trained to undertake such assessments. Other approaches

adopted by courts where difficulties arise include confirming the age of a suspect through the testimony of family members. Establishing the child's age may often delay court proceedings, and children may be detained unnecessarily due to delays in age determination.

Judicial officers should recognise this risk as early as possible, and select reasonable measures to address the problem. External service providers and international organisations may also be able to provide assistance in this regard, and creative approaches should be sought at a local level.

3.2.3 Is this child suspect considered to be criminally responsible?

A related decision is whether a child suspect is considered to be criminally responsible and should therefore enter criminal proceedings. This matter is complicated as it relates to the emotional and psychological maturity of the child.

It is usually dealt with by national legislation that states at what age children should be deemed to have criminal responsibility. For example, Tanzania sets this at age 12, while Somaliland sets this at age 15.

Kenya and Ethiopia have more graduated systems and set three age groups. The youngest group is not considered to have criminal responsibility (age 0 to 8 in Kenya, and age 0 to 9 in Ethiopia). An older group is set where judgements need to be made as to whether the child is criminally responsible (age 9 to 13 in Kenya, and age 10 to 15 in Ethiopia). The third oldest group in both countries is considered to have full criminal responsibility.

In some jurisdictions, these age groups also determine sentencing regimes and limitations, as well as places of detention. The UN Committee on the Rights of the Child has indicated its concerns that some states set the age of criminal responsibility too low (7 or 8). The committee guides that the minimum age of criminal responsibility should be set at age 12, and this should be used to guide judicial officers where no national minimum is stated.[13]

Where no legislative provisions exist, some jurisdictions have used the expertise of psychologists or other mental health professionals to assess the child and advise the court in this regard.

It should be noted that this matter may often be clouded by concerns relating to the seriousness of the offence for which the child is accused, and terrorism-related offences are often of a serious nature. Criminal justice authorities may feel the pressure from the public or others to be tough on terror suspects, and the protection of the child suspect may seem a secondary consideration.

Legislation may also dispense with some protections relating to children depending on the seriousness of the offence. Judicial officers should remain cognisant of their duty to ensure the protection of child suspects notwithstanding the crimes they are accused of committing, and ensure that protections meet international standards.

Where children are deemed too young for prosecution, an important question for judicial officers is why the child has come to the attention of authorities and why they are under suspicion of terrorism. If the child is too young or deemed not to have criminal capacity, the court should consider whether they are in need of child-

protection measures, and undertake a referral of the child and his or her family to relevant welfare or social service authorities, referred to above.

3.2.4 Should the child be detained through pre-trial proceedings or trial?

International principles are clear relating to the detention of a child. This is guided by the principle that children should only be detained as a measure of last resort, and for the shortest possible period.[14] This is to ensure the protection of children, given the potential risks associated with detention noted above.

At the earliest possible time of the child's contact with the criminal justice system, judicial officers should make all efforts to ensure that children are not kept in custody, and alternatives sought to secure the child's availability for court proceedings.

A range of options are available, depending on the circumstances. The best option is for children to be placed in the custody of parents or caregivers, and in this case the court may even obtain formal assurances from these adults that the child will return to court for further proceedings, by issuing an order of this nature. Bail is another alternative under these circumstances.

If detention is absolutely necessary, efforts should be made for placement in a detention centre suitable for the needs of children. Under these circumstances, judicial officers should continuously review the length of detention.

3.2.5 Protection and safety during detention

If the detention of a child suspect is deemed necessary, two matters are of importance – the conditions of detention, and the length of time of detention.

International guidelines have been developed to ensure the protection of the health and welfare of children in detention, and authorities may apply standards such as the UN Rules for the Protection of Juveniles Deprived of their Liberty.[15] Judicial officers may have the discretion to select places of detention, and provide instruction relating to the conditions of detention.

Judicial officers often have and should exercise the authority to enter and monitor places of detention, or request that other independent authorities have access to suspects.

Important general standards to assert in this regard are:

- Children should not be detained with adults or with other children who are significantly older.
- Conditions of detention should be humane and child-friendly, and provide for basic needs including food, water, ventilation, physical space, education, etc.
- Staff in places of detention who are charged with the custody and care of children should be appropriately trained and qualified, and deemed suitable to work with children (i.e. should not be the subject of criminal convictions).
- Children should have access to their parents, caregivers and legal representatives while in detention.

- The conditions of detention should be monitored by judicial officers or other independent bodies.

