East Africa Regional Elaboration of The Hague Memorandum Good Practices for the Judiciary in Adjudicating Terrorism Offenses

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Introduction

On 8-10 July 2015, the Global Center on Cooperative Security (Global Center) held a three-day workshop for the judiciary to advance the implementation of the Global Counterterrorism Forum's (GCTF) *The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses* (hereinafter Hague Memorandum). The workshop, held in Nairobi, Kenya, was conducted in partnership with the Intergovernmental Authority on Development Security Sector Programme and the Kenya Judiciary Training Institute, under the auspices of the GCTF Criminal Justice Sector / Rule of Law Working Group. Participants included judges from Kenya, Tanzania (represented by judges from mainland Tanzania and Tanzania Zanzibar), Uganda, and the United States of America (U.S.), members of regional organizations including the Institute for Security Studies (ISS) and the East African Magistrates' and Judges' Association (EAMJA), and a senior rule of law adviser to the U.S. who facilitated the drafting of the Hague Memorandum.

The principal objectives of the workshop were to provide a regionally-focused discussion on issues across the breadth of the Hague Memorandum for the judiciary and compile a regionally-specific elaboration of the good practices and lessons learned for future reference and use by local, regional, and global stakeholders. The present elaboration aims to build upon an important principle appearing in the preamble of the Hague Memorandum, which recognizes that states can only implement "those aspects of any set of good practices that their legal systems allow for" and encourages states to implement the good practices that are "appropriate to their circumstances and consistent with their domestic law, regulations, and national policy, while respecting applicable international law." This principle is also qualified in the GCTF Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector (hereinafter Rabat Memorandum) which states that recommendations "must be built on a functional criminal justice system that is capable of handling ordinary criminal offenses while protecting the rights of the accused."

The workshop assessed the challenges associated with handling terrorism cases in the East African region, reflected on the good practices within the unique judicial environment of the participating countries, and considered a broad range of legal tools, training opportunities, and strategies to achieve their implementation. The East Africa Regional Elaboration of the Hague Memorandum sets forth regional trends, presents a set of recommendations which emerged from the regional meeting, and provides a regional elaboration of the important principles and practices developed by the GCTF with emphasis on those enumerated in the Hague Memorandum.

The reflections contained in this document emerged in the context of the heightened state of insecurity in East Africa prompted by continued horrific acts of terrorism, including the April 2015 attack on Garissa University which left 147 dead, and the March 2015 shooting of Joan Kagezi, the lead Ugandan

state prosecutor in the trial of the 2010 al-Shabaab bomb attack that killed 76 people in Kampala, Uganda. The importance of a regional elaboration of the Hague Memorandum is demonstrated by the transnational nature of these crimes and the regional responses and cooperative mechanisms that they require. In the 2010 bombing, Uganda worked with the governments of Kenya, Tanzania, and Somalia to investigate and bring to justice the alleged perpetrators of the attacks. Those charged and currently awaiting trial include nationals from Kenya, Uganda, and Tanzania in proceedings delayed by court challenges fraught with allegations of serious human rights abuses, including on the nature of the extrajudicial transfers and claims of torture by Ugandan police and security agencies.

The discussions make reference to these attacks and their ongoing trials, but also of the personal experiences of the participating judges, putting at the forefront the issues of the rights of the accused and the security of judicial officers and courtroom participants elaborated under Good Practices 5 and 7, respectively. The recent events highlight the challenges of balancing the rights of the accused to a fair trial with the interests of the state and the victims through an effectively managed trial (Good Practices 1, 2, 3, and 8); in securing the rights of the accused, notably to effective counsel and freedom from torture (Good Practice 5); in providing protective measures and upholding the rights of witnesses and victims in a manner not prejudicial to the accused, while emphasizing that the former's rights were not adequately considered vis-à-vis those of the accused (Good Practices 4 and 9); and in the treatment of the intelligence evidence gathered in the adjudication of terrorism offenses (Good Practice 6). The cross-cutting issue of security further underlies the discussion on the content and nature of the training that should be provided to judges (Good Practice 1) in the region, highlights the need to bolster victims' and witnesses' protection throughout the trial proceedings (Good Practice 4), and good practices concerning media guidelines for the responsible reporting of terrorism and other high-profile cases (Good Practice 8).

Good Practice 1: ***Identify and Assign Specially Trained Judges***

In the participating countries, judicial training on terrorism matters is typically conducted by international organizations and nongovernmental organizations (NGOs) such as EAMJA, the Global Center, ISS, the United Nations Office on Drugs and Crime, and the United States Agency for International Development, in collaboration with other training institutes. Of the three countries, only Uganda has specialized training for judges in the area of terrorism and related national security cases provided through the International Crimes Division (ICD) of the High Court of Uganda.[1] Ugandan judges serve in more than one division and are not necessarily limited to the work of the ICD.

Political and institutional reasons were cited for the resistance in Kenya to the creation of an international crimes division comprised of judges specially trained in terrorism matters. In recent years, the International Criminal Court (ICC) and the international community have increased pressure on States Parties to the Rome Statute to address the issue of complementarity—the principle that national courts should be the primary vehicles for the prosecution of serious international crimes—and in Kenya, the prevailing perception was that such institutions were being forced upon them without regard to cultural, institutional, and other national considerations. This view is compounded by the resentment felt toward the ICC stemming from historical and political reasons.

One such consideration was that the creation of a new division of the High Court would implicate far-reaching structural and constitutional changes in the composition of the judiciary. In Kenya, most crimes

[1] The ICD has jurisdiction over war crimes, crimes against humanity, genocide, terrorism, human trafficking, piracy and "other international crimes." High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, section 6.

are heard at the magistrates' courts and go on appeal at the High Court, who also have original jurisdiction to hear criminal (and civil) cases, including murder.[2] Acts of terrorism prosecutable under the Prevention of Terrorism Act of 2012 are tried in the first instance magistrates' courts[3] at the higher ranks, among judges who have eight to ten years of experience. As such, giving sole jurisdiction to prosecute these crimes in the High Court would require a legislative change and limit the types of cases heard at the lower courts, already considered capable of handling international crimes.

