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**FIGHTING TERROR IN EAST AFRICA: LESS LIBERTY FOR
MORE SECURITY? ANALYSIS OF ANTI-TERRORISM
LEGISLATION AND ITS IMPACT ON HUMAN RIGHTS**

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Research Dissertation presented for approval of the Senate in fulfilment of part of the requirements for a Masters of Laws, *LL.M*, in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I do hereby declare that I have read and understood the regulations governing submission of a Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this university, and that this dissertation conforms to those regulations.

DECLARATION

I, Nerida Nthamburi, do hereby declare that this minor dissertation submitted for the degree of Master of Laws at the University of Cape Town has not previously been submitted by me at this or any other University, that it is my own work and that all sources and all referenced material in it have been acknowledged.

Nerida Nthamburi

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DEDICATION

For my parents, for believing in me.

To the memory of Cathryn Nderitu who lost her life that fateful August 1998 when terrorists targeted East Africa. May her life not have been in vain.

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LIST OF ABBREVIATIONS

African Charter	African Charter on Human and People's Rights
AU	African Union
CAP	Chapter
CIA	Central Intelligence Agency
CTC	Counter-terrorism Committee
EACTI	East Africa Counterterrorism Initiative
EAPCCO	East Africa Police Chiefs Co-operation Organisation
ECHR	European Convention on Human Rights
GA	General Assembly
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
NEPAD	New Economic Partnership for Africa's Development
OAU	Organisation of African Unity
OCHR	Office of the High Commission on Human Rights
SC	Security Council
UK	United Kingdom
UN	United Nations
US	United States of America

'We speak about laws and policies. But we should never forget that this is about people, about families. Terrorism creates victims. Counter-terrorism is creating new victims.'

Nicholas Howen, International Commission of Jurists

CHAPTER ONE

INTRODUCTION

1.1 Introduction

This study assesses the impact of terrorism and counter-terrorism legislation on the rule of law, constitutional law and human rights. While terrorism affects almost all African states¹, the study focuses on three East African countries, Kenya, Tanzania and Uganda. This region has experienced terrorist attacks in the past and has the potential to experience even more terrorist attacks due to its proximity to countries and regions that sponsor and harbour terrorist organizations, such as countries in the Middle-East, Somalia and Sudan.² It is significant to note that Kenya, Tanzania and Uganda have a common legal background dating from the East African Community set up in 1967 as well as similar laws and policies. The Community was dissolved in 1977 but was re-established in 1999.³ The Community currently consists of Kenya, Tanzania and Uganda as well as the recently included countries, Rwanda and Burundi, in 2007.

The study assesses the relevant human rights jurisprudence on terrorism and analyses the approach of various human rights monitoring bodies and domestic judicial bodies in dealing with terrorism and human rights related matters.

This dissertation shall address the following issues:

1. Whether the legislative measures adopted by the three Eastern African countries under study are compatible with international and constitutional human rights standards.

¹ Egypt, Somalia, Sudan, Eritrea are examples of countries in the North and Horn of Africa which have been targets for terrorists. Somalia and Sudan have been suspected of hosting and training terrorists who then attack neighboring countries such as Kenya and Tanzania. See Victor Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-terrorism, Law and Policy*, (2005: Cambridge, Cambridge University Press).

² See also Reuters News, *U.N urges States to get Moving on Terror Plan*, 16th May 2007. Available at <http://www.reuters.com/article/worldNews/idUSL1655876820070516> Accessed on 10th June 2007

³ The Treaty Establishing the East African Community was signed on 30th November 1999 and came into force on 7th July 2000 after Kenya, Uganda and Tanzania had ratified it. Available at <http://www.africa-union.org/root/AU/recs/eac.htm> (Accessed on 10 August 2007).

2. Whether human rights can be reconciled with security concerns and how best that reconciliation might be achieved.

1.2 Background to the Study

On 7th August 1998, at approximately 10: 45am East African time, suicide bombers set off car bombs in vehicles which exploded at the American Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. In Nairobi, 213 people were killed and an estimated 4000 people injured.⁴ In Dar-es-Salaam, 12 people were killed and another 35 injured.⁵ At the same time there was an unsuccessful attempt by the same group of terrorists to target the American Embassy in Kampala, Uganda. These unprecedented attacks reverberated throughout the international community and subsequently an international terrorist organisation based in Afghanistan, *al-Qaeda*, headed by suspected international terrorist, Osama bin Laden, claimed responsibility for the attacks.⁶ The target of the attacks was undoubtedly the American embassies and staff but almost all the victims were Kenyan and Tanzanian citizens.

After 1998 the East African region experienced more attacks which reiterated the need for effective security measures and a formalised counter terrorism regime. In 1999, Ugandan security forces foiled a plot to bomb the US embassy in Kampala.⁷ In 2002, Kenya experienced two further terrorist strikes resulting in multiple deaths, this time in the form of simultaneous missile attacks on an Israeli-owned hotel at Kenya's coastal town, Mombasa, and an Israeli-chartered aircraft departing from the Mombasa airport carried out by the international terrorist organisation *al-Qaeda*.

Unlike the other two East African countries prior to the August 1998 bombings Uganda had experienced acts of terrorism albeit on a domestic level. Uganda underwent years of

⁴ See also David H Shinn, 'Fighting Terrorism in East Africa and the Horn', (September 2004) *Foreign Service Journal*, 36 at 37.

⁵ *Ibid.*

⁶ Pamala Giset and Sue Mahan (eds), *Terrorism in Perspective*, (2003: USA, Sage Publications), 53.

