



How does the Implementation of Counter Terrorism Measures Impact on Human Rights in Kenya and Uganda?

Kennedy Monchere Nyaundi (NYNKEN002)

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Supervisor: Professor Thomas Bennett

Co-Supervisor: Professor Derry Devine

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Declaration

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted has not been previously submitted by me for a degree at this or any other university, that it is my work in design and execution, and all the materials contained herein have been duly acknowledged.

Kennedy Monchere Nyaundi

Date

Abstract

Title: How does the Implementation of Counter Terrorism Measures impact on Human Rights in Kenya and Uganda?

This thesis explores the impact of counter terrorism measures on human rights in Kenya and Uganda. It identifies terrorism as a global problem and reviews its common features. It recognises that the human cost of terrorism has been felt in virtually every corner of the world. It analyses the nature and scope of trends of terrorist activities in Kenya and Uganda, offers possible reasons for the increase of incidents of terror and considers the challenges in combating terrorism in these countries. The thesis outlines the fundamental freedoms that are most commonly engaged in the fight against terrorism and describes states' obligations in respect of those rights. It recognises that a significant effect of terrorist activity is the tendency to pit security against human rights. It demonstrates that legislation intended to strengthen anti terrorism efforts raise serious concerns in relation to international and domestic human rights law.

The thesis investigated one central concern: How does the implementation of counter terrorism measures impact on human rights in Kenya and Uganda? To answer this question, the study sought to investigate several related questions: In the enforcement of counter terrorism measures, is it possible for governments to play by the constraints of the rule of law? Is freedom during times of emergency as important as during peacetime? Is it possible and practical to observe art 4 of the ICCPR in the war against terrorism or should a lower threshold be established?

In seeking to answer these questions the thesis undertook an in-depth analysis of Kenya's Prevention of Terrorism Act and Uganda's Anti Terrorism Act and considered the application of the legislation in the respective countries. The states' theory and practice was contrasted with the domestic and international human rights frameworks. Underlying the analysis was a desire to answer the question: Have the states, in enactment and application, violated human rights law?

The thesis recognised the inherent tension between security and human rights. It acknowledges that terrorism poses a special security challenge and suggests a reconsideration of the international human rights framework to permit states a broader flexibility in dealing with it. There is recognition, also, that states do not consider terrorism as a simple matter of criminal law enforcement but a problem of national security for which they assert a wide discretion in safeguarding their countries. Unless the law recognises what is evolving state practice, human rights will be observed in defiance, not compliance.

Kennedy M Nyaundi (NYNKEN002)

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Mortensen v Peters (1906) 14 SLT 22.

Navaratnam v Secretary of State for the Home Department [2013] EWHC 2383 (QB) (31 July 2013).

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Othman (aka Abu Qatada) v Secretary of State for the Home Department [2013] EWCA Civ 277 (27 March 2013);

R v The Head Teacher, Kenya High School & another exparte SMY (A minor suing and next friend AB (2012) HC 318 of 2010

Tag v Rogers 267 F.2d (D.C. Circ. 1959)

The Exchange of Greek and Turkish Populations Case, (The Greco-Bulgarian Communities case), (1930)
P.C.I.J Series B. No. 17.

The Greek Case (1969)12 YB 1.

Richmond Newspapers, Inc. v Virginia 448 U. S 555 (1980).

Rodriguez-Fernandez v Wilkinson 654 F.2d 1382 (10th Circ. 1981).

United States v Brignoni-Ponce 422 U.S. 873 (1975).

United States v Ortiz 422 U.S. 891 (1975).

United States v Martinez-Fuertes 428 U.S 543 (1976).

United States v. Reynolds 345 U.S. (1953) 6.

Abbreviations

1. Entities

AU	African Union
EAC	East African Community
GA	General Assembly
IGAD	Inte-Governmental Authority on Development
ICJ	International Commission of Jurists
SC	Security Council
UN	United Nations
HRC	Human Rights Committee

2. Legal Instruments

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Charter on Human Rights
ECHR	European Convention on Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights

3. Journals

Comp	Comparative
Eur	European
Int	International
J	Journal
L	Law
Rts	Rights
Rev	Review

4. Short names to legal provisions

Art	Article
C	Convention
Para	Paragraph
S	Section
Ss	Sections

Chapter I INTRODUCTION

TERRORISM AS A THREAT TO INTERNATIONAL PEACE AND SECURITY

1. Description of the problem

Terrorism is a complex and highly pervasive global problem, which poses a major threat to the international community.¹ Terrorism is certainly not a new problem, but the events of 11 September 2001 (September 11)² in the United States of America introduced a new sense of resolve and urgency in global efforts to detect and prevent it. 'Terrorism is clearly taking on a new dimension.'³ As states put in place programs to deter international terrorism, experts agree it is 'likely to increase and become bloodier.'⁴ This situation poses difficulties in the application of human rights law and challenges the deeply held convictions of those dedicated to uphold the human rights movement.

It may be said that terrorism poses two interrelated problems. The first is the practical nature of acts of terrorism, the second, analytical. The difficulties posed by the latter have greatly exacerbated global efforts to find a solution to it.

(a) Features of terrorism

Terrorism manifests itself in a war-like fashion. It is portrayed as something beyond ordinary 'law and order' issues.⁵ Thus, frequently, September 11 is referred to as 'a declaration of war' and counter terrorism efforts are metaphorically referred to as 'the war on terrorism'.⁶

In current literature on terrorism, certain features of the problem are evident. First, the association of terrorism with war explains the gravity of the threat and in some way justifies state responses through emergency procedures in a manner akin to a response to war.⁷ The war metaphor, however, fails when it is

¹ Weiner T 'Terrorism's worldwide toll was high in 1996' *NY Times* 1 May 1997 at 9.

² When four commercial airliners were hijacked en route to California from Logan International, Dulles International and Newark Airports. Two of the airliners were flown into the World Trade Centre, one each into the North and South Towers. One was flown into the Pentagon and the fourth crashed near Shanks Ville, Pennsylvania. There were 2974 fatalities as well as the 19 hijackers available at http://en.wikipedia.org/wiki/sept_11_2001_attacks accessed on 15 June 2009.

³ Combs C C *Terrorism in the Twenty-First Century* (4 ed) 115.

⁴ Murphy J F 'The control of international terrorism' in Moore J N Tipson F S & Turner R F (eds) *National Security Law* at 445

⁵ Tsoukala A 'Defining the terrorist threat in the post-September 11 era' in Bigo D & Tsoukala A (eds) *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11* (2008).

⁶ Lord Goldsmith 'How should Britain protect its citizens?' *The Times* 11 May 2004.

⁷ Graham P Keenan T & Dowd A 'A call to arms at the end of history: A discourse-historical analysis of George W. Bush's declaration of war on terror' (2003) 15 (2-3) *Discourse & Society*, 199-221.

considered that terrorists are not considered as combatants.⁸ It is recognised that whenever it is sought to link war with terrorism, the intention is to provide a convincing basis for legitimacy of the measures taken to combat it, even when they violate individual liberties. Nevertheless, the parallel between terrorism and war draws attention to similarities in which recourse may be made to exceptional measures to combat it.⁹

Secondly, it is acknowledged that terrorism is no longer confined to domestic scenarios.¹⁰ The random and wanton nature of the threat, its scale and potential for vast damage to property and huge human destruction is so profound that terrorist attacks are now regarded as a turning point in the whole of human history. This situation obliges states to introduce new counter terrorism measures in order to provide security for their population.¹¹

Thirdly, the terrorist threat is constantly changing and developing. Terrorists are creative, imaginative and ingenious. Their targets and techniques of attack are being improved. The possibility that 'the next threat could be in form of a chemical, biological, radiological or nuclear weapon'¹² is no longer idle speculation. Many commentators have expressed the fear that terrorists are keen to obtain a 'dirty bomb'.¹³ Again, while war lasts for a definite period of time, terrorism signals an enduring apparently perpetual affair. No wonder it is regarded as the security threat of the twenty first century.¹⁴ Presently, there appears to be no prospect of a substantial reduction in the threat.

Finally, terrorism is indivisibly linked to crime, since, terrorists usually have to engage in crime in order to fund their activities.¹⁵ Sometimes the distinction between terrorism and crime is lost in the fusion of terrorist and criminal activities. For this reason, attempts to counter terrorism must also deal with the crime that supports it.

⁸ David A S 'A question of determinacy: the legal status of anticipatory self-defense' (2009) 40 *Geo. J. Intl L* 523, 548

⁹ This thesis discusses anti terrorism measures and their impact on human rights and does not deal with humanitarian law.

¹⁰ Travis A Dare C & White M 'Britain sliding into a police state' in which British Prime Minister Tony Blair is quoted to have said 'there is a new form of global terrorism in our country, in every European country and most countries around the world.' *The Guardian* 28 January 2005.

¹¹ Wintour P in 'Peers warn of terror bill cuts' in which the Home Office Minister Lord Rooker said 'terrorists rewrote the rule book and we have to do the same.' *The Guardian* 28 November 2001.

¹² Gunaratna R 'The enemy deep within' *The Times* 12 June 2002.

¹³ Patterson E 'Just war in the 21st century: Reconceptualizing just war theory after September 11' 2005 *International Politics* 42.

¹⁴ Ganor B 'Terrorism in the Twenty-First Century' in Shapira S C et al (eds.) *Essentials of Terror Medicine* (2009) 13.

¹⁵ Corte L 'Explaining terrorism: A psychosocial approach' (2007) *Perspectives on Terrorism* (1) No 2.

(b) Prevalence

Terrorism is not a theoretical problem. It is real and its impact on the everyday lives of people is ever present. The consequences of terrorism are evident to every traveler, sports enthusiast, entertainment fan or even churchgoer. Today, in Kenya and Uganda, everybody travelling by public transport, entering a stadium for an afternoon of entertainment or a leisure facility is subject to a security check. It is disconcerting that worshippers attending church services have to undergo security verification at the doorstep of the church. In one sweep, terrorism has changed the social lives of an entire population.

While 'terrorism and its analogues, war crimes and crimes against humanity, have been committed since antiquity'¹⁶ advances in communications and technology have provided terrorists with both new means and objects of destruction.

The attacks are often barbaric, the perpetrators making no distinction between audience and victims. Because terrorism creates acute anxiety, it attracts official ire and public tolerance to whatever measures that are taken in attempts to stem it and attain public security.

Kenya and Uganda have for a long time suffered the effects of terrorism, and these countries are at present the unfortunate recipients of revenge attacks by Al Shabab for their involvement in the Somalian crisis. The loss of lives and damage to property increases by the day. As elsewhere in the world, terrorists operating here have benefited from globalisation. The ease of movement of persons and funds as well as the availability of weapons has enabled terrorists to operate across borders with minimal difficulty. States, however, have not been as alert, and their responses by way of state co-operation have remained fragmented and largely ineffective.

(c) Reactions to terrorism

'Following the massive terrorist attacks of September 11 governments around the world proclaimed a "war" against terrorism as a central domestic and foreign policy.'¹⁷ As a crime, terrorism finds refuge in few countries and is reviled by the great majority of people. While the world is united in condemnation of terrorism, there is not much agreement on how to resolve the problem. Beyond issuing joint statements and resolutions, there is no coherent response in military, legal or political strategies in dealing with terrorism. A

¹⁶ Dinstein Y 'International law as a primitive legal system' 19 *NYU J Int Law & Policy* 11.

¹⁷ Freeman M & Van Ert G *Essentials of Canadian Law: International Human Rights Law Irwin Law* (2000) 516.

crime planned and executed in secret is invariably difficult to detect, investigate and prosecute. This difficulty often results in governments taking extreme measures to address terrorism because of the anger and frustration that it arouses.

Some commentators question whether the international reaction to September 11 has led to a transformation of established legal principles applicable in dealing with emergencies, particularly regarding recourse to use of force and state responsibility.¹⁸ Others are of the opinion that international law is adequately equipped to address the relatively new and polymorphous threats of terrorism.¹⁹ On either side are sound reasons indicative of the fact that the September 11 attack adversely interfered with and complicated the delicate balance between security and human rights.

There is no doubt that a unified global effort is essential, if not critical, in the fight against terrorism. Unilateral state solutions, whether political, military or judicial, will hardly succeed against a highly mobile target. Because the 'international legal order lacks a general central law enforcement authority'²⁰ the answer to terrorism lies in a joint global initiative of whatever name or nature.

(d) International legal responses

There are 14 UN core sectoral conventions on counter terrorism,²¹ each giving its own definition of terrorism but agreeing that it is a serious offence to be severely punished. The conventions concur that all terror-related offences should be criminalised, extraditable and punished. In other words, terrorism should

¹⁸ See for example Fitzpatrick J 'Speaking law to power: The war against terrorism and human rights' (2003) 14 *EJIL* 241–264; Von Schorlemer S 'Human rights: Substantive and institutional implications of the war against terror' (2003) 14 *EJIL* 265–282; 'Human rights after September 11' International Council on Human Rights Policy (2002) available at http://www.ichrp.org/files/reports/29/118_report_en.pdf accessed on 5 March 2008.

¹⁹ Oraa J *Human Rights in States of Emergency in International Law* (1992); Hartman J 'Derogations from human rights treaties in public emergencies' (1981) 22 *Harvard Int LJ* 2; Carty A 'Human rights in a state of exception: The ILA approach and the Third World in Tom Campbell et al (eds) *Human Rights: From Rhetoric to Reality* (1986) 60.

²⁰ Delbruck J 'A more effective international law or a new "world law"? Some aspects of the development of international law in a changing international system' (1993) 68 *Indiana Law Journal* 720.

²¹ The full text of the conventions may be obtained from the following sources: *The Suppression of Unlawful Acts against the Safety of Maritime Navigation* (27 ILM 668), *Protocol Concerning the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf* (27 ILM 685), *The Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention)* (10 ILM 133), *The Suppression of Unlawful Acts against Civil Aviation (Montreal Convention)*, *Protocol for the Suppression of Unlawful Acts of Violence at Civil Airports* (27 ILM 627), *The Protection and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents* (13 ILM 41), *The Taking of Hostages* (18 ILM 1476), *The Suppression of Terrorist Bombings* (UN Doc A/Res/52/164) *The Protection of Nuclear Materials* (18 ILM 1419) and for *The Suppression of the Financing of Terrorism* (UN Doc/A/52/109).

be penalised in all the various forms that it has developed in the past decades. Still, one of the constraints in the global attempts to tackle terrorism has been the ambiguity of its definition.

The end of the Cold War presented the United Nations with the possibility of consensus in its resolutions regarding anti terror law. Through Resolution 49/60 of 1994 the General Assembly approved the 'Declaration of Measures to Eliminate International Terrorism.'²² This declaration was intended to create the foundation for a new convention against terrorism and to eliminate the number of exceptions to previous rules. 'The key contribution of this resolution was a consensus on a working definition of terrorism that would find its way into several subsequent documents.'²³ Through Resolution 51/210, the GA was in 1996 tasked with negotiations on a comprehensive anti terror convention.

Although the work would normally have taken some considerable time, it was accelerated by the urgent need to deliver. In 1997 the GA produced the International Convention for the Suppression of Terrorist Bombings and in 1999 it approved the International Convention for the Suppression of the Financing of Terrorism. Security Council Resolutions 1269 (1999), and 1373 (2001) drove the urgency of dealing with terrorism to a crescendo, with calls to 'take the necessary steps to combat terrorism.' Under Resolution 1373 the SC directed all member states of the UN to prevent and suppress the financing of terrorism as well as criminalise the wilful provision of funds for acts of terrorism. A common theme that runs through the Bombing and Financing Conventions is a call for the States Parties to 'adopt such measures as may be necessary, including where appropriate, domestic legislation to ensure that criminal acts within the scope of the convention[s] are punished by penalties consistent with their grave nature.'

Acting under the shadow of Resolution 1373 and the anti terror conventions, Uganda moved with speed to domesticate the directives of the UN. Finding great difficulty in walking its anti terror bill through parliament, Kenya, in the short run, resorted to extra legal counter terrorism measures.

2. Causes of terrorism: A synopsis

Terrorism is an extremely complex and diverse phenomenon. Decades of counter terrorism programs and incessant global condemnations have not succeeded in stemming incidents of the offence. Instead

²² The General Assembly in Resolution 46/60 of 1994 approved the *Declaration of Measures to Eliminate International Terrorism*.

²³ See Stiles K W 'The power of procedure and the procedure of the powerful: Anti-terror law in the United Nations' (2006) 43(1) *Journal of Peace Research* 37–54, 42. Resolution 49/60 defines terrorism as: 'Criminal acts intended or calculated to provoke a state of terror in the general public group of persons or particular persons for political purposes [and] are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.'

terrorists have succeeded in creating a climate of fear and discomfort. If the emerging trends of terrorist activities continue, the possibility of terrorists deploying weapons of mass destruction is no longer moot. The consequences of such an action would, of course, be too horrendous to contemplate. For this reason, and if terrorism is to be eliminated, it is proper and fitting that an attempt be made to understand the underlying causes.

Research literature on the causal factors and the diverse goals that compel people to carry out terrorist acts is extensive.²⁴ Trends in terrorism keep shifting – there has been a change from the nationalist, left wing terrorism of the 20th Century to internationally generated causes, many of which are based on religion. Sometimes it appears as though an understanding of the causes may lie in an attempt to comprehend individual rather than group motivations. It is also true that the explanation for an act of domestic terrorism may be different from that of a transnational one.

Despite the growing body of sound empirical studies, no unanimity has emerged on the determinants of terror. Some scholars attribute incidents of terrorism to a negative impact of a low GDP²⁵ within a country while others find no connection between the economic status of a country and terrorism.²⁶ On issues of governance, some see a relationship between terrorism and political repression.²⁷ It is thought that democracy reduces both the motivation and therefore incidents of terrorism.²⁸ But this thinking is not collective because similar studies have shown that democracies produce more terrorists than autocracies.²⁹ There is thus a need for further, comprehensive studies on the determinants of terrorism.

Terrorism thrives in the heart of a disaffected individual, sometimes acting in a group with a shared legitimising ideology. This is why it may be true to say that ‘there is no single cause of terrorism any more

²⁴ There is a never-ending debate in terrorism discourses as to whether the factors and goals for terrorist activity are one and the same thing or merely complementary.

²⁵ Blomberg B and G.D. Hess ‘The Lexus and the Olive Branch: Globalization democratization and terrorism’ in Keefer P and Loyaza N (eds) *Terrorism Economic Development and Political Openness* (2008) 116-147

²⁶ Krueger A B and Malekova J ‘Education poverty and terrorism: Is there a causal connection?’ (2003) 17(4) *Journal of Economic Perspectives* 119-144.

²⁷ Kurrild K P, Justesen M K and R. Klemmensen R ‘The political economy of freedom democracy and transnational terrorism’ (2006) 128(1-2) *Public Choice* 289-315.

²⁸ *Ibid.*

²⁹ Lai B (2007) ‘Draining the swamp’: An empirical examination of the production of international terrorism 1968–1998’ *Conflict Management and Peace Science* 297–310.

than there is a single cause of killing.³⁰ Attempts at psychological profiling of people engaged in acts of terror do not provide any significant criteria because the actors are different and are drawn from such varied backgrounds. It is not easy to find a link in the behavior of a Saudi cleric, a German university student, a Peruvian peasant, a Chechen soldier, a Japanese scientist and an Indian factory worker.³¹ Moreover, the causal reasons for terrorism converge and sometimes overlap, creating a web, which is difficult to analyse. Given the different motivations and perspectives of the right-wing, nationalist-separatist, social revolutionary and religious fundamentalist, it is no wonder that a multiplicity of factors underlie terrorism.

In broad terms, the fundamental causes of terrorism are political, religious or ideological. In particular, however, the motivation for terrorism is always political, as extremists of a religious or ideological predilection often seek to achieve a political ambition. Further, the political, religious and ideological reasons manifest in varied modes, thus complicating a clear-cut analysis and compartmentalisation of the offences. Tied together with the core causes are discrimination, poverty, lack of opportunities, unequal distribution of resources and failing state structures.

In this study, I will discuss the indisputable key causes of terrorism: religion, nationalism and globalisation.

(a) Religion

A consideration of the root causes of terrorism often starts with religion, especially Islam.³² Looked at in isolation, this is, of course, an over-simplification. Yet, 'in many instances religion has supplied not only the ideology but also the motivation and organizational structure for the perpetration of terror in the world.'³³ It would appear that 'the escalation of global violence, terrorism-associated, with religion and her institutions is an ever-present reality with us.'³⁴

It is important to observe that the trend to extremism that gives birth to terrorism is not the sole preserve of Islam. Christianity has, historically, provided its fair share of radicals and fanatics who have killed in the name of religion. Religion serves to cement the political motivations of persons who are

³⁰ Richardson L *What Terrorists Want* (2006) at 59.

³¹ *Ibid* at 60.

³² Okoro K 'Religion and terrorism: A socio-historical re-consideration' (2010) 2(2) *Journal of Alternative Perspectives in the Social Sciences* 550-576;

³³ Juergesmeyer M 'Holy orders: Opposition to modern States' (2004) 25 *Harvard International Review* 34-38.

³⁴ *Supra* n 32 at 554.

otherwise linked by ethnicity or cultural orientation. Because the core factor uniting such persons (together with religion) is transmitted, there is a spill over across borders, with a resultant global effect. This is evident in the Middle East, where religion and terrorism have consorted for many years.³⁵

Terrorism in the name of religion is particularly violent because it is laced with moral certainty and divine affirmation. What would otherwise be an extraordinary act of desperation becomes a religious duty. In the mind of the religiously motivated, acts of terror are instruments of divine sanction.³⁶

The growth of terrorist groups with a religious motive has grown steadily from the 1960s (when none of the eleven recorded incidents of terrorism had any kind of religious factor) to the mid-1990s (when, of the 50 known terrorist groups about a dozen had religious motivations).³⁷ In 2004, of the 77 terrorist groups designated or listed by US Department of State, 40 appear to have some mixture of religious and political motives.³⁸

That religious fanaticism has crossed the shores of the Mediterranean Sea and the Persian Gulf is evident from the overflow in the murderous acts of such groups as Aum Shinrikyo of Japan (whose stated motivation was to bring about the apocalypse).³⁹ Again, as an indicator that religious and political stimuli

³⁵ Examples within and outside the Middle East are numerous: On 26 February 1994 Dr Baruch Goldstein, a follower of the radical fundamentalist Jewish group, the Kach Movement, entered a crowded mosque in the West Bank town of Hebron and emptied three 30-shot magazines with an automatic assault rifle, killing 29 worshippers and wounding more than 150. The surviving worshippers beat him to death. Dr Baruch, an American trained physician working for the Israeli Defence Forces was driven by a desire to stop Yitzhak Rabin from 'leading the Jewish state out of its God-given patrimony and into mortal danger.' Dr Baruch was condemned by the Israel Government but hailed amongst the settlers as a hero and a martyr. Rabin castigated Dr Baruch, calling him a 'deranged fanatic belonging to the "fringe of a fringe" within Israeli society.' Unfortunately, in November 1995, Rabin himself was assassinated by Yigal Amir who later stated: 'I have no regrets. I acted alone and on orders from God.' Amir, a Jewish law student, said that the assassination was meant to halt the Mid-East peace process and stop Rabin 'giving our country to the Arabs.' On the face of it, Amir appears to have been motivated by religious ideology. In court, he told the presiding magistrate that he had been inspired by the Halacha (Jewish legal code), which instructs one to kill an enemy. 'My whole life, I learned Halacha,' he said. 'When you kill in war, it is an act that is allowed.' A closer look at Baruch and Amir's actions demonstrate the difficulty in separating religious from political motives. Both Dr Baruch and Amir rely on religion as a primary motivator but their actions were geared towards achieving a political goal – the destruction of the Mid-East peace process. The Torah is for the Jews what the Koran is for the Muslims; an open text whose interpretation may be skewed to support the vilest zealotry and extremism.

³⁶ Terrorism Research Centre, United States available at www.terrorism.com/terrorism/basics.html accessed on 4 April 2012.

³⁷ Hoffman B *Inside Terrorism* (1998) 91.

³⁸ Patterns of Global Terrorism 2003 United States Department of State.

³⁹ On 20 March 1995 the group released a nerve gas, Sarin, in a Tokyo subway. The gas killed 12 passengers and injured more than 5000. Aum Shinrikyo is a cult whose name is a combination of Aum, which is a sacred Hindu syllable, and Shinrikyo, which means 'supreme truth'. It appears to have been a syncretistic religion, founded in 1987 by Shoko Asahara and which combines elements of Buddhism, Hinduism and Christianity. See Religious Tolerance available at <http://www.religioustolerance.org/dc-aumsh.htm> accessed on 7 April 2009; See also, Aum Shinrikyo', Terrorism Knowledge Base available at <http://www/tkb.org> accessed on 5 May 2009.

can never be wholly divorced, Aum Shinrikyo had political ambitions.⁴⁰ For them the religious incentive is further weakened by court evidence that they acted not only to hasten the new millennium as they alleged, but also to forestall a police investigation of their illegal activities.⁴¹

Ramzi Yousef, the convicted 1993 bomber of Manhattan's World Trade Centre and a follower of 'Abd-al-Rahman's al Jamaa al-Islamiyya', alleged that he had been instructed by Allah to kill Americans.⁴² In court, he told the judge, '[y]es, I am a terrorist and proud of it as it is against the US government.' Yousef denounced the US government as a 'liar and butcher' for its support for Israel.⁴³

Mohamed Sidique Khan, the teaching assistant who masterminded the 7 July 2005 transport bombings in London, and Mohamed Bouyeri, the Dutch-born Moroccan Muslim who murdered Amsterdam film-maker, Theo van Gogh, claim to have been inspired by God.⁴⁴ In a taped testimony, Sidique Khan railed against British foreign policy ending with the worlds 'Islam is our religion' and 'the prophet is our role model.'⁴⁵ The common thread which runs through the many religiously enthused acts of terror is the conviction that they are divinely directed – even mandated.

They may come in a skullcap or a turban, but religious extremists are united in their belief that they are performing a sacred act of salvation for their communities or indeed on behalf of God himself (whatever they perceive him to be). Nowhere is this clearer than in Muslim terrorist groups, as in Islam, religion cannot be isolated from politics.⁴⁶ At the same time, no one can say for certain how much weight the late Osama bin Laden placed on religion as a motivating factor for his actions, but certain groups such as Hamas or Hezbollah operate within the structure of a religious philosophy heavily influenced by political complaints against Israel.

It may appear that bin Laden was obsessed more by politics and used religion as a tool,⁴⁷ but he led a potent strain of militant Islam which is simultaneously theological and cultural, and which seeks to

⁴⁰ Ibid. In the 1989 Japanese parliamentary elections, the group nominated 24 candidates, none of whom was elected to parliament.

⁴¹ Supra n 31.

⁴² 'Proud terrorist' gets life for Trade Centre bombing *CNN Interactive* 8 January 1998 available at <http://www.cnn.com/us/9801/08/yousef/update> accessed on 18 April 2009.

⁴³ Ibid.

⁴⁴ Manji I 'Religion is the root cause of terrorist threat' *The Australian* 5 July 2007.

⁴⁵ Ibid.

⁴⁶ Ranstorp M 'Terrorism in the name of religion' available at <http://www.ciaonet.org/wps/ramoi/> accessed on 12 August 2012.

⁴⁷ The late Osama bin Laden was indicted by the United States of America for the 1998 bombings of the US Embassies in Kenya and Tanzania. He was also reportedly connected with the 1993 World Trade Center bombing; the 1993 killing of American

drive infidels out of the Muslim world so as to establish strict Islamic rule everywhere Muslims live.⁴⁸ When asked by CNN's Peter Bergen to specify his particular grievance against the United States, bin Laden was reported to be most enraged by the American military presence in Saudi Arabia, which he viewed as the greatest possible desecration of the Holy Land.⁴⁹ Bin Laden found plenty of firebrand clerics who offered Quranic backing for his belief that terrorism is glorious.⁵⁰

For many groups, religion plays a role not unlike that of political ideology, for instance Maoism for the Shining Path or Marxism-Leninism for the social revolutionary movements, because it provides an all-encompassing philosophy or belief system that legitimises and elevates their actions.⁵¹

Religious fundamentalism is therefore a key-driving factor that accounts for a large segment of terrorist activities, yet this is a factor that international law can hardly regulate.

(b) Nationalism

'It is a paradox that nationalism is gaining ascendancy despite the hype about the spread of globalisation and the weakening of the state.'⁵² From the disintegration of the Soviet Union, the fragmentation of Yugoslavia and the independence of Eritrea to the persistence of the Irish question, nationalism seems to have resurfaced with new vigour as a worldwide phenomenon.⁵³ The Chechnya problem, the age-old Kashmir dilemma, the sporadic activities of ETA as the main organisation acting on behalf of the Basque National Liberation Movement and the repeated attacks by the PKK (the Kurdistan Workers Party in Turkey) reveal the existence of potent nationalist forces in many parts of the world, and the willingness and ability of those organisations to use terrorism as a vehicle for attaining political goals.

Nationalist groups share an enduring ideology and a recognition that numerous just causes have been assisted by what would without doubt be portrayed as terrorism. The French battle against Nazi occupation, the birth of the Jewish state, the struggle against colonial domination and ultimate freedom in Africa and elsewhere all entailed methods and tactics which at that time qualified to be termed terrorism.

soldiers in Somalia; the mid-90s bombings of US facilities in Saudi Arabia; and the 2000 attack on the USS Cole. It was no surprise, therefore, when he featured prominently as the planner and facilitator of 9/11.

⁴⁸ Plotz D 'What does Osama Bin Laden want?' *Slate News* 14 September 2001.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Supra* n 25 at 86.

⁵² Bhattacharya A 'Conceptualizing Uyghur separatism in Chinese nationalism' (2003) 27(3) *Strategic Analysis* 357-381 at 357.

⁵³ *Ibid.*

The various minority groups motivated by nationalism share a definite grievance, which is felt to be a form of discrimination committed by a majority. The minority coalesces around a certain leadership, which promises to secure either equality or a complete breakaway from the majority. For such groups terrorism becomes a medium of expression to gain both attention and freedom.

Closely linked to the sense of unfair treatment towards minority groups is a lack of opportunity for political participation. The situation is made worse when the law is used to block political opposition, and the state resorts to police and intelligence repression to control the population. Terrorism is then taken up as a weapon of last resort, usually advanced by an extremist faction within a broader movement.⁵⁴ Outside political power itself, minority groups may seek to assert language rights, religious beliefs and symbols. In this same context, 'civil and political rights and privileges, regional ethnic parity in the economy when an ethny is subordinated or disadvantaged in economic opportunity, social status, political voice and rights of cultural expression'⁵⁵ all come together to form a basis for social strife.

(c) Globalisation

Globalisation may be defined as the widening of international relations.⁵⁶ In contemporary societies, globalisation unites as much as it divides. It promotes both unity and exclusion. It creates space for those who are free to move and restrictions for those who are trapped in their locality.

Globalisation thus affords free movement for some and localisation for others, a situation that presents either pleasure or discontent, particularly because those who are considered 'globals' set the pace of life, generally. The discontent is palpable amongst those who feel downtrodden and abused by the effects of globalisation.

Debates within the Muslim world, from Saudi Arabia, Egypt, Iran, Libya, Syria and Pakistan repeatedly dwell on the western contamination of the Muslim way of life and the religion of Islam in particular. Stress on negative western influences portrays the merger of politics and economics as a factor that alienates large segments of society from the decision-making process. It is felt that globalisation, with

⁵⁴ Crenshaw M 'The Causes of terrorism' (1981) 13(4) *Comparative Politics* 379-399.

⁵⁵ Williams R M 'The capital sociology of ethnic conflict: Comparative international perspectives' (1994) 20 *Annual Review of Sociology* 49-79.

⁵⁶ Khana P and Rusi A 'Europe century' *The Guardian* 17 June 2008.

its inherent expansionist market forces, has undermined traditional ways of life, generating a volatile anger and resentment among the under-privileged.⁵⁷

The inequalities in the distribution of domestic and global resources, which have produced the Third World–First World dichotomy manifests in a new version of conflict based on structural violence.⁵⁸ The argument is that globalisation leaves behind a huge chunk of the world's population whether economically, socially or culturally, in both developed and developing countries. As a result of the insecurities they feel, many such people are likely to engage in a fierce battle against international forces and those driving and benefiting from them.⁵⁹

Studies undertaken to investigate how democratisation and globalisation influence terrorism –the motives of terrorists and how democratic institutions and international integration influence non-state economic actors – are inconclusive. They nevertheless point out that, whereas the advent of democratic institutions in a source country significantly reduces terrorism, the advent of these same positive developments in targeted countries actually increases terrorism.⁶⁰

3. Importance and Purpose of the Study

This study examines Kenya and Uganda's counter terrorism measures and considers, if at all, they are effective and legitimate. It seeks to answer questions as to whether, in the context of extreme random and arbitrary violence, states should remain strictly bound by international human rights instruments. At a secondary level, the study reveals the dangers posed by indiscriminate violence deployed by terrorists. It considers the dilemma: Has terrorism shifted the boundaries of state compliance with human rights law?

This research is motivated, on the one hand, by the current global interest in the tension between terrorism and human rights and, on the other, a need to assess the impact of anti terrorism law on human rights in Kenya and Uganda.

At a personal level the study satisfies my own fascination with the interplay between security and human rights. As a courtroom lawyer I have often found myself defending persons accused of acts of

⁵⁷ Kareem E *Reclaiming Tradition: Islamic Law in a Modern World* (2011).

⁵⁸ Galtung J '11 September 2001: Diagnosis, prognosis, therapy' in Galtung J et al, *Searching for Peace: The Road to Transcend* London (2002) 88–102.

⁵⁹ Leblond P (Book Review) Aydinli E & Rosenau J N (eds) *Globalisation Security and the Nation State: Paradigms in Transition* (2005) 7 *International Studies Review* 648–644.

⁶⁰ Blomberg B S & Hess G D 'The Lexus and the Olive branch: Globalisation, democratization and terrorism', a paper presented at a World Bank workshop on Security and Development, Washington DC, May 26–27, 2005 available at econ.claremontmckenna.edu/papers/olivebranch3.pdf accessed on 20 May 2012.

terrorism. In this role I have witnessed the frustration of state prosecutors seeking to justify actions of the investigating officers who have apparently overstepped the boundaries of legality in their handling of the suspects. To contribute to the debate on the proper balance between counter terrorism measures and human rights, this study examines the anti terrorism legislation in Kenya and Uganda with a view to determining whether it complies with the international human rights regime, and, if not, whether allowances should be made for transgression.

Kenya and Uganda have been chosen for a variety of reasons. First, I am a citizen and a resident of Kenya, a factor that allows me first-hand information and practical experience concerning the situation in the country. Secondly, Kenya and Uganda have in the past three decades attracted a high number of terrorist attacks. Thirdly, Kenya has drawn world attention to its anti terrorism programmes largely because of its proximity to Somalia. Fourthly, Uganda was among the first countries, after September 11, to enact anti terrorism legislation. For both countries, the law, though still in its infancy, makes for an interesting case study of global reactions to the 'new terrorism'. It is considered relevant and appropriate to assess the impact of the new legislation on human rights. Finally, Kenya and Uganda represent a select group of emerging democracies. It is pertinent to evaluate the impact of anti terrorism legislation on the development of such states in the areas of the rule of law, human rights and democracy. Are anti terrorism measures winding back advances made in these critical areas of development?

The central theme of this study may be reduced to one main question: How does the implementation of counter terrorism measures impact on human rights in Kenya and Uganda? The pertinent issues that arise and call for investigation are: Can states fight terrorism effectively and still uphold human rights when terrorists flout them at will? Is the human rights framework sufficiently flexible to endure the 'new norm' in a counter terrorism era? Is it possible for governments to offer security within the existing human rights structure or is there need for enlargement of executive discretion and a greater limitation of rights? Are basic freedoms during times of emergency as important as during peacetime?

These questions are a consequence of new realities brought about by a global wave of diabolical terrorist attacks, which seem to miss no opportunity to create fresh miseries for the world community. In the light of these assaults the thesis analyses the pros and cons of the legislation adopted to meet the terrorism challenge.

The thesis seeks to explore the extent to which Kenya and Uganda's legislation maintains international human rights standards, especially with regard to fair trial, liberty and security of the person, equality before the law, privacy, due process, protection of refugees, freedom of expression and assembly, freedom of speech and press and freedom of movement. In making this analysis the thesis returns to the central question: In the face of extreme random violence, is it possible for states to offer adequate public security and still comply with international human rights law? In moments of constant terrorism threats, which of these basic rights need to be subject to greater intrusion to provide greater public security?

The subject matter under study is a topic that generates much discussion in the international field but little at the domestic level. It is hoped that this study will attract the interest of human rights activists to the challenges attendant on a strict observance of human rights in the face of constant danger from terrorists. The thesis will, hopefully, be a useful reference for states and other stakeholders who are keen to put in place or amend their legal and administrative anti terrorism measures.

It is appreciated that the relationship between counter terrorism and human rights is always in a state of tension. This research seeks to investigate whether Kenya and Uganda have struck the correct delicate balance. On the one hand, we have a scathing criticism that the new security laws violate basic rights and freedoms and deny terror suspects due process and the protection of the law.⁶¹ On the other, is an argument that proponents of human rights must accommodate an enlarged security concern permitting executive encroachment into the human rights sphere so as to deal with a barbaric phenomenon perpetrated by persons who have no regard for the law. It is said that, in such an atmosphere, it is perhaps inevitable that liberties and rights will be restricted.

Taking a moment to step back and reassess the debate on security and human rights, it is pertinent to suggest that perhaps the time has come for a review of the limits placed upon governments by human rights treaties and to permit such governments greater latitude in their efforts to achieve public security. There are whispered suggestions that, in the fight against terrorism, human rights are perhaps no longer sacrosanct.⁶² Those opposed to this proposition are said to be stuck in a pre- September 11 mindset.⁶³ How exactly is a balance to be found?

⁶¹ See Human Rights Watch 'In the Name of Counter-Terrorism: Human Rights Abuses Worldwide' A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights March 25, 2003 available at http://www.hrw.org/sites/default/files/reports/counter-terrorism-bck_0.pdf accessed on 20 May 2008.

⁶² Albrechtsen J 'Human rights can no longer be sacrosanct' *The Australian* September 13 2006.

⁶³ Ibid.

To answer this question it is critical to find a human rights approach to fighting terrorism. This is not an easy venture. In fighting terrorism, governments find it difficult to abide by the strict principles of human rights and the rule of law. Yet, in ignoring these issues, the executive threatens the very foundation of democracy. This is a profound dilemma. Contemplating it, the UN General Secretary observed in the year 2002: 'we face a nearly unsolvable conflict between two imperatives of modern life – protection of the traditional civil liberties of our citizens and, at the same time, ensuring the safety from terrorist attacks with catastrophic consequences.'⁶⁴

Even in these difficult times, many scholars hold the view that 'in the global struggle against terrorism, states cannot compromise on core democratic values.'⁶⁵ This has been echoed by the UN Secretary General's many public addresses on the subject.⁶⁶ Others hold the view that in the face of incessant terror attacks, human rights must give way to practical dictates of national security.⁶⁷

4. Description of the study

This thesis involves an analysis of international human rights law and Kenya and Uganda's domestic anti terrorism legislation. It uses international and regional human rights instruments as a basis for evaluating Kenya and Uganda's counter terrorism measures as an objective standard for assessing whether they comply with human rights, and, if not, whether derogations and limitations within the domestic human rights regime are permissible.⁶⁸ In evaluating compliance, full use is made of decisions of regional human rights courts and commissions. The jurisprudence of the European Court of Human Rights Court is preferred because the African Court is modelled on the European Court, and, as demonstrated in the study, the African Commission borrows heavily from the decisions of the European Court.

The study makes use of primary and secondary sources of information. In order to avoid a repetition of issues, a thematic approach is employed. At the domestic level primary sources comprise the constitutions of Kenya and Uganda, legislation, bills, policies, regulations, government notices and judicial decisions. At the international level it makes use of treaties and their protocols, declarations, resolutions of the UN General Assembly and the Security Council.

⁶⁴ UN Press Release (21 NOV 2002) SG/SM/8518 online: www.un.org/News/Press/docs/2002/S G S M 8518.DOC.htm

⁶⁵ See the Ottawa principles on Anti-terrorism and Human Rights in Forcese C & LaViolette N *The Human Rights of Anti-Terrorism* (2008).

⁶⁶ UN Secretary-General 'Madrid address on global strategy for fighting terrorism' Press Release SG/SM/9757.

⁶⁷ *Supra* n 54.

⁶⁸ Kenya acceded to the ICCPR and the ICESCR on 1 May 1972; Uganda acceded to the ICCPR and the ICESCR on 21 June 1995 and 21 January 1987 respectively.

For purposes of explaining and interpreting the primary sources, the research uses extensive secondary materials in the growing literature of terrorism and human rights.

5. Structure of Study

The thesis is divided into eight chapters. This Chapter is introductory, considering terrorism in the context of international law and its physical and social effects. It locates the current anti terrorism struggles within the international legal framework and describes the possible causes of terrorism. Finally, the chapter offers a justification for this research.

Chapter II seeks to shed some light on the concept and definition of terrorism. It reviews the literature which offers different definitions of terrorism and appraises all international instruments dealing with it. The chapter looks at what makes terrorism different from 'ordinary' crime and considers whether terrorists are criminals or, as it is sometimes alleged, freedom fighters. The chapter decries the lack of an agreed definition of terrorism, particularly because it is one of the reasons why there is no global agreement on how to deal it. While accepting that a definition is in flux, it proposes a possible conceptual framework for an understanding of terrorism and for obtaining an acceptable definition.

Chapter III analyses the nature and scope of terrorist trends in Kenya and Uganda. It evaluates whether these states are victims or a sanctuary of terrorism and further looks at the typology of terrorist groups operating therein. It examines the context in which terrorism occurs in the two countries, and analyses the historical, social, economic and ethnic factors, which, perhaps, influence incidents of terrorism. The chapter concludes with an assessment of the challenges in combating terrorism in the selected states.

Chapter IV begins an analysis of the implementation of counter terrorism measures in Kenya and Uganda. It examines the incorporation of international law into domestic law. The premise for the discussion in this chapter is that the legitimacy of counter terrorism measures depends on their consistency with international law. A discussion of the legal challenges facing the governments of these two countries is followed by an extensive review of Uganda's anti terrorism legislation. By conducting the discussion in this way Uganda's counter terrorism legislation may be tested against an objective and verifiable standard - international law - and process. Some of the issues covered here are: the domestication of United Nations anti terrorism treaties and UN SC resolutions, the centrality of law in the fight against terrorism, especially the principle of legality, and the role of criminal law in the fight against terrorism

Chapter V contrasts Uganda's anti terrorism legislation with civil liberties protected under the country's constitution. It considers the challenges inherent in enforcing the requirements of security while upholding human rights. Uganda receives a noticeable treatment because there have been more claims of abuse of fundamental rights in that country than in Kenya. In what circumstances, and to what extent, can human rights be limited in the fight against terrorism?

Chapter VI looks closely at Kenya's Prevention of Terrorism Act, analyses its provisions and evaluates compliance with international human rights and the Constitution of Kenya. An assessment is also made of Kenya's extra legal enforcement of counter terrorism measures.

Chapter VII examines protection of human rights in a time of crisis. It discusses the international human rights framework and the protections available in the domestic realm of the two East African countries. It considers features common to the derogations and limitation regimes as well as the appropriate reach of these restrictions. Several questions arise in this context. Is the human rights framework sufficiently flexible to endure the 'new norm' in the counter terrorism era? Is it possible for governments to offer security within the existing human rights structure or is there need for enlargement of executive intrusion into human rights and a greater limitation of rights?

Chapter VIII is the conclusion. It notes recent events in Kenya and Uganda particularly as they relate to the growing insecurity in these countries, and considers whether or not a time has come to employ exceptional means to deal with the terrorist menace. There is a suggestion that perhaps there should be a reconsideration of the place of human rights in the fight against terrorism and that governments should be permitted greater latitude in securing the safety of their populations. Emphasis is laid on the fact that terrorism is itself a violation of human rights and must not be treated as an activity of an oppressed and innocent people.

Chapter II

THE ENDURING QUESTION OF A DEFINITION OF TERRORISM

1. Understanding terrorism

(a) The origin of the concept

The word 'terrorism' entered the English lexicon in the wake of the French Revolution of 1789, and its modern usage can be traced back at least to 1795.¹ The word was used to describe the brutal suppression of a population by the state. In other words, terror was a state mechanism of coercion and control. 'In the early revolutionary years, it was largely by violence that governments in Paris tried to impose their radical new order on a reluctant citizenry. This resulted in the first meaning of the word 'terrorism' as recorded by the *Académie Française* in 1798, where it was defined as *système, régime de la terreur* or 'system or rule of terror.'²

Terror, as an instrument of the state, was designed to consolidate the power of the newly installed revolutionaries over elements considered insubordinate and rebellious. In its early usage terrorism was considered a positive term. The French Revolutionary leader Robespierre declared terrorism as 'nothing other than justice, severe, inflexible [and] therefore an emanation of virtue ... applied to our country's most urgent needs.'³ This 'manifestation of virtue' was later to consume its most ardent followers, including Robespierre, who was killed by his fellow revolutionaries. It is estimated that close to 40 000⁴ people 'were executed by the guillotine, rendering the term its present negative connotation.'⁵

In the history of violence, terrorism presents itself as a form of unconventional warfare used as a tool for forcing political change. It appears as the use of indiscriminate violence or attack by non-state or state actors for political ends. Sun Tzu, the famous Chinese tactician and philosopher, summarised the

¹ Laqueur W *A History of Terrorism* (2001) 6.

² Adam R 'The changing faces of terrorism' available at www.bbc.co.uk/history/recent/sept_11_changing_faces_01.htm accessed on 15 July 2009.

³ Robespierre M 'Justification of the use of terror' in *Modern History Sourcebook* available at <http://www.fordham.edu/halsall/mod/Robespierre-terror.html> accessed on 15 June 2009.

⁴ Hoffman B *Inside Terrorism* (1998) 16. This number is contested in other texts, which estimate the number of those who died to be about 17 000. (See for example Anderson S and Sloan S *A Historical Dictionary of Terrorism* (2002) xxiii). On the other hand it is generally agreed that between 300 000 to 500 000 people were arrested and up to 200 000 may have died in prison as a result of starvation, illness or brutal treatment. See Crenshaw M and Pimlott J *The Encyclopaedia of World Terrorism* M E (1997) 48.

⁵ Burgess M 'A Brief history of terrorism' Centre for Defence Information available at http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1502#_edn accessed on 5 April 2009.

goal of terrorists when he wrote, 'kill one, frighten ten thousand.'⁶ In this manner terrorism works to compel a government to consent to certain demands for fear of future attacks or to harness a population to join in a cause sought by the terrorists. But terrorism is not a distinctively isolated form of political activity. It exists in a continuum, from aspects of conventional warfare, through to assassination, guerrilla warfare, insurgency and sabotage to state repression, persecution and torture.

Despite the differences in perspective there are a few features on which virtually all terrorism specialists agree: that terrorism is almost exclusively a political weapon;⁷ it is often grounded in ideological (not narrow partisan) politics;⁸ and that it is a technique of psychological warfare accomplished primarily through violence directed at innocent civilian victims.⁹ The victims, however, are not necessarily the primary target as the relatively small amount of violence tends to be disproportionate to the number of people affected.¹⁰

(b) Terrorism in the world context

Terrorism is certainly not a new phenomenon. Records of incidents of terror in ancient times through the Middle Ages to the modern world are legion.¹¹ What is new is the skill and expertise employed by terrorists and the magnitude of destruction attained. Advances in communications and technology have provided perpetrators with the means and objects of destruction. Currently, there are fears that terrorists may be moving towards making use of biological and chemical agents as tools of annihilation. On the extreme level, of course, is the possibility that terrorists will lay their hands on nuclear materials.¹² Terrorism is clearly the greatest threat to world peace today, and for the foreseeable future. It transcends national borders and affects everyone in the world.

⁶ Clutterbuck R *Terrorism in an Unstable World* (1994) at 3.

⁷ Combs C *Terrorism in the 21st Century* (1997)

⁸ Henderson H *Global Terrorism: The Complete Reference Guide* (2001).

⁹ Dershowitz A *Why Terrorism Works* (2002).

¹⁰ Headley B available at <http://www.jamaica-gleaner.com/gleaner/20060305/focus/focus5.html> accessed on 10 August 2007.

¹¹ Anderson S and Sloan S *A Historical Dictionary of Terrorism* (2002). Anderson and Sloan offer a full, precise and detailed discussion on terrorist groups, leaderships and events from antiquity to the modern era. They elaborate on the development of terrorism as an adjunct to political violence, its mutation and adaptation to modernity.

¹² These fears are not without foundation. On 12 August 2007 the United States stepped up its security in New York, Los Angeles and Miami in response to internet reports which indicated that Al Qaeda were planning to attack these cities by means of trucks loaded with radioactive material. 'The attack, with Allah's help, will cause an economic meltdown, many dead and a financial crisis on a scale that compels the United States to pull its military forces out of many parts of the world including Iraq for lack of any other way of cutting down on costs', an Al Qaeda source was reported as saying, available at <http://www.debka.com/> accessed on 12 August 2009.

Terrorism has been high on the global agenda for many years, primarily because it places the lives of so many innocent people at risk. The more recent threat of a reversal of the gains of globalisation and the prevailing restrictions on the movement of persons across borders is a result of fears associated with terrorism. Movement of goods and services, advancements in free trade and enterprise, and the expansion of hitherto closed economies in Eastern Europe and the Middle East run the risk of stagnation due to fears of terrorism, as these regions are, correctly or not, perceived as exporters of terrorism.

It is over ten years since the attacks of September 11, but incidents of terrorism do not show signs of abating. Instead there is an increase and development.¹³ The horror of September 11 drew the attention of the whole world and spurred resources and efforts towards the fight against terrorism. None of us, however, can say that the world is any safer now. By the measure of Rohan Gunaratna, a well-known expert on terrorism, 'terrorist actions have actually increased sevenfold since the destruction of the World Trade Centre in New York.'¹⁴ The threat, capacity and ability of horrendous terrorist attacks remain real and current. The question is not if, but when and where the attack will fall.

2. Difficulties with defining terrorism

(a) Terrorism as a legal and political problem

'Terrorism is an emotionally charged, morally laden and politically contentious concept, which has nevertheless emerged as a critical and unavoidable feature of the legal landscape both internationally and domestically.'¹⁵ 'Everyone has his own idea of the notion of terrorism.'¹⁶ The etymology of the expression boils down to the use of violence for political purposes.

In ordinary parlance two words are always manifest in a definition of terrorism: violence and politics. It is no wonder that in the popular mind terrorism is viewed as the illegitimate and violent actions of specific groups that violate the authority of rightfully established political entities. For this reason, the term 'terrorism' is often used in a disparaging, derogatory and negative sense. For Israel, Palestinian suicide

¹³ A number of terrorist attacks have occurred since 11 September. Significant ones include; the assassination of the Afghan Deputy President, Haji Abdul Qadi, on 6 July 2002; the French Tanker explosion off the coast of Yemen on 6 October 2002; the Bali nightclub bombing of 12 October 2002 in which more than 180 people died; attacks on the Paradise hotel, Kikambala, Mombasa on 28 November 2002 in which 15 people were killed and 40 wounded; the Riyadh Bombing of 13 May 2003 in which 20 people were killed and 200 injured; the Casablanca (Morocco) bomb explosion of 14 May 2003; the Madrid train bombings on 11 March 2004; the three London bomb explosions of 7 July 2005; the Chechen rebels' seizure of a Moscow theatre on 23–26 October 2006; and numerous suicidal attacks in Israel, Pakistan and Iraq.

¹⁴ Ibrahim A G 'A multi-lateral response to terrorism' in *Commonwealth Ministers' Reference Book* (2006) 99.

¹⁵ Ramraj V *Global Anti-terrorism Law and Policy* (Ramraj V et al eds) (2005) 2.

¹⁶ Higgins R and Flory M (eds) *Terrorism and International Law* (1997) 1.

bombers are the paradigmatic terrorists, while for Syria 'foreign occupation,' particularly the Israel occupation of the West Bank, is the most brutal form of terrorism.¹⁷

Terrorism occurs both in the framework of opposition to the state as well as in the service of state interests. Regrettably, we are forced to accept that terrorism is easy to recognise but difficult to define. The difficulty is manifest in the fact that even well-meaning scholars define terrorism in the context of and within the socio-economic and political conditions of their societies.

Terrorism was first considered and dealt with as a matter of international law following the assassination of King Alexander I of Yugoslavia and the French foreign minister Louis Barthou on 9 October 1934. These twin assassinations, carried out in Marseilles by Ustashi assassins (ethnic Croatian separatists), were meant to precipitate the collapse of Yugoslavia so that an independent, self-ruling Croatia could be established.¹⁸

The assassinations caused uproar throughout Europe. The plotters escaped and sought refuge in Italy. Yugoslavia, unable to persuade Mussolini to extradite the plotters for trial, appealed to the League of Nations for assistance in dealing with the situation. Whilst the League did nothing on the specific matter of the assassination, it was forced to give serious consideration to the issue of terrorism.¹⁹ After several attempts, the League of Nations finally agreed on a draft convention on terrorism. The greatest problem then, which continues to this day, was to find an acceptable definition of terrorism.

(b) Is there in fact a need to define terrorism?

Notwithstanding the emphasis placed on the need for concerted international action to confront the problem of terrorism, positive international law is far from an agreement on the need to define terrorism. Trying to define terrorism produces endless debates, at both the political and legal levels.²⁰ It would appear that 'the search for a unitary or all-encompassing notion of terrorism, in criminal law terms, constantly risks being incomplete or too advanced, because of the different underlying policy choices.

¹⁷ Mariner J 'Our many varied wars against terrorism' available at <http://writ.news.findlaw.co/scripts/> accessed on 12 July 2007.

¹⁸ Dubin D M *International Terrorism: Two League of Nations Conventions 1934–1937* (1991).

¹⁹ A complete account of the power play in Europe in the 20th century, complete with coups and assassinations sustaining such power may be read in Manhattan A *The Vatican's Holocaust* (5th ed).

²⁰ Filippo M 'Terrorist crimes and international co-operation: Critical remarks on the definition and inclusion of terrorism in the category of international crimes' 19 (2008) *EJIL* 533 at 541.

Further 'because labelling actions "terrorist" promotes condemnation of the actors, a definition may reflect political or ideological bias.²¹ It is therefore not surprising that Laqueur states that;

A comprehensive definition of terrorism ... does not exist nor will it be found in the foreseeable future. To argue that terrorism cannot be studied without such a definition is manifestly absurd.²²

In a rejoinder to Laqueur, Gibbs argues that it is no less manifestly absurd to pretend to study terrorism without some definition of it.²³ Leaving the definition implicit is the road to obscurantism.²⁴ It would appear that 'in order to respond to terrorism, a clear definition is necessary.'²⁵

The above is the approach which will be adopted in this thesis. If even a working definition of a topic is excluded, it would be impossible to embark on a coherent analysis.

In the discussions leading to the adoption of UN SC Resolution 1373, the Council considered the question of whether there is any need for a definition of the term 'terrorism'. Many states appealed for tolerance in the search for a definition, warning against the temptation to get into a quick-fix definition.²⁶

Despite the wisdom in the appeal for patience, there are sound policy and legal reasons for the need to define and criminalise terrorism. An agreed definition affords many benefits. It : may lead to harmonization of the various national criminal laws; reduce the 'differences in legal treatment' of the crime between States;²⁷ may assist in satisfying the double criminality rule in extradition requests, and in establishing 'prosecute or extradite' regime for terrorist crimes;²⁸ might support attempts to restrict the political offence exception to extradition;²⁹ it would refine the definition of a refugee, for those accused of

²¹ Rubenstein R E 1987 *Alchemists of Revolution: Terrorism in the Modern World*.

²² Laqueur W 1987 *The age of terrorism* 5

²³ Gibbs J P 'Conceptualisation of terrorism' 1989 54 (3) *American Sociological Review* 329-340 at 329.

²⁴ *Ibid*.

²⁵ Rubby C L 'The definition of terrorism' 2002 *The society for the psychological study of social issues* 9-14 at 9.

²⁶ See Rossand E 'Security Council resolution 1373, the Counter-Terrorism Committee, and the fight against terrorism' 2 (2003) *AJIL* 97 333-341

²⁷ EU proposal in the discussions on the '1998 Rome Statute of the International Criminal Court, preamble; MC Bassiouni, *Crimes Against Humanity in International Criminal Law*' (1992) 46-47.

²⁸ J Murphy, 'Defining international terrorism: A way out of the quagmire' (1989) 19 *Israel YB Human Rights* 13, 35.

²⁹ See Wyngaert C V 'The political offence exception to extradition: How to plug the terrorist's loophole' (1989) *Israeli Yearbook on Human Rights* 297; Bassiouni M and Wise E *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).

perpetrating the crime would not qualify to be described as such;³⁰ and it would proffer assistance to states in the implementation of sectoral treaties which describe terrorism without defining it.³¹

It is generally accepted that the lack of a definition of terrorism hinders efforts to develop effective international counter terrorism mechanisms.³²

The indecision over what constitutes the offence corrodes all endeavors to stem it. Yet there are those who think that terrorism is a term of convenience without legal significance.³³ Higgins poses these questions: Does the theme 'terrorism' really constitute a distinct topic of international law? Put differently, is there an international law of terrorism or merely international law about terrorism? Is our study of terrorism a study of a substantive topic, or rather the study of the application of international law to a contemporary problem?³⁴

These observations are correct as far as they go, but if one keeps searching for acts of terrorism without defining terrorism itself, then its denunciation is encouraged more than its understanding because the reasons for an action are confused with its explanation, definition and support.³⁵ Without a definition of terrorism each act is considered separately and may, depending on context and location, qualify to be termed as terrorism or excused as an act of martyrdom.

Our understanding of the crime is left to our appreciation of the history and usage of the term with its subjective innuendo.³⁶ It is the absence of a definition that makes it possible for hegemonic powers and their sympathisers to keep changing the definition to suit political expediency. This case-by-case definition by discretion can only be brought to an end by agreement on the issue.

³⁰ Bassiouni M C 'A policy oriented inquiry into the different forms and manifestations of international terrorism,' in Bassiouni M C (ed) *Legal Responses to International Terrorism: (1988)* xv, xl.

³¹ *Supra* n 20.

³² UN Secretary General Kofi Annan, speaking at an international summit on terrorism in Madrid, said of terrorism: 'for too long the UN has not agreed on what to fight' available at <http://english.safe-democracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html> accessed on 2 August 2010.

³³ Higgins R 'The general international law of terrorism' in Higgins & Flory (eds) *Terrorism and International Law* (1997) 13–29.

³⁴ *Ibid* at 15.

³⁵ Marc S J 'Some questions about the definition of terrorism and the fight against its financing' 14 (2003) *EJIL* 365 at 369.

³⁶ A double standard results from the open net. In their book *The Terrorism Industry*, Herman E and O'Sullivan G claim that according to the CIA, only US enemies are considered terrorists. Libya and Syria, for example, are designated sponsors of international terrorism when they aid and sponsor the Islamic Jihad, while the US funding of groups such the Contras or the Afghan Mujahidin is defined as 'assistance extended to freedom fighters'. In this lethal language game, some states are losers and US allies are winners.

A definition of terrorism should distinguish between political and private violence as well as making it possible to avoid the overlap in the many existing anti terrorism treaties. It may moreover provide direction to states as to the implementation of UN anti-terrorism resolutions without contravening principles of human rights and the rule of law.

In addition, when the constitutive elements of the crime are agreed, the international community will be in a better position to deal with terrorism. Consider this example: in the wake of September 11, President Bush declared the attacks the 'work of terrorists' engaged in an 'act of war.'³⁷ The Guantanamo Bay captives collected from all around the world, however, are 'detainees' not 'prisoners of war.'³⁸ The first of these detainees are now being tried for 'conspiring to commit war crimes.'³⁹ The confusion of terms is evident.

Quite apart from the political desire to define terrorism, there is an even stronger legal need. Jurisprudence on criminal law requires that only what is known and proscribed may be punished. The principle of *nullum crimen sine lege* stipulates that a person shall not be criminally responsible unless the conduct in question constitutes, at the time it takes place, a crime. The definition of a 'crime' is always strictly construed and is not to be extended by analogy. In case of ambiguity, criminal law exercises an interpretation in favour of the person being investigated, prosecuted or convicted.⁴⁰

A definition of terrorism has obvious political connotations and consequences. For this reason, states appear preoccupied with repeated declarations that there is no internationally agreed definition.⁴¹ In this they are more concerned with the political rather than the legal repercussions of the lack of a definition,

³⁷ See President Bush's address to a Joint Session of Congress (20 September 2001) available at www.whitehouse.gov/news/releases/2001/09/20010920-8.html accessed on 20 June 2009.

³⁸ The detainees held by the United States in Guantanamo Bay were classified as 'enemy combatants.' The US administration had claimed that these prisoners were not entitled to the protection of the Geneva Conventions but on 29 June 2006 the US Supreme Court ruled against this interpretation. [On 7 July 2006, the US Department of Defence issued a memo stating that the prisoners would in the future be entitled to protection under the Geneva Conventions]. In the case of *Hamdi v Rumsfeld* [542 US 507 (2007)], the Supreme Court held that Hamdi, held as an enemy combatant and a US citizen was entitled to due process.

³⁹ The first two detainees to be charged were Ali Hamza Ahmed Sulayman al-Bahlul and Ibrahim Ahmed Mohamed, both allegedly members of Al-Qaeda. The two are said to have been bodyguards of Osama bin Laden and stood accused of conspiring, among other things, to attack civilians, destroy property and commit acts of terrorism.

⁴⁰ See Dana S 'Beyond retroactivity to realizing justice: A theory on the principle of legality in international criminal law sentencing' (2009) 4 *Journal of Criminal Law & Criminology* 857.