A related consideration was the view that judges should be generalists capable of handling any case before them, especially where the crimes are covered under the penal code. There was a reluctance to specially train judges in matters of terrorism or fostering a "super breed" of judges who handle more complex crimes within the judiciary. The emphasis on generalists was especially acute as the rotation of judges from one jurisdiction to another is set at specific periods of time (four years in Kenya)[4] or less determinate intervals (not exceeding three years in Tanzania)[5] throughout the country. Despite this concern, reference was made to the shortage of judges and the need for additional training of magistrates in regions hardest-hit by terrorism, such as Garissa and Mombasa in Kenya.[6] Cases involving national security and terrorism furthermore expose judges to unique risks, pressures, and challenges to their security and well-being (*see* Good Practice 7 section), and the view was presented that judges needed to share the burden out of considerations of fairness and security.

The Tanzanian delegation cited similar structural and cultural considerations for the unenthusiastic reception to this good practice. There was a strong reluctance to create further divisions within the judiciary in Tanzania in addition to the existing ones that include commercial, labor, and land divisions. These partitions were seen to be largely inefficient, the Tanzanian experience with its land division serving as a cautionary tale: its establishment[7] imposed a great burden on judges as land disputes were disproportionately numerous and spread out throughout the country, requiring judges to travel long distances and dispose of a large caseload. Moreover, there was a lack of political will to allocate resources toward a specific division or training for the adjudication of terrorism cases, which were not as prevalent and had politically-sensitive implications, as terrorism cases are concentrated among Muslim populations along the coast of Tanzania and in Zanzibar and their increased attention could be used to exacerbate tensions along cultural or religious lines. Judges nonetheless recognized the need for more lobbying for special training on terrorism matters generally, especially as crimes of terrorism have original jurisdiction with the High Court in Tanzania and no difference in rank is made among magistrates in the High Court, unlike in Kenya. [8]

[2] Constitution of the Republic of Kenya, art. 165.
[3] The Prevention of Terrorism Act, No. 30 of 2012, art. 38.
[4] As decided by informal agreement among judges in regular audiences with the Chief Justice. The agreement was undertaken to minimize disruption in judges' lives and prevent corruption in the jurisdictions where judges work. The period is currently established at every four years for judges of the High Court and two years for judges in the Court of Appeals.
[5] For judges in the High Court, as decided by informal agreement among judges in regular audiences with the Chief Justice.
[6] On 10 July 2015, the Kenyan Judiciary Service Commission posted additional judges in Mombasa, following protests by the Law Society of Kenya Mombasa chapter concerning the shortage of judges and magistrates in Mombasa. Willis Oketch, "Mombasa judges transferred," Standard Digital, 11 July 2015, http://www.standardmedia.co.ke/article/2000168758/mombasa-judges-transferred.
[7] Established under Government Notice No. 63 of 2001.
[8] See The Prevention of Terrorism Act, 2002, section 34(1).

The following regionally-specific recommendations were proposed:

1. Ideally, every judge should receive continuing legal training in terrorism cases. However, resource considerations, the system of judicial transfers, and the prevailing view that judges should be generalists lead to the view in some East African jurisdictions that special training on terrorism should be an elective and not an exclusive mandate. Judges proposed that some time should be allocated during the induction training for magistrates in the handling of international and organized crimes cases.
2. In addition to training on the substantive crime of terrorism, issues that should be included in the special training for the adjudication of terrorism cases include: dealing with extradition and mutual legal assistance requests, asset recovery, victims and witness protection, security, stress management, and media guidelines for judges. Materials should be developed to assist judges in adjudicating terrorism offenses, such as bench books or practice manuals on the topic.
3. The view was shared that the creation of an international crimes division may involve far-reaching and costly legislative changes that are not desirable in all contexts. The creation of special sessions conducted outside of normal court sessions to hear terrorism cases specifically, instead of establishing new divisions or conducting targeted specialized training, was suggested as an alternative. The proposal elaborates that judges from outside of the community should be brought into these special sessions, drawing from the election petitions cases example in Kenya. These have the added advantage of being more secure for judges, as they remain relatively anonymous within the community of the alleged perpetrators and victims.

Good Practice 2: *Support the Use of Continuous Trials in Terrorism and other National Security Cases*

Judges agreed with the many negative effects that a noncontinuous trial may have on the overall delivery of justice. The "justice delayed is justice denied" maxim was acknowledged as a reality for many stakeholders of the criminal justice system. Piecemeal trials that delay trial outcomes, at times for years, result in a range of problems leading to community dissatisfaction with the entire justice system. The system is deemed unfair and potentially harmful for the accused, witnesses, victims, and communities seeking protection and justice. A particular harm caused by such delays in terrorism cases is the greater vulnerability of witnesses and victims to intimidation (*see* the section on Good Practice 4). Protracted proceedings also increase security risks and put pressure on judicial officers and their staff, as has been experienced in Mombasa where judicial officers received information on planned attacks against the courts.

Continuous hearings were described as being employed in all three countries. In Kenya, a judge has the discretion to hold a continuous trial and plan her calendar accordingly. The use of strict timelines was successfully implemented during the Kenyan election petitions of 2013, wherein courts were able to hear and deliver judgments on petitions well within the mandated period of six months.[9] This was made possible in part because courts heard cases on a daily basis. Preliminary hearings and pretrial conferences were also identified as important tools for ensuring that a trial proceeds in a continuous manner.

Nonetheless, in many instances judges cited that it took several years to dispose of cases, including terrorism cases. The major contributors to delays included:

1. Availability or unwillingness of prosecution witnesses. Although the courts have the power to subpoena witnesses, oftentimes the witness cannot be found, leaving the court no further recourse.