⁷ United States Department of State Report, *Patterns of Global Terrorism*, (2000:United States). Available at <http://www.state.gov/s/ct/rls/crt/2000/2418.htm>. (Accessed on 3rd June 2007).

internal unrest as a result of insurgent campaigns carried out by the Sudanese-backed Lord's Resistance Army (LRA) in northern Uganda and the Sudanese and Congolese-supported Allied Democratic Forces (ADF) in Western Uganda.⁸ The Ugandan government has classified these groups as 'terrorist organisations' and has proceeded to charge several individuals linked to these groups with terrorist offences.⁹

These terrorist attacks underlined the emerging threat of international terrorism to the region. Notably, Tanzania was one of the first states in Africa to implement stringent antiterrorism laws.¹⁰ The Ugandan Anti-Terrorism Act was passed in 2002 while the Kenyan Suppression of Terrorism Bill was drafted in 2003 but has not yet been adopted as law.

1.3 A Brief look at the Constitutional History and Human Rights in East Africa

Kenya, Uganda and Tanzania, all former colonies of Britain, received independence in the early 1960's.¹¹ Soon after independence, all the three states were one-party states. During this one-party regime in all three states, human rights were systematically violated by the governments despite the presence of Bills of Rights in their Constitutions and citizens had little if any recourse to the courts for redress of violations committed¹². After independence, Uganda went through a tumultuous period with military coups, dictatorships and internal conflicts through to the 1990's during which human rights violations were committed by the government against its citizens.¹³ In Tanzania, one-party rule came to an end in 1995 with the first democratic elections held in the country since the 1970s.

⁸ Stefano Betti, 'The Duty to Bring Terrorists to Justice and Discretionary Prosecution', (November 2006) *Journal of International Criminal Justice*, 1104.

⁹ *Ibid.*

¹⁰ The Prevention of Terrorism Act, No. 21 of 2002 (Tanzania). See also Annette Hubschle, 'South Africa's Anti-Terror Law: Among the Most Restrictive?' (2005) 4 *African Security Review*.

¹¹ Kenya was granted independence in 1963 and declared itself a Republic the following year; Tanzania was a colony of Germany from 1880-1919 and became a British colony in 1919. In 1961, Tanganyika gained independence and merged with the island of Zanzibar to form the United Republic of Tanzania in April 1964. Uganda became independent in 1961 and declared itself a Republic in 1967.

¹² For further reading see Kabudi, PJ, *Human rights jurisprudence in East Africa: A comparative study of Fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda* (1995: Baden-Baden, Nomos Verlagsgesellschaft).

¹³ See 'East Africa Human Rights Report- Uganda', (2003) 1 *East African Journal of Human Rights and Democracy*, 73.

In the 1980's and 1990's the Kenyan government was criticised for its violation of human rights. There were allegations of state-sponsored torture, illegal arrests, intimidation of the press by security forces, disappearances and murder.¹⁴ Starting in the latter decade of the twentieth century all three East African countries underwent constitutional and regime changes leading to an opening up of democratic space, increased awareness of human rights and recourse to judicial measures to ensure that the state met its human rights obligations.

In the early 1990's Kenya underwent a constitutional change with the introduction of multi-party politics in 1992. Kenya had been a single-party state since 1982. Following this, there was a gradual opening up of democratic space culminating in a regime change in 2002.¹⁵ Tanzania's independence Constitution of 1961 did not have a Bill of Rights but in 1985 a Bill of Rights was introduced into the Constitution by way of a constitutional amendment.¹⁶ The Bill of Rights Tanzania's constitution protects both economic, social and cultural rights and civil and political rights.¹⁷ The Constitutions of all the three East African countries are based on the observance of a democratic system of government committed to the rule of law and to the respect, promotion and protection of fundamental rights and freedoms.¹⁸ All three countries' constitutions include a Bill of Rights. The protection of human rights is a function of the State through constitutional provisions. The constitutions of the three countries are supreme and any laws in conflict with the Constitution are null and void to the extent of the inconsistency. If legislation conflicts with the any provisions of the Constitution, the constitutional provisions prevail and the legislation is regarded as illegal, unconstitutional and null and void. All

¹⁴See Human Rights Watch, 'Human Rights Watch Report, Kenya' (1993). Available at http://www.hrw.org/reports/1993/WR93/Afw-02.htm#P104_44398, (Accessed on 10 September 2007). See also Yash Ghai, and J. P. W. B. McAuslan, *Public law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, (1970: Oxford University Press, Nairobi).

¹⁵ See Fred Matanga 'Kenya: A Chequered Path to Democracy', (2003) 1 *East African Journal of Human Rights and Democracy*, 31.

¹⁶ See 'East Africa Human Rights Report- Tanzania', (2003) 1 *EA Journal of Human Rights and Democracy*, 40 at 43.

¹⁷ Part III, Constitution of the United Republic of Tanzania (1997 edn).

¹⁸ *Supra* note 12.

legislation is expected to comply with constitutional norms and any provisions conflicting constitutional guarantees are void.¹⁹

1.4 Significance of the Study

The study identifies problems with counter terrorism legislation and practices in the three identified states as well as analyse the impact of the ‘war on terror’ in these countries with regard to the rule of law and human rights principles.

The study assesses whether these recent anti-terrorism legislation as well as counter-terrorism measures in East Africa conform to the requirements of the rule of law. The study hopes to make a contribution leading to a review of anti-terrorism laws enacted in East Africa in terms of ensuring their compatibility with human rights and constitutional principles.

1.5 Literature Review

This study focuses on three democratic East African countries and what effect counter-terrorism measures have on human rights and constitutional freedoms in these countries. Blakesley²⁰ has noted that:

The greatest danger posed by terrorism to our democracy and to our constitutional republic may be our executive branch’s overreaction to terrorism and its use of terrorism to erode the constitutionally mandated checks and balances and sharing of powers in foreign affairs, war powers and combating international crime.

Not much has been written on the effect of counter terrorism laws on human rights in the East African region. However, authors focusing on the Southern African region have noted that the issue of terrorism and the sustainability of human rights is a key challenge

¹⁹ Section 3, Constitution of Kenya (2000 edn), Section 30 (5) Constitution of the United Republic of Tanzania (1997), Article 2, Constitution of Uganda (1995).