⁴¹ On 4 November 2011 the Chairperson of the General Assembly Working Group – which was established to finalise a draft convention on international terrorism – delivered an oral report in which she admitted that there was as yet no agreed definition of terrorism. She named the outstanding issues and highlighted the Organisation of Arab Unity's demand 'that the convention would not prejudice the right of self-determination' and that it incorporates their idea of 'state terrorism.' See Sixth-Six Session, Sixth Committee, Agenda 109, *Measures to Eliminate International Terrorism*, available at www.unmultimedia.org accessed on 2 April 2012.

because most states now have a law that prescribes and punishes terrorism. The net result is that each state has taken the liberty to lay down its own definition of terrorism, often criminalising aspects of fundamental freedoms, which pose a challenge to state repression.

The preponderance of this mischief is to be found in countries that engage in human rights abuses akin to state terrorism. In the minds of most people, terrorism is the epitome of all that is 'evil' and reprehensible. That the term is politically malleable is to be seen from the numerous existing definitions, the common denominator of which is an 'I know it when I see it' attitude. Every country condemns terrorism and many employ the term opportunistically.⁴²

Israel and the United States have championed and partly won their cause against terrorists by employing superior public relations instruments. The United States 'war on terrorism' is justified as retaliation for September 11 and a self-defence mechanism for any future attacks. The 'war', even though it targets Al Qaeda and the Taliban, is not focused on any specific group. The 'enemy' is terrorism in general and those who harbour terrorists. Beyond the United States, on one side, and Al Qaeda and the Taliban, on the other, an understanding of the American version of terrorism becomes blurred. The term assumes a moral judgment: reference to one's foe as a terrorist implies the moral and political high ground.

3. Defining terrorism in international law

(a) Academic writing on the subject

In scholarly literature and international forums, it is now a cliché, but one worth repeating, that 'there is no general consensus on a definition of terrorism.'⁴³ It is perhaps true that 'the difficulty of defining terrorism lies in the risk it entails of taking positions'⁴⁴ and in the fact that in almost all cases the old adage that 'one man's terrorist is another's freedom fighter' still holds true.

Terrorists use fear as a weapon to obtain political power. Oppressive governments may also use terror to maintain a balance of power in favour of the incumbent executive. In both instances, the acts of terror function as a psychological weapon to cower an opponent into submission. Hence, the characteristics of terrorism and the methods employed to eliminate it, create a complicated narrative that

⁴² *Supra* n 16.

⁴³ Zeidan S 'Desperately seeking definitions: The international community's quest for Identifying the spectre of terrorism' (2003-2004) 36 *Cornell International Law Journal* 491.

⁴⁴ *Ibid.*

makes it difficult to agree on a definition. Conceptually, however, the dialogue around a definition needs to be pursued.

On the one hand, we may share the view held by Crenshaw that 'certain essential elements of the definition of terrorism are ... situational constants. Terrorism is a method or system used by a revolutionary organisation for specific political purposes. Neither one isolated act nor a series of random acts is therefore terrorism.'⁴⁵ On the other hand, we may be attracted by Ackerman's view which thinks that 'terrorism is simply the name of a technique that involves the intentional attack on innocent civilians'⁴⁶ because in and of itself, terrorism manifests in many facets.

There are also suggestions that terrorism is a political phenomenon without legal significance and cannot therefore be described through a precise legal definition.⁴⁷ This difficulty notwithstanding, there are certain common features that run through and mirror a collective understanding of terrorism.

First, political motivation is an essential factor in almost all acts of terrorism.⁴⁸ Political motivation distinguishes terrorism from 'ordinary' crime committed for personal benefit. Secondly, unlike 'ordinary' crime, it targets persons on the basis of group identity rather than personal characteristics.⁴⁹ If an individual is targeted it, often, is because they represent a specific political system and the attack is a message demanding political change.⁵⁰

These two features separate terrorism from 'ordinary' crime but do not determine the range of activities, which may be committed to achieve the goal. There are, nevertheless, challenges inherent here. First, some formulations include inchoate offences, where no result occurs, while, in others, a certain kind of injury, damage or loss must accompany the act complained of.⁵¹

⁴⁵ Crenshaw M *Explaining Terrorism- Cause Process and Consequences* (2011) 1-32 at 22.

⁴⁶ Ackerman B *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2006) 5.

⁴⁷ Abrams N *Anti-Terrorism and Criminal Enforcement* 3ed. (2008) at 62-75

⁴⁸ Harmon C *Terrorism Today* (2000) 31-33 (defining terrorism as: 'the deliberate and systematic murder, maiming, and menacing of the innocent to inspire fear for political ends.')

⁴⁹ See Schmid A 'Terrorism- the definitional problem' (2004) 36 *Case Western Reserve J. of Int'l law* 375 at 408 (noting the negative aspect of terrorism, namely, defining what terrorism is not. The definition excludes certain types of assassinations, where the direct victim is the only target, as opposed to de-individualized murder where the victim serves only as message generator to reach a wider audience).

⁵⁰ For example, the assassination of Israeli Prime Minister Itzhak Rabin.

⁵¹ The International Convention for the Suppression of the Financing of Terrorism refers only to 'causing death or serious bodily injury'.

The criminal justice system does not always respect the distinction between 'ordinary' crime and terrorism with the result that there is sometimes a gap between scholarship on terrorism and terrorism offences. Nevertheless, several scholars have tried their hands at defining the offence. A definition of terrorism as 'the use of violence against random civilian targets in order to intimidate or to create generalised pervasive fear for the purpose of achieving political goals'⁵² would appear at first glance to put the matter to rest. However, as will presently become evident, this definition has many gaps in the wider scheme of things.

Terrorism has also been defined as 'the threat of individual acts of violence or a campaign of violence primarily designed to instill fear.'⁵³ Whether at a localised or international level it is now broadly recognised that indiscriminate terror for political purposes has become a common feature of the revolutionary struggles, particularly after the Second World War.⁵⁴ In a 1983 study, Alex P Schmid⁵⁵ tabulated no less than 109 definitions of terrorism.⁵⁶ He stated that:

Terrorism is a method of combat in which random or symbolic victims serve as instrumental targets of violence. These instrumental victims share group or class characteristics, which form the basis for their selection of victimisation. Through previous use of violence or the credible threat of violence other members of that group or class are put in a state of chronic fear (terror). This group or class, whose members' sense of security is purposely undermined, is the target of the terror. The victimisation of the target of violence is considered extra-normal by most observers from the witnessing audience on the basis of its atrocity; the time (e.g. peacetime) or place (not a battlefield) of victimisation or the disregard for rules of combat accepted in conventional warfare. The norm violation creates an attentive audience beyond the target of terror; sectors of this audience might in turn form the main object of manipulation. The purpose of this indirect method of combat is either to immobilize the target of terror in order to produce disorientation and/or compliance, or to mobilize secondary targets of demands (e.g. government) or targets of attention (e.g. public opinion) to changes of attitude or behavior favoring the short or long term interests of the users of the methods of combat.

⁵² Alexander Y 'International terrorism: National, regional and global perspectives' (1976) *Journal of International Affairs* xiv.

⁵³ Jenkins B 'International terrorism: Trends and potentialities' 32 (1) (1978) *Journal of International Affairs* 115.

⁵⁴ Walzer M *Political Principles* (1980) 201–203.

⁵⁵ Alex Schmid is an internationally known Dutch scholar in terrorism studies and former officer in charge of the Terrorism Prevention Branch at the United Nations.

⁵⁶ Schmid A *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature* (1983) 119–152.

Five years later, in a revised edition of this book, Schmid offers a fresh definition of terrorism, where he says:⁵⁷

Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individuals, group or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representatives of symbolic targets) from a target population, and serve as message generators. Threat and violence-based communication processes between terrorists (organisation), (imperiled) victims, and main targets are used to manipulate the main target (audiences), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion or propaganda is primarily sought.

In 1992, Schmid advanced a less wordy definition, whereby he defined it as 'peacetime equivalents of war crimes.'⁵⁸ But then terrorism can occur during armed conflict or during peacetime. What would you call acts of terrorism perpetrated during wartime? Does this definition render the application of the laws of war to terrorists, to the exclusion of any other laws? It is clear that this definition though short, clear and precise is replete with operation problems.

Interestingly, however, the Supreme Court of India adopted this definition of terrorism and applied it in the case of *Madan Singh vs State of Bihar*.⁵⁹ The court, after reminding itself that there is no universally agreed definition of terrorism, declared that:

If terrorism is defined strictly in terms of attacks on non-military targets, a number of attacks on military installations and soldiers' residences could not be included in the statistics. In order to cut through the Gordian definitional knot, terrorism expert A Schmid

⁵⁷Schmid A et al *Political Terrorism; A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature* (1988) 5.

⁵⁸ See website of United Nations Office on Drugs and Crime available at <http://www.unodc.org/> accessed on 4 June 2010.

⁵⁹ In the Supreme Court of India, Criminal Appellate Jurisdiction, Criminal Appeal 1285 of 2003, *Madan Singh vs State of Bihar* (Court Appeal 1297 of 2003). This was an appeal under section 19 of India's Terrorist and Disruptive (Prevention) Act, 1987 (TADA). The appellants questioned their conviction for the commission of terrorist acts under section 302 read with section 149, section 307 read with section 149, 352 and 379 of India Penal Code and section 3(2) of the TADA. The court had to decide whether the activities complained of qualify to be termed terrorist activities. India's TADA makes provision for the prevention of and coping with terrorist and disruptive activities. The Act does not define terrorism. Section 3(1) provides for 'punishment for terrorist acts'. It states 'whoever with intent to overawe the government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such manner as to cause death of or injuries to any person or persons or loss of, damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, detains any person and threatens to kill or injure such person in order to compel the government or any other person to do or abstain from doing any act, commits a terrorist act.'

suggested in 1992 in a report to the then UN Crime Branch that it might be a good idea to take the existing concerns on what constitutes a 'war crime' as a point of departure ... we could simply define acts of terrorism veritably as 'peacetime equivalents of war crimes'.

Some observations on Schmid's definition are pertinent. First, the definitions lend themselves more to situations where the violence is directed at people. No mention is made of violent activities aimed at destruction of property. Schmid views terrorism as violence aimed at animate 'victims'. In this sense, use of radioactive material,⁶⁰ destruction of aircraft and related offences,⁶¹ and other such acts prohibited in related conventions would not qualify as terrorist acts.

Secondly, Schmid's definitions presume that there is always a 'target of terror' in all terrorism activities. This is not necessarily true. A person who hijacks a plane with the sole intention of delivering himself to a state where he wishes to seek asylum, as much as by one who seeks to make demands upon a government commits an act of terrorism.

This is not to say that Schmid's work was not absolutely positive. A remarkable contribution, and addition, in Schmid's 1992 definition is the recognition that a terrorist may be either an individual or a state actor. For both, 'the object is to use intense fear or anxiety to coerce the primary target into behavior or to mould its attitudes in connection with a demanded power (political) outcome.'⁶² According to Prof Pradel, 'an act of terrorism is one which creates a collective fear in the population in order to make it yield.'⁶³

Elagab is of the opinion that:

The term terrorism is used to define criminal acts based on the use of violence or threat thereof, and which are directed against a country or its inhabitants and calculated to create a state of terror in the minds of the government officials, an individual or a group of persons, or the general public at large. It could be the work of one individual, but more often than not, is the effect of organized groups whose philosophy is based on theory that "the end justifies the means."⁶⁴

⁶⁰ See Article 2 of the Convention for the Suppression of Acts of Nuclear Terrorism.

⁶¹ See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation UNTS No 14118 Vol 974 at 178-184.

⁶² Parst A 'Survey of possible legal responses to international terrorism: Prevention, punishment and co-operative action' (1975) 5 *Georgia Journal of International and Comparative Law* 431.

⁶³ Pradel J 'Les Infractions de terrorisme' in Dalloz S *Chronicle* (1987) 39(10) as quoted by Jacques B in *France's Responses to Terrorism* in Higgins R and Flory M (eds) *Terrorism and International Law* (1997) 144 at 150.

⁶⁴ Elagab Y O *International law documents relating to terrorism* (1997) xix.

Studies conducted by the Terrorism Research Centre, an independent institute dedicated to the research of terrorism,⁶⁵ offers a collection of definitions, which, viewed collectively, paint a clear picture of what terrorism might be.

- 'Terrorism is the use of force designed to bring about political change;' (Brian Jenkins)
- 'Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted;' (Walter Laqueur) and
- 'Terrorism is the premeditated, deliberate, systematic murder, mayhem and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence as audience.' (Jannes M Poland).

It is clear that, beyond spurring a chorus of rejection and debate, every new definition of terrorism proves that there is no dearth of knowledge on the subject. It would appear that we all perceive terrorism from a platform of moral values. This moral system is informed by our culture, education, religion and other nuances that explain our peculiar mind-sets. There is, however, a widespread acknowledgment that terrorism is a bad thing, which invites censure. Indeed, the term terrorism is a catchall; a fashionable word for all that is evil amongst us.

It seems evident that coming up with a comprehensive definition of terrorism would seem at first glance to be an impossible task because 'there is not one but many different forms of terrorism.'⁶⁶ 'The distinction between terrorism, guerrilla warfare, conventional warfare and criminal activity is often blurred.'⁶⁷ Repressive regimes call those who struggle against them terrorists whilst those who struggle to topple the regimes call themselves freedom fighters.⁶⁸ In this conundrum one sympathises with those who think, 'an adequate essentialist definition of what is now usually called terrorism appears ... to be impossible as well as undesirable.'⁶⁹

Notwithstanding the difficulties with a definition, when the world is confronted with phenomena that go beyond the capacity of the ordinary penal laws to condemn, an immediate and deliberate action has to be taken to curb it. If, as it stands, 'terrorism is a term without legal significance,'⁷⁰ world political leaders

⁶⁵ See Terrorist Research Centre available at <http://www.terrorism.com/> accessed on 26 August 2008.

⁶⁶ Laqueur W *The Terrorist Reader: A Historical Anthology* (1999) 46.

⁶⁷ Griset P & Mahan S *On Terrorism and Its (Re) Sources: A Review Essay Terrorism in Perspective* (2003) xii.

⁶⁸ *Ibid.*

⁶⁹ Khatchadourian H *The Morality of Terrorism* (1998) 10.

⁷⁰ Rosalyn R 'The General international law of terrorism' in Higgins R & Flory M (eds) *Terrorism and International Law* (1997) 28.

and scholars have an obligation to provide a legal meaning because 'to solve a problem, it must be defined.'⁷¹ This is vital especially when we consider that the lack of a definition of terrorism is one of the factors inhibiting a unified global fight against the scourge.

The thesis argues that terrorism can only be fought and defeated within an agreed global framework. No one state or regional block can singlehandedly fight and defeat the offence. There has to be a concerted effort to create an environment that does not tolerate any terrorist activity. It is in seeking to galvanise the global determination to eliminate terrorism that the United Nations and its agencies have been involved in attempts to reach an agreement on a definition of terrorism.

(b) League of Nations

The United Nations' attempts to define terrorism rest on similar attempts by its predecessor.⁷² This followed the twin assassinations in Marseilles in 1934.⁷³ 'After long and heated debates that lasted four years, the Final Act of the diplomatic conference [of the League's Committee for International Repression of Terrorism] met and simultaneously adopted the Convention for the Prevention and Punishment of Terrorism and the Convention for the creation of an International Criminal Court.'⁷⁴ The two conventions complemented each other; the first to create the offences and the second to set out an international framework for punishment. Although the efforts collapsed with the coming of the Second World War, it is recognised that 'the League of Nations' work in promulgating a comprehensive Convention on Terrorism reflects the earliest, most significant effort in that regard.'⁷⁵

'Remarkably, the League of Nations anticipated most of the legal issues which would plague the international community's response to terrorism in the following seven decades: the political and technical difficulties of a definition; the problem of 'freedom fighters' and self-determination; state terrorism and the duty of non-intervention; state criminality and applicability to armed forces; the scope of the political offence

⁷¹ Wallach E J 'Can terrorism be defined in a principled legal fashion?' available at http://lawofwar.org/defining_terrorism.htm accessed on 15 May 2012.

⁷² The League of Nations, the predecessor of the United Nations, made great strides in dealing with terrorism and produced two conventions that often form the basis of international discussions on terrorism.

⁷³ *Supra* n 18.

⁷⁴ League of Nations Final Act of Conference Geneva 16 November 1937 LON DOC. C.548.M385 1937 V (1938) 19 LON OJ 23 in Alexander Y Browne M & Nanes A (eds) *Control of Terrorism: International documents* (1979) at 19.

⁷⁵ Marston G 'Early attempts to suppress terrorism: The terrorism and international criminal court conventions of 1937' (2002) *BYBIL* 293. See also Starke J 'The Convention for the Prevention and Punishment of Terrorism' 19 *BYBIL* at 214.

exception to extradition; the impact of freedom of expression; and the relationship between terrorism and asylum.⁷⁶

The threshold question - whether to define terrorism generically or only to prohibit objective criminal acts - persisted throughout the drafting process.⁷⁷ The 1937 League Convention ultimately defined 'acts of terrorism' in art 1(2) as 'criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, a group of persons or the general public.'⁷⁸ This definition has remained resilient and heavily influences current attempts to define terrorism. Hallowed as it is, it has been much criticised, and quite rightly so.⁷⁹ The reasons for this are many.

Defining terrorism by the terror it causes is a tautology. At the same time, speaking of criminal acts is evidently vague. This is so because the notion of crime varies from one state to another. It will also be recognised that 'classifying as terrorism only those acts that are directed at a state, that is acts directed against a structure consisting at once of a population, a territory and a government endowed with sovereign power, is a very restrictive idea, since in most cases only one of these elements is a target of a terrorist attack.'⁸⁰

(c) United Nations

(i) General Assembly

The quest for a definition of terrorism is currently one of the main issues playing out both in the UN General Assembly's Ad Hoc Committee on Terrorism and in the Security Council's Counter Terrorism Committee. The language and the political arguments in these committees are essentially identical. The debate reflects not so much a desire to close the gaps on a legal definition of a term that has bedeviled the institution for so many years, but rather a way of coming up with a definition that supports each country's political inclinations.

'Underlining all the (initial) efforts of the UN to address the problem of terrorism has been a debate about whether the concept of terrorism should, and could, be defined.'⁸¹ 'The marshaling of an international

⁷⁶ Saul B The 'Legal response of the League of Nations to terrorism' (2006) 4(1) *Journal of International Criminal Justice* 78 at 79.

⁷⁷ *Supra* n 69 at 89.

⁷⁸ *Ibid.*

⁷⁹ Cooper A 'The terrorist and the victim: Victimology' (1976) 1(2) *International Journal* 229.

⁸⁰ Jacques B 'France's Responses to Terrorism' in Higgins & Flory (eds) *International law and Terrorism* (1997) 144 at 145.

⁸¹ Higgins R *Terrorism & International Law* in Higgins & Flory (eds) 14.

law strategy on terrorism is a story of (UN) committees and their reports, of resolutions, of drafting of treaties and calls for state action.⁸² There is recognition at the UN that all of the acts that constitute terrorism are by nature criminal in most jurisdictions, whatever the motive.

This notwithstanding, the UN member states do not as yet have an agreed definition. The reasons are various, but crystalize around the political dynamics pertaining to terrorism. It is evident that standing at the gates of a comprehensive definition of terrorism are the ideological leanings of the diverse member states of the UN and a desire to recognise and legitimise groups engaged in self-determination, together with the question of state terrorism. Of these, the UN Special Rapporteur on Terrorism and Human Rights has recently admitted that the most problematic issue relating to terrorism and armed conflict is distinguishing terrorists from lawful combatants.⁸³

The very idea of a definition, even at the UN level, is perhaps a chimera. It would appear that the UN promulgates a treaty to deal with whatever type of terrorism is current at any time in history. The difficulty in taking account of any and all unforeseen circumstances is still insurmountable. This is the basic reason why all the conventions already negotiated, agreed and signed define terrorism within a specific framework. For that reason existing UN definitions of terrorism simply catalogue and explain components of terrorism within a particular context.

In spite of the difficulties involved in defining terrorism, there is a wide consensus that terrorism cannot be effectively addressed without international co-operation. In seeking co-operation, the United Nations has adopted 14 Conventions against terrorism.⁸⁴ Each of these defines acts of terrorism within the

⁸² Ibid at 13.

⁸³ *Terrorism and Human Rights* – Final Report of the UN Special Rapporteur Kalliopi K. Koufa 25 June 2004 available at <http://www.unhcr.org/refworld/publisher/UNSUBCOM.html> accessed on 20 June 2009.

⁸⁴ These conventions are;

The 1963 Convention on Offences and Certain other Acts Committed on Board Aircraft

The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft

The 1971 Convention for the Suppression of Unlawful acts against the Safety of Civil Aviation

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons

The 1979 International Convention against the Taking of Hostages

The 1980 Convention on the Physical Protection of Nuclear Materials

The 1988 Protocol for the Suppression of Unlawful acts of Violence at Airports Serving International Civil Aviation

supplementary to the Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation

The 1988 Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation

The 1988 Protocol for the Suppression of Unlawful acts against the Safety of Fixed Platforms on the Continental Shelf

The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection

The 1997 International Convention for the Suppression of Terrorist Bombings

The 1999 International Convention for the Suppression of the Financing of Terrorism

The 2005 Protocol to the Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation

ambit of the specific convention and do not offer a general definition. The thread, which connects the various definitions, is the element of or threat of terror.

Aware of these weaknesses, the General Assembly (GA) drafted a resolution that led to the creation of the 1972 Ad Hoc Committee on International Terrorism.⁸⁵ This Committee was given the task of defining terrorism. Discussions and debates centered on what types of acts characterise terrorism, the purpose of the acts and the target and character of the perpetrator.⁸⁶ The Ad Hoc committee established three subcommittees to examine the definition, causes and prevention of terrorism.

The committees received seven proposals on a definition. The Non-Aligned group⁸⁷ submitted a collective proposal, but France, Greece, Haiti, Iran, Nigeria and Venezuela made independent proposals. In their definition the non-aligned states sought to include terror acts of states, illegitimate state conduct and state-sponsored violent activities, especially by the armed forces. They accordingly defined terrorism as 'acts of violence committed by a group of individuals which endanger human lives and jeopardise fundamental freedoms the effects of which are not confined to one state.' The definition went on to add that this did not affect the right of self-determination or struggles against colonial or racist regimes.

The French definition elaborated on terrorism as a heinous act committed on foreign territory; Greece described terrorism as violent acts aimed at putting pressure on a government on a dispute or for personal satisfaction, but distinguished terrorists from freedom fighters; Haiti reserved political aspirations in their definition whilst Iran added violence against freedom movements as terrorism. Nigeria and Venezuela spoke in more or the less the same language as Iran.

The major distinction was that Western countries sought to limit the definition of terrorism to individual or group attacks excluding police and military operations of states, while the developing countries insisted on including state activities. In this atmosphere of dissention it was not possible to reach an agreement as to whether a definition was either necessary or desirable.⁸⁸ Several attempts at a definition came to naught, leading to the dissolution of the Committee in 1977. Having failed to achieve its principal

The 2005 International Convention for the Suppression of Nuclear Terrorism
Obtained from United Nations treaty collection at: <http://untreaty.un.org/>

⁸⁵ Haffery N *The UN and International Efforts to Deal with Terrorism* Pew Case Studies in International Affairs (1998) Case 313:1.

⁸⁶ Ibid.

⁸⁷ The group consisted of Algeria, Congo, Democratic Yemen, Guinea, India, Syria, Tunisia, Tanzania, Yemen, Yugoslavia, Zaire and Zambia.

⁸⁸ Ibid.

goal, the Committee offered no definition when it reported to the GA in 1979.⁸⁹ The UN continued to prohibit certain conduct, however, especially when directed at certain persons. This was done in order to maintain a balance in consensus building so as to create unanimity on the condemnation of terror incidents without having to invoke a contentious definition of the crime.

In the 1989 Resolution on Measures to Prevent Terrorism (Res 44/29), for example, the GA, in agreeing to 'convene an International Conference to define terrorism and to differentiate it from the struggle of peoples for national liberation,'⁹⁰ first gave recognition to the fact that terrorism 'endangers or takes human lives or jeopardises fundamental freedoms.' It also recognised that a 'study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own ought to be undertaken.'⁹¹

Serious consequences attend the politically discriminatory labelling persons or groups as terrorists. There is a West–East and North–South pull in this process. The less developed and less powerful countries question the notion that rich countries should enjoy a monopoly in calling an entity terrorist. More specifically, Arab countries have been at the forefront of high-level discussions on a definition on terrorism that would include state actors. The late Muamar Al-Qadafi of Libya once said that 'those who use missiles or fighter jets and rockets are legitimate. Those who use small bombs are considered terrorists.'⁹² This is why it is sometimes said that terrorism is the poor man's weapon.

In almost every international forum where terrorism is discussed, members of the Arab League, led by Libya, Syria and Iraq always insist that a definition of terrorism must recognise the distinction between terrorism and a legitimate expression of self-determination. Speaking on behalf of the Arab League at the UN General Assembly, soon after the events of September 11, the Libyan representative stated:

'We cannot condemn terrorism and fight it when it hits one country and turn a blind eye when it hits other countries. It is unacceptable to label as terrorism the struggle of people to protect themselves or to attain independence, while at the same time ignoring real terrorism and it's many faces such as occupation.'⁹³

⁸⁹ GAOR 34th Session, Supp No 37 (A/34/37) 1979.

⁹⁰ General Assembly Resolution 44/29 of 4 December 1989.

⁹¹ *Ibid.*

⁹² Riesman M W 'International legal responses to terrorism' 22 (1999) *Houston J International Law* 33.

⁹³ UN GAOR 56th session, 49th Plan. Mtg. UN Doc GA/9962 (2001) available at <http://www.un.org/news/press/docs/2001/ga9962.doc.htm> accessed on 12 November 2010.

It may be pointed out that, until recently, Arab countries were seen to devote much of their effort to forcing a re-examination of the social, political and normative foundations of international law as they relate to the realities of their sovereignty. For that reason, they have done little to contribute to the formulation and progressive development of a definition of terrorism. This is now changing. A vociferous and determined Middle East voice in the General Assembly ensures that Western notions of terrorism can no longer pass unchallenged. Serious consideration has to be given to the alternative voice. It is hoped that this will result in a proper negotiated framework, which seeks to obtain a consensus on a definition.⁹⁴

It will be remembered that the Resolution on Measures to Prevent Terrorism was based on several other UN Resolutions,⁹⁵ Declarations⁹⁶ and Reports,⁹⁷ which deal with various aspects of terrorism. The resolution could not avoid mention of the affirmation of 'the principle of self-determination and the inalienable right of all peoples under colonial and racist regimes ... and other forms of alien domination and foreign occupation and the legitimacy of their struggle.'⁹⁸ In this context, it was possible for the GA to pass the Resolution (without vote) in which it:

1. Once again unequivocally condemns, as criminal and unjustifiable, all acts methods and practices of terrorism wherever and by whomever committed, including those which jeopardise friendly relations among states and their security.
14. Requests the Secretary-General to continue seeking the views of Member States on International Terrorism in all its aspects and on ways and means of combating it including convening, under the auspices of the United Nations, of an International conference to deal with International terrorism in the light of the proposal referred to in the penultimate preambular paragraph of the present resolution.

In 1996, the GA, in Resolution 1210 of 17 December, decided to establish an Ad Hoc Committee to elaborate an International Convention for the Suppression of Terrorist bombings and, subsequently, an International Convention for the Suppression of Acts of Nuclear Terrorism to Supplement related existing International Instruments and thereafter to address means of further developing a comprehensive legal

⁹⁴ See 'Counter-Terrorism Implementation Task Force First Report of the Working Group on Radicalization and Extremism that Lead to Terrorism: Inventory of State Programmes' available at <http://www.un.org/terrorism/pdfs/radicalization.pdf> accessed on 5 October 2010.

⁹⁵ See Resolutions 3034 (xxvii) of 18 December 1972, 31/102 of 15 December 1976, 32/147 of 16 December 1977, 34/145 of 17 December 1979, 36/109 of 10 December 1981, 38/130 of 19 December 1983, 40/61 of 9 December 1985 and 42/159 of 7 December 1987 available at <http://www.un.org/documents/> accessed on 16 February 2009.

⁹⁶ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (Res 2625 (xxv)(annex)), the Declaration on the Strengthening of International Security (Res 2734 (xxv)) and the Definition of Aggression (Res 3314 (xxiv) annex).

⁹⁷ See Recommendations of the Ad Hoc Committee on International Terrorism contained in its report to the GA at its thirty-fourth session (thirty-fourth session, supplement No 37 (A/34/37) Chapter IV).

⁹⁸ Supra n 55 Preamble.

framework of Conventions dealing with International Terrorism.⁹⁹ The Ad Hoc Committee's mandate was further framed by two declarations adopted by the GA; that is, the Declaration on Measures to Eliminate International Terrorism¹⁰⁰ and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism.¹⁰¹ The former defines terrorism as 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'.

Since its establishment, the Ad Hoc Committee has negotiated several texts resulting in the adoption of three treaties.¹⁰² The latest of these Conventions, the Nuclear Terrorism Convention came into force nearly two years after its ratification. Like all sectoral conventions before it, the Convention criminalises specific, concrete acts of terrorism and is intended to prevent attacks involving a broad range of possible targets including nuclear power plants and nuclear reactors. It also applies to threats and attempts to commit such crimes. Under the Convention, the alleged offenders must be either prosecuted or extradited. Not quite unexpectedly, the three Conventions that have been drafted by the 1996 UN Ad Hoc Committee do not provide a general definition of terrorism. It is hoped that when the committee completes its work on the draft text of a comprehensive convention on terrorism it will, perhaps, come up with a comprehensive definition.

Presently, preliminary agreements have been reached on the majority of the draft treaty's 27 articles, but issues of the Convention's scope,¹⁰³ the preamble, a definition of phrases¹⁰⁴ and a definition of terrorism¹⁰⁵ are still outstanding. The old debate around the inclusion of state-sponsored terrorism and acts

⁹⁹ The latest comprehensive report of the work of this Committee is available on the United Nations Website. (Report of the Ad Hoc Committee established by the General Assembly Resolution 51/210 of 17 December 1996 Eighth Session (28 June – 2 July 2004) General Assembly official records, 59th Session, Supplement No 37 [A/59/37] at <http://www.un.org> accessed on 6 May 2012.

¹⁰⁰ Resolution 49/60 of 9 December 1994.

¹⁰¹ Resolution 51/210 of 17 December 1996.

¹⁰² These are: the International Convention for the Suppression of Terrorist Bombings adopted by the GA in Resolution 52/164 of 15th December 1997 and came into force on 23 May 2001, the International Convention for the Suppression of the Financing of Terrorism Adopted by the GA in Resolution 54/109 of 9th December 1999 and came into force on 10 April 2002 and the International Convention for the Suppression of Acts of Nuclear Terrorism Adopted by the GA in Resolution 59/290 of 13th April 2005 and came into force on 7 July 2007. (See interim report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996 available at <http://www.un.org/law/terrorism/index> accessed on 14 July 2010).

¹⁰³ Art 18.

¹⁰⁴ Art 1.

¹⁰⁵ Draft Article 2.1 of the Comprehensive Convention states:

Any person commits an offence within the meaning of this convention if that person, by any means, unlawfully and intentionally causes:

Death or serious bodily injury to any persons; or

of state terrorism still persists. In their submissions, Cuba, Iraq, Lebanon, Libya, Pakistan, Syria and Sudan are of the view that the definition should be expanded to include state terrorism. Other delegations hold that, while certain acts of state conduct, referred to as state terrorism, may be included in the Convention, other conduct may be the subject of other international control norms, such as the law governing the responsibility of states and the prohibition of the use of force under Article 2 (4) or chapter VII of the UN Charter.¹⁰⁶

Malaysia has, on behalf of the Organisation of the Islamic Conference (OIC), submitted a proposal seeking to include the terms 'terrorism' and 'terrorism crime' in Article 1 of the convention.¹⁰⁷ In addition Malaysia seeks to add a new paragraph to Article 2 on the definition of terrorist acts, which would unequivocally state that 'the right of people's struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime'.¹⁰⁸

This position is not without merit. First, several GA resolutions recognise and support the legitimacy of armed struggle. For example, in 1985, the GA adopted a resolution, which 'unequivocally condemns as criminal all acts, methods and practices of terrorism'.¹⁰⁹ At the same time it reaffirmed each people's right to self-determination and the legitimacy of struggles against colonial and racist regimes and other forms of alien domination.¹¹⁰ Secondly, the right to self-determination has now obtained the status of *jus cogens* in international law.¹¹¹ The flip side, of course, is that legitimate armed struggle should be carried out in the context of the laws of armed conflict and ought not to be the subject of a comprehensive

Serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility or the environment; or

Damage to property, places, facilities, or systems, referred to in par. 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an International organisation to do or abstain from doing any act.

¹⁰⁶ See UN Website: <http://www.unis.unvienna.org/unis/pressrels/2006/13105.html> accessed on 9 March 2009.

¹⁰⁷ Malaysia, on behalf of the OIC Group, A/C.6/55/WG.1/CRP.30, reproduced in A/C.6/55/L.2 (19.10.2000): Report of the Working Group at 37–38.

¹⁰⁸ *Supra* n 99.

¹⁰⁹ GA/RES/40/61 *Measures to Prevent International Terrorism* (9 December 1985) where the GA '2. Unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whoever committed, including those which jeopardize friendly relations among States and their security [F]urther urges all States, unilaterally and in co-operation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security.' Other resolutions using similar language may be: A/RES/36/109; A/RES/34/145; A/RES/32/147 A/RES/31/102; A/RES/3034(XXVII) all available at <http://www.un.org/en/terrorism/resolutions.shtml> accessed on 15. 1. 2010

¹¹⁰ *Ibid.*

¹¹¹ Brownlie I *Principles of Public International Law* 7 (1990) 512-515

terrorism convention. On the other hand it should be remembered that even International humanitarian law contains several provisions that expressly prohibit acts of terrorism.¹¹²

Issues regarding the place of state armies in the terrorism dialogue and the relationship between the comprehensive convention and the sectoral conventions are still under discussion. Again, the West–East tension is manifest. The West takes the view that activities of armies in the service of their countries should not be covered by the convention and that the comprehensive convention should not subordinate the sectoral conventions. Predictably the East takes the contrary position. The rationale for the comprehensive convention is to improve on the existing conventions and not to do away with the current regime, which deals with specific acts of terrorism. In any event, to make the comprehensive convention secondary to the other conventions would remove the spur for those countries, which have not ratified the same from doing so.

As the disagreements over definitions and jurisdiction subsisted there was an attempt to seek an agreement on the less contentious parts of the convention and to return to the definitional part later, but this was rejected.¹¹³ One of the last drafts of the convention circulated for discussions in 2005 gave the following definition of terrorism:

1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
 - (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

¹¹²Article 33 of the Fourth Geneva Convention provides in part that “Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” A similar provision is found in the two Additional Protocols to the four 1949 Geneva Conventions: Article 51(2) of Protocol I on international armed conflict and 13(2) of Protocol II on non-international armed conflict provide in part that “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Article 4(2) of Additional Protocol II provides that “acts of terrorism” against civilians and non-combatants “are and shall remain prohibited at any time and in any place whatsoever”. International humanitarian law also contains provisions which, without using the term “terrorism”, prohibit acts that – depending on the intent, the nationality of the perpetrator and victim(s) and other such considerations – may be prohibited by one of the treaties against terrorism. The prohibition in Article 3 common to the four Geneva Conventions of acts of violence against “persons taking no active part in hostilities”, for example, would apply to some acts of terrorism. Similarly, the prohibition of attacks against nuclear power plants in Article 56 of Additional Protocol I would apply to some acts prohibited by the 2005 Convention against nuclear terrorism.

¹¹³ Dycus S, Banks W C & Raven-Hansen P *Counter Terrorism Law* (2007) 6.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of the present article.

The GA's failure to define terrorism is no happenstance. It is a direct result of what the UN is and how it works. The Organisation is no more than a collection of states saddled with procedures that tend to favour the wealthy and powerful. On the other hand, the task of devising a legal definition falls within the remit of the Legal Committee – also known as the Sixth Committee – which includes all 193 member states of the UN.¹¹⁴ This Committee, in practice, operates by consensus. Proceedings in the Sixth Committee often progress through regional body representation.

Within the Sixth Committee the Organisation of the Islamic Conference (OIC) – whose 57 members include states such as Sudan, Saudi Arabia, Syria and Iran – has consistently and through the years, insisted that any definition of terrorism exempt 'organisations engaged in struggles against colonial domination and foreign occupation.'¹¹⁵ In the same breath the OIC insists that regular armed forces of sovereign states be subject to UN rules concerning terrorism.¹¹⁶ This position finds support from many scholars who not only define terrorism in the light of violence and coercion by state actors but also by state agencies.¹¹⁷ As a matter of fact it is alleged that the state is the greatest perpetrator of terrorism today.¹¹⁸ This dissimilarity of position does not help in moving towards an agreed definition. In one sentence: While terrorism is perhaps the defining security threat of our time, the UN has failed to define it.¹¹⁹

Besides the political maneuvering, two divergent views abide at the UN GA: on one side are the 'puritans' who seek to walk the straight and narrow and who observe that the international community may not successfully engage in efforts against terrorism without a clear definition of the conduct, acts or practices that constitute terrorism; on the other side are the pragmatists, who, admitting the difficulties of defining the term, direct attention away from efforts to secure a definition to obtaining an agreement on the different aspects of terrorism. Either way, the important thing is that each state should criminalise all acts

¹¹⁴ There are two observer states and 11 other 'states' whose sovereignty is disputed.

¹¹⁵ *Supra n 65*.

¹¹⁶ *Ibid*.

¹¹⁷ Laquer W *The Age of Terror* London (1987) *Passim*.

¹¹⁸ Livingston N *The War against Terrorism* (1982) 11.

¹¹⁹ At the UN the troubling question of a definition is not one of terrorism only. The understanding of the meaning and scope of the term 'minorities' has been important for both the UN Commission on Minorities and Non-Discrimination (whose work programme has entailed the study of minority issues) and for the Committee under the International Covenant on Civil and Political rights – which has to interpret and apply Article 27 of the Covenant which guarantees minority rights – but neither body has in its work succeeded in agreeing upon a definition. Again, the International Law Commission decided not to proceed with a definition of an international watercourse (or an international drainage basin) preferring to adopt draft articles on the matter, deliberately turning away from definitional contests. See, Higgins R and Flory M (eds) *Terrorism and International Law* (1997)14.

prohibited in the UN's anti terrorism conventions and apply heavy punishment in attempts to deter would-be terrorists.

(ii) The Security Council

Against this background of GA disagreement on a definition, it sometimes appears as though the SC takes unilateral decisions by passing resolutions that are binding on all member states of the UN without a discussion and consensus. For example, 'between 1985 and 2001 the SC adopted a range of measures addressing terrorist threats to peace and security.'¹²⁰ After the September 11 the problem of the lack of a definition became more pronounced as the SC adopted general legislative measures against terrorism without defining it.¹²¹

The totality of the SC's resolutions has been to encourage member states to adopt their own definitions of terrorism.¹²² A non-binding Council definition of late 2004 fails to remedy the serious difficulties caused by the lack of an operative definition in Council practice.¹²³ Following several acts of hostage-taking in the previous year, in 1985 the SC at its 2637th meeting on 18 December 1985 adopted Resolution 579 (1985) in which it recalled the statement of 9 October 1985 by the President of the SC,

[r]esolutely condemning all acts of terrorism, including hostage-takings [and] urged further development of international co-operation among states ... to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of International terrorism.¹²⁴

The wording of Resolution 579/85 was unusual. This was the first time that the SC discussed terrorism in general terms without a specific incident connection.¹²⁵

SC Resolution 638,¹²⁶ for example, was adopted against the background of more hostage-takings, including a UN Military observer in Lebanon, and it required states to 'prevent, prosecute and punish ... all

¹²⁰ Saul B 'Definition of terrorism in the UN Security Council: 1985–2004' (2005) 4 *Chinese Journal of International Law* 141–166 at 141. Ben Saul traces the SC treatment of terrorism from the 1972 attack on Israeli athletes at the Munich Olympics to the 2004 Madrid Train Bombings.

¹²¹ *Ibid.*

¹²² Redress Report: Terrorism, counter terrorism and torture: international law in the fight against terrorism available at www.redress.org/downloads/publications/TerrorismReport.pdf accessed on 5 June 2011.

¹²³ *Supra* n 112.

¹²⁴ S/Res/579 (1985) of 18 December 1985.

¹²⁵ *Supra* n 112.

¹²⁶ The SC adopted Resolution 638 as a consequence to Israel's abduction of Sheikh Abdul Karim Obeid, the leader of the Hezbollah in Lebanon, on 28 July 1989. He was taken from his home in southern Lebanon to Israel. Obeid was held responsible, among other activities, for the kidnapping of an American Marine Colonel William R. Higgins in February 1988. Israel had hoped to use the sheikh as a card to affect an exchange of prisoners and hostages in return for all Shi'ites held by it. Resolution 638,

acts of hostage-takings and abductions as manifestations of terrorism.¹²⁷ Instead of condemning hostage taking within the 1979 Hostages Convention, however, the SC enlarged the operational effect of the Convention by terming all hostage-taking terrorist action. This general treatment of terrorism continued in the SC¹²⁸ with Resolution 1566 of October 2004, in which the SC, though not laying down a general definition of terrorism, delivered itself in terms often interpreted as conveying what the SC deems to be terrorism. In this resolution the SC reaffirmed all prior resolutions concerning threats to International peace and security caused by terrorism, and the need to combat terrorism in all its forms and manifestations and acting under Chapter VII of the UN Charter;

1. Condemn[ed] in the strongest possible terms all acts of terrorism irrespective of their motivation, whenever and by whomever committed, as one of the most serious threats to peace and security;....
2. Recall[ed] that criminal acts, including against civilians, committed with intent to cause death or serious bodily injury, or taking hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an International organisation to do or abstain from doing any act, which constitute offences within the scope of and as defined in the International Conventions and Protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and calls upon all states to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

Through Resolution 1566, the SC appears to have sought to consolidate and crystallise all previous sectoral definitions of terrorism and to provide a generic template from which future state and global definitions would draw. It is important to note that Resolution 1566 (2004) was passed unanimously. This was a strong message and a giant step towards codifying a definition in terms of a composite SC appreciation of the elements of terrorism. The effect of this resolution is that many states have sought to

unanimously adopted, called for the 'immediate safe release of all hostages and abducted persons, wherever and by whomever they are being held.'

¹²⁷ S/Res/638 (1989) of 31 July 1989.

¹²⁸ The SC, for example, termed the 1989 assassination of the Lebanese President in Beirut a terrorist attack; the attack on a civilian aircraft overflying the Sahara and in which more than 400 people died was termed a terrorist act and after the Gulf War, the SC required Iraq 'to inform the Council that it will not commit or support any act of International terrorism ... and renounce all acts, methods and practices of terrorism.' *Supra* n 73.

mimic the elements of terrorism contained in the resolution, sometimes with serious negative consequences.¹²⁹

(iii) UN Committees

On 4 December 2004 the United Nations Security Council's High Panel of Threats, Challenges and Change released its report, in which it decried the lack of an International agreed definition of terrorism.¹³⁰ The Panel, while welcoming the SC's Resolution 1566 (2004) observed that 'lack of agreement on a clear and well-known definition undermines the normative and moral stance against terrorism and has stained the United Nations image and that achieving a comprehensive convention on terrorism, including a definition, is a political imperative.'¹³¹ The Panel then proceeded to suggest that a definition of terrorism should include a description of terrorism as

'any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council Resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilian or non-combatants, when the purpose of such act, by its nature or context is to intimidate a population, or to compel a Government or an International organisation to do or to abstain from doing any act.

This definition, whilst commendable, is yet to receive an unequivocal acceptance in the General Assembly.

(d) The African Union

The Organisation of African Unity (which was the predecessor to the African Union) Convention on the Prevention and Combating of Terrorism,¹³² provides:

For the purpose of the convention:

'Terrorist act' means

any act which is a violation of the criminal law 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 and is calculated or intended to:

¹²⁹ Sometimes questions arise as to the binding nature of SC resolutions. Without definitively dealing with this issue, it is important to note that SC resolutions establish a 'policy' for other similar resolutions and provide a practice for custom formation.

¹³⁰ 'A More secure world: Our shared responsibility' – Report of the High Level Panel on Threats, Challenges and Change (Executive summary) (2004) 48 Para 159. United Nations website available at www.un.org accessed on 15 June 2009.

¹³¹ Ibid Para 159.

¹³² Art 3. Adopted at Algiers on 14 July 1999.

- i) Intimidate, put in fear, force, coerce, or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act to certain principles; or
- ii) Disrupt any public service, the delivering of any essential service to the public or to create [public emergency; or
- iii) Create general insurrection in a state.

This wide OAU definition has greatly influenced many member states in their various attempts at a definition and justifies the broad and expansive meanings given to terrorism by both Kenya and Uganda.

4. Definitions in anti-terrorism legislation in Kenya and Uganda

The lack of leadership by the UN in providing a single definition of terrorism has given way to different states promulgating diverse definitions of what in their view constitutes terrorism. The definitions are as many and as varied as there are states.

Kenya's Prevention of Terrorism Act and Uganda's Anti Terrorism Act, for example, provide different definitions of the offence. Kenya's Act does not define terrorism but describes certain acts or threats as 'terrorist acts'¹³³ if committed with the intention of: intimidating or causing fear amongst members of the public or a section of the public; or intimidating or compelling the Government or international organization to do, or refrain from any act; or destabilizing the religious, political, constitutional, economic or social institutions of a country, or an international organization. The Act exempts acts committed in pursuance of a protest, demonstration or stoppage of work from the definition of terrorist acts so long as they are not intended to result in any of the range of consequences enumerated therein.¹³⁴

Uganda's Anti Terrorism Act¹³⁵ defines terrorism as 'the use of violence or threat of violence with intent to promote or achieve political, religious, economic, and cultural or social ends in an unlawful

¹³³ Section 2 (1) defines a 'terrorist act' as an act or threat of action –

- (a) which-
 - I. involves the use of violence against a person;
 - II. endangers the life of a person, other than the person committing the action;
 - III. creates a serious risk to the health or safety of the public or a section of the public;
 - IV. results in serious damage to property
 - V. involves the use of firearms or explosives;
 - VI. involves the release of any dangerous hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;
 - VII. interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;
 - VIII. interferes or disrupts the provision of essential or emergency services;
 - IX. prejudices national security or public safety;

¹³⁴ Ibid.

¹³⁵ Section 7 (2) Anti Terrorism Act.

manner, and includes the use of violence or threat of violence to put the public in fear or alarm.’ This definition is amplified by the further designation of a person as a terrorist if that person ‘unlawfully and intentionally makes, manufactures, delivers, places, discharges or detonates an explosive or other lethal device into or against a place of public use, or state or government facility, a public transportation system or infrastructural facility.’¹³⁶ Like Kenya, Uganda’s legislation defines an act as terrorism only if it is committed with intent to cause death or serious bodily injury, or to cause extensive destruction of a place, facility or system, where the destruction results in or is likely to result in major economic loss.¹³⁷

It may be observed that both Kenya and Uganda adopt broad definitions and include the intention or purpose for any act considered a terrorist act. This formulation is consonant with definitions in most of the Commonwealth countries and it follows the Commonwealth Anti Terrorism Model law.¹³⁸ Intention or motive is thus a core component of an act of terrorism and distinguishes it from ordinary crime.

5. Challenges in obtaining a universal definition of terrorism

Over the years, finding an agreed definition of terrorism has proved to be a difficult and frustrating exercise. Various reasons are advanced. First, it is admitted that the meaning and usage of the term has changed several times in the past two hundred years.¹³⁹ Secondly, it is said that ‘terrorism, in the most widely accepted contemporary usage of the term, is fundamentally and inherently political.’¹⁴⁰ Because of this it is difficult to distinguish it from other forms of political violence. The line separating guerrilla warfare from terrorism is very thin, often begging the question whether there can be such a thing as legitimate terrorism.

On the political plane, those engaged in resistance action – guerrillas, underground and national liberation movements – often have to justify their position not just by the choice of positive sounding names but by a continual justification of their actions.

If we accept the thesis that terrorism is ineluctably linked to politics and power, why then should it be so difficult to define? The reason may be found in the fact that a shift in the power balance from guerrilla warfare to legitimate government influences the label and vocabulary attached to an individual and the organisation s/he represents. Of course, nobody confuses terrorism with ordinary criminal conduct. The

¹³⁶ Ibid Section 8(1).

¹³⁷ Ibid.

¹³⁸ Commonwealth Anti Terrorism Model Law available at <http://www.hrca.org.au/terrorism.htm> accessed on 2 May 2010.

¹³⁹ Hoffman B *Inside Terrorism* (1998) 13–15.

¹⁴⁰ Whittaker D J (ed) *The Terrorism Reader* (2001) 5.

self-sacrifice of a terrorist distinguishes him or her from the self-interest of the common criminal engaged in an act for personal gain.

Following the Second World War, the meaning of terrorism reverted to the revolutionary connotations with which it is most commonly associated today. The term was henceforth largely associated with radical activism in reference to the violent uprisings then being pursued by various nationalist groups in Asia, Africa and the Middle East.¹⁴¹ 'During the late 1960s and 1970s, terrorism continued to be viewed within a revolutionary context, but the usage expanded to include nationalist and ethnic separatist groups outside a colonial or neo-colonial framework (as well as radical, entirely ideologically motivated organisations).'¹⁴²

Although the revolutionary cum ethno-nationalist, separatist and ideological exemplars continue to characterise our most basic understanding of the term, in recent years, 'terrorism' has been used to represent broader, less distinct incidents associated with attempts to destabilise the West as part of a vast international conspiracy.¹⁴³ In this context, terrorism is seen as a weapon of the weak against stronger, more powerful states. Terrorism enables individuals and organisations to wage non-conventional war with the use of basic tools of violence. With changes in the connotations of the term – at one time reflecting the positive and at another the negative – the political dialogue that influences the interpretation has swayed the legal discourse, resulting in a bewildering array of definitions.

The definition and conceptualization of terrorism, however, is not only the preserve of philosophers and academics. It is a real concern that impacts on the everyday lives of people. The implications of labelling a group a terrorist organization, as opposed to a guerrilla group, are far-reaching, having consequences for, inter alia, the recognition and diplomatic status of leaders, funding and international resource support.

Is it possible to move the language of terrorism from the political and subjective to the neutral and objective? 'Scholars who have sought to provide a lead in defining the concept have painstakingly tried to transform it from a polemical tool to an analytical term.'¹⁴⁴ This is an intractable undertaking, however, because the offence is so intimately tied to ideology, thus defying a purely intellectual interpretation.

¹⁴¹ Ibid.

¹⁴² Whitaker *Supra* n. 128 at 6.

¹⁴³ Ibid.

¹⁴⁴ Crenshaw M *Terrorism in Context* (1995) 7–15.

The desire to recognise and protect 'the legitimacy of the struggle [against] foreign occupation by all available means, including armed struggle' and 'the right to resist' are constant refrains from the UN GA (reflecting the demands of the Organisation of Islamic States and most of the developing countries to keep the Palestinian struggle outside the terrorist label).¹⁴⁵ Unavoidably connected to the much-hallowed right to resist is the right to self-determination in all its manifestations. The argument is that the right to self-determination should be reserved in any definition of terrorism.¹⁴⁶

The second ground for disagreement centers on whether state terrorism should be included in the definition and that state terrorism should be defined to include violent acts by the military forces of a state. On this second ground, the UN GA, which traditionally inclines towards the developing countries (because of their numerical majority vote) passed the Elimination of Terrorism Declaration (1989)¹⁴⁷ which confirmed 'the inalienable right to self-determination and the independence of all peoples under colonial and racist regimes and other forms of alien domination and foreign occupation.' This declaration alludes to state terrorism in terms of 'the world-wide persistence of acts of International terrorism in all its forms including those in which states are directly or indirectly involved.'

Traditionally, the West has been reluctant to permit a definition of terrorism, which includes state actors. Two principal reasons may be advanced: First, a definition, which includes state actors, may expose the military personnel of states to prosecution. Secondly, America, for example, does not allow trade with 'terrorists'. By confining the meaning of the word to non-state actors, American corporations can continue to exploit trade links with repressive regions engaged in acts of state terrorism. As examples, Pakistan, Turkey, Indonesia and China intimidate, bully and terrify large segments of their population but are open to trade links with the United States. On another level, the frequent Israeli incursions into Palestinian lands are often criticised and labelled terrorism by the Arab League. An inclusion of state action under a terrorism definition would thus have deep political consequences.

¹⁴⁵ See General Assembly Resolution A/RES/37/43, adopted on 3 December 1982. It 'Reaffirms the legitimacy of the struggle for independence, territorial integrity, national unity and liberation from colonial occupation by all available means, including armed struggle. Commission on Human Rights Resolution 2002/8' 'recalling particularly GA Res 37/43 of 3 December 1982 reaffirming the legitimacy of the struggle of people against foreign occupation', was adopted on 15-04-2002; 40 states for, 5 against and 7 abstentions. Commission on Human Rights Resolution 2003/6 'recalling particularly GA Res 37/43 of 3 December 1982 reaffirming the legitimacy of the struggle of peoples against foreign occupation and for self-determination', was adopted on 15-04-03, 33 votes for, 5 against and 15 abstentions.

¹⁴⁶ Noteboom J 'Terrorism: I know it when I see it' (2002) 81 *Oregon Law Review* 553-558. Noteboom argues that in their various forms and shapes, definitions of terrorism ought to recognise the right of a people to free themselves from foreign domination.

¹⁴⁷ See A/RES/44/29 72nd plenary meeting of 4 December 1989, available at <http://www.un.org/documents/ga/res/44/a44r029.htm> accessed on 26 May 2010.

6. Conceptual clarification of the offence of terrorism

The definition of terrorism is controversial and contentious. Voluminous scholarship addresses the term from multidisciplinary aspects including political theory, foreign relationships, philosophy, and international law.¹⁴⁸ Most authors agree that 'definitions of terrorism are controversial for reasons other than the purely conceptual.'¹⁴⁹

Political leaders, as well as the media, have perfected the technique of using the term in general reference to all forms of violent criminal activity and political extremism. For this reason, the legal definition of the term has been condemned to an ideological or political bias. There is a need to liberate the terminology from these political shackles and to break down its basic elements so as to obtain its actual legal meaning.

Because terrorism is practiced in so many forms, any attempt to achieve a general definition runs the risk of allowing certain important features to slip by unnoticed. It is now more than forty years since Walter Lacquer lamented that 'the term terrorism has been used in so many different senses as to become almost meaningless, covering almost any, and not necessarily political, act of violence.'¹⁵⁰ This remark, which still holds true, makes it even more necessary to obtain a definition.

Conceptual issues in respect of the offence of terrorism must seek to answer five interrelated questions:

First, is terrorism necessarily illegal (a crime)? Second, is terrorism necessarily undertaken to realise some particular type of good, and if so, what is it? Third, how does terrorism necessarily differ from conventional military operations in a war, a civil war, or so-called guerrilla warfare? Fourth, is it necessarily the case that opponents of the government engage in terrorism? Fifth, is terrorism a distinct strategy in the use of violence and, if so, what is that strategy?¹⁵¹

In seeking to answer these questions, one hopes to attain a distinct meaning of the term that may be used for legal and communication purposes. Almost all of the definitions of terrorism discussed in this thesis presuppose its illegality.

In most jurisdictions, the constitutive elements of the offence exist as stand-alone crimes with the qualification that terrorism is politically motivated and directed at influencing an audience other than the

¹⁴⁸ Crenshaw M *Explaining Terrorism: Causes, Processes and Consequences* (2011) 1-32.

¹⁴⁹ Gibbs J P 'Conceptualisation of terrorism' (1989) 54 *American Sociological Review* 329-340 at 329.

¹⁵⁰ Lacquer W *Terrorism* (1997) 6.

¹⁵¹ *Supra* n 39 at 330.

victim of the crime. What do we make of those jurisdictions in which terrorism is tolerated, especially when it is directed at victims outside the state?

Conceptually it may be necessary to settle the debate as to whether terrorism is a crime because it is morally reprehensible (*malum in se*)¹⁵² or because the law defines it as such (*malum quia prohibitum*).¹⁵³ This distinction is relevant because, first, the underlying difference is the basis on which many common law offences were developed,¹⁵⁴ and it may therefore assist in understanding the basis for the condemnation that terrorism attracts. Characterising terrorism as a crime *malum in se* affects how we think about its definition and legal consequences. It influences our view of it as an absolute crime, inviting moral and legal prohibitions.

Secondly, the *malum in se* connotation reduces our sympathy for any person accused of the offence and invites an enlarged definition, thereby allowing stern punishment even for ordinary offences once they are termed 'terrorist'. Thirdly, terrorism as a crime *malum in se* reduces our desire to maintain the rule of law, even when human rights are threatened. Yet, if we conflate law and morality, we lose the distinction between the two and often preclude any reasonable exceptions to the rules that govern criminal conduct.

Several authors think that terrorism is morally indefensible,¹⁵⁵ and, in most jurisdictions, it is criminalised. But the critical question is whether terrorism should be criminalised because it is morally reprehensible or because it is a wrong against society.

It has been noted that the 'use or threat of use of violence' permeates all definitions of terrorism. The violence is directed at animate and inanimate objects. However, 'writers often suggest that only humans can be targets of violence,'¹⁵⁶ suggesting that the destruction or damage to buildings, animals and the environment does not qualify as terrorism. Nonetheless, because the use or threat of violence is directed at influencing a third party, the destruction of inanimate objects may well instill fear in human beings.

¹⁵² Latin phrase meaning 'wrong or evil in itself'. The phrase is used to refer to conduct assessed as sinful or inherently wrong by nature, independent of regulations governing the conduct.

¹⁵³ Latin for 'something is wrong because it is legally prohibited'.

¹⁵⁴ Canadian Law Dictionary Yogis J A (2003)

¹⁵⁵ See Primoratz I 'What is terrorism?' in I Primoratz (ed) *Terrorism: The Philosophical Issues* (2004) 24; Naverson J 'Pacifism and terrorism: why we should condemn both' (2003) 17(2) *International Journal of Applied Philosophy* 14 and Rosenbaum A S 'On terrorism and the just war' (2003) 17(2) *International Journal of Applied Philosophy* 180.

¹⁵⁶ *Ibid.*

The definitive component of the offence of terrorism is a political objective, without which there would be no difference between a terrorist and a murderer. It would appear to be now settled that for an offence to be an act of terrorism there must exist an intention to influence the political field so as to obtain a power advantage.¹⁵⁷ With regard to military operations and terrorism, it would appear that the classic disparity between the two lies in one being in the service of a legitimate state and the other that of a non-state actor.

A disturbing question still persists: can it be said that states engage in terrorism? An affirmative answer to this question takes us back to the first inquiry as to whether an act is a crime because state authorities hold it as such or the law prohibits it – for if the law sanctions an act, that act cannot be illegal. Perhaps the criteria for omitting the armed forces of a state from a definition of terrorism would be that a military operation is carried out by a recognisable unit, acting in the open, as opposed to the surreptitious, covert activities of terrorists. By parity of reasoning, state terrorism occurs when a state agent, acting on the orders of a superior, engages in acts of terror as an underground activity. When a state engages in open and admitted acts of terror, it is perhaps (justified or not) an act of law enforcement as accepted within that state. Violence as an essential aspect of the strategy of terrorism contributes to the normative goal and is present in all acts normally referred to as terrorism.

Two other points may be raised with respect to a conceptual understanding of terrorism. It is perhaps true that there are several types of terrorism. A distinction may have to be made between domestic terrorism, international terrorism, state terrorism, economic terrorism, social terrorism, etc. 'A common denominator for all these forms of terrorism is the deliberate, politically inspired use of, or threat to use, violence against civilians or civilian targets by a weaker side in an asymmetrical conflict.'¹⁵⁸

The asymmetry in the rank and status of the actors is clearer in a conflict between non-state and state actors, but it is vague when the roles change. Thus to hold out a state as a terrorist, a different evaluation standard is required. This, of course, may be found in the international law of armed conflict,

¹⁵⁷ A divergence of thought is expounded by Laquer, who makes reference to the labour unrest in the American labour movement (e.g. the 1 October 1910 Los Angeles Times building bombing, which killed 20 people and destroyed the building. Calling it 'the crime of the century', the newspaper's owner, Harris Gray Otis, blamed the bombing on the unions, a charge denied by the unionists; the 25 December 1910 incident destroyed a portion of the Llewellyn Iron works in Los Angeles, where a bitter strike was in progress. In April 1911 James McNamara and his brother John McNamara, Secretary-General of the International Association of Bridge and Structural Workers, were charged with the crimes of murder and conspiracy in dynamiting of the Llewellyn Iron Works. Though termed as acts of terrorism, these acts had no political goal. Numerous other acts of violence with no political motivation point to the fact that serious considerations should be given to limiting use of the terrorism concept to crimes under the political umbrella.

¹⁵⁸ Hoffman B 'Defining Terrorism' in *Inside Terrorism* (1998) 13.

which sets out the permissible standards of state action¹⁵⁹ and criminalises others as either 'war crimes' or 'crimes against humanity'.¹⁶⁰ Standard reference to a political goal as a motivation for terrorism appears to have assumed a broad view of politics to encompass a religious or ideological objective. Thus the actions of Al Qaeda, while dressed up as religious in their objective, are inextricably political.

7. Distinction between 'ordinary' crime and terrorism

Crime is not difficult to define. It is legally prohibited behavior that causes harm to an individual or a group of persons.¹⁶¹ Murder, arson, destruction of property, rape and robbery are all easy to recognise and categorize as crimes. It is not so easy with terrorism. There is, however, a general agreement that terrorism is an attack on society and its democratic institutions.

Terrorism, though a crime, is the use of indiscriminate violence as a weapon of political expression. The motive or intention of the perpetrator of terrorism stands them apart from the ordinary criminal. Whilst the ordinary criminal acts for personal benefit, the terrorist is driven by what they consider a higher goal and often acts against society as a whole and seldom against an individual.

In many jurisdictions, definitions of terrorism refer to the purpose for the threat or act,¹⁶² invoking a desire by the suspect to provoke 'a state of terror in the general public,'¹⁶³ as a motivation for the act.