[9] Elections Act, chapter 7, section 75.

2. Availability of defense counsel. Defense counsel able and willing to handle terrorism cases are few and often have conflicting calendars as they handle many cases at once. As a result, judges raised concerns of professional integrity of the defense counsel. If the action rises to the level of professional misconduct, judges in Tanzania have the power to deregister the defense counsel. In Kenya, the court may require the counsel to pay a minimal fine.
3. Ineffective (and lazy) judges. Judges acknowledged that there are varying levels of commitment to handling cases expeditiously. Methods to uphold the highest standards across the bench included forming peer groups who can advise and influence one another, a practice employed in Uganda. In Tanzania, every courthouse is outfitted with a statistical dashboard of daily disposal rates in the public domain to support transparency and accountability. It was recommended that the Judicial Code of Ethics contain provisions addressing this concern.
4. The problem of poor trial management skills of the judge. Today, judges must act as a managerial judge who takes full charge and plays an active role in preparing the case, setting the schedule, and in trying the case. Establishing the rules and tone that the trial will observe from the outset was considered imperative (*see* section on Good Practice 3). In order to succeed, this approach must be supported by the appellate courts, especially in their handling of interlocutory appeals.
5. Juggling different cases in the court's calendar or managing a terrorism case along with judges' regular caseloads. Judges noted that it was difficult to prioritize terrorism cases, as other cases also contain particular urgencies and unique circumstances that may warrant similar consideration and attention.

There are particular justifications that the court may accept as good cause for delays during terrorism trials. These include being responsive to issues that arise regarding the security arrangements for all users of the court and awaiting the availability of expert witnesses and forensics evidence.

The following regionally-specific recommendations were discussed:

1. In order to address the lack of availability of defense counsel, it was recommended that judges note the conflict that counsel has with another case before a different court and cross-check with that court. If the stated conflict did not exist, this would rise to the level of professional misconduct.
2. The court should seek to be proactive in ensuring punctuality and the strict observance of court hours and dates to minimize these delays.
   Chief Judges should be educated on the practice of re-assigning cases when a judge receives a terrorism case. This could be a temporary re-assignment for the duration of the terrorism trial, at the conclusion of which the case may be returned to the judge.

Good Practice 3: *Develop Effective Trial Management Standards*

The recommendations provided within this good practice were considered relevant and useful to the East African context. Judges from the participating jurisdictions agreed to the importance of scheduling pretrial/trial management conferences, sometimes referred to as preliminary hearings. By establishing the rules, providing guidelines, and setting expectations with the attorneys, the court can better manage the proceedings. Examples of additional issues that could be covered during these hearings include:

- Setting time limits for opening and closing remarks, examination, and cross-examination of the witnesses;
- Specifying what technology is permissible inside the courtroom (ex. television screens, cell phones, video cameras, real time recordings);

- Detailing guidelines for the media (*see* the section on Good Practice 8) (ex. may attorneys conduct media interviews on the courthouse steps?).

Although the Hague Memorandum provides a number of recommendations on how to improve trial management, these were deemed less significant than the challenge shared across the region of the lack of court reporters. In many instances, judges make a record of the proceedings in long-hand. This is done while the judge must simultaneously predict, anticipate, and ask questions, make credibility determinations of the witnesses through observation, and at times, conduct a second interpretation of the hearings in order to create a record in English. This absorbs a tremendous amount of time often requiring the judge to pause the proceedings in order to ensure they are adequately juggling the many demands. The judges estimated that two-thirds of their time was spent recording.

Although there have been some pilot projects in both Kenya and Tanzania to hire and train court reporters, these have not been successful for a variety of reasons. In Tanzania, the court reporters left the court for higher paying jobs in the private sector after they were trained. Currently, the technology that exists in the courtrooms may include a television and teleconferencing equipment, but rarely audio recording devices and no trained operators. Black and brown-outs require courts to resort to the use of generators, when they are available.

Good Practice 4: *Support Special Measures to Protect Victims and Witnesses in the Trial Process*

In the East African context, the value of kinship rooted in traditional family and clan structure endures. Witnesses and victims frequently reside with their families, extended relatives, or clans. As such, judges felt that it is not appropriate to ascribe a narrow definition of victims or prescribe individualistic remedies for their protection, such as providing endangered witnesses with new identities or relocating them outside of the community. The judiciary should facilitate the carrying out of swift criminal trials by incorporating protective measures for witnesses and victims willing to testify in court, such as by holding in camera hearings and assigning medical and psychosocial assistance, in addition to those listed in the Good Practice. Protecting victims and witnesses should remain on the court's agenda as victims and witnesses' cooperation is essential to ensure fair and successful prosecutions, all the while recognizing that the implementation of witness protection measures may impinge on the accused's right to a fair trial, including the right to a public or open trial. This last concern accentuated the need for formal legislation to provide specific guidance to judges.

Due to the prohibitive costs associated with witness protection programs, most jurisdictions do not have a witness protection unit or robust legislation to fund those resources. Out of the three participating jurisdictions, Kenya is the only one with a witness protection act. In Tanzania and Uganda, aspects of witness protection are provided for under the domestic legislation for specific crimes or situations, some of which have been introduced as a result of the incorporation of international treaties—mainly, the Rome Statute of the ICC[10]—into domestic legislation.

Despite ongoing efforts, a comprehensive scheme for the protection of witnesses and victims of terrorism remains nonexistent or deficient in the East African jurisdictions. Even in Kenya, the available measures are conditioned upon funding, and NGOs have stepped in to fill in the gap and provide certain services.[11] Police, investigators, and prosecutors have also adopted informal protective measures in the absence of formal legislation. Upon the request of investigative agencies, police officers in Uganda

[10] Infra fn. 17.