²⁰ Christopher Blakesley, *Terrorism, Drugs, International Law and the Protection of Human Liberty: A Comparative Study of International Law, its Nature, Role and Impact in Matters of Terrorism, Drug Trafficking, War and Extradition* (1992: New York, Transnational Publishers).

in the region. Charles Goredama²¹ briefly analyses counter terrorism practice in South Africa with an emphasis on initiatives against terrorism and the impact of these initiatives on certain human rights. He concludes with a warning on the exclusion of the human rights regime in the area of counter terrorism while conceding, that in certain circumstances, it may be permissible to limit certain rights for legitimate national security purposes.²²

Annette Hubschle²³ examines South Africa's anti-terrorism legislation and draws similarities with other anti-terrorism laws around the world such as the United States (US) and United Kingdom (UK) on certain aspects such as erosion of fundamental civil liberties. She however comes to a conclusion that South Africa's legislation is liberal and one of the least restrictive antiterrorism laws in place.²⁴

Makau Mutua²⁵ argues that human rights are under challenge from the war on terrorism influenced by American and European (what he terms as Western-dominance) focus on security. He states that Western domination of the human rights debates 'crushes dissent and virtually eliminates any opportunities for a robust dialogue on the scope of human rights'.²⁶ Mutua acknowledges that the war on terror has given the US the ability to narrow its scope of human rights and in some instances even exclude certain known rights.²⁷ The significance of this argument is that that a change may occur in the definition of human rights in many countries around the world influenced by the perception of Western governments of the supremacy of security issues over human rights.

²¹ Charles Goredama, "Initiatives against Terrorism in Southern Africa: Implications for Human Rights" (2003) 12 (1) *African Security Review*, 91 (hereinafter referred to as Goredama).

²² *Ibid*, 99.

²³ Annette Hubschle, *South Africa's Anti-Terror Law: Among the Least Restrictive?*, (2005) 14 (4), *African Security Review*.

²⁴ *Ibid*.

²⁵ Makau wa Mutua, 'Terrorism and Human Rights: Power, Culture and Subordination', 8 (2002) *Buffalo Human Rights Law Review*, 302.

²⁶ *Ibid*, 302.

²⁷ *Ibid*.

There are commentators who believe that counterterrorist policies are compatible with enjoyment of human rights principles. Charters²⁸ examines counterterrorist policies in six countries: the United Kingdom, Germany, Italy, France, Israel, and the United States. In relation to implications of counterterrorist policies on human rights he argues that there is no 'wholesale rush to restrict freedoms' despite rhetoric about the need to 'stamp out terrorism'.²⁹ He further notes that there are several infringements on human rights common to counterterrorist measures which include: expanded search and arrest powers, increased periods of detention, proscription of terrorist organizations, and expanded deportation of powers. However, given the apparent resilience of democracies in the face of terrorism, and the success in countering terrorist attacks, Charters argues that it is possible for governments to balance the security requirements with protection of human rights in countering terrorism.

The United Nations has taken an active role in this context and has warned of the increasing violation of human rights in the name of counter terrorist policies. There have been various resolutions by the General Assembly calling on the High Commissioner for Human Rights to take an active role in examining the issue of the protection of human rights and fundamental freedoms in the context of measures to combat terrorism and to co-ordinate efforts to promote a consistent approach on this subject.³⁰ The Office of the High Commission on Human Rights (OCHR) has made several contributions on the question of the protection of human rights in the context of counter terrorism initiatives including the Report of the High Commissioner for Human Rights to the 58th Session of the Commission on Human Rights, *Human Rights: A Uniting Framework*³¹ and *Guidance notes to the Counter-Terrorism Committee of the Security Council*³² The High

²⁸ David A. Charters, *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries*, (1994: Westport, CT, Greenwood Press).

²⁹ *Ibid*, 221.

³⁰ See General Assembly Resolution 59/191 (A/RES/59/191), December 20, 2004 and Commission on Human Rights Resolution 2004/87 (E/CN.4/RES/2004/87), April 21, 2004.

³¹ Report of the High Commissioner for Human Rights to the 58th Session of the Commission on Human Rights, *Human Rights: A Uniting Framework*, E/CN.4/2002/18

³² Available at www.un.org/Docs/sc/committees/1373/sel-doc.html (Accessed on 3 July 2007).

Commissioner for Human Rights has consistently highlighted the role of respect for human rights as an indispensable part of a comprehensive counter terrorism strategy.³³

In contrast to the above views, detractors question whether it is possible to fight terrorism effectively when a respect for human rights is required. Pro- antiterrorism legislation activists justify this by arguing that the public is more vulnerable to a devastating terrorist attack today than it has been in the past, and consequently that the executive is in the best position to protect the public.³⁴ Posner and Vermeule³⁵ emphasise the virtues of unilateral executive actions and argue for making extensive powers available to the executive as warranted. They are of the view that the judiciary should neither second-guess security policy nor interfere on constitutional grounds.

This study hopes to contribute to the above academic writings with a focus on the East African region as limited studies have been done to analyse the potential impact of anti-terrorism legislation on human rights in this region.

1.6 Methodology

The study was conducted through literary study by means of information acquired from existing scholars and analysis of international law and to a limited extent, case law. The chief research tools were the internet and books and periodicals. As per University regulations, strict care was taken to acknowledge these sources and reference material was correctly cited.

The study examined particular provisions within anti-terrorism legislation and compared these with existing constitutional and human rights standards.

³³ Statement of High Commissioner for Human Rights, Louise Arbour, to the Biennial Conference of the International Commission of Jurists, '*Security Under the Rule of Law*' Berlin August 27-29, 2004.

³⁴ See Posner Eric A., and Vermeule, Adrian, *Terror in the Balance: Security, Liberty, and the Courts*, (2006: Oxford University Press, USA). They argue that security concerns take precedence over human rights in part to the nature of terrorism. In the past, terrorists could not reach the across borders as easily as they can today, and they did not have the technological means to kill as many people as they can today.

³⁵ *Ibid*, 12-14.