A problem, however, arises with the classification of terrorist related offences. Often, definitions of these crimes prohibit an especially wide array of offences. The prohibited acts typically – though not necessarily – also characterise terrorist acts. The identifying criteria are that the acts were committed with intent to intimidate a civilian population and coerce a government to do or abstain from doing a certain act. This approach, though viable, creates ambiguity as it raises questions as to whether the list of terrorist related offences is limited to those often listed in statutes, or perhaps, that the list contains examples. This

¹⁵⁹ Dr Hans Peter Gasser, former senior legal advisor at the International Committee of the Red Cross (ICRC) outlines the basic rules of IHL. He states: Persons who are not, or no longer, taking part in hostilities shall be respected, protected and treated humanely. They shall be given appropriate care without discrimination. Captured combatants and other persons whose freedom has been restricted shall be treated humanely. They shall be protected against all acts of violence, in particular against torture. If put on trial, they shall enjoy the fundamental guarantees of a regular judicial procedure. The right of parties to an armed conflict to choose methods or means of warfare is not unlimited. No superfluous injury or unnecessary suffering shall be inflicted. In order to spare the civilian population, armed forces shall at all times distinguish between the civilian population and civilian objects on the one hand and military objects on the other. Neither the civilian population as such nor individual civilians or civilian objects shall be the target of military attacks.

Available at <http://www.icrc.org> accessed on 10 June 2010.

¹⁶⁰ See Article 7 and 8 of the Rome Statute of the International Criminal Court, UN Document a/CONF.183/9.

¹⁶¹ See Williams G 'The Definition of a Crime' (1955) *Current Legal Problems* 107.

¹⁶² Several treaties prohibit 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'

¹⁶³ See for example GA Res. 51/ 210, 17th December 1996, UN Doc., A/ RES/ 51/210 (1996)

may be explained by the fact that in international treaties, and largely in domestic law, the distinct features of terrorist offences do not, on their own, constitute terrorism. Motive to commit terrorism is a fundamental element without which the act may not amount to terrorism.

While terrorism is a crime, it is obvious that not all crime is terrorism. The possible convergence of crime and terrorism is not union, and a different standard has to be used to evaluate the two. Ultimately, terrorism is a peculiar type of crime. It is a very specific and distinctive, one where motive makes a critical difference.

8. Conclusion: Finding a working definition

In this chapter the thesis examines the history, developments and difficulties in attempts to obtain an agreed definition of terrorism. It analyses the challenges inherent in finding an acceptable definition, but notes that there are common elements in definitions both in the international and domestic arenas. It has been shown that international law influenced the drafting of definitions of terrorism in Kenya and Uganda, and, more generally, in the manner in which these states have dealt with the crime.

Amidst the disagreements on definition, the thesis argues that a response to terrorism would be more effective if a common analysis, explanation and understanding of the phenomenon could be reached.

A definition is necessary because:

- It permits a coherent approach to state definitions - and reduces the possibility of abuse of power
- it gives states a complete monopoly and discretion on what offences should be included in its anti terrorism measures
- It narrows the choice of means whereby states may combat the offence and determine appropriate sentences the offences should attract.

In summary, the absence of an agreed definition inhibits a coordinated approach in the fight against terrorism. It makes each offence specific to each state and permits an abuse of the law by allowing governments to define terrorism in a manner that renders it applicable to political opponents.¹⁶⁴ A state is thereby able to demonise opposition movements, and thereby gain the moral high ground. Often, this tactic permits the exclusion of the judiciary from anti terrorism processes.

¹⁶⁴ See Discussion in Chapter V and VI.

What then is terrorism? To gain an understanding that may aid in crafting a possible definition I make the following observations: that terrorism is a threat or act or omission which results in deliberate use of violence against a civilian population;¹⁶⁵ it entails instilling widespread fear in a population that is not the victim of the violence and is utilized as a means to achieve a political end.¹⁶⁶

With this in mind I propose to define terrorism as 'the use or threat of violence against civilians or the destruction of property intended to intimidate or compel a government in furtherance of a political objective.' Terrorism then breaks down to: use of force, against innocent people for political purposes. An organization, which seeks to undertake any of these activities would qualify to be, designated a terrorist organisation. Flowing out of this is a definition of a 'terrorist' as a person who, purposely, knowingly, recklessly or negligently, either: gives support to or aids the cause of terrorism,¹⁶⁷ or; is a member of a terrorist organisation, or; provides assistance to a terrorist organisation or a member of a terrorist organisation.¹⁶⁸ It may be said therefor, that a 'terrorist act,' is any threat or violent act, in violation of the domestic law of any state, which endangers human life and is intended to intimidate or compel a government or the civilian population in furtherance of a political goal. The list of these 'acts' would be endless.

Finally, three distinct elements are identifiable in this discussion: the use of the term 'terrorism' represents an act which advances extreme fear; the expression is linked to activities aimed at a political objective and that the act is committed by an individual or a group and is directed at civilians. It is readily admitted that this encapsulation does not accommodate the factor of state terrorism. This is intentional, for it is my view that for theoretical reasons, it may be desirable to limit the definition of terrorism to non-state actors and to seek quite a different definition for state terrorism. By its composition and function, the state retains a certain measure of legitimacy of recourse to violence and all acts of state violence cannot be

¹⁶⁵ There is of course a debate as to whether violence aimed at inanimate objects does amount to terrorism. While blowing up an empty building may cause fear in the population the same is not as threatening as when violence is directed at human beings. Another issue, which arises in the reference to a civilian population is whether 'civilian' is sufficiently representative of the target population. See discussion in Primoratz I 'What is terrorism?' in I Primoratz (ed.) *Terrorism: The Philosophical Issues* (2004) 24.

¹⁶⁶ Questions arise as to whether Al Qaeda, for example, is motivated by political ends or whether Pablo Escobar's criminal gangs in Colombia or the Sungu Sungu, Chinkororo or Mungiki of Kenya are driven, in their killing of Judges, police, politicians, journalists or members of the public, by political or criminal goals.

¹⁶⁷ Under this limb, fund raising money for or donating money to a terrorist organisation would qualify as an act of terrorism if the funds are used to plan or conduct an act of terrorism.

¹⁶⁸ This may be in the form of providing a hideout, transportation, training, funding or firearms.

equated with the terrorism of non-state actors. At another level, there appears to be a general perception that terrorism is criminal. But is a terrorist necessarily a criminal?

Terrorism, as a subject of inquiry, would not be a topic requiring extensive investigation in Kenya and Uganda if its occurrence were not widespread in these countries. In the next chapter, I discuss the nature and trends in terrorist activities in Kenya and Uganda. The chapter will show the typology of the terrorist threat facing the two countries and examine whether they are victims or sanctuaries of terrorism. An attempt is made to show how these countries may successfully combat the threat of terrorism.

Chapter III

THIRTY YEARS OF TERRORIST ACTIVITIES IN KENYA AND UGANDA

1. Locating Kenya and Uganda on the terrorist map

(a) Geographic and ideological influences

The United States of America has identified East Africa and the Horn of Africa¹ as 'the region in sub-Saharan Africa most threatened by indigenous and international terrorism.'² 'After September 11, United States intelligence collected information showing that fighters linked to Al Qaeda were operating from and being trained and equipped within the region.'³ It is now believed that Al Qaeda has foot soldiers in southern Somalia, Somaliland, eastern Kenya and Zanzibar.⁴ Conditions obtaining in this region present an ideal environment for global terrorism to flourish.⁵ 'Porous borders, pervasive corruption and the lack of police capacity allow terrorists to move about freely, find safe haven, and establish logistical hubs.'⁶ As a matter of fact, the key terrorist threat in Kenya and Uganda stems from the failure of the states to control their territory and to offer any meaningful protection to potential targets.⁷

Besides these factors, the convergence of ethnic, cultural and religious tensions engender a fertile ground for recruitment of disillusioned youth into the terrorism movements. Kenya, for example, presents a situation in which 'arms, people and fundamentalist ideologies move freely within a conflict system.'⁸ The country provides 'a permissive environment for terrorist operations, logistics and sanctuary.'⁹

A survey of major terrorist incidents in Kenya and Uganda shows that most are connected to Islamic extremism. Geographically, Kenya's north-eastern frontier abuts the Horn of Africa and thence the Arabian Peninsula, a region traditionally known to be a breeding ground of Islamic fundamentalism. To its immediate North Eastern border is Somalia, a nation that has not had an effective central government for

¹ References to the Horn of Africa include the countries of Djibouti, Eritrea, Ethiopia, Kenya, Somalia, the Sudan and South Sudan.

² Shinn D H 'Terrorism in East Africa and the Horn: An overview' (2002) 72 *African Journal of Political Science* 81–97 at 79.

³ West D L 'Combating terrorism in the Horn of Africa and Yemen' (2005) *Belfer Centre for Science and International Affairs* 7.

⁴ *Ibid.*

⁵ Testimony of former US Assistant Secretary of State for African Affairs Susan Rice US Congress House Committee on International Relations Sub-Committee on Africa, Committee on International Relations Africa and the war on Terrorism, 107th Congo and 1st Nov 2001 11.

⁶ Rosenau W 'Al Qaeda recruitment trends in Kenya and Tanzania' (2005) 28 *Studies in Conflict & Terrorism* 1–10 at 1.

⁷ *Ibid.*

⁸ Chacha K B 'From local conflicts to global terrorism: can refugees and regional security problems jeopardise the renewal of Kenya?' (2004) 7 *African Journal of International Affairs* 57-79 at 59.

⁹ *Supra* n 3 at 2.

almost twenty years. To the north of Kenya lies Ethiopia and Sudan, and to the west of Uganda, Rwanda, Burundi and the Democratic Republic of Congo. The significant signature marking all of Kenya and Uganda's neighbours is internal and sometimes external conflicts. This has created an environment of easy access to weapons, predominantly explosives, which are the terrorists' weapons of choice. In particular Somalia acts as both a short-term transfer point and a training ground and storage area for materials, which are then smuggled across Kenya's north-east border into the country.

The dangers posed by Somalia extend well beyond simply being a conduit for weapons. The country is a major source of refugees, large numbers of whom have inundated Kenya. These people present a number of problems, not the least of which is a fundamentalist ideology, which is largely supportive of terrorism.

(b) The nature of the terrorist threat

Shinn identifies two kinds of terrorism present in Kenya and Uganda: acts perpetrated by organisations based outside the region and those instigated by an internal insurgent group against authority within a country.¹⁰

The first of a progression of terrorist incidents in Kenya, which occurred on 31 December 1980, falls into the first category. The attack, a bomb blast at the Norfolk Hotel in Nairobi, then owned by an Israeli family, was undertaken by a Palestinian radical group. Though the attack was directed primarily at the state of Israel and its people, as well as the large numbers of westerners who patronised the hotel, it was also a retaliation against Kenya for its help to the Israeli government in the July 1976 Entebbe hostage rescue mission.¹¹ Also, in this category are the simultaneous bombings, on 7 August 1998, of the American Embassies in Nairobi and Dar es Salaam. This massive, coordinated event cost 303 lives and an estimated five thousand injuries. Concomitant with the Nairobi and Dar es Salaam bombings was a similar attempt on the American Embassy in Uganda, which was, however, foiled.¹²

¹⁰ Supra n 2. David Shinn speaks with a measure of authority on terrorism in Africa, as he served for 37 years in the US Foreign Service, seven of those years at embassies in Africa. He was at one time an ambassador to Ethiopia and Burkina Faso. At the time of writing this thesis he was an adjunct professor in the Elliot School of International Affairs at the George Washington University.

¹¹ 'Terrorism in the Horn of Africa' United States Institute of Peace available at www.usip.org/pubs/specialreports/sr113.htm accessed on 4 August 2008.

¹² Ibid.

In November 2002, Al Qaeda-backed terrorists bombed an Israeli-owned hotel in Kikambala, Mombasa and simultaneously attempted to down an Israeli airliner by the use of a shoulder-fired surface-to-air missile.¹³ The connecting line in all these first-category attacks is that they were not, at first instance, directed at the countries where they took place. They were aimed at third parties and the countries of attack were proxy soft targets.

In the second category of terrorist incidents lie domestic insurgency groups such as Uganda's Lord's Resistance Army (LRA) and the Allied Democratic Front. These are politically motivated groups that utilise guerrilla and terrorist methods in driving what is essentially a political message. In spite of this double analysis, questions still linger as to whether terrorism in Kenya and Uganda is domestic or international.

(c) Kenya and Uganda: victims or sanctuaries of terrorism?

It has been recognised that Kenya and Uganda attract a disproportionately high level of terrorist activity in the region. Kenya is particularly susceptible due to its perceived close relationship with the United States and other Western democracies. Kenya's major terrorist threat is still Al Qaeda-sponsored militants. Since the American Embassy attack of 7 August 1998, it has been common knowledge that Al Qaeda and its assorted networks operate in Kenya with bases in the coastal cities of Lamu and Mombasa, and tentacles reaching as far as Nairobi. The testimony of witnesses and the four men charged in New York with the Nairobi Embassy bombing suggests that an Al Qaeda terrorist network has been in existence in Kenya for a very long time.¹⁴

The leadership of this network is drawn from the Gulf States, Pakistan, the Comoros and neighbouring Somalia.¹⁵ The preferred entry mode for the terrorist suspects is often through Muslim charitable organisations. In time the suspects obtain resident status and set about seeking to recruit local personnel for their future actions. What starts as an innocent charitable youth institution may then mushroom into a dangerous terrorist unit.¹⁶

The apprehension of the Kenyan government is that indigenous Kenyans may be drawn into the revolving door of international terrorism. Indeed this worry has increased with Kenya's involvement in the

¹³ 'Kenya: Revealed – Dark secrets behind Al Qaeda terror raids' *The Nation* 16 January 2007.

¹⁴ Khadiagala G 'Kenya: Haven or helpless victim of terrorism' in *Terrorism in the Horn of Africa* (2004) 3 United States Institute of Peace Special Report available at www.usip.org accessed on 2 March 2010.

¹⁵ *Ibid.*

¹⁶ See, for example, "Kenya bans six Islamic aid agencies after U.S. Embassy bombing," Associated Press, September 9, 1998

Somalia crisis. It is now clear that the Al Shabab, fighting in Somali, has recruited young Kenyans as agents of terror and is sending them to attack local targets in retaliation for the Somali invasion. The attacks, which have become a common occurrence in Nairobi and Mombasa point at a change of tactic for Al Shabab and pose a long-term problem for Kenya.¹⁷

This fear is not without foundation. On August 2004, a policeman was killed in Mombasa when a terrorist suspect under arrest detonated a hand grenade, killing himself and the arresting officer.¹⁸ In the ensuing melee, an associate of the suspect escaped. It is said that either or both the deceased suspect and the one who escaped were Kenyans. Further Western intelligence sources indicate that the Somalia refugee camp in Daadab, in the northern part of Kenya, has been turned into a terrorist training ground by suspects operating under the aegis of Al Haramain, a Muslim charity which fronts religious schools and social programs.¹⁹

As an indication that terror cells have taken root in Kenya, after the 7 August bombing in Nairobi, the government, aided by intelligence supplied by the American FBI, raided several locations on the coast and arrested several persons in connection with the incident.²⁰ Further, the arrest of Mohamed Sadik Howaida, at the airport in Karachi after arriving on a flight from Nairobi, showed how wide the terrorist web had spread. Howaida was initially picked because he was travelling on forged travel documents, but investigations quickly linked him to the events in Nairobi.²¹ Ibrahim Hussein Abdel Hadi Eidarous and Adel Mohamed Abdel Magid Abdel Bari were arrested in London for the same offence.²² The bulk of the arrests, however, occurred in Nairobi and Mombasa.

In the month of July 2001 Kenyan police arrested eight Yemeni and 13 Somalia nationals. In November of the same year, more than 20 persons with suspected links to Al Qaeda were arrested in Lamu, a coastal city in Kenya.²³ The intricate network connecting all the arrested persons is Al Qaeda and

¹⁷ Since October 2011 when Kenya invaded Somalia the Global Terrorism Database has recorded almost weekly attacks in Kenya. See Global Terrorism Database available at <http://www.start.umd.edu/gtd/> on 6 June 2011.

¹⁸ Global war on Terror available at www.globalissues.org > Issues accessed on 17 July 2008.

¹⁹ Kagwanja P M *Responding to terrorism in East Africa* Presentation at a Conference on Terrorism and Counter Terrorism in Africa (Centre for International Political Studies) University of Pretoria 23 March 2003.

²⁰ 'Patterns of Global Terrorism 2003' (April 2004) A Report prepared by the United States government available at <http://www.state.gov/documents/organization/31912.pdf> accessed on 5 June 2009.

²¹ Online Focus News Hour August 17 1998 available at <http://www.pbs.org/newshour/bb/Africa/july-dec98/bombing-8-17.html> accessed on 17th July 2008.

²² 'British arrest 2 embassy suspects' *The New York Times* 12 July 1999.

²³ Terrorism in the Horn of Africa Special Report by the United States Institute of Peace available at <http://www.usip.org/files/resources/sr113.pdf> accessed on 7 June 2010.

Islamic fundamentalism. A deduction may thus be drawn that the grievances giving rise to the incidents of international terrorism in both Kenya and Uganda arise elsewhere in the world.²⁴

Reports concerning Al Qaeda confirm the existence of several of their sleeper cells in the region, ready to be activated at any time.²⁵ That this is not an empty threat was confirmed in June 2003 by information given to interrogators by a suspect, who confirmed that Al Qaeda agents were plotting to drive a truck full of explosives to the newly built American Embassy in the outskirts of Nairobi.²⁶ The suspect also gave information to the effect that some Al Qaeda fighters were intent on hijacking a light aircraft flying into or out of Somalia and crashing it into the Embassy in a September 11 style of attack.²⁷ These reports were taken seriously and led to the closure of the American Embassy in Nairobi for a number of days.

Although Kenya has experienced civil strife connected to the poor handling of its ethnically divided politics, it has remained comparatively peaceful in a region wracked by continual conflict. Nevertheless, the country suffers from the malaise afflicting most of the region; strong ethnic divisions, cultural agitation as a rallying call founded on differences in traditions and practices, the choice of violence as a means of solving political disagreements, alarming economic disparities and a widespread corruption in the public service. This combination of ingredients, spiced with easily available weapons, is a recipe for trouble free terrorist operations. Easy access to weapons is a factor common to all conflicts in the region, and connects all levels of violence.

The never-ending stream of Somali refugees crossing into Kenya is a constant source of terrorist danger. It is estimated that well over 25 000 Somali refugees entered Kenya when the Islamic Courts Union took over power in Mogadishu and a similar number tried to cross over when the Ethiopian-aided Federal Transitional Government of Somalia resumed power, but were forcibly returned to Somalia.²⁸ There is a well-founded fear that Islamic militants camouflaged as refugees are gaining entry to Kenya to organise and carry out acts of terrorism. Currently most of Somalia is under the control of Islamic fundamentalists under different guises. The local authorities and the regional bodies in Somalia are governed by clan

²⁴ Corbin J *The Base: Al Qaeda and the changing fall of global terror* (2003) 72-85

²⁵ Murunga A 'We are not yet ready to fight terrorism' *Daily Nation* 17 July 2003.

²⁶ 'Kenya: American embassy targeted in Al-Qaeda plot' *Oakland Tribune* 25 Oct 2003.

²⁷ VOA News Com 'US Embassy in Nairobi Re-opens 3 days after closing in Terror Alert' 25 June 2003 available at <http://www.globalsecurity.org/security/library/news/2003/ob/sec-030625-voa03.htm> accessed on 19 June 2008.

²⁸ Prabhakar K R 'Kenya a victim of terrorism' available at <http://fauthcommons.org/node/g4821/print> accessed on 6 July 2008.

warlords who pledge a high degree of loyalty to Islam together with its avowed reluctance to accommodate any western values.²⁹

Except for the July 1976 Israeli hostage incident, Uganda has attracted little international terrorist activity. The government of Uganda has labeled internal insurgency groups such as the Lord's Resistance Army and the Allied Democratic Forces as terrorist groups, but has not succeeded in connecting these groups with international terrorism or indeed terrorism as understood in the international arena.

(d) Is terrorism in Kenya and Uganda an internal or external problem?

The perception that the terror problem in Kenya and Uganda is a conflict between western powers and Al Qaeda begs the question whether the war on terror is in reality an internal problem. Sometimes it is felt that the attacks in these countries are intended to hit out at Western interests, and these countries are only a proxy of the West. Since independence, Kenya, for example, has maintained close ties with the United States and Israel. It is acknowledged that they maintain close contacts in intelligence sharing and the training of security personnel.³⁰ In terms of investments, which are usually the targets of terrorism, Israel and the United States retain a considerable presence in tourism, light manufacturing and general commerce.³¹

This presence provides two reasons for attack. First, it is a source of anger and resentment. Secondly, it offers a number of readily accessible Western targets. When the United States went to war in the Persian Gulf, for example, it used Kenya's airbases for military logistics and utility supplies, and the port of Mombasa and the Kenyan Air Force base in Nanyuki were the chosen points of entry and departure for the American naval and air forces, respectively. The United States Central command, which covers the Middle East, Central Asia and the Horn of Africa, does not operate a permanent base in Kenya, since it still maintains the base in Djibouti, relatively close to Kenya.³² Nevertheless Kenya is an important point of entry

²⁹ Baehr D 'The Somalia Shabaab militias and their Jihadist networks KAS International Reports available at www.kas.de/wf/doc/kas_23599-544-2-30.pdf?110811143225 accessed on 6 August 2011.

³⁰ Whitaker B E 'Reluctant partners: fighting terrorism and promoting democracy in Kenya' (2008) 9 *International Studies Perspectives* 254–271.

³¹ 'Kenya: U.S. Expresses Confidence in Economy' available at http://www.freshplaza.com/news_detail.asp?id=5432 accessed on 12 June 2008.

³² 'Country Profile: Kenya government and politics' available http://www.mongabay.com/reference/country_profiles/2004-2005/2-Kenya.html accessed on 7 May 2011.

for American, British and Israeli military and intelligence officers who are constantly monitoring the movements of suspected Al Qaeda operatives.³³

Twice or three times every year, the British military and their American counterparts use remote parts of Kenya for infantry training and joint exercises with members of the Kenyan armed forces.³⁴ In recent years the United States has provided joint peace support training through its Africa Crisis Response Initiative (ACRI) program as well as conventional military training under the Africa Contingency Operations Training Assistance (ACOTA) program. A key amphibious joint exercise named "Edged Mallet" is conducted regularly along the northern Kenyan coast and has involved up to 3000 US Marines. In 2004 the joint exercise had regional terrorism as its principal focus.³⁵

Several other reasons may explain why Kenya and Uganda are a soft target for terrorism. First, 'the fact that East Africa and the Horn are home to some of the poorest countries in the world, with high levels of social injustice and political alienation, is frequently cited as one reason.'³⁶

Further, Muslims in Kenya do not enjoy a very cordial relationship with the government. They complain of isolation from the politics and economy of the country. Although they make up a large number of the inhabitants of the coastal and northern parts of the country they complain about being left out of employment opportunities and being targeted for arbitrary arrest in the guise of fighting terrorism.³⁷ There are claims that Kenya's Anti-Terrorism police unit uses the terrorist label to blackmail Arab and Somali traders into paying huge amounts of money ostensibly for protection from deportation for supporting terrorist organisations.³⁸ Although Al Qaeda cadres have gained access to the Muslim community, there is no overwhelming evidence that the fundamentalist ideology has taken significant root amongst the indigenous Muslims. For this reason, there are not likely to be many local recruits to the terrorist cause.

In summary, Kenya and Uganda offer several factors that increase suitability for terrorist activity: weak, corrupt states with poor governance structures, permitting unhindered mobility through the region, and a compliant law-enforcement system susceptible to bribery that allows manipulation of security

³³ Ibid.

³⁴ Supra n 29.

³⁵ Supra n 29.

³⁶ Shinn D H 'Fighting terrorism in East Africa and the Horn' (2004) *Foreign Service Journal* 36 at 38.

³⁷ See Rowan D 'Arbitrary arrests of muslims in Kenya' available at <http://www.wsws.org/articles/2001/nov2001/keny-n21.shtm> accessed on 2 March 2012.

³⁸ See 'Police raids alienate Kenya's largest ethnic minority' available at <http://www.voanews.com/content/violent-eastleigh-police-raids-alienating-kenyas-ethnic-somali-minority/1551714.html> accessed on 5 September 2012.

systems. It is said that the explosives used in the bombing of the US Embassy in Nairobi in 1998 and the Israeli owned hotel in Mombasa in 2002, as well as the missiles that were fired at an Israeli airliner on the same day were smuggled into Kenya across the porous border with Somalia by Al Qaeda operatives or allied groups.³⁹ Kenya has no capacity to monitor its boundaries, particularly the open eastern coastline that runs from Eritrea to Tanzania.

In addition to the lack of policing of boundaries, ill-equipped immigration structures and poorly paid immigration officials, there is widespread corruption among civil servants, which facilitates movement of aliens across international boundaries. An embarrassing event worth mentioning is the August 2008 failure of the Kenyan police to arrest the most wanted suspect for the 1998 American Embassy bombings - even when they had him in sight. The suspect, Fazul Abdulla, managed, twice within as many weeks, to evade a police dragnet, first by running out through the kitchen door of a house (which was supposed to be under surveillance) while the police were approaching and, secondly, by impersonating a Muslim cleric and driving through a police road check point.⁴⁰ It is said Fazul had travelled to Kenya from Somalia for the purpose of receiving treatment for a kidney problem.⁴¹

Such escapes indicate that the suspects have sympathisers within the police force and receive important information on police plans and impending raids. It also reinforces the common theory that the Kenyan authorities are unable to exercise any significant control over the border points where entry appears to have taken place without any hindrance. More worrisome is what the police found in Fazul's hideout: two Kenyan passports that Fazul had acquired one in 1998 and the other in 2008. The passports found in a house in Malindi from which Fazul made his first escape bore the same picture but with different names, dates and places of birth.⁴²

³⁹ Brown S 'Deteriorating human security in Kenya: Domestic, regional and global dimensions' in Grant AJ and Soderbaum F (eds) *Regionalism in Africa* (2003) 93-109.

⁴⁰ 'Kenya police find vital information on terror suspects' *Daily Nation* 5 August 2008 and also 'Fazul escapes arrest again' *Daily Nation* 19 August 2008.

⁴¹ 'How terror suspects eluded police' *The Standard* 5 August 2008.

⁴² *Ibid.* One passport was obtained on 21 February 2008 and is due to expire in 2018. It identifies Fazul as Mirza Adan Hussein Ali born on January 1 1980 in Mombasa. The second identifies him as Ali Mohamed Abubakr, born in 1972 in Garissa and issued on December 6 1999 a year after the 1998 Nairobi bomb blast. Since then three members of the same family have been charged in a Mombasa court with helping Fazul to escape. The accused, Mahfuth Hemed Abubakr, his wife Luftiya Abubakr Bashrahi and their son Ibrahim Mahfuth Ashur have denied knowing that their guest was in any way connected to the atrocities he is accused of having committed.

Poverty is rampant in Kenya and Uganda. The Economic Report on Africa places the East African countries at the bottom of the ranking, with rural poverty being amongst the highest in Africa.⁴³ It is estimated that fifty per cent of Kenyans live below the poverty datum line, unable to meet their most fundamental needs.⁴⁴ This is not to say that poverty is the single explanation for the propensity to terrorism; rather, it suggests that poorly paid security and immigration officials are often unable to resist the temptation to corruption.

The history of the East African region, right from the anti-colonial struggles, through independence to the present day manifests an array of either intra-state or inter-state conflicts. The three-decade civil war in South Sudan and the collapse and long absence of any central authority in Somalia has opened up the region to a proliferation of small and light weapons. In particular Somalia is known to attract and harbour Islamic extremists, and the country serves as a convenient training ground and safe haven. It is also seen as a short-term transit point as well as storage area for explosive materials and other weapons, which are then smuggled into East Africa through Kenya's north-eastern border.

The anti-Amin and anti-Obote civil conflicts in Uganda, coupled with the 18-year LRA insurgency in the north, have created regional instability, which increases the easy availability of weapons. For years, both before and after the Ogaden war, Kenya's central government was unable to exercise any meaningful control in the northern part of the country. Kenyan Somalis, in every way akin to their cousins in Somalia, engage in subtle methods of sub-control of the region through clan loyalties enforced by militias. Travel and business is possible only when secured by the Kenyan armed forces, whose itinerary and number are insufficient to provide security for all the occupants of the region.

For these reasons every household feels the need to own a gun. Guns have in some cases become an accepted trade currency and are used in a barter-line system of exchange. The clan warlords

⁴³ An analysis of income distribution in Africa shows a high degree of inequality. Compared with other regions of the world Africa has the second most unequal income distribution next to Latin America. The Gini coefficient for Africa as whole is 44.4 per cent. The highest values for inequality are for South Africa, Kenya and Zimbabwe see 'Economic Report on Africa: 1999 The Challenge of Poverty Alleviation'.

⁴⁴ Central intelligence Agency World Fact book 2003 available at <https://www.cia.gov/library/publications/the-world-factbook/index.html> accessed on 2 May 2008.

trade in weapons, which then find their way to the rest of the region. It is estimated that there are between 500 000 and 1 000 000 illegal small arms and light weapons in circulation in the region.⁴⁵

2. The typology of terrorist groups operating in Kenya and Uganda

Consideration of a typology of terrorist groups operating in Kenya and Uganda should start by appreciating that terrorism differs from violence and insurgency in general. That being so, it is important to realise that there are perhaps as many typologies of terrorism as there are definitions of terrorism.⁴⁶ There may be classification founded on motivation, methodology, location or group dynamics. Also, in spite of repeated debates with no agreement, it is accepted that there is both state and substate terrorism.⁴⁷

Substate terrorism in the modern world system may be subdivided according to a structural location in the international system and ideological justification. Structural location varies along a three-tiered division into a core, semi-periphery and a periphery.⁴⁸ In this sense there may be: terrorism committed by a core actor against core government organisations; terrorism which originates in the periphery or semi-periphery and is directed at either other peripheral or semi-peripheral governments; and terrorism which originates in the periphery or semi-periphery and is turned against core states.⁴⁹

Within these divisions are the ideological foundations for the type of terrorism waged. These may be left-wing or right-wing extremism,⁵⁰ single-cause or special interest terrorism,⁵¹ religious terrorism,⁵² national or ethnic terrorism⁵³ and race-based or hate terrorism.⁵⁴

⁴⁵ Muggah R and Berman E 'Humanitarianism under threat: The Humanitarian impact of small arms and light weapons' Special Report 1 Geneva Small Arms Survey available at http://hei.unige.ch/sas/files/sas/publications/spe_reports_pdf/2001-sr1-humanitarian.pdf accessed on 3rd July 2008.

⁴⁶ White J R *Terrorism: An Introduction* 4ed (2003).

⁴⁷ Omar A L & Bergessen A J 'Types of terrorism by world location' 27 (2) *Humboldt Journal of Social Relations* 162-192. The authors contend that the term substate terrorism is used to refer to terrorist activity that originates from groups of individuals that are not directly connected to governmental agents and are thus located below the level of the state as such. While sub state terrorists may receive support from external governments agents they remain under the rubric of substate terrorist as long as they retain a motivation of their own and are not agents of the external government.

⁴⁸ For a full discussion of this see Chase-Dunn et al 'Trade globalisation since 1795: waves of integration in the world system' *American Sociological Review* 65 at 77-95.

⁴⁹ *Ibid.*

⁵⁰ Left-wing terrorism is communist ideology-based. The foundation of this theory is that government owns the means of production and provides for the needs of all citizens in a classless society. Left-wing terrorism looks into the future of building a more just and fair society. Right-wing terrorism is driven by hate and prejudice. In this class are the Ku Klux Klan and the neo-Nazis. Right-wing extremists fight to maintain a status that gives them a value system different and privileged from everyone else.

⁵¹ Single-cause terrorism focuses on defending a certain right; animal protection, environment, anti-abortionists, etc.

⁵² Religious terrorism is terrorism undertaken to defend or drive a religious cause.

⁵³ National or ethnic terrorism manifests self-determination ideals. Most anti-colonial wars fall into this category.

Schultz has developed a three-tier classification that recognises terrorism typologies as: revolutionary, sub revolutionary and establishment terrorism.⁵⁵ This classification also speaks to the typologies of terrorism in Kenya and Uganda. Revolutionary terrorism is the threat or use of political violence aimed at effecting complete revolutionary change whilst sub-revolutionary terrorism is the threat or use of political violence aimed at effecting various changes in a particular political system (but not to abolish it). Establishment terrorism on the other hand, is the threat or use of political violence by an established political system against internal or external opposition.⁵⁶ This classification has seven possible variables, which are determined by the causes underlying the decision to use violence, the internal and external environment, the goals sought to be achieved, the strategy employed, the means, organisation and participation of the activists and the audience in general.

(a) Vigilante terrorism

Perhaps a classification, which covers almost the entire typology of terrorism in Kenya and Uganda, is that given by Barkan and Bryjak in their seminal work, *Fundamentals of Criminal Justice*.⁵⁷ The authors delineate terrorism in Kenya and Uganda into vigilante, insurgent and state terrorism. Curiously, they do not highlight the eternal problem of international terrorism or that associated with domestic religious or political fundamentalism.

Vigilante terrorism manifests in Kenya and Uganda in the form of criminal organisations that use extreme violence against the general public to attract government attention for a pseudo political domestic cause. The activities of these vigilante groups are marked by incidents that address a local concern. These incidents are directed at the domestic government with no international outlook. Vigilante terrorists often use violence against private citizens to express hatred or resentment towards certain changes brought about by government. The Mungiki,⁵⁸ Chinkororo⁵⁹ and Sungu Sungu⁶⁰ are some of the more lethal Kenyan

⁵⁴ Race-based or hate terrorism is self-explanatory and was responsible for the near-extirpation of European Jews and the tragic events in Rwanda in 1994.

⁵⁵ Schultz R 'Conceptualizing political terrorism' (1978) 32 *Journal of International Affairs* 7–15.

⁵⁶ *Ibid.*

⁵⁷ Barkan S and Bryjak G *Fundamentals of Criminal Justice* (2004). The authors borrow heavily from Gurr T (1989) *Political Terrorism: Historical Antecedents and Contemporary Trends* and Gurr T (ed) (1989) *Violence in America: Protest, Rebellion and Reform*.

⁵⁸ Mungiki is a secretive outlawed and quasi-religious group whose origin dates back to the late 1980s. The Mungiki is an exclusive Kikuyu male entity whose membership is drawn from the Central and Rift Valley provinces of Kenya. The Mungiki claims ideological links with the anti-colonial Mau Mau movement. It has a strong presence in Central province and the slums of Nairobi where it controls and charges for access to basic services such as electricity, water and sanitation. Immediately after the December 2007 election results the Mungiki set about killing, maiming and mutilating members of pro-opposition ethnic groups who, it was thought, did not vote for Mwai Kibaki, a Kikuyu candidate.

groups, which, besides carrying out criminal activities that benefit the organisations and their members, are also clandestine political groups for hire. They often manifest resistance to social change.

The Mungiki, the most prominent of them all, is a shadowy criminal organisation linked to a series of gruesome crimes. It is not clear whether Mungiki is a religious cult or just a lawless gang. The group first attracted public attention during the land clashes that preceded the first multiparty elections in 1992. The Kenya Africa National Union (KANU), then largely dominated by the Kalenjin tribe of President Moi, which inhabits the agriculturally rich and expansive Rift Valley province, used local militias to threaten non-Kalenjin communities against voting for the opposition parties. The script was to coerce the non-Kalenjin communities to vote for President Moi or risk losing their land and investments in the Rift Valley. Against this backdrop, the Mungiki was formed as a defence force directed particularly at protecting Kikuyu interests. Yet the Mungiki was not just a militia force. It pledged to return the Kikuyu community to its traditional lifestyle; a kind of cultural purity. The Mungiki rejects Christianity in all its manifestations and has been notorious in advocating female circumcision and other traditional practices.⁶¹ On admission to its ranks Mungiki members take an oath as a pledge of loyalty.

With time Mungiki has transformed itself from a rural based militia to an urban gang with political leanings. Mungiki members often circulate leaflets rich in revolutionary language as a mobilisation tactic. Analysts say that the group is trying to gain popularity by use of anti-colonial and anti-establishment epithets reminiscent of the Mau Mau rebellion.⁶²

The Mungiki hit alarm bells when it declared that it had aligned itself with the Muslim community because mainstream Christian churches were condemning it.⁶³ For whatever reason, and with full information of the group's criminal activities, the Muslim community embraced and welcomed the Mungiki

⁵⁹ Chinkororo represents the armed wing of the Kisii community. Traditionally, Chinkororo was a community defence unit mainly found in the border areas with the Maasai. Its work was limited to curtailing cattle rustling and recovering stolen animals.

⁶⁰ Sungu Sungu is the Kuria equivalent of the Kisii Chinkororo.

⁶¹ The number or incidents of Mungiki activities are too numerous to recount. Just to demonstrate how deeply rooted the group has become, the Government of Kenya announced in June 2007 that it had arrested 1000 Mungiki sect members. Mungiki manifests as a secret society with local cultism. First emerging in the 1980s, Mungiki, whose name means multitude in the Kikuyu language, use prayers and archaic rituals to bond members. The group was banned in 2002 after Mungiki members armed with knives and clubs killed more than 20 people in a Nairobi slum. See Reuters report: 'Kenya President warns Mungiki gang as murders continue' 1 June 2007 available at <http://www.alertnet.org/thenews/newsesk/I01506896.htm> accessed on 23rd July 2008.

⁶² Atieno A 'Mungiki, Neo-Mau Mau & the prospects for democracy in Kenya' (2007) 34 *Review of African Political Economy* 526-531.

⁶³ 'Kenyan churches alarmed by spread of Mungiki sect' *Pan African News Agency* 3 September 2000.

into its fold, prompting some leaders of Mungiki to convert to Islam and to adopt Muslim names.⁶⁴ Whether or not Mungiki subscribes to any political ideology, the group's activities, especially the maiming and killing of private citizens, is a source of great concern. Certainly the group exposes fissures in the security apparatus, on which any other terrorist group may seek to capitalise. The government's response has been to employ wanton and arbitrary killings of members of the sect in an attempt to cow them into submission.⁶⁵

Other local groups are Sungu Sungu and Chinkororo.⁶⁶ These groups have their origin in community policing. They are the product of a spontaneous development of community-based policing that grew out of lack of government capacity to provide security to local communities. In the eyes of government in the rural communities, the Sungu Sungu and Chinkororo are regarded as legitimate instruments of law enforcement.

The ambiguous legality of these groups manifests in the fact that while the administration and local communities regard them as justifiable elements in security provision, the police and the judiciary consider them unlawful.⁶⁷ The anomalous existence of these groups makes them susceptible to manipulation by politicians, and, indeed, they have been used for political ends. Hence, to the extent that these vigilante groups engage in violence for political reasons they fall within the wider definition of terrorist.⁶⁸

Similar vigilante groups involved in quasi-political activities include the Kalenjin Warriors and the Sabaot Land Defence Force.⁶⁹

⁶⁴ Ibid. Ndura Waruinge, the sect's national co-ordinator, adopted the name Ibrahim and accused church leaders of inciting the police against the sect's members. The Council of Imams, led by their chairman Sheikh Al Shee, speaking at a Mombasa mosque after 13 members of Mungiki converted to Islam, asked the government to stop harassing members of Mungiki who are exercising their freedom of worship and association. The Imams said that since Mungiki has become part and parcel of the Muslim community they will not allow anybody to subject them to any form of mistreatment.

⁶⁵ On 4 June 2007 alleged members of the Mungiki sect shot dead two police officers in Mathare's Nairobi Estate. They took away the guns that the policemen were carrying. On 5 and 7 June in an exercise dubbed 'Operation Kosovo' the police raided Mathare slums and killed more than 30 members of Mungiki.

⁶⁶ The Sungu Sungu has its roots among the Kuria ethnic community of both Kenya and Tanzania, while Chinkororo is a product of the Kisii tribe in Kenya.

⁶⁷ Ibid.

⁶⁸ Gimode E 'An anatomy of violent crime and insecurity in Kenya: The case of Nairobi in the last quarter of the twentieth century.' Paper presented to the Conference on the Urban Experience in Eastern Africa. Nairobi: British Institute in Eastern Africa 2001.

⁶⁹ See Report of the Kenya Human Rights Commission 2008 available at www.khrc.or.ke/resources/.../37-khrc-strategic-plan-2008-12.html accessed on 15 August 2012.

(b) Insurgency terrorism

The second typology of terrorism is insurgency, and the main example is found in Uganda.⁷⁰ This type is sometimes referred to as dissident terrorism and is employed by groups seeking to topple the existing political order. The Lord's Resistance Army (LRA) has been the most visible in terms of attacks and casualties. Its activities correspond to most definitions of terrorism, as it involves violence for political purposes. Further, the group aims at reaching an audience beyond the victims and has a clear political objective. Terror is regarded as only a means of reaching the target.

The LRA, led by Joseph Kony, operates in the north of Uganda and, until the signing of the Sudan Comprehensive Peace Accord, had bases in Southern Sudan. The LRA rebels say that they are fighting for the establishment of a government based on the Biblical Ten Commandments. The LRA is responsible for numerous abuses and atrocities. Of its prominent infamies is the abduction of children for use as child soldiers or sex slaves for their soldiers. As an insurgent group, the LRA's activities are certainly expressive of local terrorism. In 1988, for example, the LRA abducted no less than six thousand children who, in clandestine bases, were transformed into virtual slaves as guards, concubines and soldiers. Those who tried to escape were put to death. LRA forces have also targeted local government officials and employees.⁷¹

In comparison with Uganda, Kenya has had little insurgent terrorism. In both countries the agitation for multi-party democracy in the 1980s and the 1990s was carried out through massive exercises of political propaganda but none was violent. The dissident groups operating in the two countries did not employ violence to achieve their goals.

(c) Transnational terrorism

Transnational terrorism, the third type, has been prevalent in both Kenya and Uganda. There have been three major transnational terrorist attacks in Kenya.⁷² The key element of this form of terrorism is its international nature. Either in planning or execution, it starts in one country and culminates in another.

⁷⁰ The Lord's Resistance Army and the Allied Defence Front are the two political groups engaged in guerrilla warfare in Uganda.

⁷¹ 'The Lord's Resistance Army' in *Global Security* available at <http://www.globalsecurity.org/military/world/para/ra.htm> accessed on 24 July 2008.

⁷² The first of a series of transnational terrorist events took place at the Norfolk hotel, Nairobi on New Year's eve in 1981 followed by the August 7, 1988 American Embassy bombing and the November 28, 2002 Kikambala hotel bombing in Mombasa, Kenya.

(d) State-sponsored terrorism

Terrorism by the state is a type of terrorism committed by governments or quasi-governmental agencies and personnel against perceived state enemies. Among the people who are victims of state terror are political dissidents and insurgent groups, together with any others who may hold views different from those in power.

State terrorism plays out either in the international or in the domestic arena. America has coined a new terminology to describe states which sponsor international terrorism or use terrorism against their own people: rogue states.⁷³ The threat posed by state terror is perhaps greater than that of non-state actors because the state has the means for exercising the most lethal forms of violence. In this way both the so-called rogue states and those who pass judgment over them are often guilty of acts of terrorism. Saddam Hussein's Iraq, Muammar Gaddafi's Libya and Bashir Assad's Syria are a perfect example of states which used terrorism against their internal and external enemies. Similarly there are arguments as to whether Israel's use of force against the Palestinian people may be equated with state terrorism.

State terrorism may manifest in many ways. A government may use paramilitary personnel or a militia group to undertake acts of terrorism against its perceived enemies. By acting in this manner the state is able to present a facade of non-involvement in the terror, and yet still achieve its objectives.

In the East Africa region, state terrorism is perhaps most evident in Uganda where the political landscape is replete with violent conflict. The government of Uganda has on many occasions used intimidation, repression, and naked violence against the political opposition. Arbitrary arrests, illegal detentions as well as brutal means are used against members of the opposition. A parliamentary commission investigating the violence during the 2001 presidential and parliamentary elections unearthed cases of detention of suspected opposition politicians in illegal locations, torture, and state-sponsored violence against opposition supporters.⁷⁴ In many cases state agents carrying out the arrests wore civilian

⁷³ 'Rogue state' is a term applied to states considered threatening to the world's peace. This means meeting certain criteria, such as being ruled by authoritarian regimes that severely restrict human rights, sponsor terrorism and seek to proliferate weapons of mass destruction. In America's list of rogue states are such countries as Iran, North Korea, Syria, Libya and Cuba, whose pursuit of weapons of mass destruction makes them hostile to US interests available at www.state.gov/t/us/rm/26786.htm accessed on 20 July 2008.

⁷⁴ See Human Rights Watch Country Report on Uganda 2003. On January 12 2002 police broke up a peaceful rally in Kampala organised by an opposition party, the Uganda's People's Congress (UPC), by firing on demonstrators with live ammunition. They killed a young journalist, Jimmy Higenyi, and injured several other persons with gunfire. They briefly detained several UPC leaders and two journalists. Local elections held in February were the occasion for cases of manipulation and abuse by government forces. Plainclothes agents abducted a campaign worker for Kampala's mayor, took him to the headquarters of

clothes with no identifying insignia. Civilians were held in army barracks in different parts of the country (although by law the army is allowed to carry out arrests only in emergency situations), at the Chieftaincy of Military Intelligence (CMI) headquarters and at a facility controlled by the Joint Anti-Terrorism Task Force in Kampala.⁷⁵

Sometimes it appears that the manner in which Uganda deals with its insurgents and political opposition is so violent and indifferent to suffering that it may fit the construct of state terrorism. Often Uganda does not deny the acts of its agents, content perhaps to justify them in terms of state security measures. A state that uses violence against its political competitors to gain the political upper hand attracts a state terrorist label. A government that uses violence or a threat to resort to violence as part of state apparatus to enable it to control its population is as guilty of terrorism as a non-state actor who seeks to influence a government to do or abstain from doing a certain act.

3. International and domestic terrorism

This discussion has identified that Kenya and Uganda suffer from international and domestic terrorism. This classification is not entirely clear-cut, as some groups may overlap – at once being viewed as domestic, as well as manifesting characteristics of international terrorism.

Within the domestic realm, Kenya manifests terror groups of a vigilante type while in Uganda insurgency terrorism is more prominent. What, however, are the distinct features of these groups?

'International terrorism is one in which the planning and execution transcends national boundaries. In defining international terrorism, the purpose of the act, the nationalities of the victims, or the resolution of the incident are considered. Activities of International terrorism are usually planned to attract widespread publicity and are designed to focus attention on the existence, cause, or demands of the terrorists.'⁷⁶ International terrorism therefor is that, which involves the citizens or property of more than one country. In this group are the Taliban, Al Qaeda and Al Shabaab.

Chieftaincy Military Intelligence (CMI – a government security agency), and later to an unacknowledged detention center in Kampala. They accused him of co-operating with armed rebel groups and beat him severely. Available at <http://www.hrw.org/wr2k3/africa13.html> accessed on 16th June 2008.

⁷⁵ Ibid. Detainees were held in overcrowded cells and sometimes tortured. One woman, released in April 2002, testified how her detention had included being held for a week in March 2001 in a hole dug in the ground; another detainee told Human Rights Watch how he had been tortured on the genitals. On 23 July, 2002, a detainee of the CMI, Patrick Manenero, died while being rushed to hospital. According to the death certificate, his death was caused by internal bleeding due to blunt force trauma.

⁷⁶ Patters of Global Terrorism 1999 United States Department of State viii (2000)

Domestic terrorism, on the other hand, involves groups or individuals whose terrorist activities are conducted within a state. In this category are groups such as Uganda's LRA, Kenya's Sungu Sungu, Mungiki or Chinkororo. Functionally, domestic terrorism is planned and executed within the boundaries of one country.

In summary international Terrorism is distinct from domestic terrorism because: its target is selected from a country other than that of the terrorists themselves; the act or omission involves crossing national borders; and members or organisers of the terrorist activity are from more than one country. International terrorism is perpetrated by residents or representatives of one or more countries against the interests of another country or by members of a violent, politically directed organisation not affiliated with the country being attacked.⁷⁷

Except, for example, the LRA and the ADF OF Uganda who have a clear political agenda, the typology of domestic terrorism present in Kenya is Vigilante terrorism. Vigilantism is defined as the enforcement of laws and punishment through the hands of private citizens.⁷⁸

Rosenbaum and Sederberg identify three broad categories of vigilantes: crime control vigilantism which directs its violence against persons who are believed to be committing acts proscribed by the established legal system; socio-group vigilantism which directs its violence at groups which are competing for a re-distribution of values within the system; and regime control vigilantism, which seeks to maintain the status quo when the formal system of rule enforcement is ineffective.⁷⁹ It is then clear that the term vigilantism is 'usually linked to the defence of the established order.'⁸⁰

Under this categorisation it does appear that in their formation and as far as their tactics trigger, produce or initiate terror, the vigilante groups of Kenya fall within this terror based typology. Gregor recognises that terroristic violence has as its purpose not coercive sanction but some proximate end.⁸¹ For the Kenyan Vigilantes their present purpose is self-interest. This does not take them out of the terrorist label as their establishment motivation had political underpinnings.

⁷⁷ Dyson W (2001) *Terrorism: An Investigator's Handbook* 20-31.

⁷⁸ Martin G *Understanding Terrorism: Challenges, Perspectives, and Issues* (2010) 130

⁷⁹ Rosenbaum J H & Sederberg C P *Vigilante Politics* (1976).

⁸⁰ Schmid A P & Jongman A J *Political Terrorism: A New Guide To Actors, Authors, Concepts, Data Bases* (2005) 46.

⁸¹ Gregor *The Morality of Terrorism* 159.

Poorly educated and unemployed, the Sungu Sungu, Mungiki and Chinkororo represent an ideological shift from the Al Shabaab or Al Qaeda, who trained abroad and undertake their activities for political and religious reasons. The former terrorise whole communities and commit criminal acts—assaults, armed robbery, kidnapping—that impact upon innocent victims for profit or some other advantage. In their conduct they meet the description of terrorists because, in my view, attacking innocent people *en mass* is a defining feature of terrorism.

The question is: should vigilante groups be treated as terrorists and treated in similar manner as international or any other domestic terrorists?

For a state, if an entity commits an act of terrorism, it should not matter that it is international or domestic or simply vigilante. The activities of the group, their impact on the population and resultant effect on the body polity are the defining criteria. The actors may be differently described but if the consequential effect of their acts are the same they should be treated equally. There cannot be different sets of law for international and domestic terrorists and vigilante groups. There can be only one definition of terrorism and one sanction. It will be difficult to establish two different sets of crime control for the same offence.

An aspect that may separate vigilantes from international or other domestic terrorists is their general lack of intent to bring about political change. Once a vigilante group takes action designed to instill fear in the population so as to bring about political change it has become a terrorist organisation and is no longer a vigilante group. This fine distinction is what creates problems in the treatment of vigilantes and other terror groups.

4. Challenges to combating terrorism in Kenya and Uganda

The challenges to combating terrorism in Kenya and Uganda present a multiplicity of factors that are often also deemed to be responsible for the proliferation of the scourge in these countries. A combination of weak security systems, underdevelopment and poor governance provide a multi-structured failure that makes it impossible to prevent terrorism.

Lack of adequate resources puts anti terrorism programs in competition for funding with other more immediate and urgent social development projects. Although these countries have suffered many incidents

of terrorism, when a choice presents between costly anti-terrorism programs and providing health care or education, the latter tilt the balance.

As already observed in all the East African countries, border controls are weak. In specific terms, Kenya and Uganda do not have the capacity to police their territories efficiently. The unsecured region provides a platform for terrorists, who move around the area unhindered. With the easy movement of terrorists goes a free flow of arms. The existence of numerous internal conflicts creates potential breeding ground for terrorists, who pose as supporters of one or other party to a conflict.

A regional campaign to counter terrorism and to disrupt terrorist networks requires a series of collaborative efforts to deny them a safe haven within the communities in which they operate. As already explained, terrorists obtain access and acceptance in communities because of the social programs they offer. Economically disadvantaged people are easy targets: the raw material for recruitment to terrorist organisations. Whether through the provision of education or health programs, regional governments must make resources available so that people are not driven by desperation into the hands of extremist elements.

Furthermore, governments in the region need to open up democratic space in order to address the grievances of the people and to starve the terrorists of a receptive audience for the ideological alternatives they offer. Terrorism is offered as an alternative avenue for political change because the governments in the region – Uganda in particular – have made it impossible for the growth of healthy political competition.

Efforts to counter terrorism entail availability of a large resource base to undertake developments in law enforcement address political and economic injustices and enhance military and security capacity. The examination of travel documentation at entry points for the purpose of restricting the movement of terrorists requires enhanced security mechanisms, which are not always available because of insufficient resourcing. Intelligence gathering also requires a heavy resource outlay. In addition, the training of counter terrorism personnel in the region needs a bilateral and corporate arrangement so that there is improved coordination in the implementation of the programs. In order to sever terrorist networks, to restrict the terrorists' freedom of movement and to curtail communication between them, intelligence links have to be sufficiently synchronised, so that information obtained by one agency is available to all. This is not yet the case, with the result that the terrorists are able to exploit gaps in intelligence. The information shared by the agencies – if any – is sketchy and inadequate, because of the constraints in obtaining it.

Further – and besides endeavours directed at removing the terror networks – there is a need to build good governance, the rule of law and a respect for human rights. To ignore this is to create incubators in which extremism will thrive. Governments in Kenya and Uganda have not shown willingness to espouse these principles. A lack of freedom destroys hope and creates circumstances where the youth are misled into lashing out at those whom they have been told are responsible for their difficulties.

The fact that Islamic communities in the region feel marginalised and experience social and economic inequality is a constant source of resentment that fuels discontent and anger in the Muslim communities.

Overcoming terrorism in Kenya and Uganda will require a sustained effort involving countries both within and outside the area. Any anti terrorist endeavour will have to deal with breaking the terrorist web, eliminating the safe havens and disrupting all terrorist networks in financing, planning and execution of attacks. Sharing of intelligence will be a crucial factor in this undertaking. In addition, serious efforts must be undertaken to address the root causes of terrorism in the region.

In the long term, however, it is crucial that efforts be made to tackle the underlying reasons why terrorists find sympathy and accommodation in Kenya and Uganda.

5. Conclusion

In conclusion the fight against terrorism is certainly a long-term battle with no winning formula in sight. As already acknowledged, dealing with causes of terrorism, other than terrorism itself is perhaps a good start in dealing with the problem.

Further, gaining an understanding of the different typologies of terrorism offers an alternative approach in appreciation of the phenomena of terrorism. First, a typology incorporates the range of terrorist activities better than most definitions. It assists in identification of the kind of terrorism for which the state must craft a response. As discussed in this chapter, terrorism may be either local or international. It may also be regional. Secondly, a study of the typology of terrorism informs the variety of activities that amount to terrorism in the area under discussion. In this way, it is realized that terrorism is not a single act, but often an array of deeds. Ultimately, by directing attention to the types of violence, which assail a particular region, focus is drawn to the actual, not the theoretical.

To sum up, the challenge to combating terrorism in Kenya and Uganda reduces to four elements: finding means to deny international terrorist groups access to the region; starving terrorists of financial sponsorship, support and a safe haven; shrinking the underlying circumstances that terrorists exploit; and building democratic systems that will address poor governance.

Chapter IV

IMPLEMENTATION OF COUNTER TERRORISM MEASURES IN DOMESTIC JURISDICTION

1. Incorporation of international law into the domestic regime

The Kenyan and Ugandan legal systems contain not only common and statutory law, but also international customary law and whatever treaties the states have decided to incorporate into their domestic laws. The application of international law in the domestic realm is determined by two different approaches: monism and dualism.

Monists assume that domestic and international laws form a single unit, that is, they are simply two components of one body of rules.¹ Hence, either national or international law may determine whether an individual's actions are legal or illegal.² Dualists, on the other hand, see international and domestic law as separate systems, operating in two independent spheres with neither asserting superiority over the other.³ Dualism accepts international law as part of the domestic realm only if its rules have been included in an appropriate manner,⁴ usually by parliamentary enactment. Lord Atkin, speaking on the position in England stated that:

International law has no validity save as its principles are accepted and adopted by our own domestic law....The courts ... will treat it as incorporated into domestic law so far as it is not inconsistent with rules enacted by statutes or finally declared by tribunals.⁵

The argument often given in favour of dualism is grounded on the basis that since treaty making is an executive function, it is not only necessary but essential to require an enabling Act of Parliament to ensure that there is no abuse of power by the executive authority. Hence subjects of a state are not

¹ See Dixon M *Textbook on International Law* 3 ed (1996) Chap 4. This acceptance of a unitary view of law is based on either the formulation of the 'pure theory of law as espoused by Kelsen or the strong ethical concerns as argued by Lauterpacht. This position is shared by other theorists, who hold that international and municipal law must be regarded as a manifestation of a single conception of law. See Kelsen H *General Theory of Law and State* Translated by Wedberg A (1945); Lauterpacht H *International Law and Human Rights* (1950).

² Several countries deal with this differently. In the case of *Rodriguez-Fernandez vs Wilkinson* 654 F 2d 1382, 1390 the United States District Court of Kansas issued a landmark decision concerning the incorporation of human rights into US common law. After concluding that the US had not ratified any applicable treaties, the court embarked upon a survey of other international documents to determine if a customary norm of international law had been established on the material point. The court then said: 'There are a great number of other international declarations, resolutions and recommendations, while not technically binding, these documents do establish broadly recognized standards.'

³ For an in-depth discussion See Kirby J 'The growing rapprochement between international law and national law' in *Visions of the Legal Order in the 21st Century Essays in Honour of Weeramantry CJ*, available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_weeram.htm accessed on 5 October 2007.

⁴ Atkin J B in Akehurst M *Modern Introduction to International Law* P 45.

⁵ *Chung Chi Cheung vs R* (1939) AC 167 at 168.

affected by a law unless it has passed through the legislative procedures.⁶ The application of international law in the domestic realm of any state does not denote the superiority of international law over municipal law but reflects the extent to which such international law has been imported into the domestic domain by local legislation.

In a dualist system, citizens have neither rights nor duties under a treaty, even one which the state has ratified. The state, however, remains bound to respect the provisions of the treaty vis-à-vis its other treaty partners. Accordingly, 'a state cannot claim inability to perform its international obligations for lack of enabling domestic legislation,'⁷ so that a state is under obligation – but only in the international sphere - to enact legislation to give effect to its international commitments.⁸

2. Domestication of United Nations anti-terrorism treaties and UNSCR 1373

The Kenyan position on international law is governed by its 2010 Constitution. Article 2(6) provides that, 'any treaty or convention ratified by the country shall form part of its law.' For Uganda, on the other hand, international treaties are not directly applicable unless they have been domesticated by parliamentary enactment.⁹ In the case of international customary law, however, it would appear that both countries follow the principle inherited from English law (which is a monist doctrine): customary law is deemed to be part of the domestic law of the state.¹⁰

⁶ Supra n 4. The position in England is demonstrated in the case of *Mortensen v Peters* 8 Fr. 93, 96, 14 SLT 227, 230 (Scot Session 1906) where Lord Dunedin said 'In this court we have nothing to do with the question of whether the legislature has or has not done what foreign powers consider usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is ultra vires or in contravention of generally acknowledged principles of international law. For us an act of parliament duly passed by Lords and commons and assented to by the King is supreme and we are bound to give effect to it its terms'. Similarly American courts have repeatedly held that a valid municipal statute overrides international law to the extent it is at variance with it. For example, in the case of *Tag v Rogers*, 267 F 2d 664, 666 [DC Circ 1959] the United States Court of Appeal for the District of Columbia Circuit held: '[t]here is no power in this court to declare null and void a statute adopted by the Congress ... merely on the ground that such provision violates a principle of international law.'

⁷ Wallace R 'International Law' in Williams S A *An introduction to International Law* (1979). Article 27 of the Vienna Convention on the Law of Treaties, 1969, states that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

⁸ In *The Alabama Claims Arbitration* case, the ICJ held that 'a piece of national law cannot be regarded as an excuse for the breach of obligations given by international law.' (1872) Intern Arb 475. See also the *Exchange of Greek and Turkish Populations case (The Greco-Bulgarian Communities case)* (1930) PCIJ series B No 17. The principle established by these cases runs through the thread of all similar matters. A state which has established international obligations is under a duty to modify its domestic law to give effect to its international responsibilities.

⁹ Abdillahi Said Osman A S 'The Attitude of newly independent states towards international law: The need for progressive development' (1979)48 Nordic Journal of Int'l L 15

¹⁰ Gerald L. Neuman G L 'Sense and nonsense about customary international law: A response to Professors B Goldsmith' (1997)66 Fordham Law Review 371.

United Nations Security Council (SC) resolutions present a slightly anomalous issue, since they are neither custom nor treaty. Nevertheless, according to art 25 of the UN Charter, as read with art 103, resolutions of the Council taken on matters of international peace and security are binding on member states regardless of other conflicting treaty obligations. Most states treat such resolutions as a species of treaty. Hence, as a response to the SC Resolution 1373, Kenya and Uganda incorporated anti-terrorism conventions and took the necessary steps to:

[P]revent the commission of terrorist acts including suppressing the recruitment of members of terrorist groups, preventing those who finance, plan, facilitate or commit terrorists within the territory and to take measures to prevent counterfeiting, forgery or fraudulent use of identity papers and travel documents.¹¹

SC Resolution 1373 created a self-monitoring unit in the name of the Counter-Terrorism Committee (CTC) which is a working group of all the fifteen Security Council members. The Resolution required all member states to report to the CTC their implementation progress no later than 90 days from the date of the resolution.