[11] NGOs such as The CRADLE, The Centre for Rights, Education and Awareness (CREAW), and Muslims for Human Rights (MHR) provide legal and psychosocial support for victims in Kenya.

patrol witnesses and their residences, assist in their relocation, monitor the accused, and inform the accused that any form of intimidation would be prosecuted. Police officers have also undertaken the initiative to hire psychologists to offer counseling to traumatized witnesses during investigations.

By and large, Kenya has embraced the principles embodied in Good Practice 4 in its legislation. The 2010 Witness Protection Act provides for the establishment of a witness protection agency,[12] whose objective and purpose is to provide the framework and procedures for giving special protection to persons in possession of important information and who are facing potential risk or intimidation due to their cooperation with prosecution and other law enforcement agencies. Pursuant to article 50(9) of the 2010 Constitution of Kenya, the Victim Protection Act was enacted in 2014 to provide for, inter alia, the protection of victims of crime and abuse of power, information and support services concerning reparation and compensation to victims, and special protection for vulnerable victims. Where there are multiple victims of terrorism, civil unrest, war, or any other activity that are likely to cause mass victimization, officers must immediately open a special register containing the biographical details of the victims.[13] The acts operate in tandem with other provisions for the protection of victims and witnesses set out in other statutes[14] and international conventions that have been domesticated.[15] However, as the agency is still in its early stages, its activities are limited and conditioned upon the availability of funds and resources. The agency primarily operates out of Nairobi.

In Uganda, there is no legal regime for the protection of witnesses and victims; the concept of witness protection is relatively new, and available measures are primarily informal and limited. Some provisions in the domestic law provide protection to witnesses in Uganda in specific circumstances.[16] As in Kenya, Uganda has incorporated the ICC Rome Statute into its domestic law, which requires states to provide assistance in protecting victims and witnesses.[17] Currently, two major proposals seek to implement protective measures for witnesses and victims in Uganda. In 2012, the Uganda Law Reform Commission introduced a draft witness protection bill that would establish a witness protection program and agency[18] and in 2013, the ICD of the High Court of Uganda drafted rules of procedure and evidence to

[12] Established under section 3A of The Witness Protection (Amendment) Act of 2010.

[13] Id. at section 6(4).

[14] See, e.g., section 77(2) of the Criminal Procedure Act, sections 75(5) and 77(4) of the Children's Act, sections 31 and 32 of the Sexual Offences Act, and sections 17-19 of the Prevention of Terrorism Act No. 30 of 2010.

[15] Kenya is a newly monist country under article 2 of the 2010 Constitution: international treaties or instruments ratified or acceded to by Kenya automatically become binding law, some of which include provisions requiring states to provide measures to protect witnesses. For instance, the UN Convention against Organized Crime is by operation of article 2(5) of the Kenyan Constitution a part of Kenyan Law. The Convention requires states to provide measures to protect witnesses from intimidation, coercion, corruption, or injury: 2005 UN General Assembly, Resolution 55/25, arts. 6, 7. Kenya is also party to the Rome Statute, which requires states to cooperate with the ICC on the protection of witnesses and victims and facilitation of a witness' voluntary attendance before the ICC. Some provisions of the Rome Statute have been domesticated in the International Crimes Act of Kenya of 2008.

[16] See, e.g., Whistle Blowers Protection Act of 2010, sections 10 (providing whistleblowers protection from liability in civil or criminal proceedings) and 11 (requiring the state to provide adequate protection upon request under certain circumstances); the Inspectorate of Government Act of 2002 (protecting the identity of informers and witnesses as well as providing for their protection); and the Access to Information Act No. 6 of 2005, section 29 (providing the conditions wherein an information officer may refuse a request for access to a record where such disclosure is likely to prejudice or impair a person in accordance with a witness protection scheme).

[17] See International Criminal Court Act No. 11 of 2010, sections 46, 58.

[18] The agency would be empowered to request the courts to implement protective measures during court proceedings, including: (a) holding in camera session; (b) using pseudonyms; (c) redacting identifying information;

address those gaps in the prosecution of serious crimes.[19] The draft rules are currently awaiting approval by the Rules Committee, the adoption of which would enable the ICD to conduct trials of serious crimes in accordance with established international standards and the best practices. Judges agreed that the draft bill and rules should be expedited so as to allow for their ratification.

The ICD in Uganda has been the focus of efforts to establish a witness protection program.[20] The situation for witnesses is particularly critical in northern Uganda, where many of the victims and witnesses live alongside alleged perpetrators of serious crimes, reemphasizing the impracticality of relocation as a protective measure. The ICD currently lacks expertise in the field of witness protection and does not have a witness protection and victim support unit. It was proposed that the Division establish a fully-staffed and well-resourced witness and victims' support unit within its registry that would provide appropriate support and protection to victims and witnesses who face security, psychological, and physical challenges emanating from their participation in the criminal proceedings. The registry should also ensure that all information relating to witnesses is kept in a secure electronic database that can be accessed only be designated registry staff.

In Tanzania, security is generally lacking for participants in a criminal proceeding. It does not have a witness and victim protection unit. As in Uganda, provisions within the national law may provide some form of protective measures.[21] Participants emphasized the power of judicial officers to make orders prohibiting any publication of information which may affect the security of witnesses and to implement a number of protective measures to ensure that witnesses are able to testify in court, including those listed in Good Practice 4. Judges further emphasized the role of technology in helping implement them. In this regard, the judiciary in Kenya has pledged to embrace technology in delivering justice through its Judicial Transformation Framework.