1.7 Chapter Outline

Chapter One has introduced the aims of the study and provided a statement of the problem and a brief background of the constitutional history and state of human rights and terrorism in Kenya, Tanzania and Uganda. Chapter Two provides an overview of the measures that states have undertaken to counter terrorism in international law and at the African regional level.

Chapter Three provides an analytical framework with which terrorism can be addressed. It considers the relationship between the need to protect individuals from terrorist attacks and the need to protect the rights of persons suspected of having committed terrorist crimes. The question of balancing security needs of a nation with a respect for human rights is explored.

Chapter Four analyses the international and domestic legal framework of this question of balance, mainly by conducting a case study of the international jurisprudence on terrorism of the UN Human Rights Committee and the domestic jurisprudence of the United Kingdom and the United States of America.

Chapter Five analyses anti-terrorism legislation in Kenya, Tanzania and Uganda with the objective of analysing the compatibility of these laws with human rights. The Chapter explores the viability of regional arrangements to fight terrorism and proposes that these should be adopted.

Chapter Six provides a conclusion to the study as well as recommendations arising from various issues raised.

CHAPTER TWO

INTERNATIONAL AND REGIONAL EFFORTS TO COUNTER TERRORISM

2.1 Introduction

This chapter attempts to define the term ‘terrorism’ and identify the factors that contribute to its occurrence. It provides an overview of the measures that states have taken at the international level and at the African regional level to counter terrorism. The international treaties and other documents that have been adopted by states within the framework of the United Nations (UN) and African Union (AU) are analysed as are the obligations that these documents place on states. This discussion provides the context within which the three countries at hand have each taken steps to enact domestic legislation dealing with issues pertaining to terrorism.

2.2 Terrorism: A Background

On 29th September, 2001 the Security Council adopted Resolution 1373³⁶ under Chapter VII of the United Nations Charter obligating States to implement more effective counter-terrorism measures at the national level and to increase international co-operation in the struggle against terrorism. The Resolution also established a Counter Terrorism Centre to monitor the issue of terrorism and to receive reports from States on measures taken in implementing counter-terrorism measures.

Even at these formative stages of the international framework to fight terrorism, the United Nations High Commission for Human Rights emphasised that the ‘best strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law’.³⁷

³⁶ Security Council Resolution S/RES/1373 (2001), Threats to International Peace and Security Caused by Terrorist Acts.

³⁷ Statement of the UN High Commissioner for Human Rights, Sergio de Mello to the Counter Terrorism Centre, October 21, 2002. Available at <http://www.un.org/Docs/sc/committees/1373/HC.htm>. (Accessed on 7th June 2007).

2.2.1 Defining Terrorism

Defining terrorism is not as easy as it may seem. At the international level, there are inconsistent definitions of the terms ‘terrorism’, ‘international terrorism’ and ‘terrorist’. Thomas Mitchell has observed quite rightly that terrorism is not a monolithic concept.³⁸ The definition is often used as a political tool - in attempts to deny legitimacy to opponents³⁹. For example, in the 1950’s the British colonial authorities in Kenya referred to the *Mau Mau* rebels⁴⁰ as terrorists while the group was regarded as a legitimate liberation movement by the Africans.

An International Convention on Terrorism⁴¹ is still in the process of being drafted and there is as of yet no internationally uniform recognized definition of the term. Nevertheless at the international and regional level, some effort has been made to define and adopt rules relating to international terrorism. The United Nations has adopted 13 international conventions relating to acts that amount to terrorism.⁴² These international

³⁸ For an overview of the difficulties in defining the term ‘terrorism’ see Thomas H Mitchell, ‘Defining the Problem’ in David Charters (ed) *Democratic Responses to International Terrorism* (1991) 13, T. Franck & S Senecal, ‘Porfiry’s Proposition: Legitimacy and Terrorism,’ (1987) *Vand J Transnat’l L* 195, R Higgins, ‘The General International Law of Terrorism’ in R Higgins & M Flory (eds), *Terrorism and International Law* (1997: London, Routledge), 13, Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (2006: Oxford and Portland, Oregon, Hart Publishing) 83-120.

³⁹ Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (2006: Oxford and Portland, Hart Publishing) 85 (hereinafter referred to as Tal Becker).

⁴⁰ The *Mau Mau* was an insurgency by Kenyan rebels against the British Colonial administration that lasted from 1952-1960. See D Throup, *Economic and Social Origins of Mau Mau 1945–1953*, (1988: Athens, Ohio University Press).

⁴¹ For a history on the search for a definition of terrorism see Tal Becker, (note 39), 89.

⁴² These Conventions include Convention on Offences Committed on Board Aircraft, 163, Convention on the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, *entered into force* Oct. 14, 1971; Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, 974 U.N.T.S. 178, *entered into force* January 26, 1973; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973; Convention against the Taking of Hostages G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), *entered into force* June 3, 1983; Convention on the Physical Protection of Nuclear Material, 1980; Convention on the Suppression of Terrorist Bombing, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), *entered into force* May 23, 2001; Convention on the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), *adopted* 9 Dec. 1999, *entered into force* 10 Apr. 2002; International Convention for the Suppression of Acts of Nuclear Terrorism, 2005. The full

conventions describe acts that amount to terrorism which include: hijacking, taking of hostages, aerial sabotage, terrorist bombings and attacks on diplomats and other internationally protected persons. The United Nations General Assembly has also passed Resolutions condemning international terrorism. General Assembly Resolution 2625⁴³ in particular requests states to desist from supporting terrorism.

The adoption of General Assembly Resolutions and binding Security Council Resolutions pertaining to terrorism herald the possibility of a uniform internationally accepted definition of terrorism. The UN Secretary General, in a 2005 report, *'In Larger Freedom'*, urged states to adopt a comprehensive international convention on terrorism that would espouse a uniform definition of terrorism⁴⁴.

A perusal of the 13 UN terrorism conventions provides an idea of what constitutes terrorism. The treaties list offences that amount to terrorism and oblige member states to criminalize these offences under domestic law. From these treaties it is possible to list a number of offences that can be legally considered as terrorism, although this list is not exhaustive when it comes to the concept of terrorism.