Judicial officers should continuously review the length of a child's detention period. Child suspects should not remain in detention for long periods, especially where complex investigations are being conducted.

Judicial officers can ensure compliance by issuing orders of detention for short periods of time, e.g. two weeks, and requiring the child's return to court for further arguments from prosecuting authorities before detention orders are extended.

3.2.6 Does the child have legal representation?

The 'best interests of the child' is a key international principle relating to juvenile justice. Legal representation of the child, as well as judicial oversight, are critical means to achieving this objective. Judicial officers serve a critical function by ensuring that the child has legal representation. Legal representatives are central to ensuring that child suspects are protected, and that law enforcement authorities are conducting appropriate investigations.

Where children's access to legal representation is impeded by poverty, courts provide them with access to counsel at no cost. Where no such legal representatives may be available, judicial officers have a duty to ensure, at the very least, that a competent adult serves as a representative of the child. However, when the potential for a severe sentence exists, courts should instead opt for pro bono legal services or seek assistance from NGOs or international organisations.

3.2.7 Is pre-trial diversion possible?

Diversion is an internationally accepted approach, promoted by the international juvenile justice regime.[16] The Committee on the Rights of the Child says, 'States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected (art. 40 (3) (b)).'[17]

Here, prosecutors or judicial officers may choose alternative approaches to the prosecution of the child, and countries may determine how these measures are employed. However, when deciding whether diversion is appropriate, authorities should not limit access to diversion to first-time offenders or those charged with minor property-related offences.

Children charged with serious offences should also be considered for diversion. The Neuchâtel Memorandum promotes the use of diversion for terrorism cases in its Good Practice 7.[18]

Uganda offers a good practice in this regard. The country's constitution provides for local councils, which are the most devolved level of government.[19] The Children Act provides for these councils to address minor offences relating to children, and also gives these councils the responsibility to safeguard and promote the rights and welfare of children.[20] Where such councils have been appropriately trained and used, they offer the opportunity for prevention, early intervention and diversion.[21]

3.2.8 Confidentiality and identity protection

Before, during and after trials, children's rights to confidentiality and the protection of their privacy is recognised by the UNCRC.[22] Children whose rights to confidentiality and privacy are protected avoid the stigma associated with criminal accusation, conviction or sentencing. These protections should apply throughout children's contact with the criminal justice system, as well as to records relating to this contact (including trial and sentencing).

In practice, judicial officers, prosecutors and law enforcement officials are encouraged to:

- Maintain as confidential the identity of child suspects
- Prohibit the media's access to child suspects
- Conduct trials as closed-door proceedings
- Ensure that all records are retained as confidential, and that third parties are unable to access such information (including for media and authorised research purposes)

3.3 Trial

All the considerations indicated above apply to the trial process, during which courts should continue to ask:

- Does the child require continued detention during trial, or could alternative arrangements be made?
- If detention is necessary, are minimum standards for the detention of children being met?
- Is ongoing and effective legal representation being provided?
- Is diversion a possibility through the trial, as new information comes to light?
- Is the trial proceeding as fast as possible?
- Is the child's identity and privacy being protected?

In addition, the following considerations are critical during the period of trial.

3.3.1 Special courts and/or proceedings

Wherever possible, children should be tried in courts or through procedures that recognise their special status and needs. The GCTF's Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses promotes that judicial officers be specially trained to adjudicate counter-terrorism cases (Good Practice 1).[23]

This guideline suggests that judges assigned to cases involving juveniles charged with terrorism offences should also receive special training on the rights of children. Further, this guideline suggests that all personnel involved in terrorism cases involving juveniles should have a specialised understanding of juvenile justice.

Good Practice 6 of the Neuchâtel Memorandum notes the need to apply juvenile justice principles even when cases are being tried in courts designed for adults.[24]

3.3.2 Assure a fair trial

Judicial officers are centrally responsible for ensuring that trial procedures and outcomes are fair. As set forth previously in this guideline, judges must exercise vigilance to identify risks associated with terrorism cases, including:

- The use of intelligence gathered through covert or unidentifiable means as evidence in court
- The use of evidence gathered through illicit means such as forced testimony through violent or threatening interrogation conditions
- The ongoing postponement of trials due to complex investigations and the unavailability of witnesses

Good Practice 5 of the GCTF's Hague Memorandum sets out key requirements relating to the rights of the accused in terrorism trials.[25] Jurisdictions should ensure that children accused of terrorism offences receive the rights set forth in Good Practice 5, as well as the wide range of special protections that apply to children as afforded by international juvenile justice standards.