The following regionally-specific recommendations were discussed:

1. In the absence of a comprehensive framework to cover all aspects of the protection of witnesses and victims, judges are placed in a difficult position of balancing the rights of defendants and victims. That challenge could be overcome by having a comprehensive legal framework to address the concerns of witnesses, victims, and their families during investigations and throughout the trial proceedings. Judicial officers should be encouraged to exercise vigilance in

(d) using video link; and (e) employing measures that obscure or distort the identity of witnesses. See The Witness Protection Bill of 2012, section 20(3). The bill would make it an offense to disclose the identity of protected witnesses or expose them in the press (section 23). The protection is extended to crucial witnesses, their relatives, persons who require protection on account of testimony given by a witness, and any other reasons that may be deemed sufficient (section 1(2)). The bill also adopts a child-sensitive approach to take into account the special needs and views of child witnesses (section 22(2)).

[19] The ICD draft rules provide for procedural protection measures such as in camera proceedings, the use of pseudonyms, and the redaction of vulnerable witnesses' identities from court records during trial. Statutory Instruments, The Judicature (High Court) (International Crimes Division) Rules, Draft of 24 August 2015, section 36 (Protective Measures).

[20] In March 2011, an independent report by international experts commissioned by Uganda's Justice Law and Order Sector advised the government on judicial matters and recommended that a comprehensive witness protection program be put in place for the ICD.

[21] In May 2015, a Whistleblowers and Witness Protection Act was passed and is currently awaiting for presidential approval. See The Whistleblower and Witness Protection Act of 29 May 2015, http://www.parliament.go.tz/assets/uploads/files/aa587-1-2015-14.pdf/.

order to identify opportunities for the application of these protective measures and exercise their inherent power to do justice by setting the necessary protections in motion.

2. Given the communal nature of East African society, the notion of a victim extends beyond the individual; relatives are also affected and may be targeted. Good practices should be developed recognizing a broader definition of who needs protection and how this can be achieved. The focus should therefore center on how to minimize the terrorists' ability to pose a threat to the community.
3. The use of technology should be encouraged in the protection of witnesses and victims, such as in the collection of evidence, protection of identities, and tracking of persons. Drawing from the experiences of the international criminal tribunals located outside of the scene of the attack, it was suggested that terrorism trials could be conducted remotely or through the use of video link conferences.[22]
4. Judges should contribute to the scholarship and encourage efforts to implement international standards and draw from other jurisdictions' experiences in the protection of victims and witnesses.

Good Practice 5: ***Supporting the Right of the Accused to a Fair Trial with Adequate Legal Representation***

Good Practice 5 references three international legal instruments as the primary sources for the rights of the accused related to criminal prosecution: the Universal Declaration of Human Rights, International Covenant for Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT). The ICCPR was ratified by Kenya (1972 by accession), Uganda (1995 by accession) and Tanzania (1976 by accession). The CAT was ratified by Kenya (1997 by accession) and Uganda (1986 by accession). Tanzania has yet to ratify the CAT.

Judges agreed that in order to administer justice fairly and to develop a robust and merits-based criminal justice system, defense counsel must be equally strong to the prosecution. This is all the more important when dealing with persons accused of terrorism acts as it is imperative that the state operate on higher moral grounds by proving guilt beyond a reasonable doubt in a manner that upholds human rights and the principles of the rule of law, often in the context of tremendous community anger and outrage.

In all three countries, there is an absolute right to counsel espoused in the constitutions. In Uganda and Tanzania, counsel is assigned to indigent defendants for crimes where the sentence is capital punishment or life imprisonment.[23] In Kenya, the Constitution provides that an advocate be "assigned to

[22] The Family Division in Uganda has already started implementing this mechanism. See also rule 75 of the Special Court for Sierra Leone Rules of Procedure and Evidence (Measures for the Protection of Victims and Witnesses).
[23] Constitution of the Republic of Uganda, art. 28(3)(e) provides that legal representation "at the expense of the State" shall be provided to a person charged with a criminal offense which carries a sentence of death or life imprisonment; The United Republic of Tanzania, The Legal Aid (Criminal Proceedings) Act, chapter 21, 1969, section 3 mandates the provision of legal counsel to indigent defendants in cases where "it appears to the certifying authority that it is desirable, in the interests of justice, that an accused should have legal aid in the preparation and conduct of his defence or appeal,… and that his means are insufficient to enable him to obtain such aid." This has been interpreted to apply to crimes that carry the death penalty, such as manslaughter, murder, and treason. See The United Republic of Tanzania, Penal Code, sections 39, 197.

the accused person by the State and at State expense, if substantial injustice would otherwise result."[24] In practice, this is limited to murder trials which are heard by the High Courts.

In Kenya, Uganda, and mainland Tanzania, the accused is informed of his or her right to counsel at first appearance and is assigned an attorney by the registrar of the court. In Tanzania Zanzibar, it is the chief justice who appoints counsel from a roster. In mainland Tanzania, the Legal Aid (Criminal Proceedings) Act grants the court discretionary powers to assign defense counsel where it is deemed desirable and in the interests of justice.[25] In terrorism cases, judges may argue the need for public interest purposes. Though the manner in which the pool of potential advocates is supplied varies across the three jurisdictions, all felt that the representation available was not uniformly and reliably skilled to handle terrorism cases.

Currently, no public defender service established by statute and maintained as an independent agency exists in the participating countries. Available funds are typically earmarked to support the investigative and prosecutorial agencies. Concern was raised as to whether the accused would trust an attorney who is funded by the state and judges agreed that the independence of the public defender service would need to be safeguarded.

In the absence of a public defender service, the Hague Memorandum advises the courts to support the efforts of government agencies and NGOs to provide legal representation. Across the three jurisdictions, such representatives must have a license to practice and few such agencies and organizations exist. University legal clinics and NGOs primarily serve to sensitize the population to their rights.

Given the vast number of languages and dialects spoken in each country, the use of interpreters during trials is commonplace and the right to an interpreter is upheld throughout court proceedings. Court clerks often serve as interpreters as they are typically native to the region and familiar with local languages. In all three countries, interpreters must take an oath indicating that they will truthfully interpret proceedings before the court to the best of their ability. In Kenya and Uganda, the accused may replace the interpreter by merely expressing dissatisfaction in the service provided. The two primary challenges expressed by the judges include (1) the need to interpret to a third language, typically English, resulting in a record that is inevitably inaccurate and (2) the poor training of interpreters who may become a 'shadow' witness.