Several countries, however, interpreted the 90-day reporting period to mean that anti-terrorism laws must be enacted within that period. In Uganda, a strong anti-terrorism legislation was proposed and passed in the super-heated atmosphere of the trauma and despair of September 11, and the compelling words of UNSC Resolution 1373. It would appear that:

Resolution 1373 – largely framed by the United States and promoted in sympathy and solidarity with Washington – may have been deliberately designed to reflect the US preference for fighting the global war on terror unhindered by what it saw as inapplicable or outdated humanitarian laws.¹²

The result was that Resolution 1373 was drafted and passed with only fleeting reference to compliance with human rights.¹³ The resolution set a distinctive precedent in the sense that the SC had

¹¹ UNSC Res 1373 adopted on 28 September 2001 under Chapter VII of the UN charter available at [http://ods-dds-ny.un.org/doc/UNDOC/GEN/NO1/557/43/PDF/NO155743.Pdf/](http://ods-dds-ny.un.org/doc/UNDOC/GEN/NO1/557/43/PDF/NO155743.Pdf?OpenElement) Open element accessed on 15 November 2007. This resolution passed under Chapter VII of the UN Charter imposed significant obligations on all member states. The resolution required members who had not ratified the sectoral anti-terrorism treaties to do so and further required those states which had not done so to freeze the assets of terrorists and deny them safe haven and to improve border security and control traffic in arms, co-operate and exchange information with other states concerning terrorists and provide assistance to other states in criminal proceedings on terrorism.

¹² Foot R 'The United Nations, counter terrorism and human rights: Institutional adaptation and embedded ideals' 29 2 HRQ 489, 499.

exercised a species of legislative power in that it had directed member states, in terms of Chapter VII, to pass laws modelled on its resolution. The Resolution itself appears to permit the executive branch of government in member states generous latitude in dealing with counter terrorism activities, and, what is more, it seems to place the imperatives of security ahead of considerations of human rights.

These assumptions are not without foundation. In almost all the counter terrorism legislation that followed the Resolution it is clear that the executive arrogates to itself the authority to declare individuals as terrorists and entities as terrorist organisations.¹⁴ In only a few of the statutes is judicial review of the declaration permitted,¹⁵ which is a marked departure from the traditional principle of the presumption of innocence in criminal law.

Many of the problems arising out of the anti-terrorism legislation promulgated after September 11 may be ascribed to two reasons. First, Resolution 1373 did not make it clear that human rights were to be upheld in the fight against terrorism. Secondly, in its initial phase, the CTC did not pay much attention to human rights in the domestic legislation.¹⁶ As a matter of fact, the first chairperson of the CTC made it clear that human rights concerns were outside the mandate of the CTC and that such issues were better dealt with by other agencies.¹⁷ The CTC wielded a checklist of the countries, which had passed anti terrorism legislation without conducting a content analysis of the statutes.¹⁸ In this way the SC and the CTC may unintentionally have created the impression that human rights may be sacrificed on the altar of greater security.

¹³ Para 3(f) calls upon states 'to take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.'

¹⁴ Bascombe D 'An update of anti-terrorism legislation in the Commonwealth' available at http://www.humanrightsinitiative.org/new/anti_terror_legislation_cw2004.pdf accessed on 2 June 2009.

¹⁵ Ibid. Some of the countries that permit judicial review are Australia, Malaysia and the Bahamas.

¹⁶ Supra n. 12.

¹⁷ The CTC's initial policy on human rights was expressed by its first Chairman in a briefing to the Security Council on 18 January 2002: 'The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organisations to study States' reports and take up their content in other forums.' See The Counter Terrorism Committee and Human Rights available at <http://www.un.org/en/sc/ctc/docs/presskit/2011-01-presskit-en.pdf> accessed on 23 June 2009.

¹⁸ In 2004 Human Rights Watch produced a disturbing report in which it laments that 'when governments describe new draft anti terror or security laws containing provisions that rights-trained experts would readily recognise as inviting abuse, the CTC [says] nothing ... when governments describe actions with major rights implications, the CTC does not even raise an issue.' See 'Hear No Evil, See No Evil: The UN Council's Approach to Human Rights Violations in the Global Counter-Terrorism Effort' 7-8 (10 April 2004) available at <http://www.hrw.org/background/un/2004/un0804> accessed on 2 March 2008.

Above and beyond the need for international compliance, the rationale for anti-terrorism legislation is the same in Kenya and Uganda, as it has been elsewhere:

[t]o strengthen and streamline the government's ability to gather evidence so as to disrupt, weaken and eliminate the infrastructure of terrorist organisations; to make terrorism a national priority in the criminal justice system; and to enhance the authority of the immigration and naturalisation service to detain or remove suspected terrorists.¹⁹

Again, in Kenya and Uganda, as elsewhere in the world, debates still rage over the proper balance between individual freedoms and national security. Questions still linger on the efficacy of counter terrorism legislation and the strategies adopted in implementing the law. Does the legislation prevent terrorism? What are the effects of counter terrorism legislation on human rights, and what is the net social gain served by such law?

It has been forcefully argued that 'the attainment of security and the protection of human rights are not necessarily antithetical either as a matter of fact or principle.'²⁰ Yet it sometimes appears as though political leaders view terrorism as an enemy to be defeated no matter what the cost to civil liberties.²¹

(a) From the UN to the Commonwealth: Moving the Conventions closer home

On 25 October 2001 the Commonwealth of Nations Committee on Terrorism met and discussed UNSCR 1373.²² It affirmed the resolution and pledged to propose to the Heads of Government that they implement its recommendations. It was agreed that there was a need for a plan of action based on the Commonwealth's appreciation of the effects of terrorism and in keeping with the fundamental values of the

¹⁹ United States Attorney-General John Ashcroft *Testimony before the House Committee on the Judiciary* (24 Sept 2001) available at <http://www.usdoj.gov/ag/crisisremarksg-24.htm> accessed on 5 June 2008.

²⁰ Lazarus L & Goold B 'Security and human rights: The search for a language of reconciliation' in *Security and Human Rights* Lazarus & Goold (eds) (2007) 1.

²¹ September 11 presented a moment of crisis from which states have been reluctant to emerge. Politicians from either side of the Atlantic are quick to single out 9-11 as the bedrock of their desire to upstage human rights in favour of security. The ever present threat of a terrorist attack calls into operation an enduring vigilance in what former American Vice-President Dick Cheney refers to as 'the new normal'. He further says that 'normal times are gone and that emerging powers are the new paradigm and the new normal in politics', available at [goliath.ecnext.com/coms2/91-0199-5799384/The problem with-normality-taking.html](http://goliath.ecnext.com/coms2/91-0199-5799384/The%20problem%20with%20normality%20taking.html) accessed on 2 April 2007. On 5 August 2005, Tony Blair told a London News Conference, 'Let no one be in any doubt that the rules of the game are changing.' With that Blair announced a set of new measures towards deportation and exclusion from the UK of those advocating for hatred and violence. He also said that the UK Human Rights Act would be amended, to counter Islamic Extremists available at <http://terrorismwatch.tripod.com/terrorism-England.html> accessed on 6 April 2008.

²² Report of the Commonwealth Committee on Terrorism (CCT): Commonwealth Plan of Action available at <http://www.thecommonwealth.org/> accessed on 4 March 2008.

association including democracy, human rights, and the rule of law, freedom of belief, freedom of political opinion, justice and equality.²³

Within this context, the Committee agreed that any member state that aided, supported, instigated, financed or harboured terrorists or permitted such activities within its jurisdiction violated the fundamental values of the Commonwealth and should have no place in it. It was suggested that the Commonwealth adopt certain legal measures to support members with the implementation of the SC Resolution 1373 including legal assistance and capacity building. In this area the Commonwealth secretariat would prepare model legislation and guidelines for member countries to use as a basis for the development of domestic legislation and other measures.²⁴

In February 2002, the Commonwealth secretariat established an expert Working Group on legislative and administrative measures to combat terrorism.²⁵ This group drafted a model legislative framework for implementing UNSC Resolution 1373, and recommended that all Commonwealth countries establish laws in accordance with the model draft. As part of the Commonwealth, Uganda hastened to comply, and Kenya followed suit much later. The speed with which the legislation was enacted in Uganda is a case study in poor draftsmanship and abuse of intent. In many ways, anti terrorism legislation in Uganda - and to some extent in Kenya - allows institutional lawlessness by security agencies and reduces the judiciary to the position of a helpless spectator.

(b) Application of UNSC Resolution 1373 in the domestic arena

Uganda's Anti-terrorism Act (Ugandan Act) came into force on 7 June 2002. The Act, drafted as a reaction to September 11, was rushed through Parliament with little or no meaningful debate except the pressure of the prevailing view that terrorism had to be defeated. It did not, therefore, receive the benefit of analysis ordinarily given to such important legislation, particularly because of the far-reaching impact it was designed to have on the existing penal code and other criminal law statutes. Although the legislation is not lengthy it deals with weighty issues, covering: seizure of terrorist property; regulation, disclosure and

²³ Ibid.

²⁴ Various other recommendations were made, including urging all member states to ratify all anti-terrorism conventions and to make available to the Secretariat copies of legislation adopted. The urgent need for international cooperation in rendition of fugitive offenders and mutual assistance in criminal matters were also recommended. It was agreed that the Committee would propose to the Heads of Governments the need to deal with these issues as soon as possible available at <http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=35145> accessed on 6 November 2007.

²⁵ Lumina C 'Legislative responses to terrorism in Africa' in Nhema AG & Zeleza P (eds) *A Survey of Selected Practice in The Roots of African Conflicts: The Causes and Costs* (2008) 197.

retention of information; new police powers; executive lawmaking powers in respect of security co-operation; and the detention of suspected international terrorists.

With the benefit of hindsight it is now clear that 'whenever legislation is passed during a time of national outrage and collective passion we dramatically increase the risk that our laws will be based upon false assumptions.'²⁶ Conversely, crisis driven legislation may only profit from post enactment analysis and amendment.

Despite the justification provided for the legislation, namely, to obtain greater public security, some of the provisions seem to cover a great deal more than the specific threat of domestic and international terrorism. Uganda's Act revisits offences already covered in other statutes, and increases the sentence for ordinary crimes such as murder,²⁷ arson,²⁸ and possession of firearms²⁹ if the accused persons are charged under the Act.

In Kenya, a vague and ill-considered Bill was published in 2003, but was widely condemned by civil society groups and promptly rejected by the National Assembly. In May 2006, the government introduced a fresh Bill dubbed the 'Prevention of Terrorism Bill'. It too received a cold reception, similar to that of the Anti terrorism Bill before it. Eventually, after several amendments to the Bill, in July 2012, Parliament enacted the Prevention of Terrorism Act, which shall be the basis of my discussion hereafter.

Several reasons may account for the different actions taken by Kenya and Uganda. On the political level, President Yoweri Museveni of Uganda has long desired acceptance and support in Western capitals. A quick compliance with international demands affords a ground for self-advertisement. At another level, Uganda needed a powerful tool to support its internal struggle against the LRA in the north.³⁰

Although public discussion and Parliamentary debates on Kenya's anti terrorism law lasted well over nine years, several provisions of the first draft of the Suppression of Terrorism Bill received executive approval and were in operation long before the law was enacted. This is not to say that anti terrorism law is

²⁶ O'Connor P O et al 'Into fire: How to avoid getting burned by the same mistakes made fighting terrorism in Northern Ireland' 2003 24 (4) *Cardozo Law Review* 1660.

²⁷ Uganda's Penal Code Chapter 120.

²⁸ *Ibid.*

²⁹ Ss 3, 5 and 11 of the Fire Arms Act Chapter 299 and Ss 3, 4, 5, 6, 7, 8, 9 and 25 of the Explosives Act Chapter 29.

³⁰ Buczek A E The paradox of US military aid: A case study of Uganda and the LRA A Research paper presented International Institute of Social Studies

necessarily a positive tool. The experience in Northern Ireland has shown that the many pieces of legislation directed at curbing terrorism resulted in frustrating the process.³¹ Some anti-terrorism provisions produce such resistance and outrage in the profiled communities that they drive frustrated and rebellious young men to join terrorist activities in order to protect their communities.

In the section below, the thesis examines the provisions of Uganda's Act and discusses its impact on the fundamental rights of the individual.

(c) The case of Uganda

(i) Preamble to Uganda's anti-terrorism legislation

The Ugandan Act opens with a broad preamble, which gives its purpose as not only the suppression of terrorism but also the proscription of terrorist organisations and obtaining information on terrorism including authorising the interception of correspondence and surveillance of persons.³²

Despite the deep and far-reaching provisions in the Act, no mention is made of individual liberties or fundamental rights. Nor does the Act seek to address the tension between security and human rights, although it is, in several cases, at variance with rights protected under the Constitution.

(ii) The over-inclusive definition

Of immediate concern in the study of the Ugandan anti terrorism legislation is the definition of the offence of terrorism. The definition in the Act is overly broad, embracing any act that: involves serious violence against a person or serious damage to property, endangers a person's life or creates a serious risk to the health or safety of the public. Any such act must be 'designed to influence the Government or to intimidate the public or a section of the public,' and to advance a 'political, religious, social or economic aim' indiscriminately.

According to the Act,³³ a person commits an act of terrorism who for purposes of influencing the government or intimidating the public or a section of the public and for a political, religious, social or

³¹ See Hogan G and Walker C *Political Violence and the Law in Ireland* (1989). The authors contend that on the balance, coercion in the form and to the extent applied in Northern Ireland was counterproductive. The point is not that violent conspiracies were to be ignored but that by and large ordinary law would have coped.

³² The full text of the Preamble reads 'An Act to suppress acts of terrorism; to provide for the punishment of persons who plan, instigate, support, finance or execute acts of terrorism; to prescribe terrorist organisations and to provide for the punishment of persons who are members of, or who profess in public to be members of, or who convene or attend meetings of, or who support or finance or facilitate the activities of terrorist organisations; to provide for investigation of acts of terrorism and obtaining Information in respect of such acts including the authorisation of the interception of the correspondence of, the surveillance of persons suspected to be planning or to be involved in acts of terrorism; and to provide for other connected purposes.

³³ S 7 (2).

economic aim, indiscriminately and without due regard to the safety of others or property carries out a wide range of activities. These activities include manufacture, delivery, placement, discharge or detonation of an explosive or other device.

The Act further provides that a person who has direct involvement or complicity in the murder, kidnapping, maiming or attack, whether actual or attempted or threatened, on a person or group of persons, in public or private institutions is guilty of the offence of terrorism. This trend of testing for any involvement in terror continues in the prohibition of any direct involvement or complicity in the murder, kidnapping, abducting, maiming or attack, whether actual or attempted or threatened on a person, official premises, private accommodation, or means of transport of diplomatic agents or other internationally protected persons.

Similarly any person involved in intentional and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any of the terrorist activities under the Act; or has direct involvement or complicity in the seizure or detention of or threat to kill, injure or continue to detain a hostage, whether actual or attempted, in order to compel a state, an international intergovernmental organisation, a person or group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage shall be guilty of terrorism.³⁴

Other activities included in the definition of terrorism are the unlawful seizure of an aircraft or public transport or the hijacking of passengers or a group of persons for ransom; serious interference with or disruption of an electronic system; the unlawful importation, sale, manufacture or distribution of any firearms, explosives, ammunition or bomb; the intentional development or production or use of, or complicity in the development or production or use of a biological weapon and the unlawful possession of explosives, ammunition, bomb or any materials for making of any of the foregoing.³⁵ The commission of any of the wide range of activities is sufficient to constitute terrorism. Obviously this vague definition of the offence of terrorism may lead to the arrest and detention of innocent persons.

As is clearly evident, the acts prohibited under the Ugandan Act are broadly defined so as to include historical and modern forms of terrorism. For instance, the inclusion of acts committed for an economic aim may cover lawful workers, union strikes or mass civil action. 'The idea that economically motivated property destruction constitutes terrorism however is questionable from a human rights

³⁴ S 7 (2) (d).

³⁵ S 7 (2) (f) (g) (h) (j)

perspective, especially because there is no exemption for protests or strikes.³⁶ Industrial action, even if it results in death or destruction of property is not committed with a terrorist intention. Suppose a mass political protest results in damage to property or loss of lives, is that act necessarily one of terrorism? The wording of the Act would suggest so.

The definition in the Act raises serious concerns with regard to its impact on advocacy, protest and dissent. For Uganda, it would appear that any advocacy intended to influence the government for a political, religious, social or economic reason is prohibited if it results in the injury or loss of lives or damage to property. Restricting the intention to political, religious, social or economic spheres limits the definition, but perhaps this is the only way to distinguish terrorism from other penal code offences, otherwise the door would be open to permitting all manner of incidents to qualify as terrorism so long as they led to loss of lives or destruction of property. What if a person, driven by personal frustrations or a desire to conserve the environment, set fire to a waste paper bin in a public park? Would that amount to terrorism? Unless there is a limitation clause, all manner of property destruction could be liable to prosecution. This is the danger inherent in defining an offence in terms of its results.

Close scrutiny of the Act reveals that the definition of terrorism overlaps with other existing common-law or statutory crimes. It would appear that an ordinary penal code crime, such as murder or arson, is elevated to terrorism if the executive thinks it is committed with terrorist intent. This allows the executive considerable discretion and may permit abuse of the anti-terrorism law for political benefit. Further, because the Act casts the definition of terrorism in such wide terms it may offend the principle that crimes must be strictly defined and interpreted. This is a basic tenet of the principle of legality³⁷

Except for the requirement that terrorism is an offence that seeks to influence the government, the Act does not make it clear how to differentiate between the ordinary penal code crimes and terrorism or

³⁶ Golder B and Williams G 'What is terrorism? Problems of legal definition' (2004) 27 *University of New South Wales Law Journal* 270.

³⁷ See Blackstone *Commentaries on the Laws of England* (1830) London Vol. 1 at pp 87-92. The principle of legality is a unifying concept, which has been applied to a wide range of more specific interpretive principles that have been developed over many centuries of common law development of the law of statutory interpretation. Amongst rebuttable presumptions, which are now part of the rubric of the principle of legality, are the presumptions that Parliament does not, unless specifically shown, intend: to invade fundamental rights, freedoms and immunities; to restrict access to the courts; to abrogate the protection of legal professional privilege; to exclude the rights to claims of self-incrimination; to permit a court to extend the scope of a penal statute; to deny procedural fairness to persons affected by the exercise of public power; to give immunities for governmental bodies a wide application; to interfere with vested property rights; to alienate property without compensation; to interfere with equality of religion.

how to discern the presence of a terrorist intention. The definition is a catchall classification that may include many forms of lawful conduct.

Terms such as 'influencing the government' or 'intimidating the public' that are not described in the definition, or in the body of the Act, lean perilously close to several acts which may be carried out in legitimate political and civil protests aimed at positive change of government policies. If, for example, a political rally develops into an unruly gang that directs its anger on the 'official premises, private accommodation, or means of transport or diplomatic agents or other internationally protected persons' would that necessarily be terrorism? Section 7 (2) (C) suggests so.

By their very nature all political protests seek to influence government. By defining terrorism in such wide terms, the Act strengthens the executive arm of government and allows it to stifle democratic dissent by the use of bare-knuckled force. In this way the Act 'subjects political activities to criminal sanctions, even when there has been no criminal activity.'³⁸ As it has been shown in the past, the Ugandan Defence Forces do not distinguish legitimate political dissent from illegal threats to state security.³⁹

The definition makes frequent references to 'damage to property', but there is no indication of the level of damage that would render an act a crime of terrorism. Evidently, without a clear delineation of the degree or extent of damage, acts that should be punished under regular criminal law would, under this Act, be punished as acts of terrorism, attracting much higher sentences.

A prominent feature in the Ugandan definition of terrorism is the inclusion of international and other governmental organisations as bodies against which compulsion must not be exerted.⁴⁰ Again, no effort is made to justify why political, social or economic coercion should not be brought to bear upon an international organisation. Indeed, it is unclear why international organisations should be included in a definition of terrorism. Subjecting protests against such organisations to the special treatment accorded to terrorism is clearly overkill, because all these organisations are protected by their founding documents and

³⁸ Judge S. B. Bossa & Mulindwa T The Anti-Terrorism Act 2002 (Uganda): Human Rights Concerns and Implications, a paper presented on September 15, 2004 to the International Commission of Jurists p. 8 http://www.icj.org/IMG/pdf/Paper_Bossa.pdf;

³⁹ Mutengesha S & Hendrickson D 'State responsiveness to public security needs: The politics of security decision-making' Uganda Country Study CSDG Papers No 16 June 2008.

⁴⁰ S 7(2) (e).

protocols with host countries. As the world witnesses many protests against international organisations, notably the World Trade Organisation, it is unwise to label all such protests as terrorism.⁴¹

In Uganda, the problem with the definition of terrorism was present even before enactment. The Bill that preceded the Act defined the offence in even more general terms, and caused great consternation in civil society, including the Uganda Human Rights Commission.⁴² Unfortunately the Bill was not properly interrogated, and the flaws in the definition were carried into law.

In sum, the wide definition of terrorism has seriously affected the offences covered under the legislation and has expanded executive power in the investigation and prosecution of suspects. It is apparent that the Act elevates a number of crimes to the status of terrorism where there is a political, religious, social or economic aim to influence the government.

(iii) Jurisdiction of the courts

Uganda's Anti terrorism Act establishes jurisdiction over all offences proscribed by the Act, 'if the offence is committed in Uganda, or outside Uganda affecting a Ugandan aircraft or vessel or if it is committed by a Ugandan citizen or against a citizen of Uganda.'⁴³ Jurisdiction is also extended to encompass offences against 'a state or government facility of Uganda, a stateless person who is habitually resident in Uganda or any person who is for the time being present in Uganda and on the property of any person.'⁴⁴ All offences committed outside Uganda to which the Act applies are to be treated as if they were committed in Uganda.⁴⁵

There is a general stipulation that 'the courts of Uganda shall have jurisdiction to try any offence under the Act wherever committed if the conditions under section 4(1), some of which are outlined above, are met.'⁴⁶ The offence of terrorism, however, and any other offence punishable by more than ten years'

⁴¹ See for example, Shah A 'WTO Protest in Seattle' available at <http://www.globalissues.org/print/article/46> accessed on 15 June 2010. Protests and scuffles were witnessed in a meeting of ministers discussing various trade rules. Sympathisers of developing countries felt that the industrialised nations were taking advantage of the poor countries in making unfavourable regulations.

⁴² Issues raised on the Bill included: The blanket death sentence on conviction of a terrorist act (Clause 7(1) of the Anti Terrorism Bill, 2001 – hereinafter the Ugandan Bill); the obvious duplication of offences with varying penalties; the shift of the onus of proof – (Clause 9 of the Bill); the open discretion granted to the executive to declare an organisation a terrorist organisation – Clause 5; the declaration of an item of clothing as proof of membership of a terrorist organisation – Clause 16 were either reworded or dropped altogether in the Act.

⁴³ S 4(1).

⁴⁴ S 4 (1) (b).

⁴⁵ S 4 (2).

⁴⁶ S 4 (1).

imprisonment under the Act are to be tried only by the High Court and bail in respect of those offences may be granted only by the High Court.⁴⁷

Prosecution for offences under the Act may be commenced only after the Director of Public Prosecutions has given consent.⁴⁸

(iv) Detection and prevention of terrorism

In Uganda, the executive has reserved to itself the power to intercept communications and conduct surveillance of a person who may not necessarily be a terrorist suspect.⁴⁹ All that is needed is authority from the Minister of Internal Affairs.⁵⁰ The interception or surveillance is premised on safeguarding the public interest.⁵¹ Other grounds given are prevention of the violation of the fundamental rights and freedom of any person from terrorism, detection of an offence under the Act and safeguarding the national economy from terrorism. The officer conducting the procedures does not need to obtain a court warrant, and the person under surveillance is not informed of the action.

The Act gives an authorised officer power to intercept the communications of any person and otherwise conduct surveillance of any individual.⁵² The scope of interception of communications is very wide and covers every imaginable means of relaying information⁵³ so long as it relates to any 'article of a kind that could be used in connection with terrorism.'⁵⁴ This power is so extensive as to permit the interception of almost any object. No distinction is made in order to exclude items or goods involved in legitimate trade or business. This all-encompassing provision could delay security and customs clearance of merchandise, and impact negatively on commerce, particularly when the government itself is engaged in the economy as a competitor with private enterprise.

The Act also provides that the officer conducting the interception is empowered to make copies of any documents and to take photographs of any person being monitored.⁵⁵ It is apparent that it permits the

⁴⁷ S 6.

⁴⁸ S 3.

⁴⁹ S 19.

⁵⁰ S 19 (1) & (2).

⁵¹ S 19 (4).

⁵² S 19 (1).

⁵³ S 19 (5). Letters, telephone calls, faxes, e-mails, monitoring of meetings, surveillance on the movements and activities of any person, electronic surveillance, access to bank accounts of any person and the searching of premises of any person are all included.

⁵⁴ Ibid.

⁵⁵ S 19 (6) (b).

executive to intercept data without prior judicial sanction. Thus the police do not need a court order to enter premises to install listening devices for purposes of intercepting communications.⁵⁶

The formulation of the provision concerning interception of communication and surveillance of persons allows the government to label any dissent as terrorist and to invade personal privacy under the guise of fighting terrorism. The ministerial act of appointment of a security officer as an authorised officer is the only safeguard against abuse of executive power.

Several objections may be raised regarding the clandestine interceptions and surveillance provisions in the Act. First, they circumvent judicial oversight in the exercise of the power thereby opening it to abuse. The provision allowing the police to set up surveillance without notice or warrant expands their power without regard to the proportionality and legitimacy of their allegations.

Secondly, no mechanism is provided for review of the materials obtained or when to (dis) continue the surveillance. A person may be under surveillance for as long as an individual security officer thinks that they are a threat to state security. In the absence of proper judicial oversight, there should at least be an objective body to review such matters, but none has been established under the Act.

Thirdly, the Act does not set out objective criteria to be satisfied before placing someone under surveillance. The only reason needed is suspicion that they may be involved in acts prejudicial to the state. Suspicion is a wide term and may be informed by social, institutional and even political considerations. A person who comes to learn of his or her surveillance must have criteria upon which to object. Context-based labelling and tagging has led to profiling of certain persons and groups without any tangible evidence.⁵⁷ Within the terrorism category, profiling has fed into the panoply of executive discrimination

⁵⁶ S 19 (5) (e) (g).

⁵⁷Listing of prohibited entities is not a new phenomenon. The UN and USA engage in a similar exercise. The UN listing process, for example, is mainly political and diplomatic, rather than judicial, while US designation processes afford limited judicial remedies to listed individuals and entities.

The UN keeps only one list of 'terrorist suspects' which focuses on individuals and entities that are alleged to part or are associated with the Taliban regime or Al-Qaida. The list is kept and updated by a Committee specifically created by Resolution 1267 of UN Security Council (the 1267 Committee). The 1267 Committee is also assisted by a Monitoring Committee, whose membership consists of experts. Proposals for inclusions in the list can only be submitted by State Members, though both States and international organizations can submit further information on listed subjects.

Listing results in three types of sanctions that Member States must implement vis-à-vis listed persons or groups:

1. Freezing of assets and funds;
2. Restrictions/ban on entry and transit of Member States' territory;
3. Prohibition on supplying, selling, transferring or use of arms.

See Goretti C 'Listing and de-listing of terrorist organizations: the Cases of the United Nations and the United States of America' available at http://www.hdcentre.org/uploads/tx_news/147ListingandDe-listingofTerroristOrganizations.pdf accessed on 2.1.2013.

against certain races and religions.⁵⁸ Profiling of individuals and organisations has various implications ranging from freezing of assets and travel bans to prohibition of providing support, contacts and membership

Privacy is protected as a right under the Ugandan Constitution.⁵⁹ Granted that issues of national security arise in considerations of surveillance, it is now clear that the Anti terrorism Act is a radical derogation from constitutional protections and has eroded personal privacy to a dangerous extent. Moreover, what happens to personal data obtained from surveillance, but which has no relationship to the commission of any crime? Is such information not open to abuse in credit ratings, blackmail, etc? Moreover, the Uganda statute is silent as to whether such information may be shared with a foreign intelligence agency.

Strong arguments, of course, do exist for the need to place modern technology in the service of the executive. It is said that 'maintaining law, order and security has become an ever more complex enterprise that relies less on tracking physical bodies than on tracking the data trails that individuals leave behind.'⁶⁰ Unfortunately no empirical study has been done to confirm whether privacy is something individuals are willing to lose as a substitute for what they may perceive as greater security. September 11 provided a tragic foundation on which governments could base their claims to provide security for the greater common good. Indeed, after that event the 'surveillance society' model of security has become increasingly viewed as legitimate, with the result that there has been a considerable increase in the use of state power.⁶¹

It is to be appreciated that privacy is more than keeping one's information to oneself. It is retaining a degree of control over one's identity – an endeavour that is by nature indefinable and fluid, but goes to the heart of what is to preserve human dignity.⁶² There is no doubt that the expanded electronic and surveillance provisions require limitations and judicial control.

⁵⁸ Ihsanoglu E 'Islamophobia and terrorism: Impediments to the culture of peace' (2010) 4 (7) *Arches Quartely* 11.

⁵⁹ Art 27 of Uganda's Constitution protects the right to privacy.

⁶⁰ Lyon D 'Surveillance studies: Understanding visibility mobility and the phenetix fix' (2003) 1(1) *Surveillance and Society* 3.

⁶¹ Levi D S 'Technologies security and privacy in the post-September European information society' 11 (2004) *Journal of Law and Society* 203 - 312.

⁶² For an in-depth discussion of this view see Goold B 'Privacy identify and security' in *Security and Human Rights* Supra 21 at 46-69.

(v) Investigations

The Ugandan Act⁶³ makes elaborate provisions for terrorist investigations. Section 17 of the Act permits police powers to obtain information for purposes of investigation into the commission, preparation or instigation of acts of terrorism or any other act that constitutes an offence under the Act. The Third Schedule provides for judicial issue of a warrant to enter specified premises and to seize and detain any material, which may be of assistance to an investigation.⁶⁴

The officer making the application to the court, however, must demonstrate that the material being sought is not the subject of legal privilege, excluded material or special procedure material.⁶⁵ The Act also provides that an investigating officer may apply to a magistrate for an order requiring the production of materials necessary for an investigation to be conducted.⁶⁶ There is a difference, however, in the operation of the rules. Under Rule 2, the person in possession of the material must themselves surrender it to the investigating officer. Under Rule 8, the material may be seized in the absence of the bearer.⁶⁷

In partial redemption of the draconian nature of the Third Schedule, an aggrieved party may make representations to a magistrate, who may vary or waive any order made under the Schedule.⁶⁸ The benefit of this provision, however, is taken away by the penultimate provision of the Schedule, which gives an investigating officer the power to give any police officer the authority, by means of a search warrant, to enter and search any premises even in the absence of the occupier.⁶⁹

To exercise the authority granted under Rule 12, and to give power of entry, all that an investigating officer has to show is 'reasonable grounds for believing that the case is one of great urgency and that it is in the interest of the state.' In this way the judicial oversight bestowed upon the magistracy can be circumvented. This rule in effect gives an investigating officer the role and power of a magistrate. The

⁶³ See Part V1

⁶⁴ Rule 7(1) of the Third Schedule allows a magistrate to issue an order on application by an investigating officer if the officer discloses reasonable grounds for believing that there is material on the premises which is likely to be of substantial value (whereby itself or together with other material) to the investigation.

⁶⁵ Rule 7 (1) (b) of the Third Schedule lays down a class of 'items subject to legal privilege' to mean client-advocate communication; rule 3 sets down a category of 'excluded material' which include trade records, human tissue or fluid held for medical treatment and journalistic material; rule 6 sets down 'special procedure material' which signifies documents held in trust for another person.

⁶⁶ Rule 8 of the Third Schedule.

⁶⁷ Further, Rule 3(8) of the Third Schedule provides for materials that may come into the possession of a person in the future.

⁶⁸ See Rule 9

⁶⁹ See Rule 7 to 10 of the Third Schedule especially Rule 12 of the Third Schedule. Rules 7 to 10 deal with warrants, entry into premises, privileged documents and enforcement of the warrants. In essence Rule 12 says that the investigating officer may dispense with the requirement of obtaining the sanction of the court if the officer is of the view that the case requires urgent intervention.

pretext of a situation of emergency requiring 'immediate action' is far too low a threshold. It is not clear what standard, if any, the investigating officer applies in making a decision that sufficient reason exists for taking immediate action.

It will be seen that the investigating officer's exercise of the power to circumvent the need for a search warrant is of an extreme nature with severe consequences. For this reason there ought to be probable cause before the power is applied. Instead of requiring an investigating officer to report any action taken under this rule to a magistrate, the Schedule requires the officer to notify the particulars of the case to the Director of Public Prosecutions (who is part of the executive). The executive, however, seldom checks itself.

To seize all manner of materials from a person who is not even a suspect at the time of the seizure for the mere purpose of investigating commission of a possible crime in the future is clearly incompatible with the constitutional protection of the right to privacy. Such an action taken capriciously is disproportionate to the end it seeks to obtain, and is unreasonable in the circumstances. It should be mandatory to involve the judiciary in all such investigations. The absence of such control permits the executive to disregard the standards of 'what is acceptable and demonstrably justifiable in a free and democratic society' and to assert state interests beyond that of the individual.⁷⁰

Section 32 of Uganda's Act⁷¹ and Rule 13 of the Third Schedule confers blanket immunity on investigating officers against any civil action if the officer can show that the acts complained of were done in good faith.

With regard to sentencing, the Ugandan Act imposes up to five years imprisonment for destroying material likely to be relevant to an investigation, 'unless the accused persons can prove that they had no intention of concealing any information contained in the material in question from the person carrying out the investigation.'⁷² This section, in aid of investigations imposes a strict liability offence. According to the

⁷⁰ See Art 43 (1) (c) of the Constitution of Uganda: Any limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

⁷¹ No police officer or other public officer or person assisting such an officer is liable to any civil proceedings for anything done by him or her, acting in good faith, in the exercise of any function conferred on that officer under this Act.

⁷² S 17 (2).

International Commission of Jurists, 'if a disproportionate burden is placed on the accused to prove facts, or to prove a lack of criminal intention, the right to be presumed innocent is effectively set aside.'⁷³

(vi) Arrest and search without a warrant

In Uganda, the provisions regarding terrorist investigations have introduced further radical changes to the institutions and personnel by which the government monitors and investigates citizens. Investigations are now directed and supervised by a Joint Anti Terrorism (JAT) Task Force, which was established in 1999.⁷⁴ JAT comprises of powerful new departments within the security forces, combining the department of Military Intelligence (lead agency), the Police Criminal Investigation Department (CID), the Special Branch (SB), the External Security Organisation (ESO) and the Internal Security Organisation (ISO). Interestingly, there is no specific mention of JAT and its role to combat terror in the Ugandan Act.

The provisions with regard to police officers' use of force in investigations require further comment. The Code of Conduct for Law Enforcement Officials, adopted by UN GA Resolution on the Code of Conduct for Law Enforcement Officials 34/169 of 17 December 1979,⁷⁵ would oblige law enforcement officials to use force only when strictly necessary and to the extent required for the performance of their duty. This resolution emphasises that enforcement official's resort to force should be exceptional and not the norm. Any use of force which is disproportionate to legitimate objectives is therefore illegal and must be investigated and punished. The provisions of the Ugandan anti terrorism statute, however, radically reduce this threshold and negate the spirit of the resolution.

Inherent (and anticipated in) the Ugandan Act is the use of firearms as a necessary force. GA Resolution 34/169 speaks directly to this issue. It recognises that 'the use of fire-arms is considered an extreme measure [and] every effort should be made to exclude it especially against children.'⁷⁶ Further, 'firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardises the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.'⁷⁷

⁷³ See ICJ Report , (2009) p. 154. <http://ejp.icj.org/IMG/EJP-Report.pdf>. 280.

⁷⁴ Open secret; Illegal detention and torture by the Joint Anti-terrorism Task Force in Uganda available at www.hrw.org/sites/default/files/reports/uganda0409web.pdf accessed on 4th June 2012.

⁷⁵ GA Res 34/169 annexes 34 UN GAOR SUPP (No 46) at 186 UN Doc A/34/46 (1976).

⁷⁶ Ibid.

⁷⁷ Art 3 of Resolution 34/169 (see commentary (C)).

It is encouraging to note that the UN Code of Conduct for Law Enforcement Officials recognises and obliges law enforcement officers, in the performance of their duty, to respect and protect and maintain and uphold the human rights of all persons.⁷⁸ The Code is specific that '[L]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.' The UN Security Council has itself stated that:

States must ensure (that) any measure taken to combat terrorism complies with all their obligations under international law and should adopt such measures in accordance with international law particularly international human rights, refugee and humanitarian law.⁷⁹

Evidently, however, the anti terrorism legislation permits broad and far-reaching police powers of investigation and allows a downstream dissolution of the line between terrorism crimes and minor public order disturbances. The resultant effect is one in which distinct areas of responsibility are reduced in police activities thereby blurring the image of legality in law enforcement actions with the latter inviting less institutional scrutiny and judicial constraint. The police thus become a law unto themselves, deciding which situation needs urgent measures and applying whatever force they deem fit with no penalty attending their activities.

(vii) Declaration of terrorist organisations

The Ugandan Act lists certain organisations declared to be terrorist.⁸⁰ The Lord's Resistance Army, The Lord's Resistance Movement, The Allied Democratic Forces and Al-Qaeda are on the commencement list. The Minister has the power to amend this list.⁸¹ The amending document must be laid before Parliament within 14 days after being published in the Gazette and may be annulled by Parliament by resolution within 21 days thereafter, but any annulment does not affect the previous operation of the instrument.⁸²

⁷⁸ Art 2 of Resolution 34/169. The commentary to article 2 identifies the human rights to be protected as those under national and international law. It states that among the relevant international instruments are the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, the Declaration on the Protection of all Persons from being subjected to Torture, Inhuman or Degrading Treatment or Punishment, the United Nations Declaration on the Elimination of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Prevention and Punishment of the Crime of Genocide, the Standard Minimum Rules for the Treatment of Prisoners and the Vienna Convention on Consular Relations.

⁷⁹ Paragraph 6 Security Council Resolution 1456 (2003) adopted by the Security Council at its 4688th meeting on 20 January 2003 available at <http://ny.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf> accessed on 7 June 2010.

⁸⁰ S 10 (1) read together with the Second Schedule.

⁸¹ S 10 (2) states, 'The minister may by statutory instrument, made with the approval of the cabinet, amend the second schedule.'

⁸² S 10 (3).

Curiously, the period of days laid down runs only when Parliament is in session. In theory, even when Parliament is in session, the Minister's declaration of an organisation as terrorist may operate for a period of 35 days before it is open to Parliamentary review. The assumption here is that the Minister gazettes the declaration as soon as it is made. This, of course, is not always the case.

A declaration may be made and acted upon before it is gazetted. Nothing in the Act suggests otherwise nor does the Act make it mandatory for the Minister to gazette the declaration before applying it. No timelines are given between the making of the declaration and the gazetting, and further, the gazetting is not made a condition precedent to operation. In such a situation the Minister may gazette a declaration after it has been applied and has served its intended purpose. Any challenge in Parliament would be otiose.

The Act is silent on the procedure to be adopted if the Minister makes the declaration when Parliament is in recess. It is assumed that the declaration will continue to operate until Parliament resumes, after which any challenge to it may be entertained. This may cause grave injury to an organisation wrongly declared to be a terrorist organisation.

The Act does not set out any legal standards for the Minister to apply in reaching a decision that an entity is a terrorist organisation. Further, there is no recourse to any judicial proceedings for an entity declared to be terrorist.

Even more objectionable is the fact that the Act does not seek to address the negative effects of the previous operation of an annulled instrument, although these may be far-reaching. The Minister may declare a terrorist organisation dissolved,⁸³ or provide for its winding-up.⁸⁴ The statute also permits the Minister to provide for forfeiture to the state of the property and assets of the organisation.⁸⁵ The process of declaring an organisation dissolved and its properties forfeited does not provide for judicial control, and the affected members have no recourse to action that may annul the Minister's deed.

A stiff penalty of ten years or a fine not exceeding five hundred currency points, or both, awaits any person who belongs or professes to belong to a terrorist organisation.⁸⁶ Equally, a person who solicits or

⁸³ S 10 (5) (a).

⁸⁴ S 10 (5) (b).

⁸⁵ S 10 (5) (c).

⁸⁶ S 11 (1) (a) read together with S 11(3).

invites support for a terrorist organisation including arranging a meeting to be addressed by a member of a terrorist organisation is liable to the same sentence.⁸⁷

In summary, it is evident that the whole procedure of declaring an organisation terrorist and criminalising association with it or support for it is executive-directed with no judicial oversight.

In Uganda's Parliamentary session on the Anti terrorism Bill, there were heated debates as to whether the power to declare an organisation terrorist should rest with the Minister or Parliament. The Chairman of the Legal Affairs Committee of Parliament, Mr Adolf Mwesige, warned that 'this exercise is so important that it would require parliamentary approval.'⁸⁸ The government was adamant that it needed to be the repository of 'this power to move quickly and decisively against suspected terrorists before they cause more havoc.'⁸⁹ The Internal Affairs Minister had recourse to the usual security argument stating that, by seeking the approval of Parliament, 'vital intelligence information would be revealed and this would compromise the security of the country and the whole purpose of the law would be lost.'⁹⁰

The manner in which the Ugandan Act deals with declaring organisations terrorist entities raises several concerns. Quite obviously, no due process is followed as no provision is made for receiving representations from the organisations that the executive intends to declare terrorist. Under the Act, such a determination is not subjected to any scrutiny and is based on the Minister's 'reasonable suspicion.' The Act gives the government new realms of unchecked power and seemingly approves governance in secrecy. The potential for abuse of this power is extremely high. It may be used to curb lawful assembly, association and free speech.

In daily life, freedom of association may take many forms. It allows individuals to befriend anyone of their choice, to organise as formal groups in business enterprises, trade unions, political parties or any other such organisation.⁹¹ Moreover, freedom of association pre-determines several other constitutional freedoms. It sets the stage for the enjoyment of freedom of speech, religion and other rights, which cannot be realised if the state determines membership. Without proof of criminal intent, the state ought not

⁸⁷ S 11 (1(b) and (c) read together with S 11 (3).

⁸⁸ Ugandan Parliamentary Hansard available at http://www.parliament.go.ug/hansard/hans_view_date.jsp?dateYYYY=2001&dateMM=11&dateDD=07 accessed on 7 June 2008.

⁸⁹Ibid.

⁹⁰Ibid Internal Affairs minister Eriya Kategaya.

⁹¹ Tocqueville *A Democracy in America* 149. He states; 'The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right to personal liberty. No legislator can attack it without impairing the foundations of society' at 149.

interfere with private entities. If, for any reason, the state finds it necessary to penetrate the shield of the right to association it should provide a compelling public justification, stronger than a Ministerial discretion based on 'reasonable suspicion.'

As is apparent from an analysis of the legislation, the declaration of an entity as a terrorist organisation visits severe consequences on the organisation and its members. Under the Act⁹² any person who solicits support for a terrorist organisation commits a crime. What does 'support' mean under the statute? Does it mean issuing press statements in favour of the organisation? How about expressions of opinion, say in editorial columns in newspapers? It is evident that 'support' is a wide term with the potential to restrict freedom of speech and media freedom. It may perhaps be clearer if the term is construed as material support.

Dicey long ago said that 'a man may with us be punished for breach of the law but he can be punished for nothing else.'⁹³ Unless the law is spelt out clearly it may cause confusion in application – a probability now indicated by the Uganda Act.

(viii) Aggravated penalty for the offence of terrorism

The discussion thus far has demonstrated how Uganda's anti terrorism legislation has curtailed civil liberties beyond the ordinary scope of penal law. The legislation has introduced sweeping changes to executive power to monitor and investigate citizens. Further, the new legislation significantly curtails the freedom of the individual and the right to privacy.

An issue closely linked to the definition of terrorism is the penalty set out for the offence. In Uganda, 'a person who engages in or carries out an act of terrorism shall on conviction be sentenced to death, if the offence directly results in the death of any person, or in any other case be liable to suffer death.'⁹⁴ The wide definition of terrorism covering offences of a lesser magnitude, for example arson and possession of weapons, converts their penalties to a death sentence. Leaving aside for the moment the question of the death sentence, the draconian nature of these punishments may well be unjustified. In a politically volatile environment, such as exists in Uganda, the temptation to make use of criminal law for

⁹² S 11 (1) (b).

⁹³ Dicey *A V Introduction to the Study of the Constitution* [1885] 10th ed (1973) 202.

⁹⁴ S (7) (1) (a) and (b).

political purposes is ever present. The result is that terrorism legislation spells a death sentence for political dissent, if the government decides to attach a terrorist label to it.

Besides criminalising terrorism, the Ugandan Act creates new offences that are ancillary to terrorism *stricto sensu*. Aiding and abetting terrorism⁹⁵ and establishment of terrorist institutions⁹⁶ are made offences of such a serious nature that a person found guilty is liable to a death sentence. Closely related to offences of supporting terrorism are provisions that criminalise any form of financial assistance for terrorist activities. Contributions towards acts of terrorism,⁹⁷ or to resources of terrorist organisations⁹⁸ and the retention or control of terrorist funds⁹⁹ are prohibited. For this reason soliciting funds for an organisation, which the Act¹⁰⁰ recognises as a terrorist organisation is a criminal offence. It does not matter that the organisation may at the same time be engaged in other charitable activities for which the contributions could be used.

The Act does not require *mens rea* for this offence.¹⁰¹ This same reasoning - of prohibiting acts without requiring *mens rea* - is applied to a person who gives, lends or otherwise makes available to any other person, whether for consideration or not, any money or other property which may be used for the furtherance of terrorism.¹⁰² The fact that no *mens rea* is required of these infractions translates them into strict liability offences proven on demonstration of the presence of the *actus reus* alone.¹⁰³

Under the Act, a person who knowingly obstructs an authorised officer from carrying out interception or surveillance is guilty of an offence.¹⁰⁴ Conversely, facilitating the control or retention or movement of terrorist funds is an offence. In an open reversal of the presumption of innocence and the age old principle that the prosecution must prove all the elements of a crime, the Act provides that it is a defence for an accused person to prove that they did not know or had no reason to suspect that the arrangement related to terrorist funds.¹⁰⁵ This reversal of the onus of proof violates a cardinal principle of

⁹⁵ S 8.

⁹⁶ S 9.

⁹⁷ S 12.

⁹⁸ S 13.

⁹⁹ S 14.

¹⁰⁰ S 2nd Schedule.

¹⁰¹ S 12 (1) (a).

¹⁰² S 12 (2) (a).

¹⁰³ Cross N *Criminal Law & Criminal Justice: An Introduction* 71-17. Strict liability offences require *actus reus* to be proved to secure a conviction, not *mens rea*.

¹⁰⁴ S 20.

¹⁰⁵ S 14 (2).

criminal law. The Act creates an assumption that the court must presume an accused person guilty until they provide evidence to prove innocence.¹⁰⁶

This reverse onus of proof is also evident in section 15(3), which excuses any person who may show that he intended to inform the Director of Public Prosecutions or a police officer of his suspicion or belief that certain funds were terrorist funds. The preoccupation with the financing of terrorism is premised on the mistaken belief that terrorists necessarily need large amounts of money to execute their missions. Post September 11 bombings have disproved this theory.¹⁰⁷

The Act also criminalises attempts,¹⁰⁸ conspiracies¹⁰⁹ and being accessory before and after the fact of the offence of terrorism.¹¹⁰ All possible interactions with the offence of terrorism are covered; either in the preparatory stage or after the act of terrorism has been committed.

(ix) Financial assistance to terrorism

Following the dramatic events of September 11, the UN Security Council 'noted with concern the close connection between terrorism and transnational organised crime, illicit drugs, money laundering, illegal arms trafficking and illegal movement of nuclear, chemical and biological and other potentially deadly materials.'¹¹¹ In addition, other international bodies have recognised the close connection between terrorism and other forms of international crime.¹¹²

At the time Uganda enacted its anti terrorism legislation, it did not have a money laundering law.¹¹³ It would thus appear that the stringent provisions in the anti-terrorism Act regarding financial assistance for terrorists were meant to fill the vacuum and starve terrorists of funds. The financial provisions came to the

¹⁰⁶ S 14.

¹⁰⁷ See a report entitled: *Countering International Terrorism: The United Kingdom's Strategy July 2006 Presented to Parliament in March 2003 by the Prime Minister and the Secretary of State for the Home Department by Command of Her Majesty* available at <http://www.iwar.org.uk/homesecc/resources/uk-threat-level/uk-counterterrorism-strategy.pdf> on 6 November 2010.

¹⁰⁸ S 23.

¹⁰⁹ S 25.

¹¹⁰ S 26.

¹¹¹ Resolution 1373 (2001) Par 4.

¹¹² For example, the G8 Ministers of Justice and Interior, in their meeting of 13–14 May 2002 drew attention to the problem of terrorist organisations supporting their activities through the commission of other crimes. The G8 recommended that states strengthen their mechanisms aimed at breaking the link between money laundering, drug trafficking, illegal immigration networks and alleged trafficking in firearms. See *G8 Recommendations on Transnational Crime*, Mont Tremblant, 2002 available at http://www.justice.gc.ca/eng/news-nouv/nr-cp/2002/doc_30441.html accessed on 5 May 2008.

¹¹³ See Edopu P 'Infrastructure to detect and control Money Laundering and Terrorist Funding in Uganda, in *Trafficking & Money Laundering in East and Southern Africa*' *ISS Monograph no 108*, October (2004) 108 (4) (ed) Charles Goredema.

aid of banks that might have recognised suspicious transactions but were powerless to stop or freeze the transactions because they did not have legal powers to do so.

Contributions towards acts of terrorism¹¹⁴ and contributions to resources of terrorist organisations¹¹⁵ are prohibited on pain of a penalty of a term of imprisonment not exceeding ten years or a fine not exceeding five hundred currency points or both.¹¹⁶ The statute defines terrorist funds as ‘funds, which may be applied or used for the commission of or furtherance of, or in connection with Acts of terrorism, the proceeds of acts of terrorism or resources of a terrorist organisation.’¹¹⁷ The Act maintains its reverse burden of proof by providing that a person who is charged under the financial assistance clauses may be discharged on proof that they did not know and had no reasonable cause to suspect that the arrangement related to terrorist funds.¹¹⁸ Immunity from criminal responsibility is provided to a person who, on becoming aware of any information regarding terrorist funds, makes an immediate written report to the Director of Public Prosecutions.¹¹⁹

(x) Property rights

In the name of fighting terrorism, the Ugandan Act expands the powers of the executive to expropriate private property.¹²⁰ It allows the government to dissolve, wind up or provide for the forfeiture of the assets of an organisation or to freeze funds and property without recourse to any judicial process. The Act does not provide for any hearing before assets are frozen or forfeited.

(xi) Conclusion

It is clear from this discussion on Uganda’s anti terrorism legislation that threats of terror can lead governments to overreact, generating distorted and unjust criminal laws, often punishing innocent activities under the guise of controlling terrorism or may altogether abandon any legal restraints for the quick gains of employing less restrictive methods like preventive detention or torture. This is not surprising. The angst generated by terrorist activities creates an environment of anxiety and anger within government. The pressure to punish the offenders and calm the population often results in an over-reaction that ignores the

¹¹⁴ S 12.

¹¹⁵ S 13.

¹¹⁶ S 16 (1).

¹¹⁷ S 16 (1).

¹¹⁸ S 14 (2).

¹¹⁹ S 15 (1).

¹²⁰ S 10 (5).

constraints of the rule of law. The frustration is palpable and the conduct understandable. This is not singly a Ugandan problem. The same has been seen in the USA, UK and many countries within the commonwealth.¹²¹ The dilemma for legislatures is how to secure their countries within the restraints of the law. This discussion shows that Uganda's Act limits procedural safeguards against arbitrary arrest and detention, placing civil liberties in a very precarious position. A broad definition of terrorism and sweeping investigative powers provide avenues for abuse. This chapter shows that, as in a time of a terrorist attack, responses to terrorism have been equally dramatic, undertaken with a sense of panic or emergency both in the political and legal arena. This has often had serious negative implications for international and human rights law.

The next chapter discusses this worrisome predicament, further examining the Act and juxtaposing it with the Constitution of Uganda to assess whether this observation is well founded or is imaginary and speculative.

¹²¹ Golder B & Williams G 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' 2006 (8) *Journal of Comparative Policy Analysis* 43.

Chapter V

HOW DOES THE ANTI TERRORISM ACT IMPACT ON CIVIL LIBERTIES IN UGANDA?

1. Terrorism and the Constitution: Civil liberties under attack?

Uganda's anti terrorism legislation is representative of a large number of similar laws enacted to counter terrorism. In many ways, the legislation exposes the fault line between democratic governance and a legally permissive violation of human rights. Indeed, in Uganda, the tension is more serious because the country represents a weak and fragile democracy in which executive power is often intrusive, showing little regard for the other arms of government.

There is every reason for concern that anti-terrorism legislation is being used as an excuse to push back the gains made in the field of human rights in favour of the old bureaucratic tendencies to advance the interests of the government. The excuse is always the same: the need to protect public security. However, 'it is of the essence that a balance is struck between security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty.'¹ A more secure world must seek to obtain a compromise between public security and due process, respect for individual liberties and a system that allows proper checks and balances within government.

To say this is not to deny the fact that 'the reconciliation of the needs of security and democracy is one of the most difficult of all tasks in the 20th century.'² It is rather to recognise that in the 'final analysis public safety and individual liberty sustain each other,'³ and that counter-terrorism and human rights are not necessarily polar opposites. They are interdependent and supporting.

To place security on centre stage usually results in a focus on the means as if they were the end. 'Ultimately, the disregard for human rights may produce greater and more vicious incidents in light of the argument that terrorism often thrives in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse.'⁴ The temptation to 'fight fire with fire', setting aside the legal standards that exist in a democratic state, generates bad governance which is a significant component of the causes of terrorism.

¹ Brenna J in *Alister v The Queen* [1984] CLR 404 at 456.

² Williams D *Not in the Public Interest* (1965) 12.

³ Report of the Commission on CIA activities within the United States; Report to the President June 1975 at 5.

⁴ See a Report of the UN High Level Panel on Threats Challenges and Change. United Nations 'A More Secure World: Our Shared Responsibility' 45 (2004) available at <http://www.un.org/secureworld/report2.pdf> accessed on 17 March 2008.

In Uganda, the institutions that check government excesses are under constant threat.⁵ The Constitution, the judiciary, a free press and the opposition all operate under severe executive constraints.⁶ It would thus appear that to have a statute that opens wide the doors of manoeuvre for a government that does not respect existing restraints is to place fundamental rights and freedoms in danger of a freewheeling executive. 'Greater powers create opportunities to abuse those powers.'⁷ When India faced a spate of violent acts in the state of Jammu and Kashmir, for example, the police bosses gave instructions for all persons arrested to be charged under the Terrorism and Disruptive Activities Act (TADA), 1985, whether they were innocent, petty offenders or political dissidents. Only three per cent of all persons arrested were eventually convicted under TADA. The others received sentences under the Indian Penal Code.⁸

Since its independence in 1962 Uganda has had a checkered career. It has been governed under four different constitutions and is presently administered by one enacted in 1995. The preamble to this Constitution recalls the country's political and constitutional instability and recognises its struggles against tyranny, oppression and exploitation. The preamble commits the people of Uganda to building a better future by establishing a socio-economic and political order based on the principles of unity, peace, equality, democracy, freedom, sound justice and progress.

Chapter IV of the 1995 Constitution provides for the protection and promotion of fundamental rights and freedoms. Specifically, it is recognised that 'fundamental rights and freedoms of the individual are inherent and not granted by the state'⁹ and that 'the rights and freedoms of the individual shall be respected, upheld and promoted by all organs and agencies of government and by all persons.'¹⁰ The difficulty lies in unpacking the anti-terrorism law and practice in Uganda to decipher whether the spirit of the Constitution finds a place in the conduct of Uganda's executive.

The Constitution protects equality and freedom from discrimination,¹¹ the right to life,¹² personal liberty,¹³ human dignity and protection from inhuman treatment,¹⁴ and protection from slavery, servitude

⁵ Olum Y 'Are the Checks and Balances to Power and the Political Playing Field Sufficient to Consolidate Multiparty Democracy?' In Kiranda Y & Kamp M (eds.) (2010) *The State of Multi Party Democracy in Uganda* 6.

⁶ Ibid.

⁷ Vijayakumar V 'Legal and institutional responses to terrorism in India' in V V Ramraj et al (eds) (2005) *Global Anti Terrorism Law and Policy* 351-367 at 351.

⁸ Ibid.

⁹ Art 20 (1).

¹⁰ Art 20 (2).

¹¹ Art 21.

¹² Art 22.

and forced labour.¹⁵ There is also protection from deprivation of property,¹⁶ the right to privacy of person, home other property¹⁷ and a guarantee for the freedoms of conscience, expression, movement, religion, assembly and association.¹⁸

Section 43 provides for a general limitation on fundamental and other human rights and freedoms. Under this section the enjoyment of individual rights is subject to 'the fundamental or human rights and freedoms of others or the public interest.'¹⁹ It is, however, acknowledged that 'public interest shall not permit political persecution, detention without trial or any limitation of the enjoyment of any constitutional right beyond what is acceptable and demonstrably justifiable in a free and democratic society.'²⁰ Section 44 of the Constitution prohibits derogation from enjoyment of freedom from torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to a hearing and the right to an order of *habeas corpus*.

2. The effect of the anti-terrorism law on constitutional rights

An assessment of Uganda's human rights record indicates that there is a link between the state's counter-terrorism efforts and individual enjoyment of basic rights. Counter terrorism affects in particular the presumption of innocence, the right to a fair trial, freedom from torture and inhuman treatment, freedom of thought, privacy rights, the freedom of expression and the right to seek asylum.

(a) Presumption of innocence

Under international human rights law, the presumption of innocence is so important that it receives specific mention in the Universal Declaration of Human Rights and the ICCPR.²¹ Equally, the African Charter on Human and People's Rights provides for the right to be presumed innocent until proven guilty by a competent court or tribunal.²² In similar terms, Uganda's Constitution recognises the right of an accused person to elect to remain silent and not to give evidence whether on oath or affirmation or at all. This is

¹³ Art 23.

¹⁴ Art 24.

¹⁵ Art 25.

¹⁶ Art 26.

¹⁷ Art 27.

¹⁸ Art 29.

¹⁹ Art 43(1) states 'in the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest'.

²⁰ Art 43(2).

²¹ Art 11 of the UDHR declares: 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defense.'

²² Art 7(1) (b) of the Banjul Charter.

recognition of the fact that the burden of proving all the elements of a criminal charge is the prosecution's,²³ a rule that is an integral part of due process.

While the Ugandan Constitution guarantees all persons protection and equality before the law and, further, that no person charged with a criminal offence shall be treated as guilty of the offence until proven guilty, Uganda's Anti Terrorism Act, in many respects, reverses the onus of proof and requires the person charged to provide evidence of innocence. Under the Act,²⁴ an individual who belongs or professes to belong to a proscribed organisation commits an offence. It is, however, a defence to prove that the organisation in respect of which the accused is charged had not been declared a proscribed organisation at the time the person charged became a member or began to profess to be a member, and that he or she had not taken part in the activities of the organisation at any time after it had been proscribed. This reverse onus is again manifest in Section 25 of the Act, which sets down a penalty for membership in a terrorism group.

There is no doubt that the Act violates the presumption of innocence. It is trite law that the indictment or formal charge against any person is not evidence of guilt. Moreover, the law does not require the accused to prove innocence or produce any evidence at all: the prosecution has the burden of proving guilt beyond reasonable doubt. If this burden is not discharged, the court has to acquit the accused, even if nothing is said in his or her defence.

The Ugandan Act, as demonstrated, introduces a reverse onus of proof, presuming an accused person guilty until he or she proves innocence. Further, the fact of professing to be a member of a terrorist organisation or taking part in its activities raises some disturbing issues. What is the permissible limit of 'professing' to be a member of an organisation? Does membership per se, without other culpable conduct or taking part in any of the prohibited activities, amount to guilt? To criminalise mere membership would appear to be overkill and a challenge to the constitutional right to association.

²³ This principle has been upheld in many court decisions: *Okale vs. Republic* (1965) EA 55; *Alfred Tajar vs Uganda EACA Criminal Appeal No. 167 of 1969* and *Sarapio Tinkamalirwe vs. Uganda Supr. Court Criminal Appeal No. 27 of 1989*.

²⁴ S 11 (1) (a).

(b) Freedom of association

The Constitution of Uganda protects the right to freedom of association.²⁵ Presumably this right applies to all persons. The Ugandan Act, however, permits the government to deny entry to aliens on mere suspicion of being associated with a terrorist group.

This provision is open to two serious criticisms. First of all, association is a very wide term the scope of which is difficult to ascertain. Secondly, it is not necessary to prove the guilt of the person with whom association is prohibited; association with a suspect group is sufficient to make a finding on the guilt of the person charged. The Act, in imposing guilt by association, leads to punishment of persons not for crimes they have committed but for the company they keep.

This conflation of terrorist offences on the one hand with innocent, lawful behaviour on the other results in possibly law-abiding civilians being tainted with the label of terrorist suspects. That the state can control, in this manner, a private citizen's individual choice and autonomy is contrary to the basic principles governing democratic practices.

Uganda's anti terrorism law has been put to various uses. It has been deployed, in similar measure, with a view to emasculating a free political environment, as well as against the LRA.

In 2006, Dr Kizza Besigye,²⁶ a prominent government critic and a perennial challenger of President Yoweri Museveni was arrested and arraigned in court accused of terrorism, rape and treason. When released on bail he was again detained and brought before a military court-martial on the same charges of terrorism. It was clear that the charges, coming just before a general election, were politically motivated and were meant to remove Dr Besigye from the public eye, to place him in custody and to prevent him from campaigning. His arrest attracted global condemnation. The government responded by stating that Dr Besigye was guilty of terrorism by associating with and supporting a rebel group, based in the Democratic Republic of Congo, known as the People's Redemption Army.²⁷ Dr Besigye was also accused of being in illegal possession of arms. This, it was said, amounted to terrorism. Charged together with Dr Besigye were 22 other persons alleged to be his co-conspirators.

²⁵ Art 29 (1) (e) freedom of association shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.

²⁶ Dr Kizza Besigye is the leader of a political party – Forum for Democratic Change. He was for many years a Colonel in the Ugandan Army, having grown up in the ranks from the days he spent in the National Resistance Movement with his one-time patient and great friend President Museveni.