3.3.3 Accused children serving as witnesses

Child suspects in some circumstances may also serve as witnesses in other trials. In such instances, trials may be stopped, plea deals reached, and charges reduced. Care should be taken that such arrangements do not disadvantage the child, or create dangers related to their testimony in other trials. Courts should employ adequate witness protection measures to ensure the security of the child witness.

3.3.4 Have the views of the child been heard and considered?

The participation of children in decisions related to them is promoted by the UNCRC.[26] In the context of trials, as well as in the sentencing phase, the testimony of children themselves is deemed to be of value, unless this jeopardises the child in any way. At the very least, the judicial officer should provide the child and his/her legal representative the option to present the child's testimony.

3.4 Sentencing, rehabilitation and reintegration

In the event that a child suspect is found guilty of an offence, a number of considerations discussed above remain of concern. These are:

- Confidentiality and identity protection, as well as the protection of records
- Consideration of the views of children in decisions relating to their sentencing
- Consideration of the best interests of the child

The following additional considerations are necessary in the sentencing phase:

3.4.1 The application of options relevant to the circumstances of the child

The UNCRC states that options available to the court in terms of sentencing should be 'non-exhaustive' in order to offer as many options as possible in relation to sentencing. This is accompanied by the principle of 'proportionality' in relation to sentencing, recommending that courts take the circumstances and conditions of the offence and the offender into account.[27]

Once again, the principle relating to detention applies – i.e. that children should be detained only as a last resort, and for the shortest possible period. Sentencing procedures should be informed as far as possible by investigations into the circumstances of the child, as well as the offence.

Sentencing judges should employ trained social service professionals who are best able to gather and present evidence relevant to the special circumstances of the particular child defendant to the court. These professionals include social workers, probation officers and psychologists. Where there are limitations in the availability of these services, other independent outsiders who are able to build trusting relationships with the child, and understand his/her circumstances, may also serve as trustworthy sources of information and recommendations for the court.

The GCTF's Neuchâtel Memorandum emphasises these principles relating to the sentencing of children convicted of terrorism offences (see Good Practice 9), which recommends the application of 'the principle of individualization and proportionality in sentencing'.[28]

The guidelines for sentencing children convicted of terrorism offences are as follows:

- Wherever possible, non-custodial sentencing should be considered.
- Non-custodial sentences should include programme interventions that may assist with the rehabilitation and reintegration of children back into society.
- Any public announcements relating to conviction and sentencing should protect the identity of the child, and serve to promote their reintegration and rehabilitation, rather than stigmatise or seek retribution.

3.4.2 The use of restorative justice approaches

Restorative justice approaches refer to programmatic measures that facilitate offenders making amends to victims, and healing relationships with communities. This differs from more mainstream approaches that seek retribution for acts committed by offenders.[29]

These approaches may be adopted at any stage of the criminal justice process and might be as simple as an informal or formal apology, or involve complex mediation processes that take place over a long period of time. Such approaches are encouraged in relation to children given the need to build acceptance by family and community members, which may be central to reintegration.

Good practices relating to Africa include approaches that integrate African traditional measures into juvenile justice provisions.[30] Traditional and religious courts that handle cases relating to children may be well placed to deal with many kinds of matters,

however special training should be provided relating to procedures that protect the rights of children.[31]

3.4.3 The prohibition of life sentences without parole and the death penalty

The UNCRC expressly prohibits the application of life sentences without parole and the death penalty for child offenders.[32] This argues again for proportionality in sentencing, and the consideration of the best interests of the child.

***Case practice:** Juvenile justice in the context of terrorism cases*

Kenya, Uganda and Tanzania have elaborate legal provisions dealing with the trials of juveniles, including designating special courts, personnel and procedures for conducting such trials. Uganda also makes provision for community-based procedures to address matters that don't involve serious offences. These systems include elements of restorative justice.

Conclusion

Child suspects of terrorism-related offences are at great risk, especially in systems where legislative provisions for their protection are limited, and where separate juvenile justice systems don't exist. Judicial officers have significant responsibilities to ensure the protection of children in criminal justice proceedings, and to employ procedures and seek outcomes that are consonant with the age and circumstances of the juvenile. Alternatives to the use of the criminal justice system should be a priority; and detention should be a last resort, for the shortest possible periods.