The practice of granting bail was relatively uniform across Uganda and Kenya.[26] In Tanzania, the Criminal Procedure Act indicates that a terrorism charge is not a bailable offense and the case should therefore receive priority.[27] In the case of non-nationals, the risk of flight and nature of the violence would likely result in the denial of bail. Particularly difficult and common is the circumstance where the accused is charged with a petty crime because investigators are unable to gather sufficient evidence to bring a terrorism charge. The accused is subsequently released on bail for the petty crime exacerbating the public's frustration in the criminal justice process.

Other procedural issues that arose in the discussion of Good Practice 5 include the importance of conducting a preliminary hearing. It was recognized that different jurisdictions use varying terms. In Tanzania, a preliminary hearing occurs prior to the trial where the court sits with the parties. The primary aim is to identify common ground on the issues in contention. A pretrial conference refers to a meeting with counsel in advance of trial to discuss exhibits, witnesses, subpoenas, time limits,

[24] Constitution of the Republic of Kenya, art. 50(2)(h).
[25] Legal Aid (Criminal Proceedings) Act of 1969, art. 3. See supra fn. 23.
[26] Constitution of the Republic of Uganda, art. 23(6) ("on such conditions as the court considers reasonable"); Constitution of the Republic of Kenya, art. 49 ("on reasonable conditions").
[27] See The Criminal Procedure Act, art. 148 (5)(a)(iv).

evidentiary problems (concerning evidence obtained through torture or involving state secrets, for example), and other issues that may arise.

The issue of the accused appearing in court with signs of torture was also discussed. Typically, a court will hold a trial within a trial to establish whether the statement was obtained voluntarily or not. In Uganda, a statute allows for the individual officer who committed torture to be sued. In Kenya, a judge may recommend an investigation in her or his ruling. In Tanzania, it is a tort to abuse a detainee.

The following regionally-specific recommendations were proposed:

1. In order to gain political support for the establishment of a public defender service, the importance of funding the defense bar as an equal contributor to the justice system, is deserving of greater elaboration in the Hague Memorandum.
2. Judges emphasized the need for better qualified defense counsel to represent indigent clients. In Uganda, every lawyer must provide pro bono representation annually in order to obtain continuing legal education points and judges agreed this was an effective manner for assuring the availability of defense attorneys.
3. In order to ensure that counsel is sufficiently skilled to handle the case, judges advised that they must be sufficiently remunerated. It was also advised that advocates should be assigned to cases carrying capital punishment or life imprisonment sentences only after completing a minimum number of years of practice.
4. Judges suggest as a good practice that the court employ interpretation personnel and those interpreters receive basic training. For example, the Uganda Judicial Studies Institute provides such training.
5. Judges agreed that terrorism trials should be given priority on appeal to minimize the long stay on remand and issues surrounding bail which, if granted, may frustrate the public.

Good Practice 6: ***Support the Development of a Legal Framework or Guidelines for the Use and Protection of Evidence from Intelligence Sources/Methods***

One of the major developments in effectively investigating and prosecuting terrorism cases in many legal systems around the world has been close cooperation between intelligence and law enforcement agencies. The ability to use intelligence information in investigations and prosecutions is directly tied to the ability to protect the sources and methods of collection of such information. The widespread recognition of the critical role that intelligence and sensitive law enforcement information can play in the prevention of terrorism and the necessity of an effective legal regime to protect the sources and methods of collection is highlighted by Good Practice 6 of the Rabat Memorandum, which encourages states to enact rule of law-based measures to protect the sources and collection methods of such information in terrorism cases. The significance of this issue is also addressed in Good Practice 6 of the Hague Memorandum which calls on judicial officials to "Support the Development of a Legal Framework or Guidelines for the Use and Protection of Evidence from Intelligence Sources/Methods." Good Practice 6 of the Hague Memorandum notes that the goal of any such legal framework is to appropriately balance the national security concerns of a government and the fair trial rights of the accused.

None of the three countries has any practice of cooperation between their national intelligence agencies and law enforcement or prosecution services in the investigation or prosecution of terrorism cases. Nor had any of the judges present at the conference ever dealt with issues related to the admissibility of intelligence derived information. None of the countries had any type of specific legal regime to address such issues.

In discussing the legal frameworks which various countries, comprising both civil law and common law systems, have developed to effectively address this issue, it was the consensus of the judges present

that in their legal systems as presently constructed, the issue would most likely be addressed by using the intelligence information in the investigative phase of the case as opposed to using such information as evidence at trial. The judges believed that intelligence information could be provided to the police for lead purposes, including to support applications for judicial approval for seizures of evidence or use of special investigative techniques such as wiretaps, so that a law enforcement investigation could be developed to produce the necessary evidence for use at trial. It was the consensus that the intelligence information could be appropriately protected using the same practices the police currently use to protect the identity of confidential sources.

All of the judges felt strongly about the need for effective cooperation between intelligence and law enforcement agencies in terrorism cases both at the national and regional level. In the judges' view the relevant ministers needed to develop the policies and procedures for the sharing of intelligence information. Once such policies and procedures were developed, judicial authorities could review them to ensure they were consistent with the rule of law.

Good Practice 7: ***Contribute to the Development of Enhanced Courthouse and Judicial Security Protocols and Effective Courtroom Security***

Judges in the region recognized the need to enhance basic security at the courthouse, inside and outside of the courtroom. They agreed with the core recommendation in the Good Practice that there is a need to have all parts of the justice system coordinate operations and function in a collaborative and comprehensive effort to address the issue of security.