²⁷ *Daily Monitor*, 24 November 2005, quoting the acting spokesman of the Ugandan army, Major Felix Kulayigye.

In response to the government action, the Uganda Law Society brought a legal challenge to the general court-martial proceedings against Dr Besigye. The Law Society took the position that a court-martial does not have jurisdiction to entertain a charge of terrorism against a civilian. In January 2006 Uganda's Supreme Court ruled that Besigye could not be tried for terrorism by a military court when the High Court was seized of a case against him based on the same facts.²⁸

The Court ruled that the attempt by the military to try Besigye and 22 others in the general court martial 'contravenes Articles 28(1) and 44(c) of the Constitution and is inconsistent with Article 28(9) of the Constitution'. The Court further found that 'the General Court Martial has no judicial power over civilians who do not fall under the Uganda People's Defence Force Act'. Finally, the court stated that 'the trial of the accused persons on the charge of terrorism contravenes Articles 28(1), Article 120(1), (3)(b) and Article 210 of the constitution.'²⁹

The terrorism charge against Dr Besigye and 22 others demonstrates how effectively the state can use imprecisely worded legislation for its own purposes. If it may be said that Dr Besigye was a supporter of a rebel movement and was in possession of illegal arms, does that make him a terrorist in the international sense of the word? True, he may be liable for ordinary penal code charges of treason and possession of arms, but this does not translate to terrorism.

The conduct of the Ugandan Defence Forces during the trial of Dr Besigye supports the claim that the terrorism charge was indeed a ruse intended to satisfy other intentions. In March 2007, after the High Court of Uganda granted bail to the accused persons, a group of heavily armed men called the Black Mambas Urban Hit Squad, officially described as part of the military's anti terrorism unit, but seen in court wearing police uniforms, stormed the High Court ready to re-arrest the accused persons as soon as they

²⁸ Supreme Court of Uganda, Constitutional Court No. 1 of 2006, *Attorney General of Uganda v Uganda Law Society*. Justice Mulenga said 'I also agree with the majority holding of the Constitutional Court that the concurrent proceedings in the two courts were inconsistent with the principle underlying the provision in Article 28(9) of the Constitution, which prohibits the trial of a person for an offence of which he or she has been convicted or acquitted. In effect that provision is an aspect of the protection of the right to fair trial.'

²⁹ The majority ruling said: 'The General Court Martial was established by an Act of Parliament as a disciplinary organ to deal with Uganda People's Defence Forces but not civilians who have committed the offence of terrorism.' The Constitutional Court further ruled that the storming of the court was 'an intimidation of the High Court and illegal.' Uganda Constitutional Petition No 18 of 2005 [unreported].

were through with processing their bail documentation. The accused persons, though on bail terms, chose to remain in Luzira prison instead of risking detention by the Uganda People's Defence Forces.³⁰

The manner in which the Ugandan government dealt with the Besigye matter is disturbing because it shows how far a repressive regime may go in the use of anti terrorism legislation for domestic political purposes. Terrorism legislation provides the government with a powerful weapon that it may employ for its own selfish ends. It has the potential to undermine fundamental constitutional rights.

The United Nations Human Rights Committee has recognised the existence in many countries of military or specialised courts that try civilians.³¹ The Committee is of the view that such courts present serious problems as far as the equitable, impartial and independent administration of justice is concerned. It acknowledges that the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice, but advises that this should be undertaken under very exceptional circumstances and proceed under conditions that afford the full guarantees stipulated in Article 14 of the ICCPR.³² The Committee suggested that a permissible situation would perhaps be that of a public emergency. Uganda, though not in such a situation, has applied extreme measures in dealing with the LRA³³ and the Allied Democratic Forces (ADF)³⁴ both of which are listed as terrorist groups in the Ugandan Act.

After 11 September 2001 the United States added both the LRA and the ADF to its list of terrorists, further enhancing president Museveni's government's resolve to use all means to fight the LRA. Recently, however, the USA has dropped the ADF from its list. Uganda, however, maintains it. The reasons for the

³⁰ This conduct by the UPDF was promptly condemned by the Chief Justice of Uganda and the President of the High Court, Justice James Ogoola, who described the incident as 'a despicable act and a rape of the judiciary.' See Ross W 'Museveni: Uganda's Fallen Angel,' *BBC News Online*, November 30, 2005 available at <http://news.bbc.co.uk/1/hi/world.africa/4482456.stm> accessed on 5 April 2008.

³¹ See Human Rights Committee General Comment 13 art 14 (Twenty-first session 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N.HRI/GEN/1/Rev.1at 14 (1994) Para 4.

³² *Ibid.*

³³ The LRA is essentially a rebel group, which employs violent methods to attract attention and promote its activities. It carries out large-scale attacks on the civilian population to undermine the government's ability to secure the country. The LRA is completely absent in the matrix of international terrorism and does not target the traditional terrorist attraction of Americans, Britons or Israelis. The LRA aims at the overthrow of the government of Uganda and intends to set up a regime guided by the Biblical Ten Commandments. Either as a religious or a political organisation, the LRA fits the terrorism definition in the Uganda statute because it comes within the ambit of the 'use of violence or a threat of violence with intent to promote or achieve religious, economic and cultural or social ends'

³⁴ The Allied Democratic Forces (ADF), which operates from south-western Uganda and has bases in the Democratic Republic of Congo, is reportedly responsible for the many cross-border security problems in the Great Lakes region. In the period 1997 to 1999 Uganda experienced a wave of attacks, with bombs being thrown into taxis, pubs, markets and other public places. The bombs attributed to the ADF killed more than 50 people and injured more than 160. There is a growing concern that these two groups have the potential to breed and foster international terrorism in the region

government's action are beyond the realm of this discussion, but it is enough to say that subjective, political criteria are used in making the listings.

(c) The right to life and the prohibition against torture and cruel, inhuman or degrading treatment

Uganda's handling of the groups labeled terrorist is a litany of human rights violations, committed by the military and police with impunity.³⁵ Indefinite detentions, torture and various other abuses are widespread.³⁶ The criminal procedure guidelines for the arrest and detention of suspects are violated continually. When the security forces arrest people suspected of being members of a proscribed organisation the detainees are not remanded in ordinary police stations or prisons. They are held in 'safe houses'.³⁷ Here they are interrogated and classified depending on what the security forces think is the level of threat that they pose to the country.

The Ugandan Constitution explicitly prohibits detention of persons in 'ungazetted' places.³⁸ Any arrested person may be held only within a gazetted police station. The safe houses, however, are said to be in UPDF barracks, JAT premises and private residences.³⁹

Serious complaints have arisen from the conduct of the security forces in the 'safe houses'. One severe case that remains unresolved is that of Abdu Smugenyi, a political detainee who was confined in a 'safe house' and died under interrogation.⁴⁰ It is reported that suspects are held for indeterminate periods without charge or court appearance. Those who make it to court exhibit evidence of serious torture.⁴¹

³⁵ See Alternative Report to the Government of Uganda's First Periodic Report Before the United Nations Human Rights Committee 'Uganda: a situation of systematic violations of civil and political rights' 2004.

³⁶ Human Rights Watch 2011 'Violence instead of Vigilance: Torture and Illegal Detention by Uganda's Rapid Response Unit New York available at www.hrw.org/reports/2011/03/23. See also Uganda Human Rights Commission Annual Reports for 2010 and 2011.

³⁷ These are secret, unauthorised, ungazetted facilities where suspects are held incommunicado, without access to family or counsel. They are preferred for interrogation purposes because they operate outside the ordinary restraints of legal procedures. They are notorious for the brutal conduct of the interrogators.

³⁸ Art. 23(2) states: 'A person arrested, restricted or detained shall be kept in a place authorised by law.' The minister of internal affairs must publish in the Ugandan gazette the location of detention places.

³⁹ See 'The Daily Hansard of the Parliament of Uganda,' December 10, 2002, Motion for the presentation, consideration and adoption of the report on the committee on legal and parliamentary affairs, on the Uganda human rights commission annual report for the year 1998, 1999, 2000 and 2001, submitted in accordance with article 52(2) of the Constitution available at http://www.parliament.go.ug/hansard/hans_view_date.jsp?dateYYYY=2002&dateMM=12&dateDD=10 accessed on 25th June 2009.

⁴⁰ On 4 May 2006 Abdu Smugenyi, a businessman, was reportedly tortured to death by electrocution in a 'safe house' in Kampala. He had been arrested in April near Kasesse, Western Uganda, and accused of involvement with the ADF. Initially the security forces had denied having Smugenyi in their custody but later admitted that he was being held by the Joint Anti Terrorist

Appeals by international agencies to have Uganda investigate the claims of torture and the death of Abdu Smugenyi have been ignored, notwithstanding the fact that the country is bound by the United Nations Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions.⁴² By these Principles, governments are obliged to prohibit, by law, all extralegal, arbitrary and summary executions and to ensure that any such executions are recognised as offences under their criminal laws, and are punishable by appropriate penalties that take into account the seriousness of such offences.⁴³ The Principles state categorically that no exceptional circumstances, even a state of war, internal political instability or any other public emergency may be invoked as a justification of such executions.

The Declaration on the Protection of All Persons from Enforced Disappearances⁴⁴ is categorical that all persons deprived of their liberty must be held in official places of detention and the authorities must keep a record of their identities.⁴⁵ This means that accurate information must be kept on a person's placement in custody and whereabouts, including transfers, and must be made available to relatives, lawyers or other persons (who may be held to confidence).⁴⁶ In case of a complaint of whatever nature related to torture or extralegal executions the Principles require that there be a thorough, prompt and impartial investigation of all suspected cases, including those where reports suggest unnatural death so as to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about the death.⁴⁷

In the case of Uganda, the government has refused to carry out any investigations or even to admit that terrorist suspects are being tortured or executed without trial. Further, and in abuse of the Principles and its own Constitution, the government of Uganda has refused to hand over the body of the executed

Task Force in Kololo, an upscale 'safe house' in Kampala. Without embarrassment the government released a report stating that Smugenyi was killed while trying to escape. This unfortunate incident remains unresolved.

⁴¹ In July 2006 a woman who was allegedly connected with the late Abdu Smugenyi appeared in court charged with treason for alleged subversive activities between 2004 and 2006. She was covered in wounds, which she said were from torture by government agents. Her trial is still ongoing without any hope of determination, because there is no cogent evidence against her.

⁴² Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989. ESC res 1989/65, annex, 1989 UN ESCOR Supp (No 1) at 52, UN Doc E/1989/89 (1989) available at <http://www.unhcr.ch/html/menu3/b/54.htm> accessed on 7 June 2008.

⁴³ *Ibid* Par 1.

⁴⁴ Declaration on the Protection of all Persons from Enforced Disappearance Adopted by General Assembly resolution 47/133 of 18 December 1992 available at <http://www2.ohchr.org/english/law/disappearance.htm> accessed on 15th December 2010.

⁴⁵ See Art 10.1 of the Declaration. Also see Rule 7 of the Standard Minimum Rules for the Treatment of Prisoners, Principle 20 and 29 of the Principles for the Protection of All Persons under any form of Detention or Imprisonment.

⁴⁶ *Ibid* Par 6.

⁴⁷ *Ibid* Par 9.

detainee, Abdu Smugenyi, claiming that his body is missing.⁴⁸ This gives credibility to the family's contention that he was electrocuted whilst being interrogated. The Principles require that the body of a person who has died in any unnatural circumstances be available for an autopsy by an independent physician.⁴⁹

Over and above the Principles, the Ugandan government is under various other international treaty obligations to protect the physical and mental integrity of all persons. This right (to physical and mental integrity) is set down in a range of international human rights documents including the International Convention on Civil and Political Rights (ICCPR),⁵⁰ the 1975 Convention against Torture and other Cruel, Inhuman or Degrading Treatment⁵¹ and the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.⁵² All these documents are explicit on their strict prohibition against torture and it is now generally accepted as a rule of international customary law.⁵³

Article 12 of the Torture Convention requires states to undertake prompt and impartial investigations wherever there are reasonable grounds to believe that torture has been committed. Article 7 requires state parties to prosecute suspected perpetrators of the offence. In very specific terms, the ICCPR expressly prohibits any derogation from the strict prohibition against torture, including in times of emergency that may threaten the life of the state. The 1975 Declaration is unequivocal in that no state may permit or tolerate the prohibited practices and that no exceptional circumstances such as a state of war, internal instability, or any other public emergency may be invoked as a justification for such practices.

The Torture Convention defines torture as:

[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or

⁴⁸ Human Rights News 'Uganda: Anti-terror unit allegedly electrocuted detainee' available at <http://www.hrw.org/english/docs/2006/07/25/uganda13812.htm> accessed on 21 April 2008.

⁴⁹ Ibid Par 12 and 13.

⁵⁰ GA Res 2200A (XXI) 21 UN GAOR Supp (No 16) at 52 UN Doc A/6316 (1966) 999 UNTS 171 entered into force Mar 23 1976.

⁵¹ Declaration on the Protection of All Persons from being subjected to Torture and Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by the General Assembly resolution 3452 (xxx) of 9 December 1975.

⁵² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entered into force 26 June 1987 in accordance with art 27(1) Available at <http://www.hrweb.org/legal/cat.html> accessed on 23 June 2008.

⁵³ On 3rd November 1986 and 21 June 1995, Uganda ratified the Torture Convention and the ICCPR respectively.

suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁵⁴

The Convention rules out any justification for torture. The reason why torture is considered so reprehensible may be found in the words of the Rapporteur of the Human Rights Committee:

Torture expresses contempt for the personality of the other individual which has to be destroyed and annihilated. It is for that reason that torture is one of the most heinous violations of human rights as it is the very denial of ... the recognition that each living being has a personality of his own which has to be respected ... [making] the duty to eradicate torture ... a primordial obligation.⁵⁵

The combination of the Torture Convention and the ICCPR clearly outlaw torture even in the so-called 'ticking bomb' scenario (where the captive knows of an imminent attack, and, if he is tortured, he will give information that will save lives). In reality, and as the Ugandan experience shows, governments not only torture persons in the 'ticking bomb' scenario but also perceived enemies and members of the political opposition. Torture has the tendency to spread through the security apparatus to become the norm in investigations, even for common everyday offences.⁵⁶ In any event, how may one tell if the suspect under investigation is the 'ticking bomb' until tortured?

Shue presents the French experience in Algeria as an example of the uncontrollable spread of torture. He states that 'the problem is that torture is a short cut and everyone loves a short cut.'⁵⁷ Though justified as a rare measure to prevent imminent assaults on civilians, torture spread 'like cancer' through the French security apparatus.⁵⁸ It is clear that the Ugandan government is in the same position. The sad picture that emerges is that there is a general policy of torturing terrorism suspects.⁵⁹ Torture is wrong not only because it denies the humanity of the victim, but also because it severely undermines society's faith in the government and the democratic process.

Speaking on the same matter, the United Nations Commission on Human Rights has reminded states that 'prolonged incommunicado detention may facilitate the perpetration of torture and can itself

⁵⁴ Art 1 of the Torture Convention.

⁵⁵ Lawson E *Encyclopedia of Human Rights* (1996) 1448.

⁵⁶ Torture is a prima facie wrong and the right not to be tortured is a non derogable right. Despite the fact that Uganda has ratified the Torture Convention and all major international instruments prohibiting torture, the executive has refused to penalise security officers implicated in torture of suspects and grave breaches of both international and domestic law.

⁵⁷ Shue H 'Torture' (1978) 7(2) *Philosophy & Public Affairs* 124–43. Excerpts reprinted in M Velasquez & D Rostenkowski (eds) *Ethics: Theory and Practice* (1985) 161–8.

⁵⁸ *Ibid.*

⁵⁹ *Supra* n 35 & 36.

constitute a form of cruel, inhuman or degrading treatment' and 'urged all states to respect the safeguards concerning liberty, security and the dignity of the person.'⁶⁰

The Commission stresses in particular that:

All allegations of torture or cruel, inhuman or degrading treatment or punishment must be promptly and impartially examined by the competent national authority, that those who order, tolerate or perpetrate acts of torture must be held responsible and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have been committed, and takes note in this respect of the Principles of the Effective Investigation and Documentation of Torture and Cruel, Inhuman or Degrading Punishment (the Istanbul principles) as a useful tool to combat torture.⁶¹

In the case of *Suarez de Guerrero v Colombia*,⁶² for example, the Human Rights Committee defined 'arbitrary' to mean 'disproportionate to the requirements of law enforcement in the circumstances of the case.' It is thus incumbent upon the government of Uganda to conduct a thorough, prompt and impartial investigation to determine the cause of the death of the suspect and to identify and bring to justice the perpetrators of the offence.

(d) Equal protection of the law

Clearly Uganda is in contravention of its own Constitution with regard to the treatment of suspects. Suspects are not afforded the equal protection of the law⁶³ and are discriminated against on account of their political opinion.⁶⁴ Although the Constitution allows the government to limit rights, the conduct of the Ugandan security forces is not within 'acceptable and demonstrably justified conduct in a free and democratic society.'⁶⁵ On the contrary, it is a disturbing and blatant abuse of counter terrorism law.

The legislation is a ready whip to use on any dissent, real or imagined.⁶⁶ The claims to be fighting terrorism have bolstered the government's brazen and unashamed attempts to clamp down on any dissent

⁶⁰ See Par 9 of Resolution 2005/39 of the Commission on Human Rights Office of the High Commissioner for Human Rights. Adopted on 19 April 2005 without a vote. See chap XI, E/CN4/2005/L10/Add.11.

⁶¹ Ibid.

⁶² Communication No 45/1979 Par 13.3.

⁶³ Art 21(1).

⁶⁴ Art 21(2).

⁶⁵ Art 21(4) (c).

⁶⁶ On 16 September 2002, soon after the enactment of the anti-terrorism law, the Director of Information at the NRM Headquarters, Ofwondo Opondo, issued a warning to all radio stations and newspapers that the government would employ the Anti-Terrorism Act against those who aired or wrote stories on the opposition politician, Kizza Besigye. He stated that 'anyone who helps Besigye spread his propaganda comes under suspicion of aiding terrorism, 'and the anti-terrorism law will apply.' Available at www.cpj.org/attacks02/africa02/uganda.html; committee to protect journalists, attacks on journalists 2002.

and alternative political thought. Civil society organisations have expressed the view that, with the enactment of the anti terrorism law, the government has developed a sense of impunity.⁶⁷ Quite apart from suppressing political dissent, the government's human rights record has degenerated owing to a general disrespect for constitutional rights and freedoms.⁶⁸ Most victims of human rights abuses attribute their treatment to allegations of treason, terrorism, insurrection or support of rebel activities or knowing persons involved in any of these activities.

(e) Personal liberty

The Ugandan Anti Terrorism Act does not confer on the police any special powers of arrest. Under Uganda's Criminal Procedure Code⁶⁹ the police may not arrest without a warrant save in the ordinary circumstances of preventing a crime. The practice is radically different. There are reports of arbitrary arrests under the guise of undertaking terrorism investigations, and prolonged confinement of persons who are often released without charge.⁷⁰ Such deprivation of liberty is contrary to section 23 of Uganda's Constitution, which preserves the right to personal liberty. Neither the Constitution nor the statutes allow the police to infringe on a person's liberty for the purpose of undertaking investigations. As demonstrated, the police detain suspects in 'safe houses', which are not authorised by law,⁷¹ and do not bother to inform the affected person of the reasons for the arrest, detention or the person's right to a lawyer of his choice.⁷²

The reasons for the arbitrary detentions often belong in the category of suspicion of being a terrorist or a supporter of a terrorist organisation. Frequently, it has been shown that the law enforcement officers do not act on any proven or precise information. There is no objective standard by which they analyse the level or risk of a threat before a person is considered a suspect. The interpretation of national security has been widened to such an extent that it would appear that the Ugandan security forces do not have any regard at all to human rights.⁷³ Mere suspicion of involvement in terrorist activities is considered sufficient ground for arrest and long detentions without reprieve until the detainee convinces the interrogators that he is not involved in terrorism.

⁶⁷ See report by Foundation for Human Rights Initiative 'The Human Rights Reporter 2001–2002' available at www-sul.stanford.edu/africa/hurights.html accessed on 2nd July 2009.

⁶⁸ Ibid.

⁶⁹ S 7 of the Criminal Procedure Act.

⁷⁰ Supra n 62.

⁷¹ Art 23(2).

⁷² This right is provided for in art 24(3) of the Constitution of Uganda.

⁷³ See Amnesty International report Uganda: Torture available at <http://www.amnesty.org/en/library/info/AFR59/010/2007/en> accessed on 24 June 2007.

Under the Constitution, persons may be arrested only for the purpose of bringing them before a court upon suspicion of having committed or in instances where they are about to commit a criminal offence.⁷⁴ Such a person, if not released, must be brought to court as soon as possible, but in any case not later than forty eight hours from the time of arrest.⁷⁵ A report by Human Rights Watch indicates that persons are arrested and detained for long periods without charge and released with a warning of a further arrest if they lodge a complaint. Most of the victims attribute their treatment to political suppression, treason or terrorism.⁷⁶

Furthermore, the report indicates that while the Constitution requires the military, security and intelligence agencies to turn suspects over promptly to the police for detention, these agencies, together with new *ad hoc* security agencies created without legal status, for example, the Joint Anti Terrorism Task Force, Operation Wembley and its successor the Violent Crime Crack Unit have defied with impunity all laws regulating arrest and detention.⁷⁷ Even greater opportunity for abuse is afforded by a constitutional provision for a pre-trial 360 day detention without bail or probable cause shown for persons suspected of treason and most forms of terrorism, which can include 'opposing the state' or possession of a firearm.⁷⁸

Under the Ugandan Act, no extraordinary powers have been given to the law enforcement officers to hold people without charge or trial. In practice, however, incommunicado detentions have now almost been accepted as the norm.

(f) Freedom of the press

Another area that has suffered through the introduction of the anti-terror legislation is freedom of the press. Under s 11 of the Ugandan Act,

Any person who establishes or runs or supports any institution for promoting terrorism, publishing news or other material likely to promote terrorism ... commits an offence and is liable on conviction to imprisonment not exceeding ten years or a fine not exceeding five hundred and fifty currency points, or both.

⁷⁴ Art 23(4)(a) and (b) of the Constitution of Uganda.

⁷⁵ Ibid.

⁷⁶ Human Rights Watch Uganda Country Report available at <http://www.hrw.org/reports/2004/uganda0404/3.htm> accessed on 5 May 2008.

⁷⁷ Ibid.

⁷⁸ Ibid.

The target of this provision is not only the people who publish but also the institution for which they work. Coupled with the power to ban organisations at will, this stipulation is severe and permits the government excessive latitude in suppressing both its political opponents and the free media.

There is reasonable concern that the provision criminalising support for terrorists is open to government manipulation to stifle political debate. It is acknowledged that this provision cuts through a journalist's work and creates fear as to which stories may be interpreted to fall within this wide purview. The fear is not entirely without foundation. Several authors have tabulated cases in which the Uganda Defence Forces have arrested and detained journalists on account of their professional work, alleging that they have engaged in activities, which are in support of terrorism.⁷⁹ The Defence Forces are known to attack and harass journalists who write unfavourable reports about the government, notwithstanding a journalist's 'right to seek, receive and impart information and ideas of all kinds, as guaranteed by art 19 of the Universal Declaration of Human Rights, art 19 of the International Covenant on Civil and Political Rights and art 19 of the African Charter of Human and People's Rights, the latter two to which Uganda is a state party.⁸⁰

In October 2002 government forces raided the offices of *The Monitor*, an independent daily newspaper, and closed it for a week, ostensibly because the newspaper had published an untrue story about a unit of LRA shooting down a military helicopter. The government ordered the chief sub-editor of the newspaper to leave the country as a condition for allowing it to reopen. The journalist responsible for the story was arrested and held for a prolonged period of time before being released. The use of the anti-terrorism legislation in this manner threatens a journalist's freedom to publish, particularly because the

⁷⁹ See Mbaine, E A 'The Effects of Criminalising Publication Offences on the Freedom of the Press in Uganda 1986–2000' unpublished MA Journalism and Media Studies thesis, Rhodes University, January 2003.

⁸⁰ On 29 October 1998 the chief sub-editor, of the Kampala independent daily newspaper, *The Monitor*, Ogen Kevin Aliro, was attacked by four men who blocked his car as he was on his way home at night. The attack was believed to be in retaliation for Aliro's investigative report titled 'Safe Houses: A Return to the Shadows?' published in the 27 October edition of *The Monitor*. The Government said it took the action because the paper had written a false report about the war on terrorism. In the early part of 2004 army spokesman Major Shaban Bantariza announced that the army was investigating certain journalists with links to terrorists. The genesis of the investigation was a booklet with telephone numbers which was recovered from the body of an LRA commander killed in combat with UPDF. The army spokesman stated that the journalists would be called upon to defend themselves because they were dealing with terrorists. This announcement drew immediate and sharp condemnation around the world. The International Federation of Journalists' general secretary Aidan White said: '[t]hese allegations against some of the most prominent journalists in the country are outrageous, especially because the anti-terrorism Act carries a death penalty for any act of terrorism. They are blatant efforts to stifle voices of dissent and undermine journalists' right to report in Uganda.' IFJ Condemns Spying Allegations against Journalists in Uganda: <http://www.ifj.org/default.asp?index=2201&language=EN> accessed on 2 June 2008.

penalties for promotion of terrorist activities are quite severe.⁸¹ The conduct of the UPDF has forced the media to self-censorship for fear of stringent government reprisals.

Uganda is a country in a fluid political context characterised by continuous and unending civil strife. As the government seems to place the terrorist label on all rebel movements, it is essential that a distinction be made between reporting on terrorist activities and supporting terrorism. A failure to draw this line criminalises freedom of the press and restricts media liberties.

(g) Right to privacy

Uganda's Anti terrorism Act permits an authorised officer to intercept the communications and otherwise conduct surveillance of any person.⁸² This right should be juxtaposed against the constitutional protection against 'interference with the privacy of a person's home, correspondence or other property.'⁸³ The argument for this invasion of privacy is premised on the constitutional recognition of lawful entry and search, for example, in circumstances where there is reason to believe that a person is engaged in acts of terrorism.⁸⁴ In the context of terrorism investigations, there is no indication that the officer conducting the search must have any regard to the historical constitutional protections of notice, probable cause and proportionality.

Privacy is an essential and valued aspect of personality,⁸⁵ and sociologists and psychologists agree that it is a fundamental need.⁸⁶ Privacy is also the basis for developing democratic principles and practices as it fosters individual autonomy, dignity, and self-determination and ultimately promotes participation in the social and political arena.

The Universal Declaration of Human Rights declares that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation.'⁸⁷ Several international human rights instruments also recognise and confer protection upon privacy.⁸⁸ The manner in which the Anti Terrorism Act treats the very important right to privacy is therefore of great concern. By allowing the police such broad scope to intercept private communications, the Act

⁸¹ The publication of any information considered favorable to terrorists is deemed a promotion of terrorist activities.

⁸² S 19.

⁸³ Art 27(2).

⁸⁴ Art 27(1).

⁸⁵ See South African Law Review Commission Discussion Project 124 October 2005: Privacy and Data Collection.

⁸⁶ Neethling J Potgieter J M & Visser P J *Neethling's Law of Personality* (1996) 29.

⁸⁷ Art 12.

⁸⁸ Art 17 of the ICCPR, Art 16 of the Convention on the Rights of the Child.

permits the executive unlimited access to the personal lives of people even when they are not a threat to public security.

Goldman states that a breach of privacy with the consequent unwanted exposure may lead to discrimination, loss of benefits, loss of intimacy, stigma and embarrassment.⁸⁹ A stipulation in Canada's anti terrorism law that is meant to allow the executive access to the private documents and communications of an individual requires a suspect to be brought before a judge to give information as part of 'investigative hearings.' In this way Canada averts the temptation to allow the executive unchecked access to a person's private life.⁹⁰

(h) Search and seizure

Coupled with the Anti Terrorism's Act's provision for interception of communication is an authorisation for search and seizure. Besides violating the constitutional right to privacy the Act permits a violation of personal security in the home and office and permits a search of papers and effects, in essence legalising searches and seizures without warrant and without need to show probable cause.

Conversely, it is a requirement of Uganda's Criminal Procedure Act that a search of any place is to be preceded by obtaining a warrant issued by a court.⁹¹ To obtain this warrant, the investigating officer must demonstrate probable cause for the search and describe the place to be searched and the person or things to be seized.⁹² The real purpose of the protection against search without a warrant is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals. This is not to say that there can be no lawful search, but simply to affirm that all intrusions into the personal domain of a person are to be governed by law.

The use of arbitrary searches and electronic surveillance as devices for monitoring criminal activity retains the potential to be deployed in aid of the executive's suppression of democratic political activity. The fear of being monitored also heightens the threat to free speech. When the American Department of Justice mistakenly suspected the Committee in Solidarity with the People of El Salvador (CISPES) of supporting

⁸⁹Goldman J 'Health at the Heart of Files?' Brandeis's lecture delivered at the Massachusetts Health Data Consortium's Annual Meeting. Available at www.doj.gov.za/salrc/dpapers/dp109-prj124/INTRO,%20PREFACE%20summary,%20CONTENTS,%20bibliography.pdf accessed on 7 May 2008.

⁹⁰ Regan P *Legislating privacy: Technology social values and public policy* (1995) 221-30. Regan argues that an essential aspect of privacy is that it sets boundaries that the state, in its exercise of power, should not transgress.

⁹¹ S 3 of Uganda's Criminal Procedure Act Chapter 116.

⁹² Ibid.

Salvadorian terrorists, the United States Senate described the resulting danger to democratic values in this way:

The American people have the right to disagree with the policies of their government, to support unpopular political causes, and to associate with others in the peaceful expression of those views, without fear of investigation by the FBI or any other government agency. As Justice Lewis Powell wrote in the *Keith* case, "The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power". Unjustified investigations of political expression and dissent can have a debilitating effect upon our political system. When people see that this can happen, they become wary of associating with groups that disagree with the government and more wary of what they write and say. The impact is to undermine the effectiveness of popular self government. If the people are inhibited in expressing their views, a nation's government becomes increasingly divorced from the will of its citizens.⁹³

A striking provision in the Act is the section allowing any recording, document, photograph or other matter obtained in the interrogation of communications, search and seizure, to be admissible in evidence in any proceedings for an offence under the Act.⁹⁴ This enlarges the motivation for unconstitutional intrusions into privacy and amplifies the essence of the abuse. In a sense, this clause disables the courts from declining to take into account evidence obtained unlawfully although they may still treat such evidence with great circumspection.

3. Immunity from civil and criminal liability

The Ugandan Act provides immunity from civil liability for an investigating officer in respect of anything done in good faith or under the authority of an order issued under the Act.⁹⁵ This immunity is a travesty of justice, which emboldens police officers to deal ruthlessly with people, without regard to the right to life or property. Innocent victims of police brutality find themselves without recourse to legal redress when the law imputes innocence or provides a legal disclaimer for a wrong. Indeed it is difficult to justify this provision in the light of the constitutional right to life, property, personal freedom, privacy, security and freedom of movement. It is inconceivable that the Act abrogates the Constitution.⁹⁶

⁹³ Heymann P B 'Civil liberties and human rights in the aftermath of September 11' 2002 (25) *Harvard J Law & Public Policy* 441 at 444 quoting Senate Select Committee on Intelligence The FBI and CIPES S Rep No 106-46 at 102.

⁹⁴ S 22.

⁹⁵ Rule 3 of the Third Schedule

⁹⁶ The Preamble to the Constitution Uganda gives as one of the foundations of the constitution '[E]nsuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged.'

The Act degrades police standards and places police officers beyond the reach of culpability, leaving innocent persons, who may suffer by police misjudgment or recklessness, without a remedy. It ought to be remembered that any measure taken by a police officer must be appropriate and as unobtrusive as possible in attaining the objective. With regard to counter terrorism, the statute grants police officers unfettered discretion on grounds of reasonable suspicion.

The maxim that there is no wrong without a remedy is often stated in recognition of the fact that the rule of law and the principles of international law recognise that for every civil wrong there must be compensation, and for every criminal transgression there shall be a punishment. To hold otherwise would be to encourage impunity and create social disorder. Impunity induces an atmosphere of fear and terror.⁹⁷ It creates a climate that threatens the rule of law and the principle of due process.

4. Conclusion

This chapter focuses on the tension between security and liberty within Uganda's anti terrorism regime. The critical issues - involving presumption of innocence, freedom of association, equal protection of the law, personal liberty and protection against torture- are contrasted with constitutional guarantees to individual freedoms.

It would appear that the exercise of executive discretion, often ignoring judicial processes and especially when the threat to public security is real, swings in favour of security. It is true that incidents of terrorism demand for government action to protect the nation. Where crimes are planned, attempted or committed, legal mechanisms for arrest and punishment must be deployed. As an alternative to extreme measures, such as detention without trial, surveillance and searches without warrant are attractive substitutes. It is argued that terrorism prevention is not a matter for the new anti terrorism law only but also an interplay entailing a respect for constitutional liberties and a fresh focus on the existing penal code provisions.

Uganda's Act uses a mixed approach of monitoring suspects, denying alien suspects access to the country and long periods of detention for purposes of investigations. It is argued that some of these controls violate individual rights but their utility with respect to terrorism investigation and prevention can hardly be challenged. No government would turn a blind eye to extremists who promote, incite or conduct acts of

⁹⁷ 'Promotion and Protection of Human Rights: Protection of Human Rights and Fundamental Freedoms while Countering Terrorism', UN ESCOR Commission on Human Rights UNDoc E/CN4/2005/103. Prepared by K R Goldman.

terrorism, however, the anti terrorism legislation provides a loaded weapon for the executive to persecute those it does not agree with. Herein is the danger or hazardous nature of anti terrorism legislation: it may cure as well as hurt. Uganda's practice shows that sidelining safeguards designed to prevent executive excesses, while perhaps inevitable, leads to an erosion of the rule of law.

Chapter VI

KENYA: LEGAL AND EXTRALEGAL COUNTER TERRORISM MEASURES

1. Introduction

(a) Pervasiveness of legislation

The events of September 11 catapulted the minds of world leaders into a state of dystopia. Consequently two dynamics are evident in international conduct towards terrorism: First, the anxious and almost certain expectation of another attack and, secondly, the constant stream of anti terrorism laws on all continents.

Today, most states have promulgated legislation to address pre- and post-attack concerns – for good reason, because ‘the threat of terrorism to life and liberty cannot be addressed simply by *ex post facto* rectification for the sake of justice.’¹ It is becoming clear, however, that certain elements of anti terrorism legislation impose burdens on fundamental freedoms without much evidence of their effectiveness. Some authors feel that the threat posed by terrorism may be countered by means other than a severe and exaggerated legislative response.²

(b) Kenya’s geographical location and its implications

Kenya is regarded as a weak flank in the global fight against terrorism. With the failed Muslim state of Somalia to the east and Sudan and Ethiopia in the north, Kenya’s porous borders are completed by the vast Indian Ocean, which forms most of the eastern border, opening the country to the Asian subcontinent. Owing to the influence of the Arab traders who first visited the coastal areas of the country in the 16th century, mainly Muslims inhabit the coastal strip. The north of the country, occupied by Kenyan Somalis, is also largely Muslim. Awareness of this demographic is essential to understanding the role of religion in Kenya’s anti terrorist efforts.

The weakness in Kenya’s anti-terrorism struggle manifests on three levels: a long-absent regulatory legal framework, a reckless and abusive police force and a compliant judiciary.

¹ Chesney R M ‘The sleeper scenario: Terrorism-support laws and the demands of prevention’ (2005) 42 *Harv J on Legis* 1.

² Williams G ‘A Decade of Australian Anti-Terror laws’ (2011) 35 *Melbourne University Law Review* 1136.

2. Fighting terrorism in the absence of an anti terrorism law

Of the two East African countries under study, Kenya attracts the highest concern with regard to terrorism. The country has had the greatest number of terror incidents and is considered the most vulnerable to attack. In spite of this, it took Kenya a long time to enact anti terrorism legislation. There may be two reasons for this.

First, attempts to enact the legislation attracted objections from human rights activists and Muslim leaders concerned that the law might be abused to restrict fundamental rights, especially freedom of assembly, religion, speech and association.

Secondly, there was spirited propaganda to the effect that the legislation would be an American-sponsored attempt to target Muslims. These claims slowed the law-making progress by sowing suspicion among the public and diverting attention from the urgent need for enactment.

The contrived delay in the enactment of the statute has not improved relations between the government and the Muslim community. Each side feels it has legitimate grievances against the other. While the government complains of lack of co-operation from the community, the group has a raft of grievances, ranging from unfair profiling of Muslims to targeting of Muslim youths for arrest whenever an act of terrorism is being investigated. Islamic groups have demonstrated often in Mombasa and Nairobi, denouncing in equal measure the British, American and Kenyan governments' policies towards Islam.³ More recently Muslim youths have burnt the flags of the United States and Israel in condemnation of what they see as the strong-arm tactics those two countries use on the Palestinians.⁴

Kenya has ratified several international human rights instruments as well as 12 of the 14 sectoral anti terrorism treaties.⁵ The language of the conventions is explicit on the obligation of states to observe human rights in their counter terrorism efforts. Moreover, Kenya's Constitution has elaborate provisions for protection of fundamental rights and freedoms defining the boundary between individual licence and government tyranny.

³ *Daily Nation Friday* 4 July 2003; *Sunday Nation* 31 August 2003. See also 'Kenya's Terror Bill Rejected', available at <http://news.bbc.co.uk/2/hi/africa/3069211.stm> accessed on 7 November 2005 and also *The Friday Bulletin, The Muslim News Update*, 2 July 2004). See also Abdulghafur H S Elbusaidy 'Islam in Kenya' in Hussein Solomon *Islam in the 21st Century: Perspectives and Challenges* Centre for International Political Studies (2005) 34 Pretoria.

⁴ Muslims in protest over Gaza crisis' *Daily Nation* January 1 2009

⁵ See Goredema C African Commitments to Combating Organized Crime and Terrorism Available at www.iss.co.za/pubs/Other/ahsi/Goredema_Botha/pt2chap9.pdf Accessed on 5 November 2010.

Both in the domestic and international arena it is recognised that 'the anti terrorism fight is aimed at protecting basic human rights and democracy, not to undermine them'⁶ and that 'measures to counter terrorism must be in strict compliance with international law, including international human rights standards'.⁷ In the same vein, an *ad hoc* committee of the UN General Assembly has released a report that spells out the need to include human rights observance in all counter-terrorism efforts.⁸

In the long absence of the appropriate legislative framework, Kenya was forced to adopt certain measures to secure the population against terrorism. In February 2003 an Anti Terrorism Police Unit (ATPU), made up of representatives from all security agencies, was established.⁹ Further, in 2004 the National Counter Terrorism Centre was launched.¹⁰ These units depend on the National Security Intelligence Service for the information necessary for their operations.

The ATPU has been roundly condemned for its frequent violations of fundamental rights. Even so, the courts have been slow to step in and pronounce its operations illegal. Complaints against the unit range from incommunicado detention of suspects to torture and rendition of Kenyans as well as resident foreigners without due process.¹¹ It is said to operate outside official police guidelines; it arrests and detains people without observing police regulations, as well as detaining suspects in various police stations – and moving them to other stations – all without entries in the official record, – known as the Occurrence Book.¹²

3. The Prevention of Terrorism Act

The journey to the enactment of the Prevention of Terrorism Act started with the publication of the Suppression of Terrorism Bill, 2003. This Bill, quickly drafted and published in reaction to September 11, had a tepid public reception and hostile debate. Muslims were particularly irked by what they saw as an American-led attempt to force through legislation unfriendly to their interests. They felt that the government had joined in the war on Islam, not on terrorism.¹³ Muslim leaders dismissed the Bill as a draconian

⁶ ICJ report quoted in a press release by the Council of Europe Secretary General when calling for prudence in adoption of anti-terrorism laws 14 November 2001.

⁷ Res 2001/37 of 23 April 2001 Preambular Par 20; See also Res 2000/30, 1997/27 and

1998/47 of the Commission on Human Rights available at <http://www.unhcr.ch/html/menu2/2/chr.htm> accessed on 2 June 2008.

⁸ See Report of the Ad Hoc committee established by General Assembly Res 51/210 of December 1996 (UN DOC A/52/37 (1997) Annex Par 74 and 83).

⁹ 'Anti-Terrorism Centre Launched in Nairobi' *The East African Standard* (Nairobi) 28 January 2004.

¹⁰ *Ibid.*

¹¹ See 'Muslims Decry Extra-Judicial Killings' <http://www.ciiibroadcasting.com/2012/04/17/muslims-decry-extra-judicial-killings-2/> Accessed on 2 July 2009.

¹² *Ibid.*

¹³ *The Daily Nation* 7 September 2003. In a meeting held on 6 September in the Ugandan capital, Kampala, Islamic leaders drawn from across East Africa said the war on terrorism was unfair to Muslims. At the meeting, Kenyan clerics said the Muslim

document drafted with the intention of oppressing the Muslim minority.¹⁴ As a result, there were a number of protests and mass demonstrations, against the Bill. The Bill was subjected to intense public debate and scrutiny, but it was rejected in 2005.

Although 85% of Kenyans are Christian, there is a vocal and aggressive Muslim population.¹⁵ Several Muslim NGOs maintain that the threat of terrorism can be met and dealt with by amending the penal code and the criminal procedure Act. The Muslim Forum for Human Rights, a Nairobi-based organisation, has been quite vocal in this regard.¹⁶

In 2006, the government tabled in Parliament a new version of the Suppression of Terrorism Bill, renamed the Anti Terrorism Bill. However, this was likewise severely condemned and shot down at parliamentary committee level. The criticism echoed that against the previous Bill: it had an anti Muslim slant; its enactment would lead to legalising violations of fundamental rights; and it embodied a global conflict between Islam and the West.¹⁷

As the opposition to the enactment of the legislation grew, so did the frequency of terror attacks. The public became restless.¹⁸ The streets of Nairobi began to experience anti-Muslim riots. To contain these and bring to an end the budding religious conflict, the Inter-religious Council of Kenya, comprising Christians, Muslims and Hindus, issued a joint statement calling for enactment of an anti terror law.¹⁹ The country having been repeatedly attacked, it was thought that a definite anti-terrorism law would close the gaps in the law and end the country's distress.²⁰ Public support grew, putting pressure on Parliament to give serious consideration to such a law.

community in Kenya had become the target of a proposed law drafted to fight terrorism. See also Kyama R *The Threat of Terrorism to Kenya* in Global Terrorism Analysis Available at <http://www.jamestown.org/terrorism/news/article.php?articleid=2370154> accessed on 4th June 2015 accessed On 17th July 2012.

¹⁴ During the parliamentary debate on the Bill, Billow Kerrow, an opposition parliamentarian, was quoted as saying: 'It is a Bill that uses shock and awe tactics on its citizens while purporting to fight terrorism. In my view our government has gone out of its way to harass citizens ... by arresting, detaining, beating and violating their rights.' *Daily Nation*, 7 December 2003.

¹⁵ Arye O (2000) *Islam and Politics in Kenya*.

¹⁶ Lind J & Howell J 'Counter-terrorism and the politics of aid: Civil society responses in Kenya' *Development and Change* (2010) 41(2) 335–53.

¹⁷ *Ibid.*

¹⁸ Are Christian-Muslim relations under attack across East Africa? The East African 5th April 2012.

¹⁹ The Association of Muslim Organizations in Kenya offered the initial muted support, which was quickly echoed by other Muslim organizations, such as MUHURI, SUPKEM, and the Empowered Muslim Youth Initiatives.

²⁰ The gravity of the situation in the country was seen when, on the morning of Sunday 30th September 2012, terrorists threw hand grenades into St Polycarp Anglican Church in Juja Road Estate, Nairobi, killing a nine-year-old child and injuring several others. See The Star 'Boy, 9, killed in church grenade attack' The Star.co.ke.30th September 2012 Available at <http://www.the-star.co.ke/news/article-168/boy-9-killed-church-grenade-attack> accessed on 20th April 2013.

In July 2012 the Attorney General published the Prevention of Terrorism Bill, 2012. The issues under consideration were well known and this time, with the attacks putting pressure on Parliament, were soon thrashed out. The debate was brief and positive and the Bill was passed.

On 12 October 2012 President Kibaki assented to the Prevention of Terrorism Bill, 2012. It had thus taken Kenya ten years to enact a law that Uganda passed within months of publication of a Bill.

In many respects this legislation has an unprecedented reach. It creates a number of ill-defined offences, with an enlarged scope, extending the reach of criminal law into new areas and establishing stricter sanctions for ordinary offences.

The main problems with the Prevention of Terrorism Act lie in the definition of terrorism, the proscription of organisations, the investigation of terrorism offences and the treatment of property seizure and forfeiture.

In a shift of the balance between security and human rights, the Act elevates security concerns over all other rights. The recourse to extended and undefined periods of detention of terror suspects revives the repealed detention-without-trial provisions.²¹ This threatens the modest gains the country has made in human rights protection and marks a drastic retrogression from a free society. The fear that the Act may be used to silence alternative political thought, and to limit freedom of association and expression is not entirely without foundation.

(a) Key features of the Act

The Act is a move away from the ordinary criminal law in the handling of terrorism offences; from a fixation with punishment of terrorist acts to prevention. It gives the Judiciary a role in the investigation and prevention of crime, quite unlike its function in conventional judicial responsibility.

The text of the Act combines two counter terrorism measures usually employed: it seeks, first, to criminalise the offence of terrorism and, secondly, to prevent, disrupt and avert incidents of terror before they occur.

²¹ Conboy K 'Detention without trial in Kenya' 8 (2) *Georgia journal of international and comparative law* 441-461.

On the first level, the Act aims at preventing terrorist acts by prescribing heavy penalties for such crimes. Further, it creates new offences and provides for added police powers to aid in the collection of evidence, as well as for special offences and mutual legal assistance.

On the second level the Act provides a framework for the control of terrorism that enables the detection of movement of explosives, exposure of terrorist organisations and prevents their recruitment of new members. One would say that in this control or management context the Act aims at future law enforcement, rather than crimes that have already taken place. This is in line with the current global shift away from reactive to more proactive methods of counter terrorism.²² The idea is to institute a system of intelligence gathering that may be used to pre-empt an attack in its planning stage. Given the large number of fatalities in any terrorist incident, pre-emption is the best defence strategy.²³

Pre-emption relies heavily on security intelligence, which is the basis of all executive action and, accordingly, the powers conferred on the security forces to obtain it are wide and extensive.²⁴ The problem, however, with intelligence obtained in this manner is that it is often portrayed as unquestionable and infallible.

Under the Act, Intelligence is the basis on which a cabinet secretary acts to deprive an entity of its legal status;²⁵ the foundation on which a police officer may apply for a warrant to enter and search premises²⁶ or arrest a person without a warrant.²⁷ Such intelligence may sometimes be patchy, fragmented and uncertain.

The difficulty with placing blind faith in intelligence is increased, not reduced, by the fact that the executive is often an interested party in the decision based on the intelligence and will choose to rely on it even when better judgment suggests otherwise. Intelligence is often a matter of presentation and interpretation of facts. A dispassionate construction of facts and the conclusion drawn from them is not possible when there is an interest in the result. Punitive decisions taken on intelligence without the benefit

²² Crelsten, RD & Schmid, A *Western Responses to Terrorism* (1993) 310. The authors examine and dismiss 'reactive counter-terrorism policy' as short-sighted, incident-driven and focused on past events. See also Bassiouni *Legal Responses to International Terrorism: US Procedural Aspects* (1988) xlii.

²³ See Livingstone, NC *Proactive Responses to Terrorism: Reprisals, Pre-emption and Retribution in International Law* (1990). Livingstone argues that legal means do not deter terrorists from acting. Bassiouni seems to support this view, being of the opinion that legal deterrence is ineffective, especially with regard to ideologically motivated terrorism. *Ibid.*

²⁴ Ss 34 & 36.

²⁵ S 3 (1).

²⁶ S 34 (1).

²⁷ S 31.

of hearing the other side of the story will time and again be found to bear negatively on the fundamental rights and freedoms of the individual.

(i) Definition

The Act does not define terrorism, but designates a range of incidents described as 'terrorist acts'. Under the Act a 'terrorist act' means an act or threat ranging from the use of violence, endangering the life of a person or creating a serious risk of health to the public or safety of the public or a section of it, or which results in serious damage to property. It also includes the release of any dangerous or hazardous, toxic or radioactive substances into the environment or the interference with an electronic system resulting in disruption of communication, financial, transport or essential services. The act or threat must be designed to intimidate or cause fear amongst members of the public or compel the government or an international organisation to do or refrain from doing any act. It may also be intended to destabilise the religious, political, constitutional, economic or social institutions of a country or an international organisation. Overall, the Act creates a broad 'definition' of terrorism, while expanding the state's investigative and procedural powers.

It will be noted that the definition excludes a protest, demonstration or stoppage of work so long as these do not result in either violence or serious damage to property, or in any way endanger the life of a person.

This prolix characterisation of 'terrorist acts' is a testament to the difficulties associated with defining an occurrence with such multifarious features. An attempt to define 'terrorist acts' in the widest possible terms produces a result that is so broad and vague as to be useless.

As is evident, the long and wordy definition under the Act lays common penal code crimes open to being described as terrorism. For example, an act is a terrorist act if it involves the use of violence against a person, or results in serious damage to property, even if it is committed in the course of a lawful protest or demonstration.²⁸ This would inevitably include protests and riots, which may occur during workers' strikes, and union protests. Further, these crimes are covered under sections 220 and 339 respectively of Kenya's Penal Code. Similarly, the use of firearms or explosives to create a serious risk to the health or safety of the public²⁹ is also covered under sections 340 and 235 of the Penal Code.

²⁸ S 2 (a)

²⁹ Ibid.

The Act perhaps demonstrates that 'little more than an ambiguous threshold exists to differentiate terrorism from other violent crimes.'³⁰

Of equal concern is the conflation of a threat and an actual action as constituting terrorism. At what level does a threat amount to terrorism? Is a person a threat merely by making a 'threat' or is some kind of paradigmatic threat required in order to meet the level of terrorism? Does the wording of the statute permit the state to base a prosecution on a prediction of dangerousness or does it need the threat to be translated into some kind of action? It does appear, though not entirely clearly, that the Act intends to treat a threat as an inchoate crime – similar to, but perhaps more embryonic than, an attempt.

The uncertainty in the wording may be misconstrued to permit the state to prosecute on the basis of a predicted likelihood, not an actual occurrence. A mere suspicion, to commit a crime either as a threat or intimidation may amount to the offence of terrorism. This raises a concern that prosecutions may violate the fundamental right to freedom of speech. There certainly is a challenge in differentiating a religious or political outburst, made in the exercise of free speech, from a true threat to commit an act of terrorism.

In the absence of settled, unambiguous thresholds the inclusion of 'a threat' within the definition can serve propagandist or geopolitical purposes.³¹ Perhaps, a threat to commit an act of terrorism could constitute a separate offence with a lesser penalty.

The fact that Kenya defines 'terrorist acts' marks a departure from the practice in the international conventions, in which the tendency has been to define 'terrorists' and not terrorism or 'terrorist acts'. The reference to 'terrorist acts' is considered a near-objective description because it seeks to explain the defining elements of such acts, therefore seeking to establish a structured, normative standard for concluding that someone is a terrorist.

Defining terrorist acts has the benefit of keeping the focus on specific types of action, and making it easier to draw a distinction between the outlawed acts and other forms of armed resistance.

This notwithstanding, it is apparent that under the Act, the definition of a 'terrorist act' is wide enough to include conduct that does not fall within popular perceptions of terrorism. While it excludes

³⁰ Scalabrino, M 'Fighting against international terrorism: The Latin American response' in *Enforcing International Law Norms against Terrorism* Andrea Bianchi (ed), Oxford, Hart (2004) 163, 165.

³¹ Raimo, T 'Winning at the expense of law: The ramifications of expanding counter-terrorism law enforcement jurisdiction overseas' (1999) 14 *Am Univ Int LR* 1482–1485, 1483.

protests, demonstrations or stoppages of work, this is so only when these do not involve the use of violence, endanger the life of a person, create a serious risk to health or result in serious damage to property.³² An observation may be made here: protests or demonstrations are by nature uncontrolled mass activities. Any resulting injury or damage to property does not amount to a terrorist activity. In making such a limited exception, the definition in effect bans protests, workers demonstrations and all forms of advocacy.

(ii) Proscription regime

Part II of the Act gives the Inspector General (IG) of the National Police Service authority to advise the Cabinet Secretary³³ to declare an entity a 'specified entity.' In making this recommendation the IG acts on 'reasonable grounds to believe that an entity has committed or attempted to commit or participated in or facilitated the commission of a terrorist act'³⁴ or that an entity is 'acting on behalf of, at the direction of or in association with a specified entity.'³⁵ Upon being satisfied that there are reasonable grounds to support the recommendation of the IG, the Secretary is empowered to gazette the entity³⁶ as a specified entity, whereupon that body is treated, in law, as a terrorist group.³⁷

Once a declaration has been made, a range of offences apply to persons who are linked to that entity, including: dealing in property owned or controlled by terrorist groups;³⁸ soliciting and giving of support to terrorist groups or for the commission of terrorist acts;³⁹ provision of weapons to terrorist groups;⁴⁰ recruitment of members of a terrorist group;⁴¹ training and directing of terrorist groups and persons⁴² and arrangement of meetings in support of terrorist groups.⁴³

³² S 2 (b).

³³ S 3 (1).

³⁴ S 3 (1) (a).

³⁵ S 3 (1) (b).

³⁶ Under S 2 (1) of the Act an 'entity' is defined as a person, group of persons, trust, partnership, fund or an incorporated association or organisation.

³⁷ Under S 2(1) 'terrorist group' means (a) an entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act; or (b) a specified entity.

³⁸ S 8.

³⁹ S 9.

⁴⁰ S 11.

⁴¹ S 13.

⁴² S 14.

⁴³ S 25.

The proscription regime has been used successfully elsewhere with varying reactions.⁴⁴ Critics point out that executive proscription threatens the rule of law, violating its core requirements, such as the principle of individual responsibility, and eroding the role of the courts in judging criminal responsibility.⁴⁵ It is also said that proscription offends fundamental freedoms, such as the freedoms of association and expression.⁴⁶ This view may not pass unchallenged. Today's vicious and indiscriminate form of terrorism has no precedent. Containing it needs all available methods, including banning entities reasonably suspected of involvement in terrorism. Proscription enables the executive to forestall terrorist activities, curtailing actual and potential sources of support.

Given the breadth of the proscription regime, it is slightly comforting that the rule contains certain measures intended to act as safeguards against its abuse. Before recommending proscription, for example, the IG is required to afford the entity a hearing to demonstrate why it should not be declared a specified entity.⁴⁷ Also, once a declaration has been made the Cabinet Secretary is required to inform the entity of the decision and provide it with the reasons for that action within seven days.⁴⁸ Most importantly, the entity may apply to the High Court to have the declaration lifted.⁴⁹ In this way, the Act guards against executive misuse of proscription.

There is a problem, however, with the conduct of a court hearing to review a proscription order. If a Cabinet Secretary requests, the court may receive certain evidence in the absence of the applicant, 'if it is considered that disclosure of that information would be prejudicial to national security or endanger the safety of any person.'⁵⁰

While safeguarding national security is important, a decision to withhold information that has been used to proscribe an entity should be used very sparingly. This is because the provision raises two

⁴⁴ Golder B & Williams G 'Balancing national security and human rights: Assessing the legal response of Common Law Nations to the threat of terrorism' *Journal of Comparative Policy Analysis* 8 (2006) 43

⁴⁵ Hogg R 'Executive proscription of terrorist organizations in Australia: Exploring the shifting border between crime and politics' in Gani M & Mathew P (eds) *Fresh Perspectives on the 'War on Terror'* (2008) 297.

⁴⁶ Ibid. Some invoke Justice Dixon's warning in the case of *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 [178] in which the High Court struck down the most famous attempt by an Australian government to ban a political organization: 'History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power.'

⁴⁷ S 3 (2)

⁴⁸ S 3 (4)

⁴⁹ S 3 (7): (7) A specified entity, which is aggrieved by the decision of the Inspector-General under subsection (6), may apply to the High Court for a review of that decision within a period of sixty days from the date of receipt of the decision.

⁵⁰ S 3 (9).

concerns; first, fair trial and, secondly, effective remedy interests. If a court is seized of information not in the knowledge of the applicant, how are they to respond to it? It is a fundamental right to know the case against you and is 'indisputably part of customary international law.'⁵¹

The proscription of an entity has far-reaching implications. Quite significantly, if an entity is proscribed based on information not known to it, justice may not be seen to have been done, thus undermining public confidence in the fairness of the legal system. Two additional fears may be raised. First, if an entity has been banned for the commission of a terrorist act, a court may defer to the executive, making negative inferences on information not made available to the entity. Secondly, there are similar provisions in the National Security Intelligence Service Act, whereby legal decisions are based on intelligence not available to the public.⁵² The Act, therefore, appears to expand the culture of secrecy in making critical decisions that may have negative consequences in the human rights realm.

On the other hand, terrorism has brought home to many the importance of national security. Nonetheless, it is essential that courts' discretion, and flexibility in decision-making, are not interfered with by the introduction of secret evidence unknown to the affected applicant.

In theory a court may still rule against the executive, even in the face of information undisclosed to the applicant, but this will be difficult, since that information will remain uncontested. Even accepting that there may be situations where it is legitimate for a court to receive confidential information, there should be a mechanism permitting Special Advocates representing the applicant to attend court and interrogate the material on their behalf.⁵³ This is the only way a court may balance the competing interests of national security and fundamental rights. A critical weakness in the use of Special Advocates is that they may not, in the course of duty, take instructions from the client and are therefore un-prepared to challenge the legitimacy or factual nature of the undisclosed materials.

⁵¹ *Hamdan v Rumsfeld*, 126 S.Ct 2749 (2006).

⁵² S 22 (8) of the National Security Intelligence Services Act no. 11 of 1998.

⁵³ A Special Advocate is a specially appointed, security-cleared lawyer who acts in the interests of a party to proceedings when that party, and the legal representative, have been excluded from attending closed hearings or accessing certain evidence. A Special Advocate's relationship with the relevant party is different from the relationship between the ordinary lawyer and his or her client. The Special Advocate is not responsible to the relevant party. The Special Advocate is able to access excluded materials and make submissions in the party's interest but cannot communicate with the relevant party about the material. Special Advocates have been used in the United Kingdom and Canada in proceedings where a party to proceedings (and their legal representative, if they have one) have been excluded from attending hearings or viewing material relevant to proceedings. While the Special Advocate procedures are not ideal, they may provide a substantial measure of procedural justice not otherwise available when a party represents themselves or are not present in the proceedings.

(iii) Terrorist offences

A number of observations may be made regarding Part III of the Act, which creates a range of offences for conduct preparatory to a terrorist act, and sets down penalties. First, in many instances the Act provides for mandatory sentences, negating judicial discretion.⁵⁴

A number of examples strengthen these observations. In seeking to deter and punish terrorist acts, the Act provides for a term not exceeding 30 years imprisonment for an act of terrorism⁵⁵ and increases this sentence to life imprisonment if the act results in the death of another person.⁵⁶

The Act outlaws fundraising and any other support for terrorist acts⁵⁷ and the use or possession of terrorist property.⁵⁸ The latter is defined as ‘proceeds from the commission of a terrorist act, money or other property which has been, is being, or is intended to be used to commit a terrorist act, or money or other property which has been, is being, or is intended to be used by a terrorist group.’⁵⁹

The restrictive words in this section seek to absolve innocent donors, because guilt is attributed when a person makes a contribution ‘intending, knowing or having reasonable grounds to believe that such property, funds or service shall be used for the commission of an act of terrorism.’⁶⁰

The prohibition against collection or donation of property extends the reach of the criminal law in three significant ways. First, it allows prosecution of persons who facilitate acts of terrorism but are not themselves actively engaged. This includes persons who aid proscribed organisations. Secondly, it permits prosecution if the executive can show that the contribution specified in the charge was directed to a terrorist organisation; the donor then has to show that they had no reasonable grounds for believing that such contribution could be used to advance terror activities. Thirdly, the section potentially criminalises contributions to all organisations, be they harmless youth groups or religious charities.⁶¹

⁵⁴ Ss 4–10.

⁵⁵ S 4 (1).

⁵⁶ S 4(2): Where a person carries out a terrorist act, which results in the death of another person, such person is liable, on conviction, to imprisonment for life.

⁵⁷ S 5.

⁵⁸ S 6.

⁵⁹ S 2.

⁶⁰ S 5. This accords with criminal law requirements of *mens rea*. See Codification of Criminal Law: General Principles; The Mental Elements in Crime (1970) 41–47.

⁶¹ *Supra* n 5.

The wording of section 5 is clear.⁶² Not only money but also aid in the shape of 'property'⁶³ or a 'service' are prohibited.⁶⁴ This covers all manner of help other than money and may include provision of a car or driving a terrorist to their target. In essence, the section establishes the offence of being an accessory through the provision of such aid.

It is self-evident that the law should prohibit gifts intended to aid terrorism. The difficulty is that it is not always possible for a donor to know beforehand what the resources will be used. Without such knowledge the *mens rea* is absent and a conviction may be a violation of the accused's freedom. It should be remembered that 'before a conviction there must be knowledge that a crime of the type in question was intended'.⁶⁵

There is another difficulty inherent in this section. When a contribution is made in money, how is the donor to know, or the prosecutor to prove, that part of the money that went into an account was used for terrorism, while the rest was for a legitimate, charitable cause?

Further, section 5 may be covered by an amendment to the penal code, specifically to the section prohibiting management of prohibited organisations.⁶⁶ This would serve the same purpose but remove the infamy associated with terrorism from this ordinary crime.

In order to introduce a ban on any financial arrangements that may aid terrorists, the Act forbids involvement in an arrangement to facilitate the retention or control by or on behalf of another person of any terrorist property.⁶⁷

Section 8 of the Act criminalises dealing in property owned or controlled by terrorist groups.⁶⁸ A person may exonerate themselves of this offence on evidence that they took all reasonable steps to satisfy themselves that the property was not owned or controlled by or on behalf of a terrorist group.⁶⁹

⁶² A person who, directly or indirectly, collects or provides or invites a person to provide or make available any property, finance or a service intending, knowing or having reasonable grounds to believe that such property, finance or service shall be used (a) for the commission of, or facilitating the commission of a terrorist act; or (b) to benefit any person or terrorist group involved in the commission of a terrorist act, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years.

