

CASE MANAGEMENT OF TERRORISM TRIALS

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October 2017

*Handling Terrorism Cases in the
Criminal Justice System*

Challenges of a Terrorist Trial

Terrorism differs from other criminal acts. It is designed to destroy a political regime or an entire society. A fairly conducted terrorist trial is an emphatic demonstration that the act of terrorism has been a failure.

Defining what constitutes a terrorist attack is not always simple. But identifying a case as a “terrorism” case makes a huge difference in case management.

Is this a terrorist attack?



Is this a terrorist attack?



The Importance of Defining “Terrorism”

- Identifying a case as a “terrorism” case makes a huge difference in case management.
- A few ways that the “terrorism” designation impacts your case:
 - *Raises questions of whether there should be special terrorism courts, and which judge, or judges, should preside, as well as where trial should be held.*
 - *Are special terrorist laws necessary or does present domestic legislation cover the act of terrorism*
 - *Increased security concerns to judge and their family and the courthouse staff*
 - *Issues of adequate representation and prolonged trial proceedings that raise questions about human rights*
 - *Concerns about increased radicalization because of prolonged detention*
 - *Effective trial management standards that ensure a speedy and continuous trial*
 - *Unique evidentiary challenges including witness protection and handling sophisticated and confidential evidence requiring international cooperation*
 - *Ensuring victims of terrorism and survivors have access to justice*
 - *Sentencing*

Challenges in a Complex Terrorist Trial

and relevant Hague Memorandum Good Practices

1. Notoriety

- *Practice 8—Media Guidelines for Court and Parties*

2. Security

- *Practice 4—Measures to Protect Victims and Witness*
- *Practice 7—Courthouse and Judicial Security*

3. Case Management of Complex Trials

- *Practice 1—Identify and Assign Specially Trained Judges*
- *Practice 2—Continuous Trials*
- *Practice 3—Effective Trial Standards*
- *Practice 5—Supporting Right of Accused to Fair Trial*
- *Practice 6—Protection of Evidence from Intelligence Sources/Methods*

4. Sentencing

- *Practice 9—Ensuring Victims of Terrorism Access to Justice*

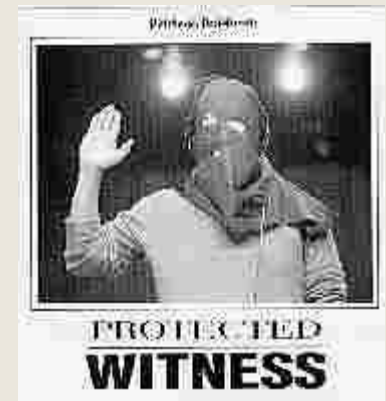
Notoriety

- National Anguish/Anger
- Media Coverage
 - Which type of media? Each has its own unique needs
 - Print media (courtroom seating)
 - Television media (access and locations; protecting witness notoriety)
 - Radio (cell phone recordings and computer capability)
 - Social media



Security

- Judicial Security
 - Judge
 - Staff and courthouse security
 - Large influx of public + press intermixing with families of victims and families of accused = volatile situation
- Witness Security
- Violence Level of Accused
 - True believers (e.g., jihadists)
 - Organizational (existing power inside and outside organization)



Case Management of Complex Trials

and relevant Hague Memorandum Good Practices

- There are five relevant Good Practices:
 - Good Practice 1: Identify and Assign Specially Trained Judges
 - Good Practice 2: Support the Use of Continuous Trial in Terrorism and Other National Security Cases
 - Good Practice 3: Develop Effective Trial Management Standards
 - Good Practice 5: Supporting the Right of the Accused to a Fair Trial
 - Good Practice 6: Protecting Intelligence from Intelligence Sources/Methods

Two Divergent Approaches to Case Management:

- The Active System:
 - *Judges take a firm hand in controlling a case*
 - *Judges take a direct and active role in case management, status conferences, and oversight of the case*
- Many Other Passive Systems:
 - *Attorneys drive the pace and timing of the case*
 - *Judge takes minimal or passive role in controlling the case*

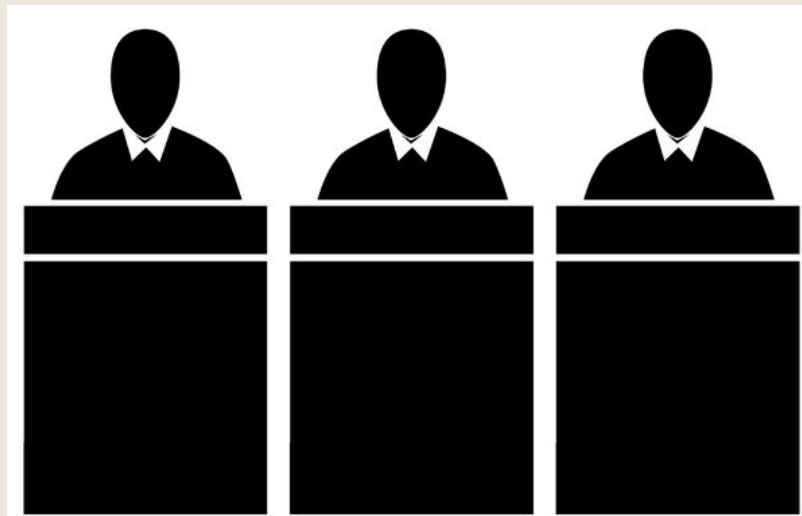
Case Management of Complex Cases

Key Topics:

- *Choice of Judge*
- *Right of Accused to Fair Trial: Appointment of Counsel*
- *Pretrial Detention*
- *Radicalization*
- *Trial Management Standards*
- *Obtaining Evidence*
- *Sophistication of Evidence*

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

- Using specially trained judges creates:
 - *Efficiency*
 - *Consistency*
 - *Continuity*
 - *Proper Training*



How are judges selected?

- One option: Specialized Anti-Terrorism Courts
 - Location: think about whether the criminal proceeding should move to the specialized court or remain in the community?
- Does the chief judge select the trial judge for the case?
 - Or, should the court use direct calendaring?
- Number of judges on the panel
 - If there is just one judge, the case has to start over if the judge is harmed or unable to continue with trial

Hague Memorandum Good Practice 5: *Right of the Accused to a Fair Trial*

Right of the Accused to Counsel:

- Problem: multiple defendants: Can the same attorney represent multiple defendants?
- Speedy appointment of counsel
- Problem of indigency: Does the state provide counsel at public expense?

Pretrial Detention

- Once a judge is appointed, the trial must commence as scheduled and proceed without unnecessary delay.
- This means pretrial detention hearings should be held as soon as possible, to determine whether the defendant will be held before trial.
- Proceeding without delay minimizes the length of pretrial detention—why is that important?
 - *This deradicalizes because the longer a defendant is in pretrial detention, the more radicalized he becomes*

Hague Memorandum Good Practice 2: *Support the Use of Continuous Trial in Terrorism and Other National Security Cases*

- Cases should be heard from start to finish without a break
- If the case is not continuous, it:
 - *Undermines the justice system;*
 - *Decreases the incentive for pretrial resolution;*
 - *Creates more opportunities for intimidation and obstruction of justice; and*
 - *Greatly increases the hardship on witnesses and victims.*

Hague Memorandum Good Practice 3: *Develop Effective Trial Management Standards*

As a general principle, judicial trial management is the key element to ensuring that the parties are prepared to proceed, the trial commences as scheduled, and proceeds to fair conclusion without unnecessary delays or interruption.

- Assigning to a specific judge
- Charges filed in court of competent jurisdiction
- Increasing continuity of trial days
- Developing trial management schedule for each case, with standards and rules consistently applied
- Scheduling pretrial/trial management conference as soon as possible
- Maintaining records of what is decided at conferences

Pretrial Conference

- Schedule various segments—including disclosure of evidence and issues that may arise (i.e. confidential informants/Crown witnesses)
- Timetable for the filing of documents or motions with the court
- Identification of special requirements (i.e. need for interpreters and availability)
- Any conflicting dates with other trial courts
- Identification of witnesses and issues with witnesses

Pretrial Conference Order

- Set a firm trial date
- Outline court procedure—including conduct of parties, witnesses, and spectators
- Review schedule of witnesses to ensure continuity, and nature of testimony to avoid duplication and to resolve complicated evidence issues (such as voluminous bank records in a terrorist financing case, using a summary witness)
- Determine the use of technology during trial

Early and active judicial involvement is key!

Effective for Terrorism trials:

- Judge takes a direct and active role in the management of the case
 - *case management*
 - *oversight*
 - *status conferences*

Not Effective for terrorism trials:

- Letting attorneys drive the litigation

Evidence Considerations in Terrorism Trials: Sophistication of Evidence

Some evidence considerations that arise in terrorism cases:

- Sophistication of Evidence
 - Blood, DNA, fingerprint analysis (bomb blast)
 - Bomb material analysis
 - Phone records – wire intercepts
 - Financial records (privacy, bank secrecy)
- Obtaining Evidence
 - Informal
 - Mutual Legal Assistance (MLAT)



Evidence Considerations in Terrorism Trials: Financial Sophistication

Financial sophistication is another concern in terrorism cases:

- Asset forfeiture statutes
- RICO – Organizational
- Wire taps, phone intercepts, pin registers
- Bank records (privacy, volume, and accessibility)



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

- Taking precautions to ensure there is no repeat victimization during court proceedings
- Ensuring that victims are advised of their rights under the law
- Providing victims adequate notice of all hearings and continuances
- If possible, allowing victims to attend the hearings

Sentencing

- Death Penalty or Life Imprisonment
 - Death Penalty – Effect on War on Terror
- Where Should Accused Be Tried?
 - Multinational Jurisdiction
 - In which jurisdiction should the accused be tried first?