Good Practice 7 enumerates certain enhanced security measures that may accompany a terrorism case.[28] Security checkpoints, metal detectors, and other screening technologies are not available at the public entrances to the courthouse and courtrooms in Tanzania, though they are generally and increasingly more present in the courthouses in Kenya and Uganda. None of the jurisdictions provide different seating arrangements, staggered entrances, or secure waiting areas for victims and witnesses. While Kenyan, Tanzanian, and Ugandan judges have separate parking entrances, these are not extended to other court personnel, the accused, and witnesses. All jurisdictions restrict and may prohibit the use of cell phones and other electronic devices in the courthouse and courtrooms.

In the event that an accused is being disruptive to the trial process, courts in Kenya and Tanzania can proceed in the absence of the accused or adjourn the case.[29] In Kenya, judges can also make use of a two-way mirror, wherein the accused can hear the proceedings but cannot be heard. In Uganda, there are security guards in every courthouse and metal detectors in the main divisions at the Supreme Court, Court of Appeals, and the High Court. All judges are provided an armed guard who is posted outside of the courtroom. Some cities such as Mombasa, Kenya also enjoy a permanent police presence in the courts. Security was most lax in Tanzania; nevertheless, police presence and other security measures are generally bolstered for high-profile cases. While judges may carry guns in all three jurisdictions,[30] they are not specifically encouraged to carry weapons.

Unlike the individualized crime of murder, the crime of terrorism is fluid and consists of various radicalized followers who ascribe to its belief systems as a way of life. Eastern African societies and trials are localized in the sense that community members often know or have been acquainted with the

[28] The Hague Memorandum, Good Practice 7, para. 2.

[29] See The United Republic of Tanzania, The Criminal Procedure Act 1985, chapter 20, art. 197(a); Constitution of the Republic of Kenya, art. 50(f).

[30] The acts provide strict regulations for the conditions of gun ownership. See The Republic of Kenya, The Firearms Act, chapter 114; The Republic of Uganda, Firearms Act 1970, chapter 299; The United Republic of Tanzania, The Armaments Control Act 1991.

individuals trying the accused and their families. As a consequence, adjudicating terrorism cases is particularly stressful to the officers and their families; the insecurity of judges resides not only inside the courthouse, but also in the external environment. A main limitation of Good Practice 7 is therefore the exclusive focus on the court's environs, which judges felt did not adequately protect the participants in the trial proceedings particularly in light of recent killings of prosecutors in the streets of Cairo and Kampala.

The following regionally-specific recommendations were proposed:

1. Providing only courtroom security without other interventions is inadequate in the East African context. The danger posed to judicial and nonjudicial officers during trial proceedings is not as imminent in the courthouse as it is outside of those premises; security concerns extend to the spouse, children, and parents of the courtroom participants. Personal security measures must therefore be taken to address the external environment, which may include:
    a. Dispensing with predictable patterns, such as by changing schedule and travel patterns to and from the courthouse;
    b. Providing judges with armed guards posted inside the courthouse and hallways and outside judges' homes;
    c. Installing CCTV equipment around the courthouse; and
    d. Receiving training in security matters and emergency procedures.
2. In recognition of the communal dimension of terrorism trials, a proposal was put forth for the creation of a regional court for trying suspected terrorists. An international forum for trying suspected terrorists has the advantages of being perceived as a neutral adjudicator and not as an agent of the state prosecuting or persecuting a certain way of life or thinking, and provides additional protection to judges who do not live within the communities by allowing a relative degree of anonymity.
3. A proposal for holding terrorism cases within or near prison premises following the model of the Shanzu courts set up at the Shimo la Tewa prison in Kenya was also propounded for cases involving multiple defendants, where the transportation of prisoners from prison to the site of the trial poses increased security risks and related expenses. In the Shanzu courts, separate seating arrangements are provided for witnesses that only state counsel can access. The courts are open to the public and police officials may be provided on site upon request.
4. Relatedly, the judges discussed the desirability of having holdup cells at or near the courthouse to limit the risk posed by the issue of transporting prisoners. As an alternative, the terrorism trial could be relocated to a site outside of the community where the event in question occurred. Judges emphasized the need for the establishment or observance of strict disclosure guidelines or classification of documents containing the identities of witnesses and other sensitive information in the disclosure or pretrial stages to maintain the confidentiality of the participants in the trial process and to protect state secrets, informants, undercover officers, and other actors.
5. Judges suggested developing a code of conduct for attorneys trying terrorism cases to include guidance on handling victims and witnesses consistent with ethical guidelines for the profession.
6. Judges should meet with media representatives to manage coverage that may result in identifying information of witnesses and other sensitive information being released to the public (see Section on Good Practice 8).
7. Judges agreed that more resources should be allocated to witness protection measures (see Section on Good Practice 4).
8. Security must involve more actors within the criminal justice system to provide a comprehensive response to the challenges presented. Different actors within the criminal justice system must

be engaged and involved in its formulation. Judges identified chief justices in the region as being in an ideal position to address those concerns, as they have a network where they interact with the Director of Public Prosecutions (DPP), the head of police, and other criminal justice actors. During those meetings, security concerns of the courthouse should be addressed, including the elaboration and dissemination of basic emergency plans for the judiciary staff.

Good Practice 8: ***Develop and Articulate Media Guidelines for the Court and Parties***

In many of the countries in the region formal media rules do not exist and their violations do not have corresponding sanctions. There was a recognition that even where media rules and departments within the judiciary may exist, they could not adequately cover every situation and are therefore perceived as inadequate. Media guidelines were well-developed in Kenya, where the Media Code of Practice establishes media guidelines and has legal force. A summary of the code of practice is posted in all the courthouses in Kenya.

The existence of formal rules helps establish uniformity and certainty, as well as removes the pressure from the judges who are able to appeal to rules in making unpopular decisions; participants recognized the value of the good practices in modeling media guidelines. However, these take a long time to be introduced, passed, and implemented within the rules committees. In the absence of formal rules, then, it was agreed that judges should be encouraged to exercise their inherent judicial powers to limit the media presence inside the courtroom.