The 1979 International Convention against the Taking of Hostages⁴⁵ was the first international instrument to use the term 'international terrorism'. In its Preamble at paragraph 5, the document stresses that all acts of taking of hostages are to be considered manifestations of international terrorism. The International Convention for the Suppression of Terrorist Bombings⁴⁶ significantly criminalises terrorist offences under

text of these conventions is available at <http://www.un.org/terrorism/instruments.html>. (Accessed on 13th May 2007).

⁴³ United Nations General Assembly Resolution 2625/1970, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, U.N. G OAR 25th Sess., Supp No 18 at 339. U.N Doc A/8018 (1970).

⁴⁴ Report of the Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005 (2005).

⁴⁵ International Convention against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), *entered into force* June 3, 1983.

⁴⁶ International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), *entered into force* May 23, 2001. This convention provides that the main offence to be considered a 'terrorist act' is the unlawful and intentional delivery,

the convention and requires states parties to make the offences punishable in respect of their grave nature and to make them criminal.⁴⁷ The 1999 International Convention for the Suppression of the Financing of Terrorism does not provide a definition for terrorism but lists several offences in its annex that amount to a terrorist offence.⁴⁸

For purposes of this thesis, the following definition of terrorism will be adopted: an act intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act.⁴⁹

2.2.2 Factors that Contribute to the Occurrence of Terrorism

International terrorism is designed to influence governments or intimidate the public through the threatening of civilians, murder, kidnapping of persons or group of persons and the mass destruction of property in order to achieve a political, religious, social or economic aim.⁵⁰ The lack of democracy, disrespect for human rights, armed conflicts, blocked democratic transitions, underdevelopment, poverty and the lack of respect for the right to self-determination may all provide the setting for the discontent and frustration that lead to terrorism. Terrorism, as understood very generally as unlawful, co-ordinated, politically motivated violence against ‘neutrals’ or ‘civilians’ with the effect of terrorizing the population, is perpetrated by non-State actors.⁵¹

placing, discharging or detonating of an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility

⁴⁷ *Ibid*, Article 4.

⁴⁸ Article 2 (1), International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), *adopted* 9 Dec. 1999, *entered into force* 10 Apr. 2002.

⁴⁹ See United Nations Office on Drugs and Crime, *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* (2003). Available at <http://www.unodc.org/odccp/terrorism.html?id=11702>. (Accessed on 3rd June 2007).

⁵⁰ See *Disorders and Terrorism* Report on the Task Force on Disorders and Terrorism, National Advisory Committee on Criminal Justice, Standards and Goals (1976: Washington) 11 (hereinafter referred to as *Disorders and Terrorism*).

⁵¹ Dinah Pokempner, ‘Terrorism and Human Rights: The Legal Framework’ in *Terrorism and International Law: Challenges and Responses*, International Institute of Humanitarian Law Conference 30th May- June 1st 2002, available at <http://web.ihl.org/ihl/Album/terrorism-law.pdf>. (Accessed on 7th June 2007).

It has been noted that the process of globalization has aggravated the incidences of terrorism. In this day and age, it has become easier to target large populations of people globally.⁵² For example, terrorist groups in the Middle- East can plan and execute attacks on civilians in East Africa.

The reasons behind terrorism are as diverse as the types of people who commit terrorist attacks. Terrorists often believe that they have exhausted all attempts at legitimate religious or political change and have no other option to bring recognition to their cause and change to the society they live in. Terrorists intentionally target civilians in order to gain publicity. Political oppression, religious intolerance and divine revelation are a few of the most commonly cited reasons for terrorist attacks.⁵³

2.2.3 State Responses to Terrorism and the Overall Impact on Human Rights

Responses to terrorism are often determined by what the responding power perceives as key considerations of self-interest.⁵⁴ Malcolm Shaw identifies the dual approaches used in adopting counter-terrorism norms as firstly concerning the particular manifestations of terrorist activity and secondly, a general condemnation of terrorism.⁵⁵ Counter terrorism policies are determined by the politics and philosophies of a particular state. These counter terrorism measures include and often begin with the passing of antiterrorism legislation. These measures encompass changes in the criminal law, increasing law enforcement powers and administrative functions. Often, these changes violate or water down various civil and political rights of citizens in the interest of security.

The incidents of terrorism have prompted governments to view security as a major issue over human rights and this is especially true of East African governments. Makinda argues that while counter-terrorism may have initially emerged as a reaction to terrorism,

⁵² See Tal Becker (note 39).

⁵³See World Conflict Quarterly, *Terrorism*, Available at <http://www.globalterrorism101.com/TerrorismSummary.html>, (Accessed on 9th July 2007).

⁵⁴ For example security is often viewed as a key interest over respect for human rights. See Samuel M Makinda, 'Terrorism, Counter Terrorism and Norms in Africa', (2006) 5, *African Security Review*, 19

⁵⁵ Malcolm Shaw, *International Law*, (2003: Cambridge UK, Cambridge University Press), 1049

it has become a continuing practice that anticipates, prevents or pre-empts terrorist activities.⁵⁶

The relationship between human rights and terrorism and in particular the impact of counter terrorism measures on human rights has been given considerable attention at the international level since the 9/11 attacks. This concern over human rights and counter terrorism is however not a recent phenomenon. Even prior to 2001, there was considerable attention paid in international jurisprudence to the question of respect for human rights in situations concerning acts of terrorism.⁵⁷

In October 2001, the UN Secretary-General established the Policy Working Group on the United Nations and Terrorism whose objective was to identify the long-term implications and broad policy dimensions of terrorism for the United Nations and the international human rights regime and to formulate recommendations on steps that the United Nations system ought to take address the issue. The report of this Policy Working Group observed that the United Nations ought to ensure the protection of human rights while formulating international counterterrorism measures.⁵⁸ In 2002 the Policy Working Report observed that:

Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful of international human rights obligations.⁵⁹

The following year, the Secretary General noted that upholding human rights was the most effective strategy for dealing with terrorism.⁶⁰ To highlight the importance of

⁵⁶Samuel Makinda (note 54).