SECTION 4: SPECIAL MEASURES TO PROTECT VICTIMS AND WITNESSES

Overarching Good Practice

Good Practice 4: Support special measures to protect victims and witnesses in the trial process.

Introduction

Whereas witness protection is predominantly within the mandate of investigating and prosecuting authorities, the court has the responsibility to protect witnesses and the rights of victims during the trial and sentencing process.

In light of this, the judicial officer must remain assertive, alert and flexible in the determination and guaranteeing that all testimony and evidence is given in a free and fair environment. The protection of witnesses in and out of court is central to achieving this objective.

Although victim witnesses of terrorism cases face similar security threats as witnesses and therefore require protection, the needs of victim witnesses are often broader due to the physical, psychological and other impacts of the terrorism incidents that are not general to witnesses. They may therefore require assistance, support and compensation.

Meanwhile, for witnesses in particular, the modus operandi of terror groups is pertinent in illustrating the need for witness protection inside and outside court. The United Nations Office on Drugs and Crime's Good practices for the protection of witnesses in criminal proceedings involving organized crime posits the importance of witness protection in the fight against terrorism.[33]

4.1 Guidelines for in-court and courthouse protection

Good Practice 4: Support special measures to protect victims and witnesses in the trial process recommends that judicial officers determine whether special measures to protect witnesses are warranted, including:

- Concealment of the identity of a witness in court through the following:

(i) Facial concealment and voice distortion

(ii) Closed trials or closed-circuit cameras and television

(iii) Use of secure video link testimonies

(iv) Giving witnesses pseudonyms or referring to them using numbers

(v) Expunging witness names and other information that may allow them to be identified from records[34]

(vi) Permitting disclosure limitations (in terms of time) for prosecution or defence access to witness identities when allowed

(vii) Promoting informal witness protection measures by police and prosecutions during the court proceedings, where legal provisions don't exist

The court may use the above measures upon request of a party, and if special measures are warranted. However, the court must weigh the use of such measures against the right of the accused to a fair trial. Other measures that the court might consider include:

- Recommending admission to a witness protection programme, which may include changing a witness's identity and relocating him or her, either temporarily or permanently where the witness is under high risk and willing to voluntarily enter into such a programme. The witness in such a programme should also be protected when they appear in court to testify
- Recommending victim participation in legal proceedings and providing protection measures

For courthouse protection Good Practice 5 recommends:

(a) Increased police or other security staff both in and outside the courtroom

(b) The strategic use of security checkpoints and screening procedures

(c) The use of metal detectors, x-ray scanning devices, and other screening technology at the public entrance(s) to the courthouse and courtroom

(d) Prohibiting the possession of cellphones and other electronic devices in the courthouse and courtrooms

(e) Separate and secure parking and entrances for judges, prosecutors and court personnel

4.2 Guidelines for out-of-court protection measures

There are times when the need to introduce measures to protect the wellness and safety of a victim or witness outside the confines of the courtroom may arise. Ensuring safety outside court may be necessary even when there is courtroom protection, due to a possible threat to the victim or witness.

The seriousness of terrorism cases has the potential to increase the threat to a victim or witness's safety and wellness, making outside court protection for witnesses necessary.

4.2.1 Out-of-court witness protection in terrorism cases

The type, length and extent of out-of-court protection used in terrorism cases varies depending on the nature of the threat to the witness. For instance, while one witness may require out-of-court protection measures for just the duration of the trial, another witness may need protection before the start of the trial. As such, protection may be introduced at any stage of the legal process as the need arises.

Also, protection could be extended to the family members of witness A, but not to those of witness B, if witness A's family faces a security threat but that of witness B does not. Decisions should be made based on the nature of the threat to the witness, which can be gauged following an assessment of the witness's security threat situation.

Out-of-court protection for witnesses of terror cases can broadly take on two forms. The first form is referred to as 'basic protective measures' and these include but are not limited to:

- Police protection
- Police transportation to and from court
- Installation of security apparatuses at the witness's place of residence and work
- The use of safe houses for the witness and his or her family[35]

The second form that out-of-court protection may take is the enrolment of witnesses into a witness protection programme. Protection of witnesses admitted to a programme can involve changing their identity, and temporarily or permanently relocating them.

Despite the outcome of a threat assessment, other factors such as financial and human resources and international cooperation to handle possible cases needing witness relocation can affect the nature of out-of-court protection provided to a witness. For instance, police protection may be offered, despite the need for a safe house for the witness and his or her family.