⁶³ The Act defines 'property' as assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in such assets and includes funds;

⁶⁴ Unfortunately no definition is given of a 'service.'

⁶⁵ *R v Bainbridge* (1960) 1 QB 129 at 134, per Parker LCJ. Goddard LC stated in *Johnson v Youden*: 'Before a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute that offence.' [1950] 1 KB 544 at 546.

⁶⁶ Chapter IX Penal Code

⁶⁷ S 7.

Soliciting support for and giving support to terrorists is prohibited and subject to a possible prison term of 20 years.⁷⁰ Similarly, harbouring of terrorists,⁷¹ including concealing the presence of a person who is a member of a terrorist group or has committed a terrorist act is an offence. But how is a person to know that someone has committed a terrorist offence or is a member of a terrorist group? This provision places at risk family members of terror suspects who may not know of the activities of their kin.

In an attempt to cast the net broadly, the Act prohibits a range of activities related to the commission of terrorist acts: provision of weapons to terrorist groups;⁷² direction of the commission of a terrorist act;⁷³ recruitment of members for a terrorist group;⁷⁴ and training and direction of terrorist groups and persons.⁷⁵ The criminalisation of these activities is intended to isolate terrorists and deny them any assistance.

(iv) Disclosure of information

The Act criminalises various acts dealing with information about terrorism investigations. Under section 19, it is an offence to disclose 'anything', which is likely to prejudice an investigation or to interfere with material relevant to an investigation. The charge is based on 'knowing or having reasonable cause to suspect' that an officer is conducting an investigation under the Act. This is reinforced by section 41(1), which imposes a duty to disclose information relating to terrorist acts. Under this section,⁷⁶ a person who has any information relevant to preventing a terrorist act or securing the arrest or prosecution of a person who has committed such an offence must disclose it to police.

The guilt of an accused under section 19 is dependent on their 'knowing or having reasonable cause to suspect.' There is a more general formulation in section 41 where a blanket phraseology is used.⁷⁷ The *mens rea* in both sections is less specific than if the words 'knows or believes' had been used.

⁶⁸ 'Terrorist property' means (a) proceeds from the commission of a terrorist act, money or other property which has been, is being, or is intended to be used to commit a terrorist act; (b) money or other property which has been, is being, or is intended to be used by a terrorist group; or (c) any property belonging to a specified entity.

⁶⁹ S 8(2).

⁷⁰ S 9.

⁷¹ S 10.

⁷² S 11.

⁷³ S 12.

⁷⁴ S 13.

⁷⁵ S 14.

⁷⁶ S 41.

⁷⁷ A person who, knowing or having reasonable cause to suspect that an officer is conducting an investigation under this Act, (a) discloses to another person anything which is likely to prejudice the investigation; or (b) interferes with material which is relevant to the investigation, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years.

It may be pointed out that under the Act, the duty to disclose information does not provide any avenue for the accused to evaluate the significance of the information. How is one to know that information is relevant in preventing a terrorist act?⁷⁸ Or, indeed, securing an arrest? Isn't that in the domain of police work? Under the provisions related to handling of information, a person may be guilty by inertia – either by not volunteering information or not knowing that the information is relevant.

Offences relating to handling of information are, to some extent, vague and ambiguous, particularly because there is no limitation or exception where the presumption of knowing is based on a close personal relationship, for example, wife and husband, or children and parents. It is commendable that section 41(2) establishes an exception to privileged communication protected under any written law. This would cover the client–advocate relationship, or any relationship establishing levels of confidentiality. Another concern is the fact that the information provisions appear to raise the possibility of self-incrimination. Does the privilege against self-incrimination provide a safeguard for silence as a defence?

There is a general principle that where a statute imposes a duty to disclose, it inherently grants immunity from prosecution,⁷⁹ but if Parliament wanted to remove the possibility of self-incrimination it should have made specific exceptions to sections 19, 41 and 42.

It appears that the purpose of the handling of information provisions is to compel persons to volunteer information. Nevertheless, they threaten self-incrimination and prosecution of persons who may not reasonably suspect that they possess information that could be used in a terrorism prosecution.

There is genuine concern that legal provisions compelling disclosure of information may create an 'informer' society and weaken personal loyalties within families or social groups. The provisions also impact on the work of journalists who interview terrorism suspects and their sympathisers because they may face prosecution on the strength of information received in the course of their work.

(v) Powers of arrest

A police officer suspecting on 'reasonable grounds' that someone has committed or is committing an offence under the Act may arrest them.⁸⁰ This enables the police to arrest and interrogate suspects to obtain evidence on a past or on-going criminal activity. The power of arrest under this section covers

⁷⁸ S 19(b) criminalises interference with material 'which is relevant to an investigation'.

⁷⁹ Herbert, B 'Immunity from prosecution versus privilege against self-incrimination' 28 (1953) *Tulane LR* 1–21.

⁸⁰ S 31.

general suspicion and is not linked to any specific offence. The arrest is effected as a first step, to aid investigations.

In essence the Act establishes a right of arrest without a warrant, permitting questioning, without suspicion on any specific offence, thereby encouraging open arrests and long periods of detention unconnected with particular incidents. Use of this provision may extend to oppressive practices by the police and may be open to blackmail.⁸¹ People fearing arrest may also be reluctant to volunteer information to the police. This is contrary to the spirit of the Act and unhelpful to police investigations.

Under section 31, the only reason for arrest is 'suspicion of commission of an offence'. Unlike section 32, section 31 permits indefinite periods of detention because it is silent on the length of time a suspect may be held before being produced in court.⁸² The practical effect of this section is that the police may detain a person who is suspected of committing a terrorist offence for a period longer than 24 hours but must release a known member of a terrorist organisation within 24 hours of arrest.⁸³ In essence, this open provision may be used to arrest persons for other minor offences unrelated to terrorism. Further, persons may be arrested not only on grounds of personal involvement in terrorism but on mere association with suspects.

The principal purpose to be served by section 31 is the gathering of intelligence that may deter terrorism. Perhaps while terrorism remains a substantial threat, this provision may be excused.

It will, however, be seen that this provision poses a legal challenge in the judicial determination of 'reasonable grounds', which may warrant an arrest. At a minimum there must be a requirement for 'sufficient reason' to influence a reasonable person to believe that an offence has been committed. What the section requires, however, is 'reasonable grounds'. This is a low threshold, which endangers the liberty and freedom of individuals.

81 See 'Police Raids Alienate Kenya's Largest Ethnic Minority' available at <http://www.voanews.com/content/violent-eastleigh-police-raids-alienating-kenyas-ethnic-somali-minority/1551714.html> accessed on 3rd January 2013.

82 32(1) 'A person arrested under section 24 (referred to as the suspect) shall not be held for more than twenty four hours after his arrest...'

83 Ibid.

The Criminal Procedure Act⁸⁴ provides that an arrest may be effected using such force as is necessary in the circumstances. The Prevention of Terrorism Act does not provide any guidelines regarding arrests. Presumably the provisions in the Criminal Procedure Act apply even in terrorism investigations. Unfortunately, there have been complaints from suspects and their families alleging excessive use of force in either arresting or obtaining information from them. Excessive force, including, apparently, 'shoot to kill' orders against terrorism suspects, threatens the rule of law and the right of suspects to a trial and due process.⁸⁵ In the absence of a legal provision, strict rules should be provided for police arrest procedures.

(vi) Detention following Arrest

Whereas there is no fixed period of detention for a person arrested for purposes of terrorism investigations,⁸⁶ a person arrested for membership of a terrorist group may be held for only 24 hours after the arrest unless the suspect is produced in court and an order is made for continued detention, or when it is not practicable to produce the suspect in court within that period.⁸⁷

The period for detention of a member of a terrorist group has been radically reduced and ring-fenced with various conditions, making it difficult to hold persons without the risk of a court challenge. The provisions regarding a suspect's right to be released demonstrate the balancing that was done during the drafting and parliamentary debate on the Act, and manifest a curious attention to detail on the process of obtaining an order allowing the holding of a suspect outside the 24-hour period.⁸⁸

A police officer who wishes to hold a suspect beyond the permissible period must apply to court for an order and must disclose: the nature of the offence; the general nature of the evidence against the suspect; the extent of inquiries made; and the reasons for the continued holding of the suspect.⁸⁹

⁸⁴ S 21(2) If a person forcibly resists the endeavor to arrest him, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender

⁸⁵ In April 2007, over 50 armed Anti Terrorism Police and General Service Unit Officeres raided houses in Mombasa taking suspected terrorists from their beds and arresting them without warrants. The houses were ransacked while the Unit shot without provocation, beat up suspects and took money and jewellery. After the raid almost all the arrested persons were released without charge, showing that the force used in the arrest was probably not merited. See, *Stamping Out Rights: The Impact of Anti-terrorism Laws on Policing* By Commonwealth Human Rights Initiative, CHRI Report, 2007.

⁸⁶ S 31.

⁸⁷ S 32.

⁸⁸ S 33.

⁸⁹ S 33 (1).

In a further deliberate effort to protect the rights of suspects, the Act lays down matters a court should consider in the exercise of its discretion to release a suspect being held for terrorism investigations.⁹⁰

(vii) Power to gather information

The Act gives police powers of search and interrogation for purposes of investigating an offence.⁹¹ These powers are put into operation through an *ex parte* application to a magistrate, who may grant an order for the gathering of information if he is satisfied that there are reasonable grounds for believing; that an offence has been or is likely to be committed; that it is necessary to obtain information about the offence or the whereabouts of a suspect; and that the person to whom the order is directed has material information relating to an offence. In making the order the court may require the examination of a person or of any information relevant to an investigation.

While a person under investigation may refuse to answer a question or produce any document unless a court makes a compelling order, a court may issue the order notwithstanding that an answer to a question may incriminate that person. This is contrary to art 49(1) (b) of the Constitution, which grants a suspect the right to remain silent. There is fear, also, that magistrates may be turned into processing chambers, issuing orders at the behest of the police without sufficient scrutiny. It might, perhaps, be better if this power were vested in the High Court, where proper examination and inquiry is possible. Further, a court's discretion to order a waiver of the right to silence is so extensive as to override information protected by law. In making an order requiring examination, a court is given no guidance on how that is to be conducted. The Act is also silent on the conducting of personal searches.

In sum, all privileged and special procedure materials and confidential information are exposed upon issue of a court order. Section 34(1) does not specify the rank of police officer that may apply for an *ex parte* order. Any police officer of any rank may apply. This lowers the standard of protection. In Uganda, for example, only an officer above the rank of inspector may, on oath, apply for such an order.

⁹⁰ Ibid.

⁹¹ S 34.

4. Limitation of rights

Although the Constitution of Kenya and international human rights law recognise that certain rights may be limited,⁹² it is also acknowledged that some rights may not be limited⁹³ and that limitations on other rights should be proportionate to the threat posed.⁹⁴

International law requires that states should restrict rights only when absolutely necessary and must show that there is no other way, other than the restriction, of achieving the same goal.⁹⁵

The Act provides for restrictions of fundamental rights for purposes of ensuring investigations or detection and prevention of a terrorist act.⁹⁶ Specifically, the right to privacy is limited, allowing the search of a home or property or the interception of communications.⁹⁷ In a similar tone, a suspect's right to be brought before a court as soon as possible, but not later than 24 hours after arrest, is curtailed to ensure that the suspect attends court or to prevent an offence under the Act.⁹⁸ These restrictions are not based on any suspicion of a crime but are intended to enable the investigation of an offence.

These restrictions demonstrate that powers and sanctions once thought to lie outside the rules of liberal democracy are now part of Kenya's legal system.

Extended state powers, though directed at dealing with exceptional situations, create new precedents in proper limits to the scope of governmental flexibility, establishing a new 'normal' and tolerance of executive intrusion into individual rights. In the public domain, the Act is seen to impose a different standard of restrictions for persons suspected of 'terrorist acts', discarding the long-held principles of the rule of law and protection of human rights. Consequently, there is a noticeable shift of expectations regarding the limits of government power and the role of the state in protecting human rights in a time of terrorist attacks.

Some questions arise on the interaction of the Prevention of Terrorism Act and the criminal justice system. If, as it appears, the Act is to apply indefinitely, how will it influence the application of constitutional protections of individual rights? Which Penal Code provisions should be repealed to comply with the new Act? In situations where the Act and the Penal Code cover the same circumstances, under which law

⁹² This is the subject of an in-depth discussion in Chapter 7. See Art 24 of Kenya's Constitution and Art 4 of the ICCPR.

⁹³ Art 25.

⁹⁴ Art 24(1).

⁹⁵ Gittleman, R 'The African charter on Human and Peoples Rights: A legal analysis' 22 (1981) *Va J Int L* 667.

⁹⁶ S 35 (2).

⁹⁷ S 35 (3) (a).

⁹⁸ S 35 (3) (b).

should a suspect be charged? Which provisions of the Act do not comply with the Constitution and ought therefore to be amended? These and other such issues are necessary parts of the discussion of the Act's impact on the criminal justice system.

5. Significant features in Kenya's Act

First, the definition of 'terrorist acts' is broad and extensive, greatly extending the scope of terrorism beyond actual violent acts intended to cause death or serious bodily harm or destruction of property. This has opened the legislation to the possibility of abuse, making it available as a tool to be used against civil dissenters as well as political protesters.

A remarkable inclusion in Kenya's Act, which is completely absent from the Ugandan Act, is the central role of the judiciary in terrorism investigations, requiring the police to obtain a warrant to detain suspects longer than the 24-hour period permitted under the law and allowing proscribed groups the opportunity to challenge the ministerial action in court. This permits instant redress and, in the event of executive wrongdoing, an avenue for challenging the legitimacy of the action.

These safeguards are born of Kenya's experience of dealing with terrorism without specific legislation, for example, extraditing suspects to Ethiopia and the United States without due process.⁹⁹ The suspects were reportedly ill-treated and tortured and were not granted fair trials.¹⁰⁰

An important and disturbing element of the Kenyan Act is the way it expands executive decision-making without concomitant checks and balances.¹⁰¹ A number of provisions in the Act are put into operation by the exercise of discretionary power that is not subject to scrutiny. For example, the power to proscribe an entity may be used and remain functional for a period of seven days before the entity must be informed of the decision.¹⁰²

However, the Kenyan Act, although requiring only 'reasonable grounds' for proscription, sets down criteria for the exercise of discretion and allows organisations to oppose the intended proscription.¹⁰³ However, neither the criteria nor the opportunity to be heard are judicial constraints, since both rely on executive decisions. The period in which the proscription may operate before the entity must be informed

⁹⁹ Kimathi A et al Horn of Terror (2008).

¹⁰⁰ Ibid.

¹⁰¹ S 3.

¹⁰² S 3 (4).

¹⁰³ Ss 3 (1) & 3(2).

would at first instance appear to give the executive a head start in judicial petitions to review the decision and certainly violates the right to freedom of expression or association of innocent persons who hold any connection with the proscribed organisation. This may jeopardise any business or other legal connection the entity may have with other innocent organisations, which may also be prosecuted for associating with a specified entity.¹⁰⁴

Significantly, the Act provides for a judicial review of the Secretary's decision.¹⁰⁵ This review, however, is restricted, as the court may receive certain information in the absence of counsel for the proscribed organisation.¹⁰⁶ Though there is no way to test the legitimacy of such information, the court may act on it. As a safeguard, it should be made mandatory that – unless a situation is extremely urgent – a judicial officer should approve all applications for the proscription of an organisation.

To strengthen this protection, and to provide a full audit of the exercise of this discretion, the Act ought to go beyond a provision for judicial review to a merits review so that a court may test the grounds upon which a decision to proscribe was made.

6. Before and beyond the law

For a long time Kenya did not have anti terrorism legislation. In frustration, the executive relied on administrative law to secure the country. However, because of the government's questionable legal mandate, its anti terrorist activities have had significant effects on civil liberties.

Before the passing of the Act the executive dealt with terrorism through, inter alia: detention without charge; entry and search of premises without a warrant, and; deportation of citizens and foreigners without extradition proceedings.¹⁰⁷ Then and now the government's activities jeopardised the normal functioning of a democracy.

Dicey writes that public officials may, in a time of emergency, act outside the law.¹⁰⁸ For their protection, Parliament may, after the fact, indemnify them through legislation. The indemnity does not legalise their actions but serves to afford them a shield against liability. Dicey's proposition permits the exercise of extra legal power, allowing actions that may violate the law and the constitution. He considers

¹⁰⁴ Ss 8 & 13.

¹⁰⁵ S 3(7).

¹⁰⁶ S 3(9).

¹⁰⁷ S 101.

¹⁰⁸ *Supra* n 1.

that it may, at times, be justified to do this to save the state and the law itself from utter collapse.¹⁰⁹ This is not to say that Dicey preferred power uncontrolled by law, but to recognise his acknowledgement of extreme steps that may be necessary to control emergency situations.

Dicey distinguishes two legal responses to a situation of emergency. The first is an 'after the fact' reaction in which a state official may take certain justifiable action out of necessity and the second, in a situation of a clear legal mandate. Dicey prefers the second option but admits that the first is also available.¹¹⁰ It does appear that Dicey's standard for dealing with emergencies seeks to preserve the rule of law.¹¹¹

There is a strong proposition that if a government needs to assume extraordinary powers to meet the violent threat of terrorism it must seek the mandate of the legislature, which may supply the instruments, by way of a statute, with accompanying restraints to check the misuse of those powers. Unfortunately the government proceeded without legal authority, raising questions about its conduct regarding torture, involuntary detentions, due process and refoulement. The details of these concerns are discussed below.

(a) Torture

The Torture Convention prohibits torture absolutely. No exceptional circumstances, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification for torture.¹¹²

Interviews carried out in Nairobi, Mombasa and Lamu with former detainees, families of suspects, human rights activists, lawyers and faith-based organisations reveal a chain of activities indicating a general trend of abuse and disregard for human rights.¹¹³

¹⁰⁹ Ibid at 64.

¹¹⁰ Ibid at 111.

¹¹¹ See, Ferejohn J & Pasquino P 'The Law of the exception: A typology of emergency powers' (2004) *International Journal of Constitutional Law* 210, 237-9.

¹¹² Art 2(2) of the Torture Convention.

¹¹³ Amnesty International records the testimony of a wife of a terrorist suspect who stated, 'during interrogation they told me that if I did not speak the truth they would beat me up. All they wanted to know was where my husband was and I did not know. At a certain moment they actually started beating me with wooden sticks on my legs, my knees and the soles of my feet. A woman police officer carried out the beating. The next day I could not walk and had fever. I asked to be brought to the hospital, but they refused to take me.' See *Kenya: Crackdown on Terrorism Violating Human Rights*. The report's findings include: The use of torture and other ill-treatment during detention, including physical abuse. Detention of suspects without charge in undisclosed locations and without access to a lawyer or relatives. Detention in insanitary conditions without access to medical care when

Further, human rights organisations have documented and provided corroborated claims of extreme torture of suspects, particularly following the two attacks on the American Embassy in Nairobi and the Kikambala Hotel in Mombasa. Unfortunately the police continue to deny the allegations and refuse to investigate them.

Amnesty International, for example, has documented cases of terrorism suspects who have suffered at the hands of Kenya's police.¹¹⁴ Reported beatings and even electric shocks on the bodies of suspects proliferate. Others tell of arrests without warrant and inhuman treatment as well as denial of access to family and lawyers. There is a 'disturbing level of secrecy surrounding the arrests and detentions'.¹¹⁵ A man named Mohamed Ahmed Surur reported being beaten by interrogators, some of them foreign, and had electric shocks inflicted until he passed out.¹¹⁶

The motivation for the torture is usually to obtain a confession. As a prelude to torture, suspects are not informed of their due process rights, in particular their right to silence and their right to counsel. Most importantly, they are not informed that anything they say will be used against them. Being informed of these rights is essential. Only when they are waived can a confession be admitted in evidence.¹¹⁷

As already noted, the Torture Convention and the ICCPR¹¹⁸ prohibit torture. Moreover, the Kenya Constitution has an explicit provision on the matter. Article 25 provides protection from inhuman treatment,

needed. Harassment of family members and arbitrary detention of relatives to put pressure on suspects to hand themselves in. The failure of police to show warrants when arresting or conducting searches of property. Interview taken on 17 May 2004; interview and report available at <http://www.commondreams.org/news/2005/0323-03.htm> Released on 23 March 2005.

¹¹⁴ Amnesty International report available at <http://thereport.amnesty.org/eng/regions/africa/kenya> and also BBC News for Africa headline: 'Kenya tortured terror suspects' available at <http://news.bbc.co/z/hi/africa/4376249.stm> both accessed on 3 May 2008.

¹¹⁵ Ibid.

¹¹⁶ Ibid. There are too many cases of torture or inhuman treatment to enumerate. It seems that being kept in filthy conditions with no access to medical care is the norm for terror suspects.

The case of Mohamed Rashed Daod Al-O'Whali best demonstrates this. Mohamed was arrested on allegations of being a member of Al Qaeda. He was accused of being part of the group that bombed the American Embassy in Nairobi on 7 August 1998. In 2001 Mohamed was brought to trial in a New York Federal court. He claimed that his statements, made during interrogation in Kenya by a FBI special agent and an Assistant US Attorney violated his right against self-incrimination. Federal Judge Leonard Sand ruled that US Federal Agents interrogating suspects abroad have to abide by the Miranda principles, under which a defendant's statement, if extracted by US agents acting abroad, must be admitted only if it is shown that the accused was first advised of his rights and he validly waived those rights. The US prosecutor had tried to claim that no such right existed in Kenya. This of course is untrue as s 77 of the former Constitution, applicable then, contained an express provision for the right. The Judge struck out the 5-day interrogation statement taken in Kenya. Even then Mohamed was finally found guilty and sentenced to life imprisonment. *United States of America v Mohamed Rashed Daod Al'owhali aka Khalid Salim Solah Bin Rashed* (dft); District Court. Southern District of New York; criminal case Docket #98-CR-1023-1.

¹¹⁸ Art 7 of the ICCPR is express: no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. It is worth pointing out that art 4 of the ICCPR holds out art 7 as one of the non-derogable rights.

holding explicitly that 'no person shall be subject to torture or to inhuman or degrading punishment or treatment'.

To protect against the usual motivation for torture, Kenya's Evidence Act has a general prohibition against admissibility of confessions in a trial. Section 25(A) of the Evidence Act disallows admission of a confession 'unless it is made in court, before a judge, a magistrate or police officer (other than the investigating officer) is an officer not below the rank of chief inspector of police and a third person of the suspect's choice'. In spite of these novel legal provisions, torture and harassment of family members of terrorism suspects persist.

(b) Involuntary detentions

Kenyan law states that the restriction of a person's freedom by custodial detention is a penal adjunct to the judicial function of either proving the guilt of an accused or passing a sentence following conviction of a crime. Judicial and executive power cannot be legitimately exercised in any other way. Either as overreaction or overzealous conduct, Kenyan security forces arrest and detain anybody they suspect of being involved in terrorism, with the reason usually given as 'helping police with investigations'.¹¹⁹ The Constitution and the Criminal Procedure Code do not permit arbitrary detention for this purpose. Detaining somebody to find out if he belongs to a terrorist group is illegal. An exercise in due diligence and employment of intelligence information should serve as an antidote to such excesses. A liberal and civil society is endangered when the police suspend people's right to liberty on mere suspicion.

Detention for purposes of interrogation or merely to remove the individual from circulation so as to cut off a terrorist cell link and incapacitate a group is often a shot in the dark and frequently targets the wrong people. This causes anger and hostility in the profiled groups, thereby alienating the moderates, from whom police might otherwise receive good intelligence. It is thus essential that arrests be made only when there is probable cause.

A legitimate arrest, under art 9(3) of the ICCPR and art 49 of the Constitution of Kenya, is one aimed at bringing the suspect promptly before a competent judicial authority. The executive may not arrest

¹¹⁹ Kenya and counter- terrorism: A time for change A Report by REDRESS and REPRIEVE February 2009.

and detain a person in order to investigate their involvement in a crime.¹²⁰ Further, any such detention should be tested rigorously for proportionality: is there an immediate and serious threat; is there no other way of meeting the threat short of taking away the liberty of the citizen without substantive evidence? Also, it should be remembered that even when such detention is necessary, it must last no longer than the time needed to avoid the imminent threat. Kenya's security forces have often acted in violation of this proportionality test.

(c) Due process

Concern about arbitrary arrest and detention is heightened by the fact that once terror suspects are placed in custody they are not allowed access to either family or counsel, thus violating a constitutional right that should be available to all crime suspects. The situation is worse for foreign suspects, who are subject to arrest, detention and deportation without recourse to legal procedures. The immigration officers and all other authorised officers exercise immense powers over persons who may be *bona fide* asylum seekers, but who are treated like criminals by a system that does not recognise its international law obligations.¹²¹

The case of *Farah Abdullahahi v The Republic* illustrates the situation that confronts persons suspected of terrorist involvement. Farah, born in Kenya but presently a citizen of Sweden, had visited relatives in Baidoa, Somalia. He had entered Somalia through Kenya. While in Somalia he realised that his visa to re-enter Kenya was about to expire. He chartered a plane, flew to the Kenyan border town of Daadab and renewed his visa. He then chose to continue on to Nairobi. On landing at Wilson airport in Nairobi he was arrested and detained for four days, ostensibly because he had entered Kenya without a visa. On being shown the valid visa, which had been issued at the border, the immigration officers declared the visa invalid and proceeded to cancel it. After being held for six days Farah was deported to Somalia without any extradition proceedings. The ATPU forced him into a Somalia-bound plane and directed the pilot to offload him in Somalia regardless of the fact that Farah was being sought by the Somalia Federal Transitional Government and, being of a rival clan from the ruling party¹²² was a likely candidate for torture

¹²⁰ Kenya's Court of Appeal has recently let in a ray of light in this matter, ruling that a prosecution mounted in breach of the law is a violation of the right of the accused and is therefore a nullity, regardless of the nature of the violation. The Court was particularly emphatic on violation in respect of ss 72 and 77 of the Constitution, which protect the right to liberty and the due process of the law. The Court has said: '[I]f an accused is brought to court in breach of the timelines provided by the constitution he must be set free.' See *Albanus Mwasia Mutual v Republic* (Unreported).

¹²¹ *Ibid.*

¹²² This is a matter in which I was personally involved as counsel for Farah.

in Mogadishu. It is clear that the government of Kenya is party to ill treatment of foreigners, even those who are in the country legally. Those who have no valid visa face even worse treatment.¹²³

(d) Refoulement

Perhaps the worst aspect of Kenya's troubled anti terrorism programme is the manner in which the government has dealt with foreign terrorist suspects and, in some cases, Kenyan citizens. Recently, and perhaps because the state has not been able to obtain a conviction in any of the terrorism-related prosecutions, the government has resorted to sending terrorism suspects out of the country, blatantly contravening both Kenyan and international law. It seems the government's policy is to use deportation as a means of bypassing extradition proceedings. Once arrested, detainees are given no opportunity to challenge their transfers to other countries and suits brought in court have been rendered nugatory by the government's demonstration that the subjects are out of the courts' jurisdiction.¹²⁴ The usual procedure is to arrest a suspect, detain them in a secret location and forcibly remove them from the country without bringing them before a judicial authority, thereby deliberately circumventing the rule of law and undermining the principles of justice.¹²⁵

With regard to events such as arrest and rendition there is a well-founded complaint of discriminatory practices directed at the vulnerable Muslim minority. The practice, associated with the profiling of terrorists in the international field, is to take precipitate action against a Muslim, not necessarily for what he has done but for the company he keeps.¹²⁶

This practice, starting with the 1998 American Embassy bombing in Nairobi, gained notoriety with the deportation of hundreds of foreigners and Kenyan Somalis into Somalia or Ethiopia in the early part of 2007. These transfers became to be known as extraordinary renditions – the transfer of an individual to a

¹²³ Human Rights Watch: 'Kenya: Crackdown on Nairobi's Refugees after Mombasa Attacks' Press Release 6 December 2002 available at <http://hrw.org/english/docs/2002/12/06/kenya4447.htm> accessed on 25th September 2014.

¹²⁴ Human Rights Watch: *Playing with Fire. Weapons Proliferation, Political Violence, and Human Rights in Kenya* (New York 2002).

¹²⁵ *Supra* n 100.

¹²⁶ See 'The sociology and psychology of terrorism: Who becomes a terrorist and why?' A report prepared under an Interagency agreement by the Federal Research Division, Library of Congress September 1999.

foreign State, with the direct involvement of the Kenyan government, without due process and with no regard to whether the person would be subjected to torture or cruel, inhuman, or degrading treatment.¹²⁷

International human rights bodies have recorded a series of cases arising out of the Kenyan government's illegal deportations. Amnesty International reports that 'in 2007 at least 140 people (nationals of 17 different countries, including Kenya) were arrested by Kenyan authorities between December 2006 and February 2007 as they tried to enter Kenya from Somalia.'¹²⁸ They were detained in several places in Nairobi and Jomo Kenyatta international airport in Nairobi. Most of the detainees were held for weeks without charge and some were reportedly tortured or otherwise ill-treated. Some were allegedly beaten by the Kenyan police and forced to undress before being photographed. They were not allowed any contact with their relatives. They were not allowed to claim asylum and were denied access to the UNHCR.¹²⁹

In January and February 2007 at least 85 detainees were removed to Somalia and then to Ethiopia. By the end of 2007 more than 40 persons were still held incommunicado in Ethiopia.¹³⁰ Amnesty International's report is corroborated by Human Rights Watch, whose own findings indicate that between December 2006 and March 2007, 150 persons from 18 different countries were arrested at the Liboi and Kiunga border crossing points between Kenya and Somalia. The Kenyan authorities then transferred these individuals to Nairobi where they were detained in prisons and other detention facilities in and around Nairobi for periods that exceeded the length of time permitted for pre-trial detention under Kenyan law.

While in detention in Nairobi several foreign nationals, who were denied access to their consular representatives, were interrogated by American and /or other national intelligence services. At least 85 people were secretly deported from Kenya to Somalia in what appears to be a joint rendition operation of

¹²⁷ The Torture Convention prohibits the transfer of a person to a state where '[t]here are substantial grounds for believing that he would be in danger of being subjected to torture'. For the purpose of determining whether there are such grounds, art 3(1) of the Convention requires the competent authorities to take to account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

¹²⁸ Amnesty International Report, 'Rendition in the Horn of Africa' available at <http://www.amnesty.org/en/news-and-updates/feature-stories/rendition-in-the-horn-of-africa-20070615> Accessed on 4 January 2010.

¹²⁹ Kenya: *Amnesty International Report*, 2008 available at <http://therereport.amnesty.org/eng/regions/Africa/Kenya> Accessed on 3 May 2008.

¹³⁰ *Ibid.* A more worrisome report relates to a Kenyan known as Abdi Mohamed Abdillahi. Abdi, a Kenyan of Somali heritage whose family is in Kenya, was arrested at Liboi in north-eastern Kenya on the Somali border in early January 2007 after fleeing from Mogadishu. He was detained at Garissa police station and later at various police stations in Nairobi. His family said that in mid-January, when they visited him at Karen police station the police assured them that he would be released. On 20 January he was transferred by the Kenyan police and put on a chartered plane to Somalia. He was reportedly held in Mogadishu before his transfer in February 2007 to Ethiopia, where he is still detained.

those individuals of interest to the Somalian, Ethiopian or US governments.¹³¹ The report concludes that the Kenyan, Somalian and US governments co-operated in a secret programme that involved arbitrary detention, expulsion and apparent enforced disappearance of dozens of individuals who fled the fighting between the Union of Islamic Courts and the joint forces of the Transitional Federal Government of Somalia and Ethiopia from December 2006 to January 2007. While Kenya has secretly expelled people, the Ethiopians have caused dozens to 'disappear' and US security agents have routinely interrogated people held incommunicado.¹³²

A rather more detailed account of the illegal deportations is that given by Cageprisoners.¹³³ This organisation has made a detailed analysis of the names of detainees arrested during the conflict between the Union of Islamic Courts and the Somalia Transitional Federal Government, assisted by the governments of Ethiopia and the United States of America.¹³⁴ The report shows a disturbing pattern of abuse and disregard for human rights in the treatment of detainees who are held in Guantanamo Bay-style prisons in Ethiopia for purposes of interrogation.¹³⁵ The detainees are held as illegal combatants and taken through a 'process' established in Guantanamo Bay.¹³⁶

(i) Who was arrested?

Despite the fact that different organisations have given slightly different figures on the number of people arrested, it is apparent that between 140 and 200 persons were detained and rendered to Somalia by the government of Kenya.¹³⁷ They were of different nationalities: American, British, Canadian, Emirati, Eritrean, Ethiopian, Kenyan, Omani, Rwandan, Saudi, Somali, Sudanese, Syrian, Swedish, Tanzanian, and

¹³¹ Human Rights Watch Report: 'People fleeing Somalia war secretly detained – Kenya, US and Ethiopia co-operate in secret detentions and renditions. Available at <http://www.hrw.org/English/does/2007/03/30/kenya15624.htm>.

¹³² Gagnon G, Deputy Africa Director of Human Rights Watch, *supra* n 14. Human Rights watch obtained flight manifests for three flights from Kenya to Mogadishu and Baidoa, Somalia in January and February 2007. Each manifest listed names of several Kenyan police officers that accompanied the detainees.

¹³³ See report 'Inside Africa's War on Terror: Detentions in the Horn of Africa' (2007) also available at www.cageprisoners.com/our-work/reports/item/download/24 Accessed on 29 June 2010.

Cageprisoners, a London-based human rights organisation, was formed in 2003 with the aim of highlighting the plight of prisoners in Guantanamo Bay and other detainees held as part of the 'war on terror'.

¹³⁴ In December 2006, Ethiopian forces, with the assistance of the United States, ousted the Union of Islamic Courts (UIC) and installed the Transitional Federal Government of Somalia (TFG) in Mogadishu. Several terrorism suspects believed to have been responsible for the 1998 bombing of the United States Embassy in Nairobi and the 2002 Mombasa hotel bombing were alleged by the United States to be living in Somalia under UIC protection.

¹³⁵ *Supra* n 129.

¹³⁶ *Ibid.*

¹³⁷ *Supra* n 133.

Yemeni.¹³⁸ Of the 140 confirmed by Amnesty International, 85 were unlawfully transferred to Ethiopia, 27 either released in Kenya or sent back to their countries, 1 charged in Kenya, 41 acknowledged to be in Ethiopia, 4 released after being deported to Somalia and sent back to the UK, 15 released by Ethiopia, 1 charged before a military court, 40 whose whereabouts are unknown since rendition and 27 missing since their arrest in Kenya.¹³⁹

The treatment of all the detainees was outside any legal process. While in detention in Ethiopia the detainees complained of torture and ill treatment. None was given access to a lawyer, or to their families. The detainees were flown out of Kenya under cover of darkness in specially chartered flights originating from either Jomo Kenyatta or Wilson airports in Nairobi and taken to either Mogadishu or Baidoa, Somalia.¹⁴⁰ Months after the renditions became a matter of public debate, human rights organisations filed suit in Kenya challenging the detention and rendition of the affected persons. There was also the question of whether the detainees had actually been rendered. In its defence the government of Kenya unashamedly provided flight manifests confirming the renditions of several of the persons under inquiry.¹⁴¹

The Kenyan government's involvement in this process is difficult to understand. Kenya was not in any immediate threat from the detainees, who were arrested several hundreds of kilometres away in the remote desert of northern Kenya. For Somalia and Ethiopia, the reason for co-operating in the renditions was to obtain custody of persons suspected to have been involved with or in some way supporting the Union of Islamic Courts against the Transitional Federal Government of Somalia. In support of this argument it was alleged that the Union of Islamic Courts was the face of Al Qaeda in the Horn of Africa.

The treatment of the detainees in Ethiopia is appalling. They are held in dark rooms with no sanitation and no access to medical care. Several of the detainees have been tortured and ill-treated. At no point were they allowed legal consultations. The presence of foreign interrogators in Ethiopia and Somalia is now commonplace and accepted. One lady, Halima Badrudine Hussein, whose husband is wanted by the United States, was interviewed in turn by interrogators from the United States, France, Italy,

¹³⁸ Amnesty International June 2007 Report 'Kenya/Ethiopia/Somalia – Horn of Africa: Unlawful Transfers in the 'War on Terror' available at <http://www.amnesty.org/en/library/asset/AFR25/006/2007/en/dom-AFR250062007en.pdf> Accessed on 2 June 2008.

¹³⁹ *Supra* n 128.

¹⁴⁰ *Ibid.* The first of these renditions is recorded to have taken place on 20 January 2007. On this day, 33 individuals, many of them Kenyan nationals, were flown to Somalia. Other flights followed, bringing the number of persons involved to 63 by 22 March 2007.

¹⁴¹ The flight manifests of the renditions are available at <http://www.cageprisoners.com/download.php?Download=549> Accessed on 12 June 2008.

Switzerland, Israel, Libya and Pakistan.¹⁴² Clearly there has been an unlimited and unacceptable intrusion into the fundamental rights of the suspects. Granted the state has a right to protect itself from attack; the corollary to this is that the individual must be free from oppressive government action. The Kenyan government's surrender of its own citizens and those of other countries into the hands of well-known human rights violators in the names of Somalia and Ethiopia is unlawful.

While international law permits states to take effective counter terrorism measures, such measures are not without limits. The Inter American Commission on Human Rights has said that '[t]he state does not have a licence to exercise unbridled power or to use any measures to achieve its ends without regard for law or morals. The primacy of human rights is widely recognized. It is a primacy that the state can never ignore nor abridge.'¹⁴³

(ii) International law prohibitions against renditions

A crucial cornerstone of the law against extraordinary renditions is art 3(1) of the Torture Convention, which provides that 'no state party shall expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Article 3(2) of the Convention holds that for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights. Article 3 constitutes an absolute prohibition against the return or extradition of persons to a state where they are likely to be tortured.

Just as a state may not torture people, it may not place them in danger of torture. Rendition to torture is legally and morally equivalent to engaging in torture directly.¹⁴⁴ No one doubts that placing Individuals in the hands of the Somalian or Ethiopian governments is an engagement with regimes well known for torture. The government of Kenya has not shown that it sought or obtained any guarantees that the persons rendered to Somalia and later to Ethiopia (who included Kenyan nationals) would not be subjected to torture or ill treatment. While Kenyan security forces themselves are not innocent of torture,

¹⁴² *Supra* n 129.

¹⁴³ *Castillo Petruzzi v Peru*, Inter American Commission on Human Rights 30 May 1999 Publication Court Series C No 52 at para 204.

¹⁴⁴ Human Right Watch statement on US Rendition Legislation available at www.hrw/english/docs/2005/03/10/usin10294.htm Accessed on 15 April 2008.

renditions to Somalia are akin to outsourcing torture – a public relations exercise of allowing another country to do what Kenya is reluctant to be seen doing.

The Kenyan government's renditions of detainees raise concern in other spheres too. The reports by Human Rights Watch and Cageprisoners indicate that the persons rendered were arrested as they sought surreptitiously to cross the Kenyan border from Somalia following the Ethiopian-led invasion of Somalia. In so far as the facts show, they were asylum-seekers. The Kenyan government states that they were Union of Islamic Courts fighters. Whatever the case, they were innocent civilians. There are no allegations that any government was seeking them or that they had been criminally charged in any jurisdiction. In addition, there is no explanation at all of why the government avoided the standard extradition procedure. Forcible removal of persons without a court order is a flagrant disregard of due process and executive action with impunity.

In the Kenya–Somalia–Ethiopia scenario the practical manifestations of renditions are: the covert transfer of detainees from one state to another; the clandestine holding of the detainees by the second country and the harsh interrogation methods employed by the final recipient. It is generally agreed that extraordinary renditions are extrajudicial alternatives to extradition proceedings.

(iii) Jus cogens and the prohibition on torture

Kenya, Somalia and Ethiopia have all ratified the Torture Convention. The global condemnation of torture is so unified that the strict prohibition against torture may now be safely said to have obtained the status of *jus cogens* – a peremptory norm of customary international law from which no derogation is permitted.¹⁴⁵ The United Nations Special Rapporteur has delivered an explicit opinion on renditions, stating that 'the practice of extraordinary rendition constitutes a violation of article 3 of the Convention against Torture and article 7 of the ICCPR'.¹⁴⁶

(iv) The Refugee Convention

¹⁴⁵ Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe Nov. 7 2005 available at <http://hrw.org/english/docs/2005/11/07/usint11995.htm>; and Amnesty International Below the Radar: Secret Flights to Torture and 'Disappearance' at 22-24, AI Index: AMR 51/051/2006 (April 5, 2006)

¹⁴⁶ United Nations Economic and Social Council *Situation of Detainees at Guantanamo Bay* E/CN.4/2006/120 15 Feb 2006, Para 550.

Besides the Torture Convention and the ICCPR, the United Nations Convention Relating to the Status of Refugees, adopted in 1951,¹⁴⁷ expresses a prohibition of expulsion or return (*refoulement*) providing that, '[n]o contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'¹⁴⁸

In recognition of security concerns, art 33(2) excludes the benefit of this provision to a person who is a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. This provision presumes that a determination of the danger posed by any person has been made in the manner laid down by the Convention. Any action taken upon a person must be preceded by a determination of the status of that person.

(v) The Geneva Conventions

The Geneva Conventions contain a general prohibition against torture, cruel or degrading treatment in respect of a certain category of persons. Article 49 of the Fourth Geneva Convention, relating to the Protection of Civilian Persons in time of War,¹⁴⁹ prohibits individual or mass forcible transfers as well as deportations of protected persons regardless of the motive. In the event of a disagreement as to whether the person is protected, the Third Geneva Convention, relating to the Treatment of Prisoners of War, offers assistance. Article 5 of the Third Geneva Convention obliges states to treat such persons as protected persons until a competent tribunal has made a determination of their status. Before undertaking the exercise of expelling the asylum seekers from the country, Kenya was under an obligation to convene a tribunal to determine whether or not the asylum seekers were a danger to the country. In any event, even if it can be argued and shown that the persons concerned had been participants in the hostilities in Mogadishu, Article 13 of the Third Geneva Convention prohibits any state from taking any action, which 'may cause death or seriously endanger the health of a prisoner of war'.

(vi) United Nations International Convention for the Protection of All Persons from Enforced Disappearance

¹⁴⁷ Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (v) of 14 December 1950 entered into force on 22 April 1954 in accordance with art 43 available at: http://www.unhcr.ch/html/menu3/b/o_c_ref.htm Accessed on 19 June 2008.

¹⁴⁸ Art 33(1) of the Refugee Convention.

¹⁴⁹ Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949

It has been shown in the preceding discussion that out of the 140 or 200 persons allegedly rendered to Somalia from Kenya, 40 cannot be accounted for. Their whereabouts are unknown, either because no state wants to disclose that it has them in its custody or perhaps because they have been executed.

The 2006 United Nations Convention for the Protection of All Persons from Enforced Disappearance,¹⁵⁰ building on the 1992 United Nations Declaration on the Protection of All Persons from Enforced Disappearance¹⁵¹ reiterates the right of every person not to be subjected to enforced disappearance and affirms the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person. Article 1 of this Convention prohibits any justification whatsoever, whether a state or threat of war, internal instability or any other emergency, as a reason for an enforced disappearance. Article 2 defines enforced disappearance as

[t]he arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorisation, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law'.

As at the time of writing this thesis the Convention for the Protection of All Persons from Enforced Disappearance has been ratified by only four states: Albania, Argentina, Honduras and Mexico. There are, however, 74 signatories, Kenya included.¹⁵² The Convention will enter into force on the 30th day after the deposit of the twentieth instrument of ratification. The important thing, however, is that Kenya, having signed this Convention, has shown willingness to abide by it and cannot flagrantly violate its provisions.

7. Conclusion

Unlike Uganda, Kenya had sufficient time to consider, examine and debate its anti terrorism legislation. With this luxury of time Kenya was, in some instances, able to craft a statute that complies with international human rights law.

In a limited scope, Kenya's Act manifests certain imaginative accommodations, which permit the state to provide security within the confines of the rule of law and a respect for human rights. For example, the design of the search and seizure provisions, the interception of communications and arrest of suspects

¹⁵⁰ Adopted by the General Assembly on 30 December 2006 available at <http://www2.ohchr.org/english/bodies/ratification/16.htm>. Kenya signed this convention on 6th February 2007.

¹⁵¹ Adopted by the General Assembly of the UN in Resolution 47/133 of 18 December 1992.

¹⁵² *Supra* n 147.

reflect a more circumspect and judicious approach, perhaps borrowing from the experience of other states and frequent comments from civil society and human rights activists. Through such measures it may be said that the Kenyan model preserves the function of constitutionality while recognising the difference between the exception and the normal.

This has been achieved, not by permitting official lawlessness, but through general privative clauses – which exclude judicial review of certain actions- and other substantive clauses, which do not sanction judicial review in general, except on particular grounds, for example, on the test of reasonableness. In this way, the Kenyan Act provides sufficient legal opportunity to adapt to the different situations to which it may need to apply

Chapter VII

THE INTERPLAY BETWEEN SECURITY AND RIGHTS

1. Introduction

This chapter discusses the international¹ and domestic² human rights framework as regards limitations to and derogations from human rights protections in Kenya and Uganda. It examines features common to the limitation regime as well as the appropriate reach of these restrictions. It also considers principles governing the legitimacy of derogations.

It is pertinent to observe at the onset that human rights law integrates 'techniques of accommodation which allow states to dictate to what extent they shall incorporate human rights law into their domestic system.'³ Such techniques include avenues of escape or withdrawal from human rights obligations through limitations, claw back clauses or derogations, when circumstances demand.

With respect to terrorism, two issues arise for discussion. First, a state has an obligation to ensure protection for all persons within its territory from acts of terrorism and, secondly, in offering that protection the state must ensure compliance with international human rights law and other relevant international and domestic laws.⁴ Flowing from these issues is perhaps a more intractable question: what is meant by compliance with human rights? Does compliance with human rights mean absolute conformity or obedience within certain limits or restrictions? Assuming that the answer to the latter question is yes, how does one proceed?

¹ Within the UN system the General Assembly has adopted six principal international human rights conventions : the Convention on the Elimination of all Forms of Racial Discrimination (entered into force on 4 January 1969) 9464 UNTS 211; the International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force on 23 March 1976); the International Covenant on Economic Social and Cultural Rights 993 UNTS 3 (entered into force on 3 January 1976); the Convention on the Elimination of all Forms Discrimination against Women 1249 UNTS 13 (entered into force on 3 September 1981; the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment ,1456 UNTS 112 (entered into force on 26 June 1987); the Convention on the Rights of the Child 1577, UNTS 3 (entered into force on 2 September 1990).

²Ibid. Rights protected under these treaties are reproduced almost verbatim in the Constitutions of Kenya and Uganda.

³Higgins R 'Derogations under human rights treaties' 48 *BRIT. Y.B. INT'L L.* 281 (1978) at 281.

⁴ For example international humanitarian law and the constitutions of the individual states.

While considering these matters, it is essential to remember that human rights standards are not intended to guarantee rights that are abstract, hypothetical or illusory, but rights that are practical and effective. It is not enough to assert the existence of a right. It must be given practical application.⁵

2. The nature of restrictions on civil and political rights

Civil and political rights may be classified into distinctive categories: 'limited rights,' that is those that can be restricted within constraints that are spelt out in different articles of the ICCPR; 'derogable rights' that is those that permit restrictions intended to balance interests of the individual and the community or competing rights; and 'absolute rights' which permit no qualification or interference under any circumstances.⁶

Conceptually, 'the ability to restrict rights is a key mechanism for establishing an institutional dialogue about rights between the three arms of government, in contrast to representative or judicial monologues about rights.'⁷ Within this context, it is generally accepted that restrictions to rights provide a means by which states may deal with moments of crisis and still remain faithful to the human rights regime.

(a) Understanding the types of restrictions

(i) Limitation and derogation

There is a subtle but important distinction between limitation and derogation clauses. Limitation clauses restrict only the rights to which they apply⁸ whereas derogation permits a temporary suspension of certain rights to enable states to deal with extraordinary circumstances.⁹ Derogation from a right or an aspect of a right is its complete or partial elimination as an international obligation.¹⁰ Derogable rights are also termed 'qualified rights' as often they are balanced against other considerations. Rights such as the right to privacy, freedom of speech and freedom of assembly are subject to qualification as they sometimes

⁵ An important principle of law is expressed in the maxim *ubi ius ubi remedium*- where there is a right there is a remedy.

⁶ Cassese *A Human Rights in a Changing World* (1990) 90.

⁷ Debeljak J 'Balancing rights in a democracy: the problems with limitations and overrides of rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' 32 *Melbourne University Law Review* 422 at 423.

⁸ Abiola S 'Limitation clauses in national constitutions and international human rights documents' Research Memorandum prepared for the Open Society institute's public health program law and health initiative available at <http://cop.health-rights.org/teaching/46/Limitation-Clauses-in-National-Constitutions-and-International-Human-Rights-Documents> accessed on 2nd January 2014.

⁹ *Ibid.* Such extraordinary circumstances include a time of armed conflict, civil and violent unrest and a period of natural disaster.

¹⁰ Green L 'Derogations of human rights in emergency situations' (1978) 16 *Can Yearbook Int L* 92.

conflict. Thus, 'limitation and derogation clauses share one common feature: they justify violation of rights.'¹¹

A limitation on any right has to be for a specific purpose and must be reasonable and justifiable.¹² 'By their nature, limitation clauses are designed to provide for potential government imposition on individual rights to benefit other individuals, the community or society.'¹³ In similar manner, while treaty law allows derogation from human rights, the validity of such an action is subject to certain requirements set out in art 4 of the ICCPR.¹⁴

Derogation clauses are intended to limit the suspension of rights in times of emergency.¹⁵ They aim at striking a balance between the protection of the individual and the protection of national needs in times of crisis by placing reasonable limits on emergency powers.¹⁶ In essence derogation clauses express the notion that states of emergency do not create a legal vacuum.¹⁷

'The derogation regime is premised on the basic assumption that emergency is a distinct and extraordinary exception to the general rule of normalcy.'¹⁸ This means that although drafted to safeguard the scope of authority of a government, derogation clauses do not suspend the rule of law. 'They are rather an expression of it, for they regulate the relationship between the rule of law and the exception.'¹⁹

By and large derogation clauses are designed to offer governments the necessary freedom to deal with civil unrest even if it means curtailing certain fundamental rights of the individual.²⁰ It may also be said that derogation provisions are aimed at controlling, not expanding, the range of legitimate government

¹¹ Conte A & Burchill R *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2009) at 43-51.

¹² Currie I & de Waal J *The Bill of Rights Handbook* (2005) 164.

¹³ Pati R 'Rights and their limits: The constitution for Europe in international and comparative legal perspective' (2005) 23 *Berkeley J Int L* 223.

¹⁴ In addition to treaty law, case law on treaty bodies and the interpretation adopted by the Human Rights Committee (a body of independent experts, which monitors implementation of the ICCPR by states parties) provide credible guidelines on how to apply the derogation regime.

¹⁵ Cowell F 'Sovereignty and the question of derogation: An analysis of article 15 of the ECHR and the absence of a derogation clause in the ACHPR' *Birkbeck Law Review* Volume 1(1) 135.

¹⁶ *Supra* n 9.

¹⁷ Rule of Law in Armed Conflict Project available at www.geneva-academy.ch/RULAC/index.php accessed on 12th November 2013.

¹⁸ Gross O 'Once more unto the breach: The systemic failure of applying the European Convention on Human Rights to entrenched emergencies' (1998) 23 *Yale J Int L* 437.

¹⁹ *Supra* n 3.

²⁰ See generally Chadwick E *Self Determination, Terrorism and the International Law of Armed Conflict* (1992) Law; Walker C *The Prevention of Terrorism in British Law* (1996).

action during a state of emergency. The argument often cited for this proposition is founded on the imprecision of the ordinary limitation to fundamental rights and their failure to provide a clear guideline for the conduct of governments during a state of emergency.²¹ Whichever view one takes, it is evident that derogation clauses represent a compromise between safeguarding national needs and upholding the fundamental freedoms of the individual.

The distinction between derogable and non derogable rights is most evident in art 4 of the International Covenant on Civil and Political Rights (ICCPR) where certain rights are said to be non-derogable 'even in a public emergency threatening the life of the nation.' Regional human rights treaties and national constitutions often contain provisions similar or equivalent to art 4 of the ICCPR.

A state which has validly derogated from a human rights treaty is absolved from the obligation to refrain from violating rights protected by it as well as advancing a justification for any interference with such rights. It may be said that 'derogation is a temporary suspension which completely eliminates certain rights (in exceptional circumstances).'²² It 'places rights in abeyance'²³ and provides governments with an 'emergency exit' from treaty obligations enabling them to 'resort to measures of an exceptional and temporary nature' during a state of emergency.²⁴ Derogations legalise what would normally be illegal under a human rights treaty or constitutional system. 'Any violations of human rights that result from legislation passed under a derogation order are treated as the products of an emergency and justified in so far as they are a response to that emergency.'²⁵

Limitation clauses are distinct from derogation clauses on three important grounds. First, the former allow states to breach obligations in order to uphold certain rights for reasons unrelated to war or public emergency.²⁶ Secondly, they are a permanent restriction that takes away a particular right²⁷ and,

²¹ *Supra* n 3.

²² Allain J *International law in the Middle East: Closer to power than justice* 197.

²³ Ullah A 'Derogation of human rights under the Covenant and their suspension during emergency and civil martial law in India and Pakistan' *South Asian Studies* 26 (1) 181-189

²⁴ Jayawickrama N *The judicial application of human rights law: national, regional and international jurisprudence* (2002) at 202; and Ali A J 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights 2013 (17) *Law Democracy & Development* 80.

²⁵ *Supra* n 18 at 137.

²⁶ Stapleton S 'Ensuring a fair trial in the International Criminal Court: Statutory interpretation and the impermissibility of derogation' (1999) 31 *N.Y.U. J. Int'l L. & Pol.* 535.

²⁷ *Ibid.*

thirdly, they require the restriction of fundamental rights to be done through enactment of a 'law' which must be 'necessary' or 'reasonably required' to accomplish certain specified social or public goal.²⁸

The inclusion of derogation clauses in international human rights treaties represents a concession to the fact that when governments perceive threats to the nation they will invariably take action that encroaches upon civil liberties.²⁹ By recognising the fact that there will be exceptional circumstances that may necessitate derogation, provision must be made for them. This ensures that even exceptional state action remains governed by objective norms, which in turn allows for supervision by independent tribunals.

(ii) Claw back clauses

Besides limitation and derogation clauses, international human rights law recognises claw back clauses as an integral part of the regime. The phrase 'claw back' clause was first used by Higgins to refer to a provision 'that permits, in normal circumstances, breach of an obligation for a specified number of public reasons.'³⁰ Deeply rooted in Anglo-Saxon jurisprudence, these clauses represent 'an entitlement to a state to restrict the granted rights to the extent permitted by law'³¹ or 'at the discretion of the national authorities.'³²

Higgins explains that 'a claw back clause is distinct from a derogation *strictu sensu*, which allows suspension or breach of certain obligations in circumstances of war or public emergency.'³³

It is then evident that claw back clauses differ from derogations in the following respects. First, while the former subjects rights to absolute state discretion, the latter sets out the extent and conditions under which a right may be limited or its enjoyment restricted. Secondly, while claw back clauses may be permanent and may be used any time, derogation is temporary and for emergency situations only. Thirdly,

²⁸ Rachel M *The African Commission on Human and People's Rights and International Law* Chap 1.

²⁹ International Commission of Jurists, *States of Emergency – Their Impact on Human Rights* (Geneva: The Commission, 1983).

³⁰ *Supra* n 3.

³¹ Ouguergouz F *The African Charter on Human and Peoples Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 55.

³² Naldi G J 'Limitation of rights under the African Charter on Human and Peoples Rights: the contribution of the African Commission on Human and Peoples Rights (notes and comments) (2001) 17 SAJHR 110.

³³ *Supra* n 3.

whereas claw back clauses have no limits in application,³⁴ derogation cannot be claimed with respect to certain rights.

Sometimes the distinction between claw back, limitation and derogation clauses is blurred leading some scholars to conclude that claw back clauses are basically 'restriction' clauses,³⁵ or that they (claw back clauses) may also be referred to as derogations³⁶ or that these three, that is, derogations, limitations and claw back clauses refer to the same genre of restraints.³⁷ But, as the foregoing discussion has shown, there are critical differences between them.

However one perceives them, claw back clauses 'are considered particularly insidious because, by setting vague standards, they do not provide the required external control over state behaviour.'³⁸

(b) Absolute and Non Derogable rights

Under international law, some rights are considered absolute³⁹ meaning that they cannot be limited in any way, whatever the circumstances. Other rights are regarded as non derogable,⁴⁰ meaning that they cannot be suspended even in a declared state of emergency.⁴¹ Sometimes these two categories are assumed to represent one classification, creating confusion in the interpretation and application of rights.

³⁴ Bondzie- Simpson 'A critique of the African Charter on Human and Peoples Rights' (1988) 31 *Harvard Law Journal* 643-665 at 660.

³⁵ Stein T 'Derogations from guarantees laid down in human rights instruments' (paper presented at Fifth International Colloquy on the European Convention on Human Rights Apr. 9-12, 1980) Available www.wcl.american.edu/journal/lawrey/30/norris.pdf accessed on 24.1.2012.

³⁶ D'sa R M 'The African Charter on Human and Peoples Rights: Problems and prospects for regional actions' 1987 *Australian Yearbook of Int'l Law* 101-130 at 109.

³⁷ Weston B, Lukes R & Hnatt K 'Regional human rights regimes: Comparison and appraisal' (1987) 20 *Vanderbilt Journal of Transnational law* 585-637 at 627.

³⁸ Gittleman R 'The African Charter on Human and Peoples' Rights: A legal analysis; (1982) 22 *Virginia J Int L* 667 at 692. For example, Article 32(2) ACHR provides: 'The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.'

³⁹ Donnelly J *Universal Human Rights in Theory and Practice* 50.

⁴⁰ Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol.

⁴¹ See, Theodor M 'On the inadequate reach of humanitarian and human rights law and the need for a new instrument' (1983) 77 *Am J. Int L* 589; Nickel J W *Making Sense of Human Rights* (2006).

Some, but not all, absolute rights are non derogable.⁴² The ICCPR identifies absolute rights as: the right to life;⁴³ the prohibition against torture;⁴⁴ the prohibition against slavery;⁴⁵ the right of persons deprived of their liberty to be treated humanely;⁴⁶ the prohibition against imprisonment for a civil debt;⁴⁷ the right to fair trial;⁴⁸ the right to be recognised before the law;⁴⁹ and the prohibition against propaganda for war.⁵⁰ These rights are also identified in art 4(2) of the Covenant as non derogable.⁵¹

In addition to the treaty protection rendered under the ICCPR, the Human Rights Committee (HRC)⁵² has pronounced and emphasised that the right of all persons deprived of their liberty to be treated with humanity⁵³ and the prohibition against propaganda for war⁵⁴ are norms of customary international law, meaning that they are non derogable even during a state of emergency.

Further, the International Law Commission has issued a Comment advising that the prohibitions against torture or to cruel, inhuman or degrading treatment or punishment⁵⁵ and slavery⁵⁶ reflect peremptory

⁴²Conte A et al *Defining Civil and Political Rights: the jurisprudence of the United Nations Human Rights Committee* (2004) 41.

⁴³ Art 6.

⁴⁴ Art 7.

⁴⁵ Art 8.

⁴⁶ Art 10.

⁴⁷ Art 11.

⁴⁸ Art 15.

⁴⁹ Art 16.

⁵⁰ Art 20.

⁵¹ Art 4(2): No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

⁵² The Human Rights Committee (HRC), established under art 28 of the ICCPR, is a body of independent experts, which monitors implementation of the ICCPR by its states parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations". In addition to the reporting procedure, article 41 of the Covenant provides for the Committee to consider interstate complaint. Furthermore, the First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol. The full competence of the Committee extends to the Second Protocol to the Covenant on the abolition of the death penalty with regard to States who have accepted the Protocol. The Committee also publishes its interpretation of the content of human rights provisions, known as General Comments on thematic issues or its methods of work. See, for example, General Comment 27, 22 and 10 on arts 12, 18 and 19 respectively All General Comments of the Human Rights Committee issued by the Human Rights Committee are available at <http://www.ccprcentre.org/en/general-comments>.

⁵³ Art 10.

⁵⁴ Art 20.

⁵⁵ Art 7.

⁵⁶ Art 8.

norms of customary international law (*jus cogens*)⁵⁷ thereby placing them out of the derogation sphere even during an emergency.⁵⁸

A final distinction needs to be drawn between absolute and non derogable rights. Whereas an absolute right may not be subject to any restriction, a non derogable right may be limited depending on the wording of the provision which expresses the right. In other words, simply because a right is non derogable does not mean that it cannot be limited. The HRC in its General Comment 29 has made a very clear elaboration on this. It states that, 'the qualification of a Covenant provision as a non derogable one does not mean that no limitations or restrictions would ever be justified.'⁵⁹ The permissibility of restrictions is independent of the issue of derogability.⁶⁰ The Committee demonstrates this with the example of the right to freedom of thought, conscience and religion (art 18 of the ICCPR) which, while listed down in art 4(2) as a non derogable right under art 4 procedures it may be derogated within art 18(3)⁶¹ itself if it is 'prescribed by law and is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.'⁶²

Nevertheless, while certain circumstances may permit limitation of a non derogable right, such a right cannot be entirely suspended, even in a state of emergency.⁶³ This means that, even in a state of emergency, the test of 'proportionality and necessity', as a determinant in assessment of legitimacy, is still applicable. As an example, the right to life is not an absolute right. This means that the right may be limited in certain circumstances, as for instance, permitting a police officer to shoot a suspect where it is necessary

⁵⁷ *The International Law Commission Commentary on the Vienna Convention on the Law of Treaties* (1966) 2 Yearbook on the International Law Commission 248.