⁵⁷ See Edward J. Flynn, 'Counter Terrorism and Human Rights: The View from the United Nations', (2005) *European Human Rights Law Review*, 29.

⁵⁸ *Report of the Policy Working Group on the United Nations and Terrorism*, (2002) U.N G.A 57th Sess., Item 162, Provisional Agenda, at 2 UN Doc A/57/273-S/2002/875.

⁵⁹ *Ibid.*

⁶⁰ Report of the Secretary-General (April 2006) *Uniting against Terrorism: Recommendations for Global Counter-Terrorism Strategy*, U.N. Doc. A/60/825.

human rights norms in the counter terrorism arena, the United National Commissioner for Human Rights in 2005 appointed a UN Special Rapporteur on Human Rights and Counter terrorism.

2.3 International Law on Terrorism and Counter-Terrorism Measures: A Summary

The international law against terrorism consists of UN treaties, Security Council and General Assembly resolutions. These are all intended to prevent, suppress and eradicate forms of terrorism.⁶¹ It also includes various regional treaties from the African Union, the European Union and the Organisation of American States.⁶² These documents affirm the threat of terrorism to democracy and security and condemn all acts of terrorism.

Counter-terrorism initiatives take the form of fighting terrorism: defeating terrorists and their organizations; denial of sponsorship, support and sanctuary to terrorists; diminishing the underlying conditions that terrorists seek to exploit, and defending citizens and interests at home and abroad.

2.3.1 The UN and Security Council- Reconciling Human Rights with Counter terrorism efforts

The UN has adopted 13 conventions on terrorism⁶³ dealing with different aspects of terrorism and ways in which states are expected to combat acts of terrorism. The various provisions of the conventions define particular acts of terrorism as criminal offences and require state parties to establish their jurisdiction over offences and suspected offenders and further to either prosecute or extradite alleged offenders.

⁶¹ See Inter American Commission on Human Rights; *Report on Terrorism and Counter Terrorism* OEA/Ser.L/V/II.116 Doc. 5 rev. 1 Corr 22 October 2002, para 30-32.

⁶² The 1999 Organisation of African Union (OAU) Convention for the Prevention and Combating of Terrorism (hereinafter referred to as the Algiers Convention), the 1971 Organisation of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, the 1977 European Convention on the Suppression of Terrorism.

⁶³ *Supra* (note 42).

The Report on Terrorism and Human Rights published by the Inter-American Commission on Human Rights points out:

It is notable in this respect that the provisions of this body of law that require states parties to investigate, prosecute and punish terrorist crimes coincide with the doctrine under international human rights law according to which states are obliged to investigate the acts and punish those responsible whenever there has been a violation of human rights.⁶⁴

2.3.2 The Security Council

The Security Council in an effort to contain international terrorism has passed several resolutions and formed committees⁶⁵ to deal with counter terrorism. Part of the Security Council's counter-terrorism framework includes the adoption of sanctions against individuals and organisations and the imposition of binding obligations on Member States.⁶⁶ However the implementation of these measures is left to Member States.⁶⁷ Rosemary Foot traces the work of the Security Council on terrorism to the post Cold War era- and the sanctions imposed by the Security Council during this period on countries suspected to harbour and train terrorists.⁶⁸ In September 2001 the Security Council assumed a pivotal role in the international arena on counter-terrorism. In the absence of other law-making mechanisms at the international level, the Security Council used its powers under Chapter VII of the UN Charter to impose binding obligations on Member States to implement various counter-terrorism measures.⁶⁹

⁶⁴ See Inter-American Report on Terrorism and Human Rights (note 61), para 34.

⁶⁵ The Counter Terrorism Committee (CTC) was set up under the aegis of Resolution 1373 with the objective of monitoring implementation of Resolution 1373. States are required to submit state reports to the Committee.

⁶⁶ For example SC Resolution 1262 adopted after the 1998 terrorist attacks in East Africa sanctioned the Taliban for harbouring and training terrorists in Afghanistan and for their refusal to surrender Osama bin Laden suspected of instigating the 9/11 attacks.

⁶⁷ Andrea Bianchi, 'Security Council's Anti-Terror Resolutions and their Implementation by Member States', (2006) 4 *Journal of International Criminal Justice*, 1044 (hereinafter referred to as A. Bianchi).

⁶⁸ See Rosemary Foot, 'The United Nations, Counter Terrorism and Human Rights', 2007 29 *Human Rights Quarterly* 489 at 494 (hereinafter referred to as R Foot).

⁶⁹ See A. Bianchi (note 67), 1945.

Following the terrorist attacks of 11th September 2001 in the United States (9/11), the UN Security Council passed Resolution 1373⁷⁰ describing acts of international terrorism as threats to international peace and security and establishing certain measures for the prevention and suppression of the financing of terrorist acts. This Resolution is binding on Member States and obliges them to criminalise assistance for terrorist activities, deny financial support and safe haven to terrorists and share information about groups planning terrorist attacks.⁷¹

This Resolution passed under Chapter VII of the UN Charter is one of the most significant resolutions with regard to counter terrorism activities as it imposes a mandatory requirement on member states to implement Security Council Resolutions.⁷² It demands that member states, among other things, adopt counter terrorism measures whether or not they are parties to other anti-terrorism conventions and update their legislation, improve border security and control traffic in arms.⁷³ Most of the measures adopted by the UN Security Council depend on the member states' willingness and capacity to incorporate international counter-terrorism standards in their domestic legal systems.⁷⁴ It also requires Member States to submit reports to the Security Council (SC) on the progress of their implementation activities.

The Security Council has been criticised for acting without regard to human rights in its counter terrorism activities.⁷⁵ Resolution 1373 and the Counter-Terrorism Committee (CTC) have been criticised for not compelling States to ensure that legislation and

⁷⁰ Security Council Resolution, *Threats to International Peace and Security Caused by Terrorist Acts*, S/RES/1373 (2001).