4.2.2 Judicial officials and out-of-court protection

Part of the duty of judicial officers is to ensure the protection of witnesses participating in the criminal justice process. This may include securing witnesses outside court premises in collaboration with other criminal justice officials. Judicial officials contribute to upholding out-of-court witness protection in several ways.

For example, at the recommendation of a prosecutor, a judicial officer may be requested to order the relocation of a witness to a place of safety. A judge may use his or her discretion in ordering measures for the witness to be protected out of court.

Some countries permit the extension of out-of-court protective measures to witnesses who are part of the criminal justice system such as investigative officials, prosecutors and judicial officers in certain cases. Temporary special police protection for investigators, prosecutors or judicial officers during terrorism cases however should be encouraged especially if there is a threat to their security. Needless to say, protection of criminal justice officers is not standard practice in many countries and is often subject to the availability of resources.[36]

4.2.3 Out-of-court protection for witnesses and victims in the Horn of Africa

Legislation and practice for the protection of victims and witnesses in various jurisdictions in the Horn of Africa differ widely with some countries having no framework for the protection of witnesses or victims and others having more robust systems in place. By the nature of the work of judges in the adjudication of terrorism cases, this section includes information available on the protection of judges.

Case practice: Out-of-court protection for witnesses and victims in the Horn of Africa

In Djibouti, no special legislation exists for the protection of victims or witnesses in criminal matters. Neither the counter-terrorism nor the countering of the financing of terrorism legislations adequately cover matters concerning the protection of witnesses, victims and judges. Furthermore, to date protection programmes have not been used for terror cases in that country.

In Ethiopia, witnesses are provided out-of-court security and given safe houses for their protection during court. Witnesses are given protection after the trial, provided the threat to their security persists. The legal framework for the protection of witnesses in Ethiopia can be found in the Ethiopian Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010,[37] and it provides for medical treatment for the victim, as well as compensation for the loss of property. For judges, however, protection outside court is not provided.

Kenya's out-of-court witness protection framework involves a witness protection programme that provides for the physical security of witnesses as long as they are willing to testify.[38] This includes enrolment in their witness protection programme, which enables the placement of witnesses in safe houses, the relocation of witnesses and the change of identity if there is a threat to their security. Psychosocial support is also provided under this framework.

Neither Somalia nor Somaliland has a framework or measures for the protection of witnesses, victims or judges outside the courtroom.

In Tanzania, the criminal justice system physically protects witnesses outside of court, without any legislation or specific programme. Judges are however not protected under this framework.

Finally, in Uganda, no formal framework exists for the protection of witnesses, victims or judges – although there has been some effort to protect witnesses, victims and judges. In the case of protection for witnesses, the defence or prosecutor often informs the judges of a threat to a witness's security through the registrar and the judge recommends that the witness be placed under protection, provided the witness is willing.

Judges are given security detail for a limited time only, due to the prohibitive cost of maintaining security for the full duration of the trial.

4.3 Participation of victims in national criminal justice systems

In the criminal justice systems of countries in the East and Horn of Africa, there is a very limited role of victims of crime beyond them serving as witnesses and in providing impact statements that may be used in sentencing.

Good Practice 3 of the GCTF Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings recommends that legal frameworks for provision of victim services and rights be enacted as appropriate and consistent with its domestic legal system.

States are encouraged to enact legislation establishing minimum standards for providing services to victims of terrorism within the national legal system. States are encouraged to also enact legislation establishing rights and roles for victims during the criminal justice process.

4.4 Protecting vulnerable witnesses

Employing special measures to protect vulnerable witnesses is important not only in the context of upholding their rights but also in supporting any unique needs they may have as they testify and limiting secondary victimisation during the criminal justice process.

The Kenyan Witness Protection Act defines a vulnerable witness as 'a witness who for justified reasons, should be interviewed or allowed to testify in a special manner and includes children, victims of sexual and gender based violence, the elderly, persons who are ill or any other person who has been declared a vulnerable witness due to the personal characteristics of the witness, the type of offence committed or the relationship between the witness and the perpetrator or other circumstances'.[39]

4.4.1 Guidelines for the protection of vulnerable witnesses

Due to the possibility of extended engagement with vulnerable witnesses in the criminal justice process and the grave nature of terrorism, guidelines exist in various documents for protecting different types of vulnerable witnesses from the beginning to the end of the criminal justice process. Some guidelines speak to judges and other criminal justice practitioners.