⁵⁸ In summary, the rights set out in articles 6,7,8,10,11,15,16 and 20 are expressed in absolute terms, which means that they cannot be interpreted in any way which permits any limitation upon them and are not capable of being suspended, even temporarily during a state of emergency.

⁵⁹ Human Rights Committee General Comment 29 States of Emergency (article 4) U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001). Making an example of art 18, the Committee states: The reference in article 4, paragraph 2, to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3.

⁶⁰ *Ibid* Par 7.

⁶¹ Art 18 ICCPR: 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

⁶² *Ibid*.

⁶³ *Supra* n 3.

and proportionate. Outside the rubric of absolute and non derogable all other rights may be subject to such 'limitations or restrictions as are reasonable, necessary, proportionate and demonstrably justifiable.'⁶⁴

3. Derogation in international human rights law

The Universal Declaration of Human Rights (UDHR) does not specifically deal with the subject of derogation save for an implied prohibition in art 30.⁶⁵ In comparison, the ICCPR, in art 4, contains a very clear provision on derogation,⁶⁶ which can also be found, with minor amendments, in a number of regional human rights treaties such as the European Convention of Human Rights (ECHR)⁶⁷ and the American Convention of Human Rights (ACHR).⁶⁸

The African Charter on Human and Peoples Rights (ACHPR), however, has no provision for derogation. It is debatable whether this omission implies that there are no situations permitting derogation or whether it is a confirmation that all rights are subject to derogation. The African Commission on Human and Peoples Rights (the Commission) has taken the position that limitation of rights, under the Charter, cannot be justified by emergencies or special circumstances.⁶⁹ An argument, which is explored below, may be raised against this position based on the international law doctrine of necessity or self-defence.

In general, the ICCPR presents an absolute approach to rights in the sense that rights protected under the Convention are subject to restrictions but only within its provisions. Some rights are not subject to derogation except under a state of emergency and this, only as permitted under art 4. Yet other rights are considered sacrosanct and are not subject to derogation, even if the life of the nation is at stake.

Even in the realm of derogable rights, human rights law allows for limitations only within a set of exceptional circumstances. Hence the ICCPR permits states to derogate from their treaty obligations only

⁶⁴ The power to restrict rights is acknowledged in international, regional and domestic human rights instruments: see, for example, the ICCPR arts 12, 18–19, 21–2; Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature 4 November 1950 213 UNTS 221 arts 8–11 (entered into force 3 September 1953) (commonly known as the European Convention on Human Rights) ('ECHR'); Canadian Charter of Rights and Freedoms 1982ss 1, 33 (Canadian Charter).

⁶⁵ Art 30: 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'

⁶⁶ The ICCPR is said to be 'the *primus inter pares* of the universal international human rights treaties'. See McGoldrick D 'The Interface between Public Emergency Powers and International Law' Accessed at <http://icon.oxfordjournals.org/> on 5 April 2012.

⁶⁷ Art 15 of the European Convention of Human Rights.

⁶⁸ Art 27 of the American Convention of Human Rights.

⁶⁹ 'Media Rights Agenda and Others v Nigeria African Commission on Human and Peoples' Rights' Comm Nos 105/93, 128/94, 130/94 and 152/96 (1998) Accessed from www1.umn.edu/humanrts/.../105-93_128-94_130-94_152-96.html on 4 April 2012.

in times of 'public emergency threatening the life of the nation.'⁷⁰ The legitimacy of such derogation is dependent on the state keeping within the strict requirements provided by the treaty.

Over the years international law experts have developed opinions on the nature and scope of permissible derogation⁷¹ and so have certain judicial forums.⁷² Through these expositions certain situations have come to be accepted as examples of public emergencies: domestic civil and violent unrest, international armed conflict and natural disasters.⁷³

Apart from the rights in art 4(2) a state may invoke the criteria set out in art 4(1) to limit such rights as freedom of expression, the right of association and assembly, freedom of movement and the right to privacy. It is important to remember, however, that no limitations are permitted save those contained in the Covenant itself and none may be applied in an arbitrary manner.⁷⁴ Moreover, 'derogation is not equivalent to abrogation or abolition of a right.'⁷⁵

Entrenched in art 4 are certain principles that form the basis of the derogation regime.⁷⁶ It requires a legitimate derogation to conform to a strict regime which obliges the state to demonstrate, first, that there exists a 'public emergency which threatens the life of the nation.' Second, this public emergency must be 'officially proclaimed'⁷⁷ and the relevant UN organs informed. Third, derogation is permitted 'to the extent only necessary to meet the exigencies of the situation.'⁷⁸ Lastly, the derogating state must observe and not violate its obligations under international law.⁷⁹ At all times the derogating state must not take steps that will

⁷⁰ Art 4(1) of the ICCPR.

⁷¹ Some of these are: Siracusa Principles of the Limitation and the Derogation Provisions in the ICCPR (1985); the Oslo Statement on Norms and Procedures in Times of Public Emergency, 1987; Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency, 1990 and the Paris Minimum Standards of Human Rights Norms in a State of Emergency.

⁷² See, for example, *Othman (aka Abu Qatada) v Secretary of State for the Home Department* [2013] EWCA Civ 277 (27 March 2013); *Navaratnam v Secretary of State for the Home Department* [2013] EWHC 2383 (QB) (31 July 2013).

⁷³ Hartman J 'Derogations from human rights treaties in public emergencies' (1981) 22 *Harvard International Law Journal* 2.

⁷⁴ See Part 1 United Nations, Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

⁷⁵ Lehmann J 'Limits to counter-terrorism: Comparing derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights' 104 Available at projects.essex.ac.uk/ehrr/V8NI/Lehmann accessed on 16th March 2012.

⁷⁶ Art 4(1)

⁷⁷ Proclamation kicks in the operation of the 'designation clause'.

⁷⁸ The 'interference clause'.

⁷⁹ See art 4(1) of the ICCPR.

violate the principle of equality before the law and non-discrimination.⁸⁰ Article 4 of the ICCPR also emphasises the fact that limitations to any right must be prescribed by law and invoked only in pursuance of one or more specific legitimate purposes, which are 'necessary in an open and democratic society.'

These principles, discussed below, restrict the possibility of abuse of governmental power by providing a standard by which the legitimacy of derogation may be assessed.

(a) Public emergency

The ICCPR does not provide a definition of 'a public emergency threatening the life of a nation'. It is not difficult, however, to discern why this was not done. Similar situations may require different interpretations and conclusions. To define a fluid situation such as a 'public emergency' would straitjacket executive authorities and could be overly restrictive.

Likewise, it is recognised that in many domestic jurisdictions 'no statute defines a national emergency'.⁸¹ The designation of a state of emergency has been accepted by most courts to be an act of state,⁸² which in most instances is completely subjective. In some countries the president has absolute discretion in declaring a state of emergency.⁸³

Significant assistance, however, is given by the HRC and the jurisprudence emerging from the Strasbourg organs⁸⁴ in their interpretation of art 15 of the ECHR (whose derogation clause is similar to art 4 of the ICCPR). In addition, the Siracusa Principles on the Limitation and Derogation of Human Rights elaborate and offer explanations on the security conditions which may give rise to derogation.⁸⁵ The Principles state that only situations of 'exceptional and imminent danger' may justify derogation and that such a situation must affect the whole of the population or part of the territory of the state.

⁸⁰ See, for example, *A and Others v Secretary of State for the Home Department* UK House of Lords [2004] UKHL 56 ('Belmarsh detainee's case'), The detainees claimed that the United Kingdom was in breach of art 5 of the European Court of Human Rights (ECHR). Further, the detainees argued that the United Kingdom was in breach of non-discrimination under Article 14 of the ECHR as indefinite detention only applied to non-nationals.

⁸¹ Hartman FJ 'Working paper for the Committee of Experts on the Article 4 derogation provision' (1985) 7 *HR Quarterly* 89 at 91.

⁸² Report Office of the United Nations High Commissioner for Human Rights Human Rights, *Terrorism and Counter-terrorism* (Fact Sheet No. 32) 28

⁸³ Rose-Ackerman S, Desierto D A & Volosin N 'Leveraging presidential power: Separation of powers without checks and balances in Argentina and the Philippines' *Yale Law School Faculty Scholarship Series* (Paper 31) available at http://digitalcommons.law.yale.edu/fss_papers/31 accessed on 4th May 2012.

⁸⁴ The European Commission on Human Rights and the European Court of Human Rights.

⁸⁵ United Nations Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex UN Doc E/CN.4/1984/4 (1984).

There are, nevertheless, three important principles to remember when assessing the legitimacy of a state of emergency. First, art 4 of the ICCPR should be brought into play only in extraordinary circumstances and not in situations of ordinary civil unrest. Secondly, situations calling for art 4 must 'endanger the nation as a whole and its ability to function as a democratic polity, and, thirdly, the peril must be actual or strongly imminent rather than speculative, probable, latent or lingering.'⁸⁶

It is clear from the above that art 4 requires a real threat to statehood before a state of emergency can be legitimately proclaimed. The principle is that 'the danger to the state has to be actual or imminent before resort can be made to derogation.'⁸⁷ In other words 'a crisis must be a truly extraordinary exigency to qualify as a derogation-justifying emergency.'⁸⁸

The HRC has held that 'political and social disturbances in the nature of protests or civil strikes do not avail circumstances for a declaration of emergency.'⁸⁹ It adds that 'in order to qualify for derogation, a situation has to be a very serious, visible and violent political and social confrontation which cannot be dealt with by ordinary means.'⁹⁰

(b) Emergency to be limited in scope and temporal in application

Article 4 of the ICCPR does not spell out the period or length of time that a state of emergency may last. It is generally understood and accepted, however, that derogation from human rights is limited in scope and temporal in application.⁹¹ The Paris Minimum Standards of Human Rights in a State of Emergency requires that such a declaration shall never exceed the period required to 'restore normal conditions', and that the emergency should be for a period defined by a constitution, and that extensions should be subject to a *priori* legislative approval. A state availing itself of the right to derogation must terminate such derogation in the shortest time required to bring to an end the state of emergency.⁹²

⁸⁶ Supra n 81 at 91.

⁸⁷ Hartman FJ 'Derogations from human rights treaties in public emergencies – A critique of implementation by the European Court of Human Rights and Human Rights Council' (1981) 22(1) *Harvard Int. LJ* 16.

⁸⁸ Buergenthal T 'To respect and ensure: State obligations and permissible derogations' in H Louis (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 79.

⁸⁹ See Anna-Lena S *The International Law of Human Rights and States of Exception* (1998) 239.

⁹⁰ Ibid.

⁹¹ See Discussion in Henkin L, Neuman G L, Orentlicher D F & Leebron D W *Human Rights* (1999).

⁹² Par 48 Siracusa Principles.

(c) Proclamation and notification

The ICCPR requires a state that has declared a state of emergency to make a public declaration and notify the relevant UN organs and other states. This unusual requirement is designed to ensure that states do not make arbitrary or gratuitous declarations.

What is more, a state of emergency is not supposed to be a private, secret assertion. A failure to make a declaration is a breach of art 4.⁹³ 'The duty to make a public proclamation, requiring a derogating government to admit its exercise of extraordinary powers at the outset deters attempts to justify repressive action by a retroactive claim of derogation.'⁹⁴ Article 4 of the ICCPR requires that the notice be given immediately and that the derogating state supply information on the provisions from which it has derogated. Some authors seem to think that the notification requirement does not of itself comprise a legal obligation but is designed to enable international monitoring bodies to supervise compliance.⁹⁵ It may be observed that at another level the notification places the derogating state under the public scrutiny of other countries and may well serve as deterrence from serious violations.

(d) Proportionality of measures

An essential and primary requirement of art 4 of the ICCPR is the 'proportionality' principle. 'Proportionality constitutes a general principle of international law and includes elements of severity, duration and scope.'⁹⁶ It is one of the substantive restrictions on emergency powers 'requiring specific scrutiny and specific justification of each measure taken in response to an emergency, rather than an abstract assessment of the overall situation.'⁹⁷ Any measures taken during a state of emergency must be limited 'to the extent strictly required by the exigencies of the situation.'⁹⁸ This obligation relates to the 'duration, geographical coverage and material scope of the state of emergency and the measures of derogation resorted to

⁹³ In the *Lawless v Ireland* case the European Court of Human Rights held that failure to make a declaration is a violation of Art 15 of the European Convention on Human Rights. (The *Lawless* case was instituted by Gerry Lawless, who in 1957 challenged his detention without trial by the Irish government under a declaration of emergency regulations promulgated to deal with the IRA campaign in Northern Ireland) See European Court of Human Rights (ECHR) *Lawless v Ireland* (Series A, No 3 available on <http://hudoc.echr.coe.int/hudoc/default.asp> accessed on 5th June 2013.

⁹⁴ *Supra* n 87.

⁹⁵ Nowak M *UN Covenant on Civil and Political Rights: Commentary* (1993) 178.

⁹⁶ Michaelsen C 'Derogating from international human rights obligations in the 'war against terrorism – A British-Australian perspective' *Terrorism and Political Violence* 17:131 at 140 quoting from Eissen M 'The principle of proportionality in the case-law of the European Court of Human Rights' in MacDonald R S et al (eds) (1993) *The European System for the Protection of Human Rights*.

⁹⁷ *Supra* note 81 at 106

⁹⁸ General Comment 29 Para 3.

because of the emergency.⁹⁹ It is not permissible for states to 'use a sledgehammer to crack a nut,' as is often said. States parties to the ICCPR are required to provide a careful account, not only for their decision to proclaim a state of emergency, but also for any specific measures based on such a proclamation.¹⁰⁰

The obligation to limit derogation to those circumstances strictly required by the exigencies of the situation 'reflects the principle of proportionality which is common to derogation and limitation powers.'¹⁰¹ It makes it necessary for states to demonstrate that measures taken provide the only means by which the situation giving rise to derogation can be brought under control. Left unchecked, governments are likely to apply extreme restrictions under the guise of dealing with an emergency situation.¹⁰²

It is apposite to note that the ICCPR does not provide an approved category of limits to any of these constraints. Each case is considered on its own merits. In general terms, however, proportionality requires a balance between the degree of deviation from international human rights standards and the measures taken to contain the prevailing threat to the life of the nation.

It has already been noted that states have the discretion to determine which measures are 'strictly required for the exigencies of the situation'. In doing this states are permitted a certain '*margin of appreciation*'.¹⁰³

Although it is not mentioned anywhere in the ICCPR, the '*margin of appreciation*' doctrine has become central in assessing both the need for a state of emergency and the proportionality of measures taken during the emergency. This doctrine, a product of the Strasbourg organs, was first used in the

⁹⁹ General Comment 29 Para 4.

¹⁰⁰ General Comment 29 Para 6.

¹⁰¹ *Ibid.*

¹⁰² Several countries have experienced very long periods of a state of emergency: Since 1929 Paraguay has had recurring episodes of a state of emergency and so have Cameroon, Haiti, Brazil, Chile and Egypt.

¹⁰³ There is a wealth of literature on this doctrine too extensive to analyse for the present purpose. See Houtte H 'The margin of appreciation doctrine in the European Court of Human Rights' (1999) 48 *Int and Comp LQ* 638; Paul M 'Marvellous richness of diversity or invidious cultural relativism'; Johan C 'Is There a margin of appreciation in the application of articles 2, 3 and 4 of the Convention?'; Clare O 'The margin of appreciation and article 8 of the Convention'; Søren P 'The margin of appreciation and articles 9,10 and 11 of the Convention'; Yves W 'Margin of appreciation and article 1 of Protocol 1'; Jeroen S 'The prohibition of discrimination in article 14 of the Convention and the margin of appreciation'; Michael O'Boyle, 'The margin of appreciation and derogation under article 15: Ritual incantation or principle?'; and Jeroen S 'The basis, nature and application of the margin of appreciation doctrine in the case law of the European Court of Human Rights' all in the report of a seminar on the subject held under the auspices of the Registry of the Court reproduced at 19 *HRLJ* April 1998. Also see Paul M 'Universality versus subsidiarity in the Strasbourg case law on free speech: Explaining some recent judgments [1997] *EHRLR* 364; Lord Lester of Herne Hill 'Universality versus Subsidiarity: a Reply' [1998] *EHRLR* 73.

Lawless v Ireland case¹⁰⁴ where the European Commission on Human Rights extended the concept from being an instrument to weigh the proportionality of the action taken by the Irish government to a determination of whether 'a public emergency threatening the life of the nation' does prevail to justify derogation from certain articles of the Covenant. The Commission stated:

[H]aving regard to the high responsibility that a government bears to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion – a certain *margin of appreciation* – must be kept by the government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.

The margin of appreciation doctrine is often used by courts as a tool of judicial deference in permitting states discretion in the exercise of powers of derogation.¹⁰⁵ It allows room for governments to choose from a variety of options that may be taken in order to restore civil order in a time of emergency.¹⁰⁶ The pre-eminence of this doctrine was reaffirmed in *Handyside v UK*.¹⁰⁷

Although the language of the Strasbourg organs allows only 'a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation',¹⁰⁸ it is now settled that they are reluctant to set aside the opinion of a government in declaring a state of emergency. The wisdom attending this deference revolves around the policy that courts should not usurp the position of the government by deciding matters that are entirely executive in nature. A court may review a decision only by deciding whether it is in keeping with the Convention. For this reason, the doctrine allows states to determine 'how far it is necessary to go in attempting to overcome the emergency',¹⁰⁹ and at the same time provides a framework for the courts to 'remain true to the responsibility to develop a reasonably comprehensive set of review principles appropriate for the application across the entire Convention, while at the same time recognising the diversity of political, economic, cultural and social situations in the societies of contracting

¹⁰⁴Supra n 42 at 685.

¹⁰⁵ Greer S *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights Council of Europe* (2000) 5.

¹⁰⁶ *Ibid.*

¹⁰⁷ See E Ct HR Ser B 1960–61 at 82 available at www.worldlii.org/eu/cases/ECHR/1976/5.html accessed on 4th May 2010.

¹⁰⁸ *Greece v United Kingdom* (First Cyprus Case), 1958–1959 YB Eur Conv on HR 174.

¹⁰⁹ *Ireland v UK* (Northern Ireland Case) (E Ct HR) (1971-1978) 526–527, 685.

parties.¹¹⁰

States are thus given wide latitude on the steps they may take to contain a state of emergency, but judicial forums, while refraining from recommending which steps to take, retain the power to review those steps. The concept then is very much a two-edged sword that may be applied by either the state in considering when to declare a state of emergency or the court in evaluating both the circumstances leading to a declaration of a state of emergency and the proportionality of the steps taken to deal with it.

A conclusion may thus be drawn that the 'margin of appreciation' is a flexible freedom but not without limitations. In order to permit a state to exercise sovereignty a court intervenes only when it is completely necessary. The intervention of the court is then balanced between the action of the government and domestic and international law. The fact of such limitation may be drawn, for example, from the ruling of the House of Lords in the United Kingdom in which the court held, while accepting a declaration of derogation by the United Kingdom due to the 9/11 bombings in the USA, that the derogation had to be consonant with the British obligations under international law.¹¹¹

(e) Consistency and non discrimination

Under art 4(1) of the ICCPR, whatever measures a nation may take in containing a state of emergency must be consistent with other obligations under international law. In essence and practice this provision imports into the ICCPR the rules of international customary law and international humanitarian law. Two issues are then relevant.

First, a state derogating from any provisions of the ICCPR must not, in so doing, act in violation of international customary or humanitarian law.¹¹² It must be remembered that, in general terms, rules of international customary law provide greater safeguards against encroachment into fundamental freedoms than the non derogable provisions in the ICCPR.¹¹³ Secondly, and not less important, is the fact that the obligation to observe other rules of international law also allows the monitoring organs to evaluate a state's compliance with customary international law, not just the non derogable rights. For example, under this

¹¹⁰ MacDonald R 'The margin of appreciation' in MacDonald R, F Matscher & H Petzold (eds) *The European System for the Protection of Human Rights* (1993) 83.

¹¹¹ See *A and Others v Secretary of State for the Home Department*, UK House of Lords [2004] UKHL 56 (the so-called *Belmarsh Detainees Case*) For decision see www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm (last viewed 23 April 2008).

¹¹² See the *Belmarsh Detainees Case* supra n 79.

¹¹³ Stavros S 'The right to a fair trial in emergency situations' *The International & Comparative Law Quarterly* (2) 41 345.

principle, the prohibitions against torture, slavery or servitude, which are probable casualties during a time of emergency, may be supervised.¹¹⁴

A critical component of art 4(1) is the requirement that emergency measures taken in derogation may not 'involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.' This limb of art 4(1) raises two concerns. First, strictly on a matter of interpretation, the wording of this article appears to permit action being taken against any of the groups mentioned - except that there must be an added qualification. If a distinct group threatens, for example, the life of a nation, measures may be taken against that group. Secondly, the list enumerates six categories of discrimination. Does it mean that discrimination based on any other ground, say ethnicity, nationality or sexual orientation is permissible? This raises serious concern, because in an anti-terrorism regime the trend has been to discriminate against persons considered terrorist suspects because of their religion or nationality.

4. Limitation in the international human rights law

(a) Limitation under the ICCPR; General Comments by the HRC

The discussion so far has demonstrated that, under the ICCPR, the derogation regime operates within certain legal boundaries. It is clear that 'the permissible situations allowing for derogation are strictly controlled and must meet set criteria: levels of severity, period of derogation, proclamation and notification to other states and the UN, legality, proportionality, consistency with other obligations under international law, non-discrimination and non-derogability from other rights held as such by the relevant treaty.'¹¹⁵

In addition to the derogation regime, the ICCPR allows a *limitation* of rights regime which permits states to restrict rights under other circumstances not necessarily amounting to a public emergency. The right to liberty of movement and freedom to choose a residence;¹¹⁶ freedom to manifest one's religion or beliefs;¹¹⁷ freedom of expression;¹¹⁸ the right to peaceful assembly;¹¹⁹ and freedom of association¹²⁰ are Convention rights which are subject to limitation when necessary 'to protect national security, public order,

¹¹⁴ It may be said that the prohibition against torture and slavery or servitude are now *jus cogens*. See *R v Bow Street Stipendiary Magistrate Ex Parte Pinochet Ugarte* (1991) 2 ALELR (HOL) at 108-109.

¹¹⁵ *Supra* 3 at 89.

¹¹⁶ Art 12 of the ICCPR.

¹¹⁷ Art 18.

¹¹⁸ Art 19.

¹¹⁹ Art 21.

¹²⁰ Art 22.

public health or morals or the rights and freedoms of others.’

Authoritative guidelines on the nature and extent of legitimate limitations are contained in General Comments by the HRC. ‘The HRC adopts a vigilant supervisory role in assessing all derogation measures in order to help guard against overly oppressive emergency measures.’¹²¹ Even then, the HRC has made no attempt to define or set down criteria for a ‘public emergency’. It has, however, stated that ‘not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation.’¹²²

According to the HRC limitations must: restrict themselves to a definite legal principle, using precise benchmarks; be necessary to serve the permissible purposes of the limitation; and they must be proportional to the purpose.¹²³

In its first General Comment on art 4 of the ICCPR, the HRC noted that an alleged emergency would legitimately justify derogation only if the circumstances obtaining were of an exceptional and temporary nature.¹²⁴

In its second General Comment on art 4 in 2001,¹²⁵ it restated that art 4 is of paramount importance for the system of protection of human rights under the Covenant and that derogation must be of an exceptional and temporary nature. Even then, states must act within their constitutional limits and other provisions of law that govern proclamations of emergency and the exercise of such powers.¹²⁶

In the General Comment, the HRC recommends that ‘measures derogating from the Covenant must be of a temporary nature.’ It is not open to a state to govern under emergency powers for long periods

¹²¹ Joseph S, Schultz J & Castan M *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. (2000) 836.

¹²² General Comment 29 Para 3. Adopted at the 1950th meeting on 24 July 2001 replacing General Comment no 5 CCPR/C/21/Rev 1/Add.11. General Comment No 29 addresses a major problem in the human rights regime, namely the ‘grey zone’ between human rights law and situations where international humanitarian law becomes applicable. See Olivier C ‘Revisiting General Comment No. 29 of the United Nations Human Rights Committee: About fair trial rights and derogations in times of public emergency’ (2004) 17 *Leiden J Int L* 405–419. On the ‘grey zone’ See, Eide A, Rosas A & Meron T ‘Current development: Combating lawlessness in Gray Zone conflicts through minimum humanitarian standards’ (1995) 89 *AJIL* 215 and Meron T ‘Note and comment: On the inadequate reach of humanitarian and human rights law and the need for a new instrument’ (1983) 77 *AJIL* 589.

¹²³ *Ibid* General Comment 29.

¹²⁴ Par 3 Report of the Human Rights Committee UNGAOR Human Rights Comm. 36th Session Annex V11 General Comment 5/3 at 110 UN Doc A/36/40 (1981).

¹²⁵ General Comment No 29.

¹²⁶ *Ibid* Par 2.

of time while claiming to exercise the privilege of derogation.¹²⁷ Derogation is limited to the time taken to return to normalcy. A state cannot be permitted to institutionalise emergency law by extending the emergency period beyond the time necessary to deal with the extraordinary circumstances.

On the proclamation of states of emergency, the HRC declares that states must make an official declaration 'for the maintenance of the principles of legality and the rule of law.'¹²⁸ This requirement seeks to hold states to compliance with both international and national law. If a state has within its constitution certain procedures for a declaration of a state of emergency those procedures must be followed. This is in effect an international law requirement which reinforces domestic law.

Proclamation and notification is essential because it provides a basis for the HRC to investigate the state of human rights in a nation that has declared a state of emergency. Equally, it provides a basis for other states to monitor compliance within the framework of the Covenant.¹²⁹ In order for notification to have a meaning General Comment 29 requires that it should include full information about the measures taken.¹³⁰ Proclamation and notification is the starting points in an assessment as to whether violations of human rights are taking place. This is the reason the ICCPR requires that notification be made immediately a declaration has been issued.¹³¹

In assessing whether circumstances exist which may justify a declaration of a state of emergency, the HRC has adopted a more restrictive interpretation than the European Court of Human Rights. In *Landinelli v Uruguay*,¹³² for instance, the Committee held that 'a state party is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes art 4(1).' The state is under an obligation to show that the circumstances cited as the basis for a declaration of a state of emergency fulfil the requirements of art 4.¹³³ The HRC does not, therefore grant as much 'margin of appreciation' as the European Court does.¹³⁴ General Comment 29 requires states to provide 'sufficient and precise information

¹²⁷ Egypt's 30-year derogation would appear suspect, for a country cannot run on emergency powers for an unlimited time period.

¹²⁸ Par 2 General Comment 29.

¹²⁹ Par 17 General Comment 29.

¹³⁰ *Ibid.*

¹³¹ Art 4.

¹³² HRC Communication No 34/1978 Para 8.3 (1981).

¹³³ Oraa *J Human Rights in States of Emergency in International Law* (1992) 21.

¹³⁴ In *Ireland v United Kingdom* the Court held that a determination as to whether a situation has arisen for a declaration of emergency 'falls in the first place to each contracting state with its responsibility for the life of (its) nation'.

about their law and practice in the field of emergency powers.' On the whole the HRC appears to prefer a narrow and stricter approach in limiting the subjective element in the identification of public emergencies.¹³⁵

In the opinion of the HRC the rights set down in art 4(2) are non derogable by 'the fact that they are listed in art 4(2).'¹³⁶ This also applies to states which have ratified the Second Optional Protocol regarding the abolition of the death penalty. Conceptually, the qualification of a Covenant provision as non derogable does not mean that no limitations would ever be justified.¹³⁷ The important thing is that derogation should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.¹³⁸ States are therefore obligated to ensure that their domestic law ensures compliance.

The HRC highlights three factors in proportionality: severity, duration and geographic scope. The HRC also considers that restrictions allowed on certain freedoms, for example movement¹³⁹ or assembly¹⁴⁰ are 'generally sufficient' to cover situations of 'mass demonstration including instances of violence, or a major industrial accident.'¹⁴¹

In General Comment 29, the HRC stated that there are some provisions of the ICCPR which are not listed in art 4(2) that are not subject to derogation. It specifically mentions the rights of persons deprived of liberty. Such persons shall be treated with humanity and with respect for their inherent dignity. In arriving at this opinion the Committee considers that the Covenant merely confirms a norm of general international law which is not subject to derogation. In the same league is the prohibition against taking of hostages, abductions or unacknowledged detentions. These, in the opinion of the Committee, are prohibitions of an absolute nature from which derogation cannot be justified even in times of emergency.¹⁴²

This discussion will now compare the derogation and limitation of rights regime under the ECHR and the ACHPR.

¹³⁵ McGoldrick D *The Human Rights Committee* (1991) 313.

¹³⁶ General Comment 29.

¹³⁷ General Comment 29 para 7.

¹³⁸ Art 4(1) ICCPR.

¹³⁹ Art 12 ICCPR.

¹⁴⁰ Art 21 ICCPR.

¹⁴¹ General Comment 29 para 5.

¹⁴² *Ibid* paras 11 and 13.

(b) The European Convention on Human Rights

The European Convention ('Strasbourg') jurisprudence has provided valuable guidelines in interpreting situations in which derogation may be invoked. The decisions of the European Court of Human Rights, the European Commission of Human Rights and the Committee of Ministers of the Council of Europe are binding on the states concerned and offer persuasive guidelines to other regional human rights commissions and domestic courts of member countries of the convention.

For the African continent the European structure provides a mature regional human rights system from which much may be learnt and it may be noted that the European Convention served as a model for the African Charter. In many respects, 'the African Court on Human and Peoples' Rights bears some resemblance to the structure of the European Court'¹⁴³ and in appropriate circumstances 'some African courts refer to the European Convention when dealing with human rights related issues.'¹⁴⁴ For these reasons an analysis of the Strasbourg decisions is relevant in as much as it is likely to impact the jurisprudence of the African Commission and therefore the national courts of the member states of the African Union. Unlike the ECHR, the ACHR did not have as much influence on the development of the ACHPR and subsequently on the Commission's work and for this reason is not considered here.¹⁴⁵

A consideration of the 'Strasbourg' jurisprudence shows that since *Lawless v Ireland*¹⁴⁶ the practice of the European Court has been to defer to a state party's declaration that a state of emergency exists and to interrogate more strenuously the mode and extent of the interference with non derogable rights. *Lawless* endorsed a decision of the Commission where it held that 'the government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.'¹⁴⁷

¹⁴³ Heyns C 'African human rights law and the European Convention' (1995) 11 *SAJHR* 253.

¹⁴⁴ Osterdahl I 'The jurisdiction *ratione materiae* of the African Court of Human and Peoples' Rights: A comparative critique' (1998) 7 *Review of the African Commission on Human and Peoples' Rights* 133 at 253.

¹⁴⁵ See Ouguergouz F *The African Charter on Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) 377-378; Gittleman R *The African Charter on Human and Peoples' Rights: A Legal Analysis* 22 (4) *Virginia Journal of International Law* 668.

¹⁴⁶ *Lawless v Ireland*, Judgment on Merits, App no 332/57 (A/3) [1961] ECHR 2 (1961) 1 EHRR 15 IHRL 1 (ECHR 1961).

¹⁴⁷ *Greece v UK (the Cyprus case)* No 176/ 56 (1958-1959) 2 *Yearbook Int L* 174 at 176.

The European Court of Human Rights, when deliberating on the *Greek Case*,¹⁴⁸ built on *Lawless* to reiterate that, for a government to invoke art 15, an emergency must be active or at least imminent. *Lawless*, apparently, set the tone for future judicial review of executive invocation of the power to derogate.¹⁴⁹

In *Lawless*, the Commission defined a public emergency for the purposes of art 15 of the ECHR as 'a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups and constituting a threat to the organised life of the community which composes the state in question.'¹⁵⁰ This assumption 'amounts to a claim that the European Court should often defer to the judgment of national authorities on the basis that the ECHR is an international convention not a national bill of rights.'¹⁵¹

Various analysts have criticised the granting of such a broad discretion to executive authorities. Higgins is of the opinion that 'the question whether a threat to the life of a nation exists is capable of objective answer.'¹⁵² But a positive reception of statecraft may offer a sympathetic ear to governments which have to make decisions on intelligence information that may either not be open to public disclosure or which may not pass a strict evidential test and yet be credible enough to warrant the taking of certain steps in defence of the state. In those circumstances, judicial authorities may lean towards accepting the position taken by a government in order to protect the greater majority. One would say that it may be preferable to err on the side of caution.

(c) The African Charter on Human and Peoples Rights

The African Charter on Human and Peoples Rights (ACHPR) is the newest, the most distinctive and the most controversial of the three established regional human rights regimes.¹⁵³ Following on the footsteps of

¹⁴⁸ *The Greek Case* (1969)12 Yearbook ECHR 1.

¹⁴⁹ See for example, In *Ireland v United Kingdom* where the Court stated; By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. (1978) EHRR 25

¹⁵⁰ *Supra* n 146 at 56.

¹⁵¹ George L A *Theory of Interpretation of the European Convention on Human Rights* (2007) 81.

¹⁵² *Supra* n 3 at 299.

¹⁵³ Steiner H & Alston P *International Human Rights in Context* (2000) 354.

the O.A.U which, 'recognises human rights only within the context of promoting African unity'¹⁵⁴ the ACHPR subordinates individual rights to the 'collective security, morality and common interest'¹⁵⁵ with the result that individual rights often occupy a subsidiary position.¹⁵⁶

The O.A.U Charter identifies with the values set down in the UN Charter and the UDHR but does not transform these into binding principles for the state parties of the OAU (AU).¹⁵⁷ In specific terms the Preamble to the African Charter reaffirms the importance of the promotion of 'international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'.¹⁵⁸ Its distinctiveness lies in the manner it treats the duties as well as rights of the individual by placing them on equal footing. The one single right specifically reserved in the Charter is the right of self-determination.¹⁵⁹

It is not surprising that the African Charter, a product of the OAU, does not concern itself with the derogation regime. The OAU, established in 1963,¹⁶⁰ was established principally to co-ordinate and intensify efforts to achieve a better life for the peoples of Africa¹⁶¹ and to promote international co-operation, having regard to the United Nations Charter and the Universal Declaration of Human Rights.¹⁶²

The OAU Charter emphasises the sovereign equality of states and the principle of non-interference in the internal affairs of other states.¹⁶³ Throughout its life (1963–2001/2) the Organisation considered the subject of human rights as an internal matter over which member states retained exclusive domestic jurisdiction. Very rarely would the Organisation take issue with how a country treated its nationals. When it did, it raised no more than a whisper – a statement decrying a failure to protect human rights, but with no consequential sanction. This was no happenstance but an outflow of the Organisation's preoccupation with

¹⁵⁴ Okere O B 'The protection of human rights in Africa and the African Charter of Human and Peoples Rights: A comparative analysis with the European and American systems' (1984) 6 *HRQ* 141–159 at 142.

¹⁵⁵ Art 27.

¹⁵⁶ *Supra* n. 154.

¹⁵⁷ *Ibid.* On 26 May 2001 the Organization of African Unity was legally transformed into the African Union. This followed the September 1999 Sirte Declaration in which all the African heads of state and government called for the establishment of the African Union and the launch of the AU at Durban, South Africa in 2002. The Constitutive Act of the African Union (adopted by the 36th ordinary session of the Assembly of Heads of State and Government, 11 July 2000, Lome, Togo CAB /LEG/23.15) entered to force on 26 May 2001.

¹⁵⁸ Para 4 of the African Charter of Human and Peoples Rights (Adopted 27 June 1981 OAU Doc CAB /LEG/67/3 rev 5, 21 *ILM* 58 (1982) entered into force on 21 October 1986.

¹⁵⁹ Art 4.

¹⁶⁰ See the Charter of the Organisation of African Unity 479 UNTS 39 entered into force on 13 September 1963 reprinted in 2 *ILM* 766 (1963) (hereinafter OAU charter).

¹⁶¹ Art 11 (b) of the OAU Charter.

¹⁶² Art 11(1) (e).

¹⁶³ Art 111 (1) (2).

its stated position on 'non-interference'¹⁶⁴ in the domestic affairs of members thereby allowing repressive governments to abuse of human rights in order to maintain themselves in power.¹⁶⁵ Therefore the cynic might be justified in saying that the Organisation operated as a club in which leading African statesmen took decisions to sacrifice individual liberties in order to safeguard national independence.¹⁶⁶

It is within the context of gross failure by the Organisation to uphold human rights that the African Charter was negotiated and ratified. The Charter establishes the African Commission of Human and Peoples Rights,¹⁶⁷ creating for the first time on the African continent a mechanism for promoting and ensuring the protection of Human and Peoples rights.¹⁶⁸ The Commission is mandated to interpret all the provisions of the Charter at the request of a state party, an institution of the AU or an African organisation recognised by the OAU.¹⁶⁹

The Charter contains specific and general limitation clauses. Specific limitation clauses take the form of right-specific claw back clauses or right-specific norm based limitations.

A unique element in the Charter, not contained in other human rights instruments, is the concept of duties for individuals and rights for peoples as collective groups.¹⁷⁰ It appears that the wide range of duties which the ACHPR imposes on individuals subordinates individual rights to the 'collective security, morality and common interest'¹⁷¹ with the result that individual rights often occupy a subsidiary position.

¹⁶⁴ Art 3 para 2.

¹⁶⁵ Umozurike U O 'The African Charter on Human and Peoples' Rights' (1983) 77(4) *African J Int L* 902 (cited in E Bello 'The mandate of the African Commission on Human and Peoples' Rights: Article 45 mandate of the Commission' (1988) 1 *African J Int L* 59). In addition, Umozurike argues that during the life of the OAU there was a deliberate attempt to 'maintain an indifferent attitude to the suppression of human rights in a number of independent African states.'

¹⁶⁶ M'Baye K & Ndiaye B 'The Organisation of African Unity' in K Vasak (ed) *The International Dimensions of Human Rights*, revised and edited for the English edition by Alston P Vol. 2 (1982) 594.

¹⁶⁷ See arts 30 and 45 of the Charter. The Commission's decisions do not have a binding force as a court ruling. The Commission operates like the Human Rights Committee, with persuasive but authoritative power. Practice has shown that the Commission's opinions are sufficiently regarded to engender compliance. See Ankumah E A *The African Commission on Human and Peoples' Rights; Practice and Procedures* (1996) 111–177.

¹⁶⁸ Art 30(1)(2). Quite early on in its life the African Commission wrote to the President of Zaire requesting an on-site investigation of the University of Lubumbashi massacres. The letter, though ignored, was a first step to an indication that the Commission would seek to be more effective than the OAU. See Intersession Activity Report of the Chairman of the African Commission of Human and Peoples Rights, Banjul, Gambia (May–October 1990).

¹⁶⁹ Art 30 (3).

¹⁷⁰ Mutua M 'The African Human Rights Court: A two legged stool?' (1999) 21 *HRQ* 342 at 343. It is argued that the Charter makes 'a significant contribution to the human rights corpus but does not create effective enforcement machinery.'

¹⁷¹ Art 27.

The Commission has pronounced itself on the somewhat confusing integration of rights in *Communication 155/96 (2001)* where it stated;

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights both civil and political and social and economic generate at least four levels of duties for a state that undertakes to adhere to a rights regime namely the duty to respect, protect, promote and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them.¹⁷²

A number of commentators have made varying observations on this position. Heyns, for example, does not agree with the Commission's interpretation that the Charter does not permit derogations.¹⁷³ He expresses the fear that a rigid construal of the Charter, denying a right of derogation during emergencies, is 'not conducive to the protection of rights'¹⁷⁴ because, in any event, 'the Charter has no restraining influence on states'¹⁷⁵ and they may thus act in response to what they think is their best interests. He is categorical that the Charter needs an amendment to provide for derogation in the absence of which the African Commission should reverse its position or that the African Court on Human and Peoples' Rights (African Court) should step in and set out 'the conditions for legitimate derogation.'¹⁷⁶ This argument is attractive because, notwithstanding the absence of a derogation clause in the Charter, African states may invoke the general principles of international law to suspend certain provisions in Charter during emergencies.¹⁷⁷ At any rate considering that customary international law recognises legitimate derogations during a time of emergency, and acknowledging that they are now an accepted part of the human rights regime, it is critical that the African system provides for them 'to give an opportunity to African institutions to supervise emergencies.'¹⁷⁸

¹⁷² *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (2001) African Commission on Human and Peoples Rights, Commission number 155/96.

¹⁷³ Heyns C 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Ouguergouz F *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable development* (2003) 425.

¹⁷⁸ Allo A K "Derogation or limitation? Rethinking the African human rights system of derogation in light of the European system" (2009) 2 *Ethiopian Journal of Legal Education* 50.

At the outset it would appear that an instrument replete with claw back clauses does not need a general derogation clause as it would be contrary to its central spirit, that is, that states may derogate from their obligations subject to domestic law. It is argued that 'this represents a considerable structural defect as the Charter has no provisions to ensure that a core of the human rights guarantees prevail against legislative restrictions.'¹⁷⁹ Indeed it is difficult not to come to this conclusion as the claw back clauses negate the promotion and protection of human rights that the Charter seeks to encourage.

The Charter is further weakened by the absence of any provisions for individual petitions to the Commission¹⁸⁰ although there is implicit mention in a section providing for 'other communications.'¹⁸¹ This section however outlines a restrictive procedure for individuals, requiring citation of complainants, exhaustion of local remedies and refraining from disparaging the state against which the complaint is made. It is noted that this procedure is overly protective of the state against which a complaint may be made and makes admissibility of the complaint dependent on a simple majority vote of the Commissioners and a raft of technical qualifications which have nothing to do with the authenticity of the complaint. This lack of open admissibility of individual petitions to the Commission is worrisome when it is considered that the Charter permits serious inroads into fundamental rights by allowing states to restrict the exercise of fundamental rights and freedoms.

In a continent where successive regimes have demonstrated a propensity to violate human rights one would have thought that the Charter would be unequivocal. In doing this, the Charter should have been explicit on three matters. First, it should have provided an opening for legitimate individual complaints. Secondly, it should have stipulated for a stricter protection of rights by providing for certain non derogable rights. Lastly, the Charter should not have utilised a corrosive use of claw back clauses. The consequence of the combined failure to adequately deal with these issues gives the impression that all rights are derogable.

There is, however, some good news coming from the Commission. Although its textually defined powers are somewhat vague, the Commission has used a 'dynamic interpretation of its formal protective

¹⁷⁹ Kunig P 'The protection of human rights by international law in Africa' (1982) 25 *German Yearbook of Int L* 138, 155.

¹⁸⁰ See art 44 of the ACHR and arts 34 and 56 (4) of the ECHR.

¹⁸¹ Arts 55 to 59.

mandate¹⁸² to enhance its authority to hear individual petitions. In its interpretation of art 55 of the ACHPR, the Commission has taken the view that the article, which allows the Commission to receive 'communication other than that of state parties', establishes jurisdiction for the Commission to receive petitions from non-state actors.¹⁸³ This has made it possible to receive communications permitting a consideration of personal or group presentations made by NGOs and individuals.

In seeking to widen the sphere of its jurisdiction the Commission has also clarified that the Charter's claw back clauses can only assist a state which seeks to use national legislation to limit rights if such legislation is in accordance with international human rights law. This is demonstrated, for example, in the *Civil Liberties Organization (In respect of the Nigerian Bar Association) v Nigeria* in which the Commission ruling on a matter dealing with freedom of expression held:

In regulating the use of this right, the competent authorities should not enact provisions, which should limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.¹⁸⁴

On the issue of claw back clauses, the Commission has in several instances sought to allay the fear that the clauses impugn the utility of the Charter by invoking international human rights law which does not bow to domestic legislation in limiting the exercise of human rights.¹⁸⁵ In the *Media Rights Agenda and Constitutional Projects v Nigeria*, the Commission, speaking on state limitation of rights, ruled that 'the

¹⁸²See Murray R 'Decisions by the African Commission on individual communications Under the African Charter on Human and Peoples' Rights' (1997) 46 *Int & Comp LQ* 412, 424–25, 425 n 99.

¹⁸³Christof H 'The African regional human rights system: The African Charter' (2004) 108 *Penn State LRev* 679–702 at 694.

¹⁸⁴101/93 *Civil Liberties Organization (in respect of the Nigerian Bar Association) v Nigeria* 8th Annual Activity Report [in *Compilation 1994–2001 IHRDA*, Banjul 2002, 200–202] Para 16.

¹⁸⁵Thus, in *Commission Nationale des Droits de l'Homme et des Libertés v Chad* Communication No 74/92 (1997) 4 *IHRR* 94 (state of civil war led to serious and massive violations of human rights, including rights to life, prohibition of torture, inhuman and degrading treatment, and liberty and security of the person) In Para 21 the Commission observed that the Charter 'does not allow for States Parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.' Moreover, the Commission stated that the lack of a derogation clause 'can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law'. *Amnesty International and Others v Sudan* Communication Nos 48/90, 50/91, 52/91 and 89/93, Thirteenth Annual Activity Report 1999–2000 (arrest and detention without trial, acts of physical abuse, and oppression of non-Muslims violated the rights to liberty and security of the person, the prohibition on torture, and freedom of religion amongst others) Para 79. See also *Media Rights Agenda and Constitutional Rights Project v Nigeria* Communication Nos 105/93, 128/94, 130/94 and 152/96 (2000) 7 *IHRR* 265 (proscription and seizure of publications violated freedom of expression and the prohibition on retroactive laws) Para 67, See Naldi J G 'Limitations of rights under the African Charter on Human and Peoples Rights; the contribution of the Commission on Human and Peoples' Rights' (2001)17 *SAJHR* Note 5 p 109 117. Also, see Murray R 'The African Commission on Human and Peoples' Rights and International Law (2000) 123–26. Murray states that there has not been one incident in which the Commission has accepted a restriction imposed by domestic law.

African Charter does not contain a derogation clause and therefore limitation on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. It continued to say that ‘the only legitimate reasons for limitations to rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter ‘shall be exercised with due regard to the rights of others, collective security, morality and common interest.’ The Commission took the view that ‘the reasons for possible limitation must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.

5. Derogation and limitation of rights in the Constitutions of Kenya and Uganda

A Summary of constitutional provisions on Derogation and limitation

of rights in the constitutions of Kenya and Uganda

	General limitation on rights	Derogation from Rights During Emergencies	Non-Derogable Rights	Rights not Exercisable so as to Infringe Upon Rights of Others	Limitations of Rights under the Police Power or for National Security
Constitution of Kenya	Art 24: Permits limitations by a law that is to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account a number of enumerated factors.	Art 58: Derogation is limited to instances where (a) legislation passed by the National Assembly when the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency (b) the limitation is permissible only when strictly required by the emergency; (c) the legislation must be consistent with the State's obligations under international law (d) the legislation shall not take effect until it is published in the Gazette.	Art 25: The following rights are not derogable (a) freedom from torture and cruel, inhumane or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to fair trial; (d) the right to an order of <i>habeas corpus</i> .	Art 33(3): "In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others." Art 44(3): (The Right to Culture) "A person shall not compel another person to perform, observe or undergo any cultural practice or rite." Art 50(8): (The Right to a Fair and Public Hearing) "This article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security."	Sec 3(3)(i): Any regulations under the Act may not be inconsistent with the right to personal liberty or the right to protection from discrimination, or any other provision in the Constitution. ¹⁸⁶ Schedule 6 Item 7 (Transition and Consequential Provisions) of the Constitution: All law in force immediately before the CoK 2010's commencement shall continue in force and be construed with

¹⁸⁶ It is noteworthy that the Police Act still makes the reference to the old 1963 Constitution and not the CoK 2010.

					the alterations, qualifications, and exceptions necessary to bring it into conformity with the CoK 2010.
Constitution of Uganda	<u>Art 43(2)</u> : In the public interest, limitation is permissible on rights and freedoms where it is acceptable and demonstrably justifiable in a free and democratic society.	<u>Art 46(1)</u> : Legislation may be passed during a state of emergency and will not be deemed to limit a right or freedom if it authorizes the taking of measures that are reasonably justifiable for dealing with a state of emergency.	<u>Art 44</u> : The following rights are not derogable (a) freedom from torture and cruel, inhumane or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to fair hearing; (d) the right to an order of <i>habeas corpus</i> .	<u>Art 43(1)</u> : In the enjoyment of their rights, no person may prejudice the fundamental or other human rights and freedoms of others or in the public interest.	<u>Schedule 1 Item 2</u> : Members of the police force are permitted to take away the liberty or rights of any person provided they have reasonable cause.

Before undertaking an assessment of specific constitutional provisions which deal with the derogation and limitation regime, it is important to recognise that the Constitutions of Kenya and Uganda provide for the promotion and protection of a whole raft of rights ranging from the right to life¹⁸⁷ to the right to a clean environment.¹⁸⁸ All the civil and political rights recognised and protected under the African Charter have been identified and protected.¹⁸⁹

Further, the constitutions of Kenya and Uganda, in language similar to that of the international and regional treaties, distinguish between derogations and limitations.¹⁹⁰

In discussing restrictions on human rights provisions in the Constitutions, it is necessary at the outset to deal with two independent but related issues. First, it is crucial to draw a distinction between constitutional derogation from human rights and limitations or restrictions on the exercise on these rights. Secondly, it is necessary to determine whether Kenya and Uganda are subject to similar international obligations. In dealing with the latter concern, we must consider the international customary law binding on

¹⁸⁷ Arts 26 and 22 of the Kenya, Uganda Constitutions respectively.

¹⁸⁸ Arts 42 and 39 of the Kenya and Uganda Constitutions respectively.

¹⁸⁹ It is not necessary for our present purposes to enumerate all the rights herein.

¹⁹⁰ Writing on the Malawi Constitution, Chirwa D. states ' Ordinarily, the term "derogation" refers to the temporary suspension of human rights during public emergencies, while "limitation" denotes the restrictions placed by law on the exercise of human rights during peacetime or a state of emergency. The term "limitation" and "restriction" are usually used interchangeably, but not with the term "derogation". See, Chirwa D *Human Rights under the Malawian Constitution* 40.

these countries and their treaty obligations. Do these treaties contain any limitations on the duty to protect human rights?

Kenya and Uganda are parties to the ICCPR¹⁹¹ and the ICSECR.¹⁹² Article 2(2) of the ICCPR requires state parties to take necessary steps in accordance with their constitutional processes to adopt such legislative or other measures as may be necessary to give effect to the rights contained in the Covenant.

Accordingly, the national constitutions of these countries provide a chapter on 'Bills of Rights,' which is a domestic codification of the international human rights regime.¹⁹³ The rights protected are recorded almost verbatim as they appear in the international conventions. By virtue of art 2(6) of Kenya's Constitution, international conventions form part of Kenya's domestic law.¹⁹⁴

Like the African Charter, the Constitutions do not establish a priority of rights. Social, cultural and economic rights are placed on the same footing as civil and political rights.

(a) Derogations

Article 25 of Kenya's Constitution and art 44 of Uganda's Constitution enumerate rights and fundamental freedoms that are not subject to derogation: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial and the right to *habeas corpus*. These rights are not subject to the general limitation clauses in the Constitutions, as they are preserved 'notwithstanding any provision in the Constitution,'¹⁹⁵ and are 'rights and fundamental freedoms [that] shall not be limited despite any other provision in the Constitution.'¹⁹⁶ No attempt is made to explain the criteria used to distinguish these rights. The distinction, however, appears to be that some rights are so fundamental that no derogation can be justified. These four non-derogable rights identified in the Constitutions may be comparable to the seven in the ICCPR or the eleven in the ECHR.

Although the constitutions do not expressly so state, the implication is that these rights are not subject to derogation even in times of emergency threatening the life of the nation.

¹⁹¹ Kenya and Uganda acceded to the ICCPR on 1 May 1972 and 21 June 1995 respectively.

¹⁹² Kenya and Uganda acceded to the ICSESR on 1 May 1972 and 21 Jan 1987 respectively.

¹⁹³ A full discussion of this appears in Chapters 4, 5 & 6 of this thesis.

¹⁹⁴ Any treaty or convention ratified by Kenya is part of the law of Kenya.

¹⁹⁵ Art 44 of Uganda's Constitution.

¹⁹⁶ Art 25 of Kenya's Constitution.

(b) Limitations

The Constitutions of Kenya and Uganda restrict certain fundamental rights by way of limitation clauses. These limitations are of two kinds: general and specific. General limitation clauses supply an all-purpose section which applies to all rights in the Constitution,¹⁹⁷ while specific clauses relate to particular articles. The extent of limitation is spelt out in the text of the rights provisions or may be read from a general limitation of rights clause within the chapter that outlines fundamental rights. In their individual and collective effect, the consequence of the limitations is significantly to diminish the guarantees. A reading of the two constitutions indicates that there is a strong tilt towards preservation of state interests to the detriment of individual rights.

The wording of the constitutional limitations suggests that any restrictions are intended to be permanent and not dependant the prevailing circumstances.¹⁹⁸

The constitution of Kenya, for example, has a general limitation clause reinforcing the fact that a right or fundamental freedom guaranteed by the constitution shall not be limited 'except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society.'¹⁹⁹ This is based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom, the importance of the purpose of limitation, the nature and extent of the limitation, the need to ensure a balance between individual and group enjoyment of rights and the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.²⁰⁰

This general limitation of rights is repeated in a different form in the Constitution of Uganda.²⁰¹ Under art 43, the enjoyment of all fundamental rights is subject to the fundamental rights and freedoms of others and the public interest. This wide protective shield is meant to ensure that defence, public safety, public order, public morality, public health and other public interest matters are protected. Although in Uganda public interest may not permit political persecution or detention without trial, the constitution

¹⁹⁷ Art 24 (1) of Kenya's Constitution and art 43 of Uganda's Constitution.

¹⁹⁸ See for example Articles 24,26(3),33(3), 34(1) of Kenya's Constitution; Articles 21(5), 22(2), 23(1) of Uganda's Constitution.

¹⁹⁹ Art 24 of Kenya's Constitution.

²⁰⁰ Ibid.

²⁰¹ Art 43 of Uganda's constitution.

permits limitations as long as they are 'acceptable and demonstrably justifiable in a free and democratic society or as provided in the constitution'.²⁰²

(c) Judicial test for limitation clauses

As discussed earlier in this chapter, the process of considering the legality and constitutional validity of a limitation clause follows a two stage procedure; identification of the infringement and an evaluation of the justification for the infringement. The first stage is a matter of the interpretation of the right allegedly violated and deals, also, with procedural issues – the justifiability of the issue to be decided (the *locus standi* of the applicant), and whether the court has Jurisdiction to grant the relief claimed.

The second is a consideration of whether the infringement is justifiable. This assessment is a factual analysis based on the circumstances of each case. The court considers whether or not a right has been violated as alleged by the applicant. It undertakes a contextual analysis of the impact of the 'offending' legislation on society at large. Applicants who ask the court to make a favourable finding must present evidence to demonstrate that a particular section of the statute infringes their rights. If the answer to this inquiry is in the affirmative, the court must then consider whether the violation is a justifiable limit on the right. If it finds that there has been a violation that was not justified, it then considers the proper remedy to address the infringement.

In Kenya, the judicial test for the legitimacy of a limitation revolves around 'reasonableness' and 'proportionality' in 'a democratic society'.²⁰³ A general minimum requirement is that any limitation must be authorised by law.²⁰⁴ This is an expression of the principle of the 'rule of law,' where all government authority must be seen to derive from the law. No Kenyan court, however, has been asked to pronounce on whether public or private institutions' administrative rules and procedures qualify as 'law' or whether the reference to 'law' points at parliamentary and delegated legislation only.

It is noted that in considering whether or not to uphold institutional restrictions on the enjoyment of fundamental rights the courts have treated institutional rules as though they were 'law'.²⁰⁵ A proposition

²⁰² Art 43 of Uganda's Constitution.

²⁰³ *Hon Martha Karua v Radio Africa* (2006) eKLR; *Kenya Bus Service & 2 others v The Attorney General* Misc Application No 413 of 2005 (Nairobi).

²⁰⁴ *Supra* n 164.

²⁰⁵ See, *Ndanu Mutambaki & 19 others V Minister for Education & 12 others* (2007) eKLR HC 8 and *R v The Head Teacher, Kenya High School & another ex-parte SMY (A minor suing and next friend AB)* (2012) HC 318 of 2010. In this case Justice

that mere policy or practice qualifies as 'law' raises a serious problem. An institution or its head may promulgate rules which defeat fundamental rights and yet hold them out as being permissible within article 24 (1) of the constitution. As a matter of fact this has been the case with many public schools which have faced freedom of religion suits relating to certain restrictions on students' expression of their religious faith.²⁰⁶

Permitting institutional rules to limit constitutional rights opens the floodgates to petty violations based on internal rules which may be argued to be within the general limitation. In comparison, in South Africa, a policy outline does not qualify as 'law'.²⁰⁷

On 'reasonableness,' the courts consider whether the underlying limitation is of sufficient public importance to outweigh the constitutionally protected right.²⁰⁸ Further, due consideration is given to ensure that the enjoyment of such a right and fundamental freedom does not prejudice the rights and fundamental freedoms of others.²⁰⁹

It would appear that the 'proportionality' test requires an assessment to determine: whether the limitation is rationally connected to the objective; that it impairs the right or freedom as little as possible; and, that there is proportionality between its effects and its objectives.

Githua C W whilst making a finding against a student who had contended that school rules and regulations violated her right to wear a hijab stated, ' In learning institutions, these rights may be limited by rules and regulations made by various organs of management to ensure order and smooth running of schools....It is therefore my finding that the said limitation was sanctioned by the law and was also ratified in two Parents Teachers Association meetings in which the Applicant's parents participated.

²⁰⁶ In *Ndanu Mutambaki & 119 others v Minister of Education & 12 others* [[2007] eKLR] students of several different schools in Mwingi district, Eastern province of Kenya petitioned the administration's ban on their plea to wear headscarves. Justice Nyamu, rejecting the students' plea said; No doubt the hallmark of a democratic society is respect for human rights, tolerance and broadmindedness. In the case of schools, nothing represents the concept of equality more than school uniforms. Unless it is an essential part of faith it cannot be right for a pupil to wake up one morning and decide to put on a headscarf as well. This derogates from the hallmarks of a democratic society and violates the principle of equality.

²⁰⁷ *Hoffman v South African Airways* 2001 (1) SA 1 (CC) Para 41 (The policy of an organ of state that HIV positive people do not qualify to be employed as airline crew is not a law of general application).

²⁰⁸ In *Seth Panyako & 5 others v The Attorney General & 2 others* [[2013] eKLR 1 at 13] the court was asked to find that the decision of the Registrar of Societies to limit the right of the petitioners to form, join or participate in a trade union was justifiable in the light of the fact that there were, already, other trade unions serving the same purpose. The court confirming that article 41(2) of the constitution and section 14 (2) of the Labor Relations Act, No.14 of 2007 gives every worker a right to form or join a union granted the relief sought stating; '...the action by the Registrar is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'

²⁰⁹ In *Philip Mukwe Wasike v James Lusweti Mukwe & 2 others*, [[2013] eKLR 1 at page 5] the petitioner asked for unhindered access to all information held by certain mobile telephone operators to assist him prove his allegations of bribery in an election petition. He based his prayer on Article 35 of the constitution which provides for freedom of information. Justice Omondi H. A, declined to grant this prayer stating:...this right must be considered in the light of Article 24 (1) (d) which provides that fundamental rights (including the right to privacy) can only be limited to the extent that is reasonable and justifiable in an open and democratic society, and the nature of the right must be taken into account.

Lastly, on whether it is justifiable in 'an open and democratic society', the courts weigh the competing values and interests between personal and corporate needs.²¹⁰ The overarching principle is that in all cases rights can only be limited by a specific or general clause which affects all people and not merely specific individuals.

Whilst the courts have not been asked to pronounce a verdict on the constitutionality of any of the provisions of the counter terrorism legislation, it would appear that they may be prepared to offer a generous interpretation, permitting the state a wider latitude in attempts to reduce the everyday incidents of terrorism.²¹¹

In Uganda, the courts have followed the trend in Kenya. In the case of *Charles Onyango Obbo & another vs The Attorney General of Uganda (AG)*,²¹² the petitioners sought a declaration that section 50 of the Penal Code was inconsistent with the provisions of Articles 29 (1) (a) and (e), 40 (2) and 43 (2) (c) of the constitution. The central issue in this petition was whether section 50, which makes publication of false news a criminal offence, contravenes the protection offered by Article 29 (1) (a), which guarantees freedom of speech and expression, which include freedom of the press and other media. The court considered the varying positions taken by the petitioner and the AG, and, in a unanimous decision struck down section 50 of the Penal Code for being inconsistent with the constitution as it 'fails the test laid down in Article 43 (2) (c).'²¹³ The test is that for a limitation to restrict a constitutional right it must be 'acceptable and demonstrably justifiable in a free and democratic society.'²¹⁴ This reasoning is followed in *Muwanga Kivumbi vs The Attorney General of Uganda (AG)*²¹⁵ where the petitioner sought a declaration that section 32 (2)²¹⁶ of the Police Act²¹⁷ does not confer upon the police powers to prohibit political activities or that, in

²¹⁰ Ibid.

²¹¹ In comparison the European Court of Human Rights did so in *Brogan v. United Kingdom*, when acknowledging that terrorism in Northern Ireland presented the authorities with special problems and, subject to the existence of adequate safeguards, thus had 'the effect of prolonging the period during which the authorities may, without violating Article 5 Para. 3 [...], keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.

²¹² Supreme Court Constitutional Appeal No. 2 of 2002.

²¹³ 43 (2) Public interest under this article shall not permit;

(c) Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution.

²¹⁴ *Supra* n 210. Justice Oder A.H.O stated: 'In the instant case I am not satisfied that the respondent established that the limitations placed on the enjoyment of the freedom of expression and the freedom of expression and the press, guaranteed by article 29 (1) (a) of the constitution by section 50 of the penal code is not beyond what is acceptable and demonstrably justified in a democratic society.'

²¹⁵ In the Constitutional Court of Uganda Constitutional Petition No. 9 of 2005.

²¹⁶ Section 32.

the alternative the section is unconstitutional. The petitioner argued that the police cannot use section 32 (2) of the Act to restrict political rallies as the right to demonstrate can only be limited if it contravenes the general limitation clause in Article 43 of the constitution.