Underlying the issue of the media guidelines is the concern on irresponsible coverage that may lead to the disclosure of the identities of witnesses, prosecutors, and other participants in the case. Judges acutely felt that the extensive exposure of prosecutor Joan Kagezi in the Ugandan media contributed to her targeting and eventual murder. Her death has prompted judges to informally and categorically restrict the presence of media in the courtroom.[31] While drastic times call for drastic measures, judges in the region agreed that they should provide rational, clear justifications for the decision to curtail the media's right of access to information in line with the Good Practice recommendation. Media representatives should be invited and involved early on and with frequency to foster good relations. Measures to restrict the media should be balanced against the right of the accused to a public trial, the freedom of the press and the public interest in the transparency of the proceedings.

The following regionally-specific recommendations were proposed:

1. Judges should be reminded that they may exercise their inherent power to implement rules based on their judgment concerning the safety of court personnel, witnesses, parties, and other stakeholders. In the absence of formal rules, judges should be empowered to use their inherent powers to curtail the photographing and publishing of participants in court proceedings.
2. Judges should be trained on media guidelines, which could be undertaken during induction or ongoing courtroom management skills training sessions, ideally in combination with media training on the security and ethical implications of reporting on high-profile or terrorism cases.
3. Judges emphasized the desirability of having a media unit within the judiciary empowered to funnel and filter the information that is covered by the media before it is released, especially in terrorism cases. Participants also discussed the possibility and desirability of having official coverage from a media unit within the judiciary for terrorism trials that is both accessible and

[31] Article 28 of the Constitution of the Republic of Uganda allows the court or tribunal to exclude the press or the public from proceedings for reasons of "morality, public order or national security, as may be necessary in a free and democratic society."

publishable, following the model of the international criminal tribunals which have their own broadcasting station and provide official coverage of the proceedings.

4. Security concerns in the adjudication of international crimes are heightened and limit the presence of the media in the courtroom. The identity of participants in a terrorism case must be protected and not displayed everywhere as they may become easy targets.

Judges agreed that the use of cell phones should be categorically banned from the courtroom as they pose unique security risks in the recording of sensitive information.

Good Practice 9: *Ensuring Victims of Terrorism Access to Justice*

Judges in the region emphasized the need for a comprehensive strategy to address the needs of victims and integrate their voices in counterterrorism efforts. The rights of victims do not feature prominently in the legislation of the participating jurisdictions, though aspects of the rights of aggrieved persons exist under general provisions. For example, the right to access to information of all citizens is guaranteed under the 1995 Constitution of the Republic of Uganda.[32]

The role of victims is prominent during sentencing in Uganda. Under the sentencing guidelines, courts may require the prosecution to produce a victim impact statement or a community impact statement in the determination of the appropriate sentence.[33] These statements provide details on the financial, emotional, and physical impact on the victim, and adopt an ample definition of victims to include a spouse, children, parents and guardians, siblings, and all legal guardians of mentally or physically incapacitated victims.[34]

Judges lamented the limited platform given to victims during the proceedings in their respective jurisdictions. As in most adversarial systems, the Ugandan criminal justice system does not provide for the personal appearance of victims in court; rather, the DPP appears on their behalf. Deficiencies in the existing legislation were also to blame. The ICC Act of 2010 of Kenya, for example, fails to provide for the participation of victims in criminal proceedings and reparations; there is no mention of the establishment of a victims' trust fund, a prominent feature of the Rome Statute. Technology helped provide victims access to legal proceedings in Tanzania, where some courts have ordered the closed-circuit transmission of trial proceedings to multiple locations so that victims of mass violence and terrorism may more easily participate in the trial process.

Judges nonetheless stressed the importance of providing an environment for the support and recovery of victims of terrorism. Victims' access to information should not be limited to information on the legal proceedings, but also information on the access to resources available for medical care, legal representation, and psychological services for themselves and their families to support in the recovery process. In order to create an environment and network of support, judges stressed the importance of fostering an understanding of the unique and diverse needs of survivors. Victims should have the chance to meet other survivors and share their experiences with one another and with the public at large to educate the world about the pain inflicted by terrorists. From a humanitarian perspective, it was felt that the immediate concern for victims and witnesses of violent crime should be for material and psychosocial support. Without their post-traumatic care needs being met, victims may succumb to the pressures of a hearing, causing delays.

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[32] The Constitution of the Republic of Uganda, art. 41.

[33] The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 24 May 2013, Legal Notice Supplement to the Uganda Gazette, http://www.judicature.go.ug/files/downloads/Sentencing%20Guidelines.pdf, para. 14.

[34] Id. at Form A: Victim impact statement.

Ultimately, the onus is on law enforcement agencies, legal practitioners, and judicial officers to ensure that the laws are protected. Judicial officers in Kenya may be called upon to take an active role, operating within an adversarial legal system, to determine whether the victims and witnesses are aware of their rights and to ensure that those rights are consistently protected throughout the duration of the hearing. In special instances, courts may hold a trial within a trial and periodic status hearings to determine or monitor issues with regard to the protection, safety, and rights of victims and witnesses.

The following regionally-specific recommendations were proposed:

1. Judges should strive to protect and foster victim participation in accountability efforts while remaining respectful of the psychological challenges such a process can present. Victims should be provided with information on legal, medical, and psychological services.
2. Judges should take a role in developing the academic jurisprudence and encouraging civic education measures to inform the public of the rights of victims and witnesses of crime.
3. Judges could hold pretrial conferences with counsel in camera for purposes of obtaining assurances that victims' rights are protected throughout the duration of the proceedings.
4. Minimal interruptions should be allowed once the trial has begun to ensure its speedy resolution, to reduce the stress and to prevent the retraumatization that the rigors of a hearing may cause to victims and witnesses.