⁷¹ SC Resolution 1373/2001 requires Member States to prohibit their nationals or persons or entities in their territories from making funds, financial assets, economic resources, financial or other related services available to persons who commit or attempt to commit, facilitate or participate in the commission of terrorist acts. States are also required to refrain from providing any form of support to entities or persons involved in terrorist acts; take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support, commit terrorist acts and provide safe havens.

⁷² See R Foot (note 68), 494.

⁷³ See Eric Rosand, 'Security Council Resolution 1373, the Counter Terrorism Committee and the Fight against Terrorism' (April 2003) *94 Am. J. Int'l. L.*, 334.

⁷⁴ A Bianchi, (note 67), 1045.

⁷⁵ R Foot, (note 68) 494.

counter terrorism measures conform to international human rights standards.⁷⁶ It is worth noting that previous resolutions dealing with terrorism referred to the fact that all counter terrorism measures had to conform to international human rights standards.⁷⁷ The Human Rights Watch, an international human rights organisation, published a report on terrorism and counter terrorism in the UN titled *Hear No Evil, See No Evil: The UN Security Council's Approach to Human Rights Violations in the Global Counter-terrorism Effort*⁷⁸ which states:

The United Nations Security Council has the international stature and resources necessary to exercise farsighted global leadership in the campaign against terrorism. To date, it has largely failed to fully realize this potential. An important reason has been its failure to take seriously the protection of human rights in the context of counterterrorism. Counter-terrorism measures pose dangers to established human rights protections. As numerous recent cases attest, those dangers are not hypothetical and not limited to minor players or issues. Rights violations in turn are threatening to undermine the success of counter-terrorism efforts in many countries.

Robert Goldman, the UN Independent Expert on Protection of Human Rights and Fundamental Freedoms has noted that 'Resolution 1373 regrettably contained no comprehensive reference to the duty of States to respect human rights in the design and implementation of such counter-terrorism measures.'⁷⁹

Having seen the folly of their earlier counter terrorism efforts, attempts have been made to include human rights principles in counter terrorism measures. In latter resolutions, the Security Council began taking into account human rights implications. Resolution 1456

⁷⁶ See Human Rights Watch Briefing Paper, (10 April 2004) '*Hear No Evil, See No Evil: The UN Security Council's Approach to Human Rights Violations in the Global Counter-Terrorism Effort*' available at <http://www.hrw.org/backgrounder/un/2004/un0804>. (Accessed on 7th June 2007).

⁷⁷ See General Assembly Resolution, *Terrorism and Human Rights*, GA Res 48/122, UN GAOR, 48 Sess, 85 Plen Mtg, UN Doc A/Res/48/122 (1993).

⁷⁸ Human Rights Watch Briefing Paper, (note 76).

⁷⁹ Promotion and Protection of Human Rights: Protection of Human Rights and Fundamental Freedoms while Countering Terrorism', U.N. ESCOR, Commission on Human Rights. (7 February 2005), U.N Doc. E/CN.4/2005/103 at 6, 21.

passed in January 2003 directs States to ensure that measures taken to combat terrorism are in compliance with international human rights, refugee and humanitarian law. In 2004, a Counter Terrorism Committee Executive Directorate (CTED) was established to assist the CTC in meeting its objectives and an expert on human rights, humanitarian and refugee law was appointed.

This section has demonstrated that the UN through its various resolutions has sought to strike a balance between legitimate national interests and protection of human rights. Despite earlier counter terrorism efforts which often made no mention of respecting human rights, attempts have been made to include human rights principles in counter terrorism measures. As a result of this perception, the Security Council has directed states to ensure that any measure taken to combat terrorism complies with all their obligations under international law.⁸⁰

2.4 The African Regime on Terrorism

The move towards instituting a regional counter- terrorism regime has been spurred on by the recent attacks instituted in African countries and also by the directive of the Security Council Resolution 1373 which obliges all UN member states to establish institutional frameworks for the prevention and combating of terrorism at the domestic level and to sign all international conventions and protocols relating to terrorism.⁸¹

The normative framework of the anti-terrorism legal regime in Africa consists of the Organisation of African Union (OAU) Convention on the Prevention and Combating of Terrorism⁸², which is supplemented by the Protocol to the OAU Terrorism Convention⁸³

⁸⁰ Security Council Resolution 1456 of 2003, *Ministerial Declaration on the Issue of Combating Terrorism*, Adopted 20th January 2003.

⁸¹ Para 3 (d) of Security Council Resolution 1373.

⁸² OAU Convention on the prevention and Combating of Terrorism, OAU Assembly 35th Ord. Sess., OAU Doc. AHG/Dec. 132 (XXXV), 14 July 1999(hereinafter the AU Terrorism Convention).

⁸³ Protocol to the OAU Convention on the Prevention and Combating of Terrorism 3d AU Assembly Ord. Sess. 8 July 2004. As at August 2007, this Protocol is not in force.

and the Protocol Relating to the Establishment of the Peace and Security Council.⁸⁴ In 2004, the African Union (AU)⁸⁵ established an African Centre for the Study and Research on Terrorism based in Algeria with the objective of ‘boosting the capacity of the African Union in the prevention and combating of terrorism in Africa’.⁸⁶ According to the AU Convention on the Prevention and Combating of Terrorism (Algiers Convention),⁸⁷ acts of terrorism include:

Acts that endanger the life and property of civilians calculated to intimidate or coerce ‘any government, body, institution, the general public...to do or to abstain from doing any act or to disrupt any public service or create general insurrection in a State.

The 9/11 in 2001 attacks gave impetus to the restructuring of the counter terrorism regime in Africa. As a result of the 9/11 attacks, the AU convened meetings with the aim of discussing and adopting measures against terrorism at the regional level and internationally. However even prior to 2001, the OAU (reconstituted in 2000 as the African Union) had adopted the Terrorism Convention in 1999 partly as a response to the 1998 terrorist attacks in East Africa. Kenya, Tanzania and Uganda are state parties to the 1999 Terrorism Convention.