The UNODC Good practices for the protection of witnesses in criminal proceedings involving organized crime's recommendation that vulnerable witnesses be identified as early as possible in the criminal justice process is vital in ensuring that vulnerable witnesses are prioritised throughout the process.[40]

Case practice: Protection of vulnerable witnesses in the Horn of Africa context

Countries across the Horn of Africa approach the issue of protecting vulnerable witnesses differently. In some countries, there are no specific provisions for the protection of vulnerable witnesses, and in other countries there are certain provisions. Still, some countries leave decisions on matters involving vulnerable witnesses to the judicial officer.

Djibouti does not dispose of special procedures in handling terrorism cases where the accused is a person living with disabilities.

In Ethiopia, people living with disabilities are treated in accordance with the United Nations Convention on the Rights of Persons with Disabilities.[41] Those living with disabilities who are arrested stay in jail until they are found guilty and special care is taken in handling them. They are given first priority in court, and their cases are listened to first. Disabled defendants convicted of terrorism crimes are however sentenced the same way non-disabled people convicted of terrorism crimes are sentenced – to life imprisonment.

In Kenya sign language interpreters are used in court for the adjudication of cases involving deaf or mute witnesses. The Kenyan framework gives the court freedom to address any other needs.

In Somalia, juvenile suspects are not arrested or held in police custody. They are sent back to their parents or guardians if found guilty. On the other hand people with physical disabilities are treated the same as other suspects and accused persons, but their human rights are upheld.

Mentally disabled people are not criminally responsible, provided the court receives clear diagnosis from a doctor. Military courts do not have any separate provisions for vulnerable witnesses – accused persons are dealt with like any other citizen. The death sentence is imposed on those found guilty of terror offences.

Tanzania's vulnerable witnesses are granted some measure of special treatment in that they are transported from where they are to the courtroom and given special priorities. Witnesses are provided chairs, and early adjournment is usually prioritised.

However, because the law is unclear on how the elderly and disabled should be treated, it depends on the judge or prosecutor. Criminal justice procedures in Tanzania do not provide for in camera hearings, which may become necessary if threats are being issued to vulnerable witnesses.

For Uganda, the International Crimes Division (ICD) of the high court has rules of procedure and evidence that provide for the protection of witnesses. In practice, the investigator informs the prosecution of the special needs of prospective witnesses. Although the courts try to protect vulnerable witnesses and witnesses more broadly, there is no elaborate formal protection framework.

Conclusion

Witness protection programmes are prohibitively expensive. Only one of the Horn of Africa states – Kenya – has embodied the Hague Memo's Good Practice 4 in its legislation. In the absence of a set of witness-protection and victim-protection legislation, the court plays a key role in deciding how to address matters involving vulnerable witnesses and victims.

In light of the fact that judicial officers are central to the adjudication of cases, the onus often is on them to uphold the rights of victims and vulnerable witnesses while administering justice. This is to be done with due regard for the human rights of the accused, defendants and witnesses and the rule of law.

SECTION 5: SENTENCING GUIDELINES

Introduction

The practice in Horn of Africa states is that there are prescribed sentences for all criminal offences, found in sentencing guideline documents, such as the rules of criminal procedure, negotiated and adopted by the judiciary. These guidelines prescribe minimum and maximum sentences for all criminal offences. The judicial officer retains the discretion in passing sentences to convicted persons. In issuing sentences, a good practice adopted in many jurisdictions is the use of victim impact statements.

5.1 Sentencing procedures

Sentencing of convicted people for all offences is regulated by sentencing procedure or guideline documents in Djibouti, Ethiopia, Kenya, Tanzania and Uganda. In Djibouti, additional guidelines are available in legislation dealing with illicit financial flows, terrorism and other serious crimes.

5.2 Victim impact statements

The guidelines and procedures in Djibouti, Ethiopia, Kenya and Uganda allow for the use of victim impact statements after conviction and before sentencing. Tanzania's sentencing guidelines are being amended to allow for victim impact statements, but there is authority in legislation and case law to support the consideration of victim statements before sentences are ordered.

As explained in Section 4 above, the GCTF's Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings provides guidance on how to deal with victims of terrorism within criminal justice systems.

The approach to granting victims the opportunity to participate in the criminal trial of a terrorist offender is holistic in the sense that it allows them to express their concerns in the course of the criminal trial.