Agreeing with the petitioners, Mukasa-Kinyogo J A (with Justices Byamugisha C K, Okello G M, Mpagi-Bahigeine A E N and Kitumba C N B agreeing) held that 'section 32 (2) of the Police Act is inconsistent and contravenes Articles 20 (1) (2) and 29 (1) (d) of the constitution and thus null and void.' The reasoning of the judges was that the powers given to the Inspector General of Police under section 32 (2) of the Police Act to prohibit the convening of an assembly or the formation of a procession in any public place is an unjustified limitation on the enjoyment of a fundamental right.

In summary, the courts in Kenya and Uganda have shown a willingness to hold the executive accountable to the provisions of the constitution with regard to limitation of fundamental rights.

6. States of emergency

A state of emergency is said to occur when a government assumes extraordinary powers to control an unusually difficult or dangerous situation, such as war, civil unrest or natural disaster. In normal circumstances a declaration of a state of emergency is a worrisome event because it provides an opportunity for a government to increase its power over the population by suspending rights, dismantling the institutions that protect them and repressing political opponents.²¹⁸

Despite the many incidents of terrorism in the region, neither Kenya nor Uganda has resorted to emergency powers to deal with the problem.

Article 58 (1) of the constitution of Kenya permits a declaration of a state of emergency only when the country is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and only if it is necessary to deal with the circumstances that precipitated the emergency. The declaration is, at first instance, an act of the President but the Constitution requires parliamentary approval

(2) If it comes to the knowledge of the inspector general that it is intended to convene any assembly or form any procession on any public road or street or at any place of public resort, and the inspector general has reasonable grounds for believing that the assembly or procession is likely to cause a breach of the peace, the inspector general may, by notice in writing to the person responsible for convening the assembly or forming the procession, prohibit the convening of the assembly or forming of the procession.

²¹⁷ Chapter 303 Laws of Uganda.

²¹⁸ Huq A Z 'Democratic Norms Human Rights and States of Emergency: Lessons from the Experience of Four Countries' Brennan Centre for Justice, New York University, USA available at http://www.idea.int/publications/dchs/upload/dchs_vol2_sec4_1.pdf accessed on 7 June 2012.

within fourteen days.²¹⁹ The declaration and continuity of a state of emergency is therefore not entirely at the whim or caprice of the President. Even after Parliament approves, the judiciary retains the power to decide on the validity of the initial declaration and its extension by Parliament.²²⁰

Following art of 4 of the ICCPR, Kenya's Constitution permits a limitation of rights during a state of emergency only to the extent required in the circumstances.²²¹ The limitation is valid if it is consistent with the republic's obligations under international law applicable during a state of emergency.

Because the Constitution expressly provides for the application of the rules of international law as part of the law of Kenya,²²² and because any treaty or convention ratified by Kenya is part of the law under the Constitution of Kenya,²²³ it may be concluded that Kenya's new Constitution truly incorporates art 4 provisions regarding derogation under a state of emergency. In a way the Constitution improves on art 4 in that it outlines and describes situations which may give rise to a legitimate state of emergency. For this reason a state of emergency is not what the President says it is because Parliament and the judiciary have been given a part to play in relation to the President's discretion. And of course a declaration of a state of emergency and any action taken in furtherance thereof must meet certain criteria set down in art 58 of the Constitution.

Article 46(1) of Uganda's Constitution permits Parliament to enact legislation authorising the taking of measures that are reasonably justifiable for dealing with a state of emergency. Such legislation shall not be interpreted as contravening the rights and freedoms guaranteed by the constitution.²²⁴ The implication is that, during a state of emergency, Parliament is allowed to legislate to suspend or limit all rights. This is manifest from art 46(3), which specifically permits legislation that provides for detention of persons in dealing with an emergency.

For Uganda, emergency legislation is not new. The 1968 Emergency Powers Act²²⁵ provides for consolidation of the law relating to an emergency and for the President to exercise certain powers. Under

²¹⁹ Art 58(3).

²²⁰ Art 58(5).

²²¹ Art 58(6).

²²² Art 2(5).

²²³ Art 2(6).

²²⁴ Art 46(1) of Uganda's constitution.

²²⁵ Act 23 of 1968.

this Act,²²⁶ whenever an emergency has been declared by the President, the minister responsible for internal security may make regulations necessary for securing the defence of Uganda. These rules may extend to matters of public safety, enforcement of law and order and the maintenance of supplies for the life of communities. The ambiguity of the law relating to emergency powers opens the door to subjective interpretation.

Although the constitutional provisions are narrow, they do not restrict imposition of regulations that may limit fundamental rights. The minister may, for example, provide for exclusion of persons from any part of Uganda and deportation of persons who are not citizens of Uganda. The minister may also, among other matters, provide for the suspension of any law or its amendment. These are far-reaching powers for a minister to exercise through regulations.

It would appear that circumstances permitting derogation from fundamental rights were designed to affect extraordinary situations which cannot be controlled by application of the normal civil legislation. For this reason, the derogation regime was constructed to deal with temporary situations lasting only for a short time. This means that laws, rules and regulations that are meant to offer protection in a temporary situation of attack were not designed or meant to operate *ad infinitum*. In contrast, the terrorism threat is not limited in space or time. For the derogation regime to offer protection against terrorism, what is ideally the exception would inevitably be allowed to become the norm.

7. Conclusion

The discussion in this chapter shows that in the context of Kenya and Uganda, counter terrorism legislation may be justified by invoking derogation clauses in the African Charter of Human and Peoples Rights and the relevant state constitutional provisions. It should be remembered, however, that, this notwithstanding, obligations imposed by the ICCPR still apply.

It is noted that, while derogation clauses provide for a regime applicable in extreme cases of crises, the limitations expand the permissible scope of restriction of human rights, enlarging the capacity of governments to encroach upon the liberties of citizens and yet maintain a semblance of constitutional propriety. In such circumstances a state may apply considerable limits on human rights without either derogating from the ICCPR or violating its own constitutional restrictions on infringement of rights. The

²²⁶ See section 2 and 3 of the Emergency Powers Act Chapter 297 Laws of Uganda

Constitutions, however, maintain a façade of distinction between limitations and derogations. This is, to some extent, confusing because amongst the reasons given for limitation of human rights provisions is 'preservation of public security', a significant component of the derogation regime.

It appears that states have followed the logic that it is somehow better to limit than derogate from rights. This position has serious negative consequences. A state will not derogate from the provisions of the ICCPR or contravene its own constitution if, by invoking the limitation clauses, it can obtain the end it seeks. As examples, when faced with states of emergency, Cyprus, Suriname, Mexico and Iraq, refrained from derogating on the argument that the limitations offered sufficient room to deal with the situation.²²⁷

It is suggested that, in the face of daily threats posed by terrorism, a practical construal and application of civil and political rights will be obtained only if they are given an evolutive or a dynamic interpretation.²²⁸ Only then will they remain relevant. The depth and breadth of this discussion is covered in my concluding chapter, which now follow.

²²⁷ See UN Doc A/34/40, 383 (1979); UN Doc A/35/40, 297 (1980); UN Doc A/54/40, Vol. I, 324; UN Doc A/46/40, 618–56.

²²⁸ An evolutive interpretation is an interpretation where a term is given a meaning that changes over time.

'Evolutive' interpretation is synonymous with 'dynamic interpretation'. See Fitzmaurice M 'The practical working of the law of treaties' in M D (ed), *International Law* 3rd ed (2010) 188; Letsas G A *Theory of Interpretation of the European Convention on Human Rights* (2007) 65; Dupuy P M 'Evolutionary interpretation of treaties: Beyond memory and prophecy' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (2011) 123.

Chapter VIII

CONCLUSION

There are times of tumult or invasion when for the sake of legality itself the rule of law must be broken.... The Ministry must break the law and trust for protection to an Act of Indemnity. A statute of this kind is...the last and supreme exercise of Parliamentary sovereignty. It legalises illegality.... It ... combines the maintenance of law and the authority of the House of Parliament with the free exercise of that kind of discretionary power ...wielded by the executive government of every civilised country.¹

1. Looking back, facing forward

Since I began writing this thesis a number of events have taken place in Kenya, which point at an alarming escalation of terrorist activity in the country. First, there has been a wave of sporadic but apparently well-coordinated grenade attacks in Nairobi, Mombasa and Garissa as well as intervallic cases of kidnapping of tourists in the coastal cities of Lamu and Mombasa and aid workers in the Dadaab area in the northeastern part of the country.²

In reaction to these grenade attacks, in October 2011, the government of Kenya decided to launch an invasion into Somalia with a triple purpose: to rout out the Al Shabaab at the Somali port of Kismayu from which they have initiated several sea attacks into Kenya; to secure the country's eastern border; and to create a buffer zone inside Somalia.³

Unfortunately, the incursion into Somalia has attracted greater danger from the militants who control Somalia. The intensity of the grenade attacks has not reduced. It has increased.⁴ It is believed that the assaults on Kenyan territory are revenge missions sponsored by the Al Shabaab to punish Kenya for the entry into Somalia.⁵ There is another reason that may be ascribed for Kenya's invasion of Somalia.

¹ Dicey A V *Introduction to the study of the Law of the Constitution* 5th ed. (1897) 412-413.

² In October 2011 two Spanish aid workers were kidnapped from Dadaab refugee camp in northeastern Kenya and taken into Somalia, prompting relief operations to be scaled back. A few weeks before this incident militants from Somali raided a number of coastal resorts kidnapping tourists on vacation. First, a British man was shot dead and his wife snatched from a beach resort close to the Somali border. Second, a disabled pensioner from France was seized near Lamu and taken to Somalia, where she subsequently died. Her kidnapers demanded a ransom for her body. See Interview by Richard Downie, fellow and deputy director of the Africa Program at the Center for Strategic and International Studies in Washington D.C. available at globalpublicsquare.blogs.cnn.com/.../why-did-kenya-invade-somalia/ accessed on 27 June 2012.

³ Daniel B 'Why Kenya Invaded Somali' 15 November 2011 *Foreign Affairs* Published by the Council of Foreign Relations.

⁴ Annexure A shows major terror incidents in the country relating to the year 2013.

⁵ The Economist reports that: 'If the Kenyans humble the Shabaab within Somalia, the jihadists may well carry out a vengeful series of suicide-bombings in Kenya and beyond. That campaign may already have begun. On October 24th two grenade

Ever since the start of the second phase of the Somalia civil war in the early part of the 21st century, that territory has been used as a safe haven and its warlords have sponsored the pirates who have interrupted international shipping and have caused untold business losses to merchants entering the Indian Ocean.⁶

The incursion into Somalia, whilst taking perhaps an unavoidable risk, opened a new chapter in Kenya's relations with the groups that occupy its troubled neighbour. In the months that the invasion has lasted, incidents of terror have escalated on the streets of Nairobi, Mombasa and the northeastern part of the country.⁷ Death and injury have become commonplace. No one knows where the next grenade is going to explode.

The second and perhaps most conspicuous incident which points at a terror increase in the country is the 10 June 2012 helicopter crash on the outskirts of Nairobi that killed Professor George Saitoti, Kenya's Minister for Internal Security, together with his assistant Mr Orwa Ojode. This appears, at first instance, to

attacks were carried out in Kenya's capital, Nairobi, killing one person and wounding dozens of others. Kenyans are frightened.' See *The Economist* 29 October 2011.

⁶ See 'Piracy in Somali Waters: Rising attacks impede delivery of humanitarian assistance' reported at UN Chronicle (United Nations Department of Public Information, Outreach, Division) available at www.un.org/en/hq/dpi/od.shtml accessed on 27 June 2012.

⁷ On October 26th 2011 Elgiva Bwire, also known as Mohamed Self appeared in court and pleaded guilty to causing grievous harm by detonating a hand grenade at a bus station in Ngara, Nairobi. This incidence which occurred on 24th October 2011 was followed by a visit to Bwire's residence where police found 13 grenades, four pistols, an AK-47 assault rifle and more than 700 rounds of ammunition. He confessed to being a member of the Al Shabab available at <http://allboocame.com/?p=8005> accessed on 27 June 2012;

On 24 November 2011 three people were killed in explosions in eastern Kenya, with more than 27 receiving injuries. This followed the throwing of hand grenades into a restaurant in the town of Garissa, near the Somali border. Earlier, a Kenyan soldier was killed by a bomb in the border town of Mandera. Available at <http://www.bbc.co.uk/news/world-15883256> accessed on 27 June 2012; On Sunday 29 April 2012 a grenade explosion in God's House of Miracles International Church in the Ngara area of Nairobi killed a 27-year-old university student and injured 16 people. A man pretending to be a worshipper threw three grenades as the service was concluding. Only one of the grenades exploded. No arrests were made as the man ran away while firing a pistol in the air. Available at <http://www.assistnews.net/Stories/2012/s12050002.htm> accessed on 27 June 2012; On May 15 2012 attackers fired shots and detonated four grenades outside a nightclub in Mombasa, Kenya after they were denied entry, killing a security guard and wounding five people, including one of the assailants available at http://www.salon.com/writer/tom_odula/ accessed on 27 June 2012; On Monday 28 May 2012 an explosion ripped through a building full of small shops in downtown Nairobi wounding at least 16 people. The explosion injured at least 33 people, including a woman who blamed the blast on a "bearded man" who left behind a bag shortly before the detonation available at http://www.salon.com/writer/tom_odula/ accessed on 27 June 2012; On 24 June 2012 a man hurled a hand grenade into Jericho Beer Garden, a bar in Mshomoroni within Kisauni, Mombasa which killed three people and wounded many others. This attack came after the United States government had issued a travel advisory against visiting the coastal city because of intelligence information indicating that there was a plan to attack certain vital installations in Mombasa available at panafricannews.blogspot.com/ accessed on 27 June 2012; On 29 June 2012 at 11.30 am gunmen ambushed a vehicle belonging to the Norwegian Refugee Council, shot dead the driver and kidnapped four aid workers. The workers were stationed at Dadaab's Ifo II camp, northern Kenya. The gunmen are said to have taken control of the vehicle and fled towards the Somali border; On 1 July 2012 fourteen people were killed and over 66 others injured in simultaneous attacks on two churches in Garissa town, north eastern Kenya. The twin attacks on the Our Lady of Consolata Catholic Church and the Garissa AIC took place around 10.20am. See '14 killed in Garissa church attacks' *Daily Nation Newspapers* available at <http://www.nation.co.ke/News/14+killed+in+Garissa+church+attacks/-/1056/1441242/-/qo95da/-/index.html> accessed on 2 July 2012

be part of a plot.⁸ The fear that the Al Shabaab may have killed Saitoti is founded on the fact that the Minister was the architect of Kenya's military campaign in Somali and had been very vocal in condemning the activities of Al Shabaab in that country. Although the organisation did not lay claim to causing the crash their websites were awash with messages of approval.⁹

The third and most recent of the heavy casualty terror attacks took place on September 21st 2013 at the Westgate Mall, Nairobi.¹⁰ This four-day siege on an upmarket shopping centre in Nairobi led to the death of 67 people. Scores were injured. To date 58 people remain un-accounted for.¹¹ This siege remains the worst terrorist attack in the country since the US embassy bombing of 1998, and is a constant reminder that perhaps worse is yet to come.

Uganda has not been spared. While its own internal problems with the LRA seem to be tapering off, externally influenced terrorism has been on the increase.¹²

⁸ 'Kenyan minister George Saitoti's death in helicopter crash fuels terrorism fears' The Independent 28 June 2012.

⁹ See, for example, this message displayed on the Al Shabab website; 'Kenyans should know that neither would their country ever prosper nor their security improve under the heels of such men. Better off dead! The remaining invaders should be expectant that Allah will inflict His punishment by Himself upon the Kuffar or by the hands of Mujahideen. He has been aggressive in his war against Islam but died the wretched death of a Kafir and now lies rotting in his coffin on his way to hell. For the hundreds of Muslims killed & displaced by Kenya's brutal invasion, Saitoti's death is but a droplet of justice in a sea of oppression. Saitoti played a prominent role in overseeing the abduction, torture & imprisonment of hundreds of innocent Muslims in his war against Islam. From strafing of refugee camps in Somalia to the abdominal treatment of Muslims in Kenya, Saitoti and his likes perpetrated heinous crimes. HSM welcomes the death of the evil minister upon whose authorization thousands of Muslims suffered both in Somalia and Kenya.' Available at <http://www.kenyan-post.com/2012/06/exclusive-message-from-al-shabaab-on.html> accessed on 27 June 2012.

¹⁰ This attack for which the Somalia-based Al Shabaab took credit was executed in the style of the Mumbai siege of 2008 where terrorist took over a hotel and randomly shot at anybody on sight causing grave casualties. To this day it is not clear if the terrorists walked out of Westgate or whether they died in the ensuing explosions in the building.

¹¹ See Mukinda F 'Hard questions emerge over handling of terror attack' Daily Nation, September 28, 2013.

¹² For example, on 11 July 2010 bombs were detonated in two separate restaurants in Kampala as people watched the final of the 2010 FIFA World cup. The death toll stood at 74 with scores more seriously injured. Al shabab claimed responsibility for the bombings as a retaliation for Uganda's support of AMISOM. This incident gave rise to the arrest of tens of people, some as far away as Mombasa in Kenya. A Kenyan advocate who travelled to Kampala to advice some of the suspects was arrested by Uganda security agents on arrival in Entebbe airport and was released only after pleas from Human Rights organizations and intercession by the Kenyan government available at <http://english.cri.cn/6966/2010/07/13/1781s582504.htm> accessed on 27 June 2012.

2. An overview of the thesis

(a) General synopsis

This study is divided into eight Chapters. This chapter seeks to provide a summary of the findings and general conclusions. The conclusions do not follow a strict chapter sequence because they are thematically organised.

Overall, the study acknowledges the fact that an ever present threat of terrorism brings to the fore the difficult decisions that the governments of Kenya and Uganda have to make when dealing with the problem. It exposes, in real terms, the basic challenges in answering a key question in this thesis: How effectively can states fight terrorism and still respect human rights when terrorists flout them at will? This dilemma reduces to one central concern: has the threat of terrorism set in motion events more ominous than the attacks themselves?

The epicenter of this thesis is the question: How does the implementation of counter terrorism measures impact on human rights in Kenya and Uganda? To answer this question, the study sought to investigate several related questions: In the enforcement of counter terrorism measures, is it possible for governments to play by the constraints of the rule of law? Is freedom during times of emergency as important as during peacetime? Is it possible and practical to observe art 4 of the ICCPR in the war against terrorism or should a lower threshold be established?

Without harbouring any pretensions to a conclusive examination on this broad subject, and within the limited scope of this research, this study sought to provide some answers.

Chapter I identified terrorism as a global problem. It reviewed its common features and determined that terrorism is a war-like phenomenon, which is no longer confined to domestic situations. It mutates and advances with the ingenuity of the perpetrators who are forever crafting new techniques of attack. Consequently, incidents of terrorism are on the increase globally, and specifically in Kenya and Uganda. This chapter recognised that terrorism is linked with crime and attempts to stem it must also deal with the crime that supports it.

The chapter traced the international legal regime on terrorism, and noted that there are 14 core UN conventions on counter terrorism, each dealing with it within a narrow prism of particular activities. It

reviewed probable causes and offered some reasons for the growing bane of political violence. It noted that terrorism thrives in the hearts of disaffected individuals with different ideological inclinations. Accordingly, there may be no single cause of terrorism any more than there is a single cause of killing. The chapter made an in-depth discussion of the incontestably core causes of terrorism: religion, nationalism and globalisation.

(b) In the 'fight against terrorism', who is the enemy?¹³

Chapter II dealt with the difficulties in obtaining an agreed definition of the term 'terrorism.' It traced the origin of the concept and phenomenon of terrorism from the French revolution of 1795 and noted that despite differences in perspective, there are certain features of terrorism that all specialists on the subject agree. First, that terrorism is almost exclusively a political weapon. Secondly, it is often grounded in ideological politics. Thirdly, it is directed at innocent civilians, although they are not necessarily the primary target.

It was observed that while terrorism is not new, advances in communications and technology have provided perpetrators with diverse means and objects of destruction.

This chapter made an extensive review of past discussions on a definition of terrorism arriving at a conclusion that it defies all efforts to an agreed definition.

It was noted that difficulties in reaching a broadly acceptable definition of terrorism are just as much political and ideological as juridical. One may ask: Is it really hard to find a legal definition for a certain concept? Or is the difficulty engendered by certain states, avoiding a clear-cut definition, thereby giving them sufficient discretion in their actions?

From the perspective of global legal scholars, through the League of Nations to the UN, regional organisations and the states under study, it was acknowledged that there are as many definitions of terrorism as there have been attempts to define it. Within academic circles, every author who has written a paper on terrorism introduces the subject with an observation that it has no agreed definition. It was recognised that the frustration with a definition lies in the risk it entails in taking positions. It does appear that, unfortunately, we all perceive terrorism from a platform of moral values informed by culture, education, religion and other nuisances that explain our peculiar mindsets.

¹³ 'A war is half worn when you know your enemy.' You know your enemy if you can recognise them in the battlefield. See Tzu S *The Art of War*.

It was observed that within the UN system,¹⁴ 'the political and technical difficulties that plagued the League of Nations still persist: the problem of 'freedom fighters' and self-determination; state terrorism and the duty of non intervention; state criminality and applicability to armed forces; the scope of the political offence exception to extradition; the impact of freedom of expression; and the relationship between terrorism and asylum.'¹⁵ Of these, the UN Special Rapporteur has admitted that the biggest impediment to an agreed definition is the distinction between terrorists and lawful combatants.¹⁶

The failure by the UN to provide leadership in the quest for a definition has allowed states to promulgate their own definitions, sometimes, with disastrous consequences. Kenya's Prevention of Terrorism Act, for example, does not define terrorism but designates certain acts as 'terrorist acts' if committed with the intention of causing fear amongst members of the public, intimidating or compelling the government to take certain action or an international organisation to do or refrain from doing any act or destabilizing the religious, political, constitutional, economic or social institutions of a country. Uganda, on the other hand, defines terrorism but in unacceptably broad terms.¹⁷

Considered objectively, however, there is not so much a problem of definition as application, for there is a general pattern to definitions of terrorism. The archetypical configuration manifests itself as serious violence, a political motive and the creation of extreme fear. It is suggested that to move the dialogue towards an agreement there is need to expose the virtuous deception that justifies terrorism and to accept that it is essentially violence against a civilian population perpetrated for ideological purposes.

While there may not be an agreement on a precise definition of terrorism, the thesis noted that there is a broad consensus that a definition is necessary for several reasons: First, it is essential in regulating the increasing, wide definitions which threaten civil liberties. Second, it will advance the requirements of criminal law, which demands an offence be precisely defined. Third, it will inform and refine anti terrorism policies.

¹⁴ The UN General Assembly, the Security Council and different working committees.

¹⁵ Saul B The 'Legal response of the League of Nations to terrorism' (2006) 4(1) *Journal of International Criminal Justice* 78 at 79.

¹⁶ *Terrorism and Human Rights – Final Report of the UN Special Rapporteur Kalliopi K. Koufa* 25 June 2004 available at <http://www.unhcr.org/refworld/publisher/UNSUBCOM.html> accessed on 20 June 2009.

¹⁷ Section 8(1) Anti Terrorism Act. The prohibited acts are 'the use of violence or threat of violence with intent to promote or achieve political, religious, economic, and cultural or social ends in an unlawful manner, and includes the use of violence or threat of violence to put the public in fear or alarm.' This definition is amplified by the further designation of a person as a terrorist if that person 'unlawfully and intentionally makes, manufactures, delivers, places, discharges or detonates an explosive or other lethal device into or against a place of public use, or state or government facility, a public transportation system or infrastructural facility.'

Finally in chapter II the thesis proposed a definition of terrorism as ‘the use or threat of violence against civilians or the destruction of property intended to intimidate or compel a government in furtherance of a political objective.’ Ensuing from this definition, an organization that seeks to undertake any of these activities would qualify to be designated a terrorist organisation and a ‘terrorist’ would be ‘any person who, purposely, knowingly, recklessly or negligently, either: gives support to or aids the cause of terrorism,¹⁸ or; is a member of a terrorist organisation, or; provides assistance to a terrorist organisation or a member of a terrorist organisation.’¹⁹ Accordingly a ‘terrorist act,’ is ‘as any threat or violent act, in violation of the domestic law of any state, which endangers human life and is intended to intimidate or compel a government or the civilian population in furtherance of a political goal.’ The list of these ‘acts’ would be endless. It will be noted that these proposed definitions cover the full range of actors in terrorism structure: the perpetrator, victim and audience. There is, of course, the act itself. Again, the proposed definition captures the three key characteristics of terrorism —violence by non-state actors, targeting of innocents, and a political purpose.

It will be readily apparent that there is a distinction between ‘ordinary’ crime and terrorism. Whilst the ‘ordinary’ criminal acts for personal gain, the terrorist acts for what he or she considers to be a higher goal. Almost always, the political or religious or social motive provides the incentive.

(c) Past scope of trends in terrorist activities in Kenya and Uganda

Chapter III of the thesis demonstrated that Kenya and Uganda suffer from both domestic and international terrorism. It analysed the nature and traced the scope of trends in terrorist activities in Kenya and Uganda. It was observed that, in general, there is a high incidence of terrorism in these countries²⁰ owing to a number of factors: their geographical location; the inability of their governments to monitor movement of persons across their borders; in-sufficient security personnel and capacity; corruption; and the easy availability of weapons and personnel from Somalia. All these factors combine to provide an enabling environment for extremist groups.

¹⁸Under this limb, fund raising money for or donating money to a terrorist organisation would qualify as an act of terrorism if the funds are used to plan or conduct an act of terrorism.

¹⁹ This may be in the form of providing a hideout, transportation, training, funding or firearms.

²⁰The Global Terrorism Database records more than two hundred incidents of terrorism in Kenya starting from 1970, showing a marked upward trend in 1988 and increasing rapidly in 2010. During the same period, Uganda similarly experienced more attacks than Tanzania. Whilst these statistics do not give a direct correlation with anti terrorism efforts it is clear that the ‘war against terrorism’ has not provided the protection necessary to zero rate terrorism in the region. Of course there are not and would not be statistics to show how many attacks have been voided by reason of the anti terrorism measures. The benefit of the anti terrorism measures may lie in anecdotal knowledge that the measures serve a useful purpose. Statistics available at <http://www.start.umd.edu/gtd/> accessed on 2nd June 2012

The study observed that while the war on terror is seen as a global endeavor, the causes, groups and victims are increasingly local. Further, it was observed that whilst Kenya and Uganda suffer from both international and domestic terrorism the former is distinct from the latter because: its target is selected from a country other than that of the terrorists themselves; the act or omission involves crossing national borders; and members or organisers of the terrorist activity are from more than one country.

In almost all the cases, international terrorism is perpetrated by residents or representatives of one or more countries against the interests of another country or by members of a violent, politically directed organisation not affiliated with the country being attacked.²¹

Chapter III showed that in terms of international terrorism, the groups most frequently associated with recent incidents of terrorism are the Al Qaeda and the Al Shabaab who inhabit and control the Warlords in Somalia. On the domestic front, Kenya experiences vigilante terrorism more than the insurgency type associated with the LRA and the ADF of Uganda.

In summary this chapter showed that the challenge to combating terrorism in Kenya and Uganda reduces to four elements: finding means to deny international terrorist groups access to the region; starving terrorists of financial sponsorship, support and a safe haven; shrinking the underlying circumstances that terrorists exploit; and building democratic systems that will address poor governance.

The table below shows the limited number of security personnel (relative to the population) charged with the responsibility of securing the population in Kenya and Uganda. As will be seen, the countries are thinly policed and therefore it is no wonder that terrorists are free to plan their attacks with minimum fear of interception. The UN recommends that there should be two policemen per 500 persons in any state population.²²

Kenya & Uganda terror fighters²³

Country	Police to population ratio	Anti-Terror Organ	Anti-Terror Laws
		Anti-Terrorism Police	Prevention of Terrorism

²¹ Dyson W (2001) *Terrorism: An Investigator's Handbook* 20–31.

²²United Nations 'Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century' Tenth United Nations Conference on the Prevention of Crime and Treatment of Offenders A/Conf.187/4/Rev.3. April 15 2000. Germany, Hungary, Spain and South Africa have 3 policemen per thousand. Thailand has more than 3.

²³ Source: SIPRI, World Economic Forum US State Department.

Kenya	1:455	Unit: Military Intelligence; National Intelligence Service	Act 2012 . Max punishment: Life Imprisonment
Uganda	1:800	Anti-Terrorism Directorate	Anti-Terrorism Act 200 . Max punishment: Death sentence

(d) Is there a need to enact counter terrorism legislation?

Chapters IV of the thesis raised legitimate concerns about the dangers posed by terrorism to life and property in Kenya and Uganda. The basic question is whether it was necessary to enact new legislation to deal with the crime or whether the existing laws could have dealt with the problem.

The study concluded that it was essential to enact fresh counter terrorism legislation in domestication of UNSC resolution 1373 which required all member states to pass domestic legislation to criminalise and severely punish terrorism.²⁴ Not least was the need for states to take decisive measures to reassure a panicked public after a traumatic attack of terrorism. Further, like elsewhere in the world, Kenya and Uganda found it necessary to enact anti terrorism legislation so as:

‘to strengthen and streamline the government’s ability to gather evidence so as to disrupt, weaken and eliminate the infrastructure of terrorist organisations; to make terrorism a national priority in the criminal justice system; and to enhance the authority of the immigration and naturalisation service to detain or remove suspected terrorists.’²⁵

The study recognised that in promulgating counter terrorism laws, states face serious challenges based on three equally critical issues. First, the lines between terrorism and ‘ordinary crime’ is blurred. Secondly, terrorist activity not only affects civilian safety but also endangers national security, which consequently threatens the integrity of the state. Thirdly, terrorism presents a fluid and asymmetric threat with unpredictable forewarnings and consequences.

²⁴ UNSC Resolution 1373 required states to enact legislation to: [P]revent the commission of terrorist acts including suppressing the recruitment of members of terrorist groups, preventing those who finance, plan, facilitate or commit terrorists within the territory and to take measures to prevent counterfeiting, forgery or fraudulent use of identity papers and travel documents.

²⁵ United States Attorney-General John Ashcroft *Testimony before the House Committee on the Judiciary* (24 Sept 2001) available at <http://www.usdoj.gov/ag/crisisremarksg-24.htm> accessed on 5 June 2008.

These difficulties notwithstanding, the study noted that for those countries that have enacted anti terrorism legislation certain striking features of it are manifest. First, it defines terrorism in sweeping terms. Secondly, it permits the banning of certain organisations without due process. Thirdly, it allows for long detention periods without trial. Finally it shrouds the operations of the intelligence and security agencies in secrecy.

Chapters IV undertook a detailed analysis of the provisions of Uganda's Anti Terrorism Act. It noted that the Act provides for a very broad definition of terrorism which includes historical and modern forms of terrorism. The definition raises serious fears with respect to its impact on advocacy, protest and dissent because it prohibits any act intended to influence the government for a political, religious or economic reason if the prohibited act results in the injury or loss of lives or damage to property. The danger in this definition is obvious. By their nature, political or religious or social protests are unruly and may result in damage to property or loss of lives. Does this then take such protest from the realm of legitimate protest to an act of terrorism?

Further it was noted that the definition of terrorism overlaps with existing common law offences which are then elevated to terrorism if the government thinks that they were committed with terrorist intent.

The discussion on Uganda showed that threats of terror can lead governments to overplay the situation, spawning biased and unjust criminal laws, often punishing innocent activities under the guise of controlling terrorism.

For Uganda, the legislation, in many respects, expands the powers of the executive in violation of basic rights. As a result, the legislation has a negative impact on fundamental rights to, inter alia, fair trial, liberty, privacy and assembly.

3. Impact of terrorism on human rights

Chapter V of the study recognised that terrorism has a dual and conflicting impact on human rights. On one hand, terrorists kill and injure innocent persons, destroy property and spread fear and anxiety in communities. The state is therefore obliged to react in order to safeguard public safety.

On the other hand, in seeking to suppress terrorism, states develop policies and enact legislation that may exceed the permissible limits of international human rights law and accordingly violate the rights of terror suspects as well as those of innocent civilians. For example in Uganda, September 11 presented an

opportunity to settle internal scores without attracting international criticism. In essence, it allowed the country to tap into international goodwill without the risk of censure. Its anti-terrorism legislation provided a legitimate framework for various models of repression.

It is apparent that a significant casualty of the struggle against terrorism has been respect for human rights.²⁶ Yet it is to be admitted that terrorism in and of itself is a violation of human rights.

Chapter V analysed the impact of Uganda's Anti Terrorism Act on human rights. It was observed that, in many respects, the Act reverses the onus of proof and requires a person charged with an offence to provide evidence of innocence. For example, under section 6(2) of the Act, an individual who belongs or professes to belong to a proscribed organisation commits an offence. It is, however, a defence to prove that the organisation in respect of which the accused is charged had not been declared a proscribed organisation at the time the person charged became a member or began to profess to be a member, and that he or she had not taken part in the activities of the organisation at any time after it had been proscribed. This reverse onus is evident in section 25 of the Act, which deals with membership of a terrorist group, requiring accused persons to absolve themselves of the offence by tendering evidence to show that they do not in fact belong to that group.

The provisions in the Act²⁷ with respect to freedom of association, equal protection of the law, personal liberty and protection against torture are fashioned to swing in favour of state security. This is demonstrative of the fact that placing too much reliance on the needs of security may lead to an erosion of the rule of law.

This notwithstanding, the study agrees with an argument advanced by O'Connor and Rumann when they say that it would be foolhardy, even immoral, if governments were not to respond to terrorist attacks.²⁸ Yet they ask the question: 'what if the measures taken in exchange for freedoms do not protect the citizens?'²⁹ Evidently 'terrorism presents a special challenge to a democratic society: how to prevent and punish ideologically motivated violence without infringing on political freedoms and civil liberties.'³⁰ It is

²⁶ Ibid.

²⁷ The Anti Terrorism Act

²⁸ O'Connor M & Celia M. Rumann C M 'Into the Fire: How to avoid getting burned by the same mistakes made fighting terrorism in Northern Ireland' *Cardozo L. Rev.* 24 (2003): 1657

²⁹ Ibid.

³⁰ Cole D & Dempsey J *Terrorism and the Constitution* (2006) 1.

also manifest that responses to terrorism are no longer just a matter of law and order, but the continued survival of communities and the rule of law.

Chapter VI of the thesis reviewed Kenya's legal and extra legal counter terrorism measures. It reviewed Kenya's anti terrorism efforts prior to the enactment of the Prevention of Terrorism Act, and thereafter, and evaluated the provisions of the Act in comparison with international human rights treaties and the constitution of Kenya.

It was observed that the Act is an improvement on the two earlier Bills³¹ which were shelved after intense public and parliamentary debates. This demonstrates that legislation should not be undertaken in the super-heated atmosphere anger and anxiety, as happened in Uganda. The Act moves the anti-terrorism efforts from a fixation with punishment to prevention. Even better, the Act provides for judicial review of executive action in investigation and prosecution of offenders as well as surveillance and monitoring of suspects.

Unlike Uganda's Anti Terrorism Act, Kenya's Prevention of Terrorism Act does not define terrorism but designates a raft of incidents described as terrorist acts. Again, as an improvement on Uganda's Act, the definition excludes a protest, demonstration or stoppage of work so long as these do not result in either violence or serious damage to property or in any way endanger the life of a person.

It is noted that Kenya's departure from the international practice of defining terrorism, instead defining terrorist acts, provides a near objective description of the elements of the offence and is thus an improvement. A downside to this approach is the fact that the definition conflates inchoate and substantive crimes. There is no indication as to when a 'threat' to commit terrorism matures and is available for prosecution.

Chapter VI concludes with an observation that within a narrow latitude, Kenya's Act shows some innovative accommodation which allows the executive to conduct its national security duties without major violations of human rights.

The discussion in Chapter VII elaborates on the international and domestic human rights framework as regards limitations to and derogations from human rights protections in Kenya and Uganda. It reviews features common to limitation regimes as well as the appropriate scope of these restrictions. It also

³¹ The Suppression of Terrorism Bill & the Anti Terrorism Bill.

evaluates the principles governing the validity and legality of derogations. In so doing this chapter seeks to deal with two associated issues: Is freedom during times of emergency as important as during peacetime? Is it possible and practical to observe art 4 of the ICCPR in the war against terrorism or should a lower threshold be established? This Chapter shows that both in international law and in the constitutions of Kenya and Uganda, provision is made for permitting limitation to and derogation from rights through enactment of laws which may be 'necessary or reasonably required for preservation of national security, public order or health and other related concerns.'

Notwithstanding this, the study shows that such provisions are a two-edged sword. They apply to limit the exercise of individual liberties and at the same time confine a government's extent of encroachment on rights. A limitation clause pronounces the purpose of the limitation and spells out how that purpose is to be achieved. A proper evaluation of such a clause must therefore commence with an inclination towards upholding a right, the onus being on the government to prove why it should be restricted. The mechanisms of doing this are discussed in chapter VII. In essence, interpretation of limitation clauses must lean towards protection and not limitation of a right.

Chapter VII observed that temporary restrictions to certain non- absolute rights, both in law and practice, are an acceptable method of dealing with periods of insecurity. Accordingly, regional and domestic human rights commissions, tribunals and courts have developed procedures that specify conditions under which derogation is permissible.

The discussion in this chapter noted that a common denominator of the manner in which Kenya and Uganda conduct their anti-terrorism efforts is the factual denial of any claim to normalcy in state reaction to incidents of terror thereby applying measures that could ordinarily be employed in a factual and legal state of emergency. The difference, however, is that, even though these states have never declared a state of emergency they operate within the realm of emergency.

It would appear that in both Kenya and Uganda there is an executive reluctance to cite an express derogation from art 4. The reason is simple. The incidents alluded to in justifications for a factual derogation from art 4 do not qualify as grounds for an objective, and genuine derogation. A *de jure* derogation would require the state to substantiate it through a validation process that would be difficult to support within the local context and would most certainly lead to a loss of 'face' in the domestic and international setting. This

may not entirely be a failure on the part of the state. It may also be explained by the fact that traditional rules governing emergency situations are directed at intermittent instances of grave danger to public security. What used to be episodic instances of risk to the state are, in view of the dangers posed by terrorism, perpetual and unending threats of terror with severe consequences.

4. Counter terrorism and human rights: Balance or priority?

The thesis discusses the proper place of human rights in the fight against terrorism. That the relationship between these two is angst-ridden is never in doubt.

The thesis identifies the fact that the fixation on the war on terrorism has subordinated human rights making state security a predominant, virtually permanent concern, allowing states to use authoritarian laws and practices based on two core arguments. First, that the international community is at war against terrorism and any measure taken against the enemy is acceptable. Secondly, that terrorism poses exceptional security risks that must be met with extraordinary measures.³²

Conceptually, these two grounds may be collapsed into one: focusing too much on the extraordinary whilst ignoring the routine.

It is noted, however, that there are many human rights practitioners and scholars who hold the view that human rights must be respected whatever the price.³³ They state that rights would lose all effect if they were readily revocable in conditions of crisis.³⁴ The argument made is that rights are indispensable in the fight for security³⁵ and that justice is more important than security.³⁶

Yet others are of the opinion that civil liberties should only be afforded qualified protection, giving way to the dictates of security.³⁷ The argument often made here is that citizens must be willing to surrender some of their basic rights so as to attain the larger goal of achieving security for the community at large.³⁸

³² Supra n 20. See Fenwick H & Phillipson G 'Covert derogations and judicial deference: redefining liberty and due process rights in counterterrorism law and beyond' (2011) 56:4 *McGill Law Journal* 864.

³³ Supra n 20. For a discussion on this See Gewirth A 'Are there any absolute rights?' Waldron J (ed.) *Theories of Rights* (1984) 108; Freedman M *Rights* (1991) 83-100; Donnelly J *Universal Human Rights in Theory and Practice* 50-55.

³⁴ Dworkin R 'Terror and the attack on civil liberties' (2003) 50(17) *New York Review of Books*.

³⁵ Duner B 'Disregard for security: The Human Rights movement and 9/11' in Ranstorp M & Wilkinson P (eds) *Terrorism and Human Rights* (2008).

³⁶ Supra n 28.

³⁷ Sofaer A D 'Justice William Brennan after twenty five years' 1981 *California Law Review* Vol. 95 No. 6 2197 at 2200.

³⁸ Donahue K L 'Security and Freedom on the Fulcrum' in Ranstorp and Wilkinson (eds) *Terrorism and Human Rights* (2008).

Those who support the latter view hold that 'fighting terrorism is a national security problem, not a matter of mere criminal law enforcement.'³⁹ Some have gone as far as saying that civil liberties and human rights are political conveniences for enjoyment in times of peace.⁴⁰ This discussion often boils down to a debate between those who think that 'terrorists are warped, their politics pathological and consequently un-amenable to accommodation.'⁴¹ 'For this reason,' they assert, 'the appropriate response is placed on coercion, protection and punishment.'⁴²

It is critical to remember that, ultimately, all rights - notably freedom of expression, assembly, association and movement - are subject to restrictions. In other words, from time to time, all freedoms require certain infringements in order to serve a common social good. This is not to say that states may, with abandon, encroach on rights without regard to the guarantees provided. It is to acknowledge that modern democracy entails a system of balancing which equips the state with protection against forces bent on destroying the very basis of its survival. This statement may be uncomfortable for those who may confuse it with an invitation to authoritarianism and anarchy but it is a practical approach to finding means for defending the state against such incidents as September 11, Madrid, Bali, Westgate or the almost weekly grenade attacks that have become the bane of life on the streets of Nairobi.

What then is the position of human rights in the light of the never ceasing threat of terrorism? An appreciation of rights or security as fragmented, stand-alone issues without a dual appreciation of conceptual and operational issues, especially in matters related to security, does not allow the benefit of a practical appreciation of all the concerns.

Is this a matter of balancing between security and human rights or setting priorities? Authors are not agreed on this. Van Krieken argues that because security and human right are significant in and of themselves, it is important that they are given equal treatment and balanced on need.⁴³ Sometimes, the balancing is regarded as a matter of securing a balance within the human rights system.⁴⁴ This suggestion finds support in some jurisdictions which have accepted the balancing approach, adopting a 'proportionality

³⁹ Ibid.

⁴⁰ Posner A R 'Notes & dispatches - The law: Security Versus civil liberties' (2001) 288(5) *The Atlantic Monthly* 46-7; Dinh D V 'Freedom and Security after September 11' (2002) 25(2) *Harvard Journal of Law and Public Policy* 399.

⁴¹ J Bowyer Bell B J 'Terror: An overview' in Marius L, Kress L B & Wanek M G (1978) *International Terrorism in the Contemporary World* 42.

⁴² Ibid.

⁴³ Van Krieken P *Terrorism and the International Legal Order* (2002).

⁴⁴ See Kessing P V 'Terrorism and human rights' in Lagoutte S et al, *Human Rights in Turmoil: Facing Threats, Consolidating Achievements* (2007).

test' on the needs of society and the dictates of human rights. The Germany Federal Constitutional Court, for example, has laid down a three point prerequisite. It requires that any curtailment to civil liberties must be suitable, necessary and appropriate.⁴⁵ The court does not, therefore, uphold human rights over security, or vice versa, but undertakes a case by case evaluation of the situation based on the three determinants.⁴⁶

I now return to make a final comment on the questions posed in Chapter I of this thesis: Does the implementation of counter terrorism measures in Kenya and Uganda entail a legitimate restriction of human rights? In the enforcement of counter terrorism measures, is it possible for governments to play by the constraints of the rule of law? Is freedom during times of emergency as important as during peacetime? Is it possible and practical to observe art 4 of the ICCPR in the war against terrorism or should a lower threshold be established?

The experience in Kenya and Uganda is informed by what the executive of those states perceive to be the needs of the moment. While there is sufficient room within the constitutions of these states to undertake counter terrorism measures the sheer magnitude and frequency of attacks has often driven government decisions towards violations of human rights under the pretext of safeguarding public security. And, as was shown in chapter IV the government of Uganda has often used anti terrorism law to obtain political advantage over the opposition. Because of the nature of the terrorist threat, the governments of Kenya and Uganda find it difficult to observe the rule of law, respect human rights and democracy when terrorists flout them at will. For this reason, as the thesis has shown, it does appear that the executive takes the view that in times of emergency, rights should bend to the dictates of security

In the meantime, except for non derogable rights, discussed in Chapter VII, it would appear that certain rights, such as the right to association, assembly, movement and religion are subject to limitation in order to permit a greater safeguard to public security. Because of the challenges inherent in terrorism investigations, security personnel require a lot of time to process the evidence. Suspects may thus be held for long periods of time. The casualty is the liberty of the individual. In order to ensure that evidence is procured without contamination, it is necessary to allow un-inhibited search and seizure of materials. There is loss of individual privacy. The freedom of association and assembly of a suspect as well as freedom of speech may also suffer so as to limit the possibility of recruitment of young persons into extremist groups.

⁴⁵ Michalowski S & Woods L *German Constitutional Law: The Protection of Civil Liberties* (1999) 69–93.

⁴⁶ For a full discussion on this see Section 3 (d) Chapter VII.

5. Concluding remarks

In this thesis I have shown that, contrasted with international human rights law and the constitutions of Kenya and Uganda, the Prevention of Terrorism Act and the Anti Terrorism Act, in many respects, fall short of the normative⁴⁷ human rights standards. This is because human rights treaties and the constitutions are the ordinary and traditional measure we have for legality. There is, however, a new concern aboard. A disquiet that forces a comparison between normative and positive standards.⁴⁸ This is borne out by the frequency of global terrorist attacks, which have changed the world forever. The change is not only in social, political and economic terms but also in legal standing. It is debatable whether the drafters of international human rights treaties anticipated a situation such as is witnessed today.

At a practical level we must ask whether it is appropriate to permit an incursion into the human rights arena as a means to prevent terrorism or uphold the strict legal obligations and deal with the aftermath of terrorist attacks, as best as we can. There is indeed no empirical evidence in support of either side of the debate to suggest that the gathering of intelligence information whilst respecting human rights constrains security agencies in any significant manner. Similarly, the belief that useful intelligence can only be obtained through forceful and surreptitious means is a matter of anecdotal evidence only.

It is apparent that we need a new paradigm, new concepts and rules to balance the needs of security, constrain state power and, still, allow the enjoyment of fundamental rights. Constitutional absolutism, decreeing devotion to strict rules and norms even in times of emergency, does not provide direction for the governments in Nairobi or Kampala which have to make decisions on how to secure their populations against clandestine groups whose mission is to maim, kill and destroy property - and who, often, do not themselves fear death. Other 'models of accommodation' which attempt to integrate, within the existing normative structure, security considerations as well as observance of democratic values may provide different approaches to attaining an equilibrium between maintenance of the ordinary system of rules and times of emergencies.

I suggest that there is a need to move away from both these models for the following reasons. First, constitutional absolutism, without recognising exceptional circumstances where limitation of rights is legitimate, is naïve and duplicitous as it ignores the practical needs of society and constrains state power to

⁴⁷ A normative statement is one that states how things ought to be.

⁴⁸ A positive standard shows how things are 'in reality.'

respond to emergencies. Whilst its regard for the rule of law is attractive (because it appeals to set criteria) it does not provide a solution to a problem arising out of an unknown context. Secondly, though flexible and supple, 'models of accommodation' are not based on any recognised codes and acknowledged values and may often render themselves to abuse by government intent on undermining constitutional structures under the guise of meeting radical emergency needs. Both these models may result in destabilisation of fundamental principles, such as democracy, the rule of law and human rights. It is clear that fresh innovative legal concepts may be needed to deal with the current emergencies.

We have, also, to accept that criminal law, though permitting in-camera trials where state security is in issue, is fixated on public trials, and is thus not perfectly suited to combat a crime which itself thrives in secrecy. To prove guilt in a criminal trial, with regard to terrorism, the state has to produce intelligence reports obtained covertly, and whose production may be objected to, and which may jeopardise other ongoing investigations or risk exposing intelligence officers engaged in the operations. The fact that security matters are by nature secret, means that the efficacy of extra legal measures, as well as their effectiveness, while perhaps violating human rights, may not be open to public scrutiny.

Those who may be tempted to criticise the suggestion to suspend certain rights in a time of crisis must not forget that democracies have survived precisely because they have occasionally suspended traditional rights and guarantees.⁴⁹ An example often given is that of the suspension, in 1861, of the right to *habeas corpus* by President Lincoln during the American civil war. Indeed this is not the first time that a suspension of civil rights may be adopted. In the bouts of left-wing separatist terrorism in Europe of the 1970s and 80s, governments in the region suspended civil liberties with marked success.⁵⁰

6. Recommendations

Globally, the security crisis set off by September 11 does not appear to have an end in sight. The fight against terrorism is clearly in for 'the long haul'. As long as terrorists continue to have access to funds and weapons, the world shall continue to experience a protracted period in which the enjoyment of civil liberties will continue to shrink. The challenge for most states is whether they have built 'bulwarks of liberty that can

⁴⁹ William H Rehnquist *H W All the Laws but One: Civil Liberties in Wartime* (1998).

⁵⁰ Horchem J H 'The lost revolution of West Germany's terrorists' (1989) 1(3) *Terrorism and Political Violence* 353–360.

endure the fears and frenzy of sudden danger - bulwarks to help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile.⁵¹

In this part of the thesis I make recommendations that may hopefully improve both the legal and institutional capacities for dealing with terrorism.

In dealing with terrorism and its effects on human rights it is critical to distinguish between imminent and long-term threats. Once this basic taxonomy is realized it becomes clear that civil liberties must be prepared to flex more in times of immediate danger than when there is sufficient time for crafting a response. Typically, the threat of an imminent danger raises panic at all levels of government and justifies greater intrusions into fundamental rights than would otherwise be necessary if the risk were detected earlier. Associated with this is the real fear that legislation crafted in panic and intended to serve in times of crisis may end up being permanent. The exception is then raised to the normal, and liberties ceded to address an emergency are lost forever. In this section I discuss the legal, institutional and public participation reforms as immediate necessities while the strategic option is long term.

(a) Legal

There is no doubt that states are under an obligation to protect their populations against terrorism. Simultaneous with this duty is the obligation to ensure compliance with human rights that have not been suspended under emergency as well as other applicable laws. This view regards counter-terrorism measures and security as complementary, and a successful anti- terrorism program one that promotes a respect for human rights.

(i) International law

An evaluation of global trends in terrorism reveals two facts: the world is faced with an unprecedented form of terrorism and states are employing domestic legislation to enlarge their capacity to detect and punish acts of terror. This legislation, to a large extent, violates international human rights law. It would however be injudicious to end the assessment at that point. The question to be answered is this: are treaty benchmarks unobtainable because of a failure by the states to comply or because the minimum standards set are unrealistically high? Because the answer to this question lies in the complexity of the new circumstances

⁵¹ Brennan W 'The quest to develop a jurisprudence of civil liberties in time of security crises 18 *Israel Y.B on Hum Rts* 20.

provided by a perpetual threat posed by terrorism then the vibrant and dynamic nature of international law may find it necessary to shift towards accommodating an innovative response to new global realities.⁵²

There appears to be a need to reconsider the restrictions imposed on governments and to allow a larger foray into personal liberties for the benefit of the greater majority. This will of necessity require a reconsideration of international human rights treaties,⁵³ directed at the category of rights considered absolute.⁵⁴ Proposals to reconsider the derogation procedure may call for an amendment. Any amendment, if accepted, will be done through optional protocols. This proposal is a two edged sword. It may cure but it may also injure. While it may provide states freedom to conduct anti terrorism activities it will also afford them means for human rights abuses. But it is an acknowledgement of the fact that the world is faced with new problems and that there is a need to establish new norms and standards to govern the 'new normal.'

Further, for derogable rights: the limits imposed by international law may need to flex to permit an expeditious application of the needs of security in times of imminent danger so long as the intrusions are neither arbitrary nor abusive. The requirements of appropriateness, necessity and proportionality may sway in favour of public safety if it is shown that a security agent has taken action on the basis of sound reasons to believe that a suspect is a danger to society. This means that the present minimum standards for legality need to be revisited to establish a lower threshold for violence and crime perpetrated for political motives. Provisions limiting household raids, incommunicado detentions, refoulement, wire-tapping of communication and fair trial rights may need to be re-examined. This will also apply to freedom of expression and assembly. This really is the give and take necessary to balance the competing rights of the individual against the interests of the public.

Lord Justice Viscount Simonds states:

The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society.⁵⁵

⁵² It was not too long ago that international law recognised and accommodated the principle of use of force in humanitarian intervention. See Nicholas J W 'Legitimizing humanitarian intervention: Principles and procedures' (2001) 2(2) *Melbourne Journal of International Law* 550.

⁵³ See Art 40 *Vienna Convention on the Law of Treaties* 1969.

⁵⁴ Art 4 ICCPR.

⁵⁵ *Shaw v DPP* [1962] AC 220 at 267-268.

The conduct of states, from liberal democracies to obdurate dictatorships, indicates that international human rights treaties constrain state conduct in the prevention of terrorism. From the United States to Ethiopia, there is a commonality of interest in obtaining intelligence to prevent terrorism. It would appear that there is a change in state behaviour that reflects a slow a shift in customary international law with respect to rights and how to deal with the perpetual threat to society.⁵⁶ For state practice to develop customary international law, "the practice must be "extensive and virtually uniform" and must be actual as opposed to theoretical.⁵⁷ While such a practice may take long I take the view that this is the practice among states that suffer from frequent terrorist attacks, not the safe havens.

But is a legal regime that subordinates rights to security desirable? It appears that with respect to terrorism, states lean towards maintenance of security rather than preservation of rights. A fully public amendment to the international human rights treaties would be rendering a *de jure* place to what is already *de facto*.

In making these proposals I remind myself of the need to be careful when discussing international law because of the interplay between custom and treaty law, resolutions of the UN General Assembly and the Security Council and case law developed by regional and international courts. At present it does appear that only state conduct may be seen to support a redefining of international law to enlarge the power and authority of states to further limit individual liberties in favour of public safety. The reason, while simple, is this: only the wearer of the shoe knows where it pinches. States know the challenges involved in providing public safety within the constraints imposed by international human rights law.

The Vienna Convention recognises that a state may withdraw or terminate its obligations under a treaty if there is a fundamental change of circumstances constituting the essential basis of the consent of the parties to be bound by the treaty.⁵⁸ I take the view that, ultimately, terrorism may present such circumstances. The grim options are two: the security of society or the rights of the terrorist suspect.

⁵⁶ There is general agreement that customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*. See Bellinger H 'Open letter to the International Committee of the Red Cross' available at www.defense.gov/.../Customary_International_Humanitarian_Law.pdf accessed on 15. 2.2014.

⁵⁷ *Ibid.*

⁵⁸ *Supra* n 64 art 62.

Periods of detention without charge, for example, whilst a violation of liberty, may be necessary to allow executive evaluations of danger to the public, and to be accepted even before court sanction. This proposal is made on the basis that the executive may have some intelligence which supports a detention but which cannot be verified in court. To ignore this would be to jeopardise the lives of people and state security. But of course this proposal is made with the awareness that the Covenants allow a declaration of emergency and that the proposal is prone to abuse. In answer to the first concern I argue that states cannot live under a perpetual state of emergency. There will be moments when a government may obtain information that an attack is imminent. There is insufficient time to operationalise the processes of emergency laws and yet it has to act to save lives and property. In such circumstances it would be better to act than risk the lives of many people.

Time limits for questioning suspects need to be enlarged to permit security agents latitude in obtaining information. The prohibition of the return of an asylum seeker to 'territories where his life or freedom would be threatened on account of his race, religion, nationality, and membership of a particular social group' should be reconsidered if the refugee is a person involved or associated with a terrorism group. In general, there is need to increase the capacity of governments to deal with violence directed at the public.

(ii) Domestic law

This study has demonstrated that the investigation and prosecution of terrorism poses great challenges. A crime planned and executed in great secrecy, with actors separated by time and space requires certain specialised knowledge to prosecute. This is the reason the anti terrorism legislation has sought to make strong provisions with respect to surveillance and search and seizure of materials that may aid in investigations. Even though evidence may be available, its production and protection in the traditional criminal courts may be subject to several procedural challenges. Sometimes witnesses may be placed at risk and the judicial officers may not be well trained to undertake a trial of such a technical crime. This leads me to ask the question: Are traditional criminal law courts sufficiently equipped to handle cases of terrorism? To answer this query, we must ask a related but more fundamental question: Is the fight against terrorism a matter of criminal law enforcement or preservation of national security?

Whichever answer we give, we must recognise the need for a system that balances the interests of public security and individual liberty. This is no longer a luxury but an imperative intended to combat terrorism but still uphold the rule of law.

I take the view that the threat of terrorism is both a matter of criminal law enforcement and national security. I also take the view that the traditional criminal justice system cannot handle trials of terrorism suspects. Consequently I propose the establishment of a special court for the prosecution of terrorists. This would be a 'National Security Court' with limited jurisdiction which will provide an effective, constitutionally balanced system for the detention and trial of suspected terrorists. This court will afford an appropriate due process mechanism under domestic and international legal standards. This court will make provision for sensitive issues such as: bail conditions for terrorists (who may abscond trials) and the handling of classified information and the procedural rules of evidence.

For it to work well and receive public approval, it must not work like the military tribunals of Uganda. It must define its jurisdiction as a support for national security and, as far as possible, observe acceptable legal norms. It should, accordingly, provide for legal representation, whether by own counsel or Special Advocate, and be liable to a challenge by suspects on the procedure and evidence.

This proposal is made with awareness that terrorism is unlike any 'ordinary' crime because it operates in a grey area between traditional warfare and criminal conduct. To meet the requirements of this unique situation, the system of trial should engage the concerns of criminal law and have due regard to the needs of national security. This court would ensure that the credibility of the trials is maintained and the offender gets due justice. The necessity for such a court to prosecute international terrorists is always evident. The trial of the 7th August 1998 Nairobi, USA embassy, bombers was not conducted in Nairobi but in the USA. The reason given was the unsuitability of the forum in Nairobi.

The arguments for the establishment of such a court are many. First, the threat of terrorism does not appear to have an end in sight. There is therefore need for a long term system to deal with the problem. Secondly, the number of terrorist incidents has produced a growing coterie of suspects that need a specialised court if they are to be processed expeditiously. A 'National Security Court' will ensure that there is sufficient training for the judges, magistrates, the prosecutors and other court staff dealing with terrorism cases.

Thirdly, the establishment of such a court will provide legitimacy for the processing of terrorism suspects. Legitimacy is a vital strategic weapon in the exercise of political power and the use of force. Maintaining this strategy will deny the terrorists the underdog recognition they desire and sustain the state's role as the guardian of human rights and the rule of law.

A law establishing a National Security Court will provide for a longer period of detention of suspected terrorists beyond the 24 hour period that the constitution permits suspects to be held without being brought to trial, extended detention for suspects awaiting deportation to allow further interrogation, and it may also extend the jurisdiction of the court to suspects who may be found outside jurisdiction but who have committed a domestic crime. This is a practical approach to dealing with suspects who manifest criminal and 'enemy combatant' traits.

This approach has many benefits. It allows the executive confidentiality in the manner that the trials are conducted, firmer security and sufficient flexibility in the gathering of intelligence.

I have argued that terrorism is both a matter of criminal law enforcement and national security. The latter is a function of the executive arm of government, not the judiciary. Under national security, the executive retains wide discretion in confronting a security threat. In law enforcement the state seeks to discipline an errant member of society or organ of government. To do so the state takes its complaint before a court which acts as a bulwark permitting the accused the right to remain silent and yet be presumed innocent unless the executive proves them guilty.

Secondly, in order to enhance the available legal tools necessary for fighting terrorism in Kenya and Uganda these countries should implement all anti terrorism resolutions passed by the UN Security Council, the UN General Assembly, the Commonwealth, AU, IGAD and EAC. Further, in implementing the global counter terrorism measures the states should establish an independent civilian assessor on counter terrorism legislation.⁵⁹ Closely linked to this is the need for these states to establish a peer review mechanism in which states consider and critique the extent to which each state's counter terrorism efforts align with human rights.

⁵⁹ This is under consideration by the Joint Anti Terrorism Committee, a body established by the East African Community.

(b) Institutional Reform

To safeguard victim and perpetrator rights, Kenya and Uganda should take practical steps to improve executive co-operation in the investigation and prosecution of terrorism. Independently, these states should build internal capacities in the area of intelligence gathering. Further, they should set up compulsory training for security personnel so as to create awareness on humanitarian and human rights law. Model investigation and prosecution materials, showing best practices, should be made available and shared with all persons involved in handling cases related to terrorism. There is, also a need for protocols to govern executive best practices in the area of crisis management, preventive, mitigation and rehabilitative measures. The Media and civil society, which have a wide social reach, need to be involved in outreach on the effects of terrorism in communities.

(c) Public participation

Counter terrorism efforts are packaged as 'top secret' programs in which the government plays its entire hand close to its chest. In so doing it excludes a crucial constituency: the public. It should be realized that anti-terrorism activities are not the exclusive responsibility of the executive. The public has an interest. For this reason governments should cultivate public trust so as to tap into the information resource that is frequently in the public domain. It would then be easier to prevent terrorism than having to deal with the resultant effects.

(d) Strategic

I recognise that terrorism is better prevented than punished. For this reason the best anti terrorism response is prevention. To do this, states need to focus on ways to eliminate the causes of terrorism. Poverty, hunger, discrimination, unequal distribution of material resources and lack of economic opportunities generate resentment and provide fodder for persons seeking to recruit young people into the terrorist networks.

Equality in socio-economic development is a common denominator in addressing root causes of terrorism. Together with equality, states should develop good governance mechanisms. Corruption makes it possible for terrorism to thrive. It fuels and drives channels of accessibility to funds and weapons and the preparation of false documentation without which terrorism cannot survive. A transparent and accountable administration is a critical necessity in fighting corruption.

At the international level, the wealthy states need to engage in a socially just management of the effects of economic globalisation. On the social plane, it has been shown that religious discontent breeds fanaticism, which is responsible for a great many incidents of terrorism. Religious tolerance and a respect for minorities therefore will eradicate the umbrage associated with terrorism founded on religion.

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