In addition to international instruments, the AU has also come up with certain regulations and instruments that aim to regulate activities associated with terrorism which include but

⁸⁴ Protocol Relating to the Establishment of the Peace and Security Council of the AU 2002, AU Assembly. 1st Ord. Sess. Durban, South Africa, 9 July 2002.

⁸⁵ The OAU was dissolved in 2002 and reconstituted in the same year as the African Union (AU).

⁸⁶ Adopted pursuant to Assembly/AU/Dec.15 (II), EX.CL/Dec.13 (II), EX/CL/Dec.82 (IV), and EX.CL/Dec.126 (V), relating to the establishment and operationalisation of the African Centre for the Study and Research on Terrorism (ACSRT).

⁸⁷ Article 1, Algiers Convention.

are not limited to weapons of mass destruction,⁸⁸ organised crime and corruption,⁸⁹ drug trafficking,⁹⁰ mercenaries and weapons trafficking.⁹¹

The 1999 AU Terrorism Convention and the Plan of Action on the Prevention and Combating of Terrorism in Africa requires member states to enact national legislating for dealing with issues relating to terrorism.⁹² The Plan of Action consists of a comprehensive strategy for the prevention and combating of terrorism in Africa and focuses on the areas of legislative and judicial measures, security, policing and border control, the suppression of the financing of terrorism and exchange of information and co-ordination of counter terrorism activities on the continent as well as internationally.

All member-states of the African Charter are bound by the human rights obligations incorporated in the instrument as well as in other constitutive instruments of the African Union such as the Plan of Action on Human Rights in Africa. The duty to adhere to international human rights standards is explicit in the AU Terrorism Convention which at Article 22 provides that '[n]othing in this Convention shall be interpreted as derogating from the principles of international humanitarian law, as well as the African Charter on Human and People's Rights.'⁹³

2.5 Conclusion

This chapter has demonstrated that terrorism is an issue that worries many states. As a result, they have adopted a wide range of treaties that address various issues concerning terrorism and define the obligations of states. These treaties highlight the danger that

⁸⁸ 1998 Pelindaba Treaty Establishing a Nuclear-Weapons Free Zone in Africa, 35 ILM 698 (1996). Available at http://www.africa-union.org/root/au/Documents/Treaties/Text/African_Nuclear_Weapon.pdf. (Accessed on 14th September 2007).

⁸⁹ 1998 Dakar Declaration on the Prevention and Control of Organized Transnational Crime and Corruption.

⁹⁰ 1996 Yaoundé Declaration and Plan of Action on Drug Control, Abuse and Illicit Drug Trafficking in Africa.

⁹¹ 2000 Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons.

⁹² Article 2, AU Terrorism Convention.

⁹³ Article 22, AU Terrorism Convention.

terrorism poses to human security and human rights generally and require states to adopt a wide range of measures aimed preventing and combating it. In particular, states are obliged to adopt legislative, judicial measures and other measures aimed at bolstering security, policing and border control and suppressing the financing of terrorism and facilitating the exchange of information and co-ordination of counter terrorism among states.⁹⁴ However, the push for measures to counter terrorism in the name of security raise the danger that excessive measures may be adopted that ignore fundamental rights. The following chapter examines the fragile relationship between human rights and security, the conflicts that it gives rise to and how these can be resolved.

⁹⁴ Dinah Pokempner, (note 51).

CHAPTER 3

ARE HUMAN RIGHTS AND COUNTER-TERRORISM MUTUALLY EXCLUSIVE CONCEPTS?

3.1 Introduction

The conflict facing East African states and indeed many other countries is how to reconcile human rights obligations with security concerns relating to terrorism. This chapter explores the relationship between terrorism and human rights and how the two concepts impact on each other. Drawing from the analysis of the previous chapter, it explores the question whether measures to counter terrorism may be justified within the context of human rights and, if so, to what extent. This chapter will also consider how the international human rights framework deals with the imperative to protect individuals from terrorist attacks and the need to protect the rights of persons suspected or accused of being involved in terrorism activities.

3.2 States' Human Rights Obligations

Acts of terrorism destabilise countries as they have the potential to take thousands of lives and aim to destroy human rights, democracy and the rule of law.⁹⁵ Governments therefore have not only the right, but also the duty under international law, to protect their nationals and others against terrorist attacks and to bring the perpetrators of such acts to justice.⁹⁶ The manner in which counter-terrorism efforts are conducted, however, can have a far-reaching effect on overall respect for human rights.⁹⁷

Terrorism is a human rights violation. The UN General Assembly has recognised that terrorism is aimed at the destruction of human rights, fundamental freedoms and

⁹⁵ *Digest on Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights While Countering Terrorism*, Office of the High Commissioner for Human Rights, Available at <http://www.ohchr.org/English/issues/terrorism> . (Accessed on 7th June 2007), 5.

⁹⁶ This obligation is set out, for example, within the purposes and principles of the Charter of the United Nations, which is found in Articles 1 and 2 of the Charter.

⁹⁷ *Ibid.*

democracy.⁹⁸ In response to terrorism, states are under an obligation to take steps to protect the lives and physical integrity of people within their jurisdiction against terrorist attacks. Where an attack has taken place, it follows that the state is required by human rights law itself to review the adequacy of the legal measures it has in place to protect people from terrorist attack and to bring the perpetrators to justice, and to take such measures as are identified as being necessary to provide adequate protection. This is the first of the human rights implications of the attacks themselves. However beyond this states are also required to respect human rights even while carrying out counter-terrorism measures.

Human rights law establishes a framework in which terrorism can be effectively countered without infringing on fundamental freedoms. The measures and practices adopted to 'fight terrorism' also often give rise to concerns relating fair trial, torture, unlawful detention, freedom of expression, principles of non-discrimination among others.

3.3 Derogable Rights

International law recognises that although states have a duty to fulfil