SECTION 6: SPECIAL TRIAL CHALLENGES

Introduction

In the course of any criminal trial, a judicial officer may face a number of challenges as the case proceeds. Terrorism cases pose even greater and more complex challenges. While a judicial officer may take the necessary precautions to manage the trial, including setting a pre-trial conference and firm deadlines for the parties, it's the 'art of judging' that allows a judicial officer to effectively manage trial challenges. This section identifies a few of the challenges that a judicial officer may encounter in the adjudication of terrorism cases.

6.1 Guidelines on handling disruptive or dangerous defendants

6.1.1 Recommendations for dealing with a disruptive defendant

As with so many parts of the judge's role, dealing with disruptive defendants requires considerable patience accompanied by firmness when required. A defendant has the right to attend his own trial and to hear and see the witnesses give evidence. This right should only be abridged if it is necessary to allow the trial to continue.

Disruptive defendants make the judge's life difficult. They interrupt the smooth running of the trial and make it extremely hard for others to do their job. It can make it very difficult for witnesses to give their account coherently if they are being constantly interrupted or shouted at that they are lying.

Judges must not allow witnesses to be intimidated by an unruly defendant. Interruptions from the dock also make it hard for the judge to concentrate on the evidence and decide on the issues in the case. The judge therefore may find it necessary to remove a disruptive defendant from the courtroom.

Before taking such drastic measures, the court should first proceed carefully through this suggested process:

- On the first interruption, the defendant should be told firmly that interruptions of the court process cannot be tolerated; that he or she will get a chance to give his or her account in due course but each witness is entitled to provide testimony without interruption. The court should ensure that the defendant is told that he or she will receive similar treatment. After this explanation, the court should warn the defendant that further outbursts will result in his or her removal from the courtroom and the defendant will remain in out-of-court detention while the trial continues without him or her.
- If the defendant refuses to comply and continues with disruptive behaviour, the court should give defence counsel the opportunity to speak privately with the defendant, while making it clear to counsel that disruptions will not be tolerated.
- If the interruptions continue after the court resumes, then the defendant should be given one final warning.
- If the defendant is removed, the judge may wish to consider applications that defence counsel may make for the defendant to return. The defendant

should only be allowed to return if he or she is warned again that disruptive behaviour will result in removal. During any period that the defendant is not in court during the trial, it may be necessary to adjourn the court from time to time to allow defence counsel to update the defendant on the evidence that has been given.

- If the defendant remains absent at the point in the trial when he or she has the opportunity to testify, the judge must give the defendant a further opportunity to come back into court to give evidence. Again, the judge should warn the defendant against disruptive behaviour and if outbreaks occur, the defendant must be removed.
- If the defendant indicates a desire to give evidence but is disruptive when he or she returns to court, then the judge should consider alternative means by which the defendant can give evidence without being in court. Options include testifying via video link from a local jail. Every effort should be made to find a way in which the defendant can give evidence without disrupting the court process.
- If the court goes through this process of giving the defendant warnings and ample opportunity to remain in the courtroom, yet the defendant continues to be disruptive, the court is entitled to conclude that the defendant has demonstrated that he or she has given up his or her right to participate in the proceeding.
- If the defendant is unrepresented or has dispensed with the services of counsel, and has been removed from the courtroom, the judge will have to devise a method of communicating with him or her. The judge may direct the court clerk or a court-appointed lawyer to read written notes to the defendant. If communication is through written notes, the court clerk should note any reply and the notes should be kept securely with the court file so they are available for any appeal.
- It is essential during this process that the judge exhibit patience and composure, to avoid any application by the defendant that the court recuse itself on the basis of actual or apparent bias.

6.1.2 Recommendations for dealing with a dangerous defendant

First it is important that the judge makes a finding on the record that the defendant is dangerous, supported by clearly articulated reasoning, before deciding what steps should be taken to enhance courtroom security.

This is important so as not to prejudice the defendant. The issue of dangerousness normally arises when prison authorities request additional security measures are taken against the defendant. The judge should identify and evaluate the evidentiary basis for the request, and if the request is unsubstantiated, the judge should reject it.

If it is demonstrated that the defendant poses a danger if not restrained, then the least possible measures should be taken consistent with preserving the safety of those who work in the courts, including guards. It should be made clear to the defendant by the judge that while the application for additional restraint is being granted, the

judgment of the court will remain impartial and will not be influenced by the decision to enhance security.

It is important that whatever steps are taken, the defendant is able to fully participate in the trial process.

Provided that security measures are in place, the defendant should give evidence from the witness box as every other witness does rather than remaining in the dock. The judge should consider clearing the courtroom before the defendant testifies, so that court security guards can safely move the defendant from the dock to the witness box.

Once the defendant is in the witness box, the court should consider whether the defendant may give evidence without visible restraints. While safety concerns may dictate that some form of restraint is required, the judge must carefully consider every measure of control and only agree to it if satisfied that it is necessary.

It is important that the observers of the court proceedings understand that the judge has made every effort to balance the defendant's right to a fair trial with the need to ensure the safety of those in the courtroom.

6.2 Handling reluctant witnesses

Reluctant witnesses pose a challenge to the court and may require a great deal of patience from the judge. It is often not apparent why a witness is reluctant to testify. When faced with a reluctant witness, the party that called the witness to the stand should carefully encourage the witness to give answers, without affecting the substance of the witness's testimony. If the attorney sponsoring the witness's testimony is not able to successfully elicit testimony, the court may consider intervention.

The important first step is to try to get the witness to speak. The court and counsel may assist this process by starting the questioning with simple inquiries, such as asking the witness to spell his or her name and provide basic biographical information. Once the witness begins testifying, often he or she will relax and continue to provide evidence, if sufficient patience is shown by the judge and counsel.

It is contempt of court for a witness to refuse to answer questions when brought to court and the court has the power to summarily find the witness in contempt and hold the witness in custody until such time as the witness agrees to testify.

The court should use its contempt power as a last resort, however, and should instead make all efforts to elicit the witness's testimony before any threat of contempt is made. It is a better practice to refrain from threatening the witness with contempt until all other options have been exhausted, and the court determines that its contempt power is the only viable option.

If the court concludes that the witness's reluctance to testify is based on fear, the court may seek to reassure the witness, or consider alternative means by which the witness can provide testimony. Clearly the preference is for the witness to testify in person from the witness stand.

One option to elicit that testimony is an application made by the party calling the witness to treat the witness as hostile. If granted, the party may then ask leading

questions of the witness. Often a witness who initially is treated as hostile will begin answering questions freely once she or he begins testifying, and counsel may cease leading the witness through his or her account.

A less favourable option is to allow the entry into the record of a witness's written account. This option is disfavoured because the defendant has no opportunity to cross-examine the witness and test his or her veracity.

If the judge holds a witness in contempt because the witness refuses to answer questions, the witness should be taken into custody. The court should assign a lawyer to the witness who will consult the witness as soon as possible and advise the witness of his or her rights including purging the order of contempt. If the witness does not purge the contempt order, the court must decide on an appropriate punishment after hearing representations from the witness's counsel and the parties to the case.

CONCLUSION

The criminal justice system contributes to effective counter-terrorism responses. Only through upholding the legitimacy of the state by applying the law in a fair and objective manner can the narratives built by extremist organisations to recruit individuals into violence be undermined.

Violent extremist groups often attempt to frame themselves as the defenders of the oppressed and so seek to evoke harsh responses from the state to create a perception that the state is unjust.

If governments respond to terrorism outside of the rule of law, the power of groups challenging the authority of the state increases.

This is why justice systems play such a crucial role in counter-terrorism responses. Criminal justice responses are the only sustainable and effective responses to terrorism because it is only through exercising the authority of the state within the legitimate bounds of the law that terrorists can be held to account within a framework consistent with international human rights norms and standards. An effective and fair judicial system not only maintains the trust of the broader public, but serves as a powerful deterrent to terrorist actors.

Terrorism cases are heavily politicised and political pressure and public scrutiny can place additional stresses on judges adjudicating terrorism cases. Despite these pressures, it remains imperative that judges ensure that all defendants' rights to a fair and independent trial are protected. The nine good practices set out in the Global Counterterrorism Forum's Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses and these guidelines should provide judges with the necessary tools for maintaining the integrity of the judiciary and ensuring effective adjudication of these difficult cases.

The Hague Memo's good practices and these guidelines will strengthen institutions by assisting the adjudicators of terrorism cases in maintaining fairness, independence and legitimacy in the pursuit of justice.

Through these principles, the judiciary will be able to maintain the public's confidence in the legal process and maintain legitimacy in the eyes of the public. The basis of state legitimacy is dependent on its ability to fairly and effectively apply the law, and it is only within the framework of legitimate authority that terrorism can be eliminated.

APPENDICES

1. The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses
2. List of judicial officers who participated in the Horn of Africa workshops where these Judicial Guidelines on the Adjudication of Terrorism Offences in the Horn of Africa were developed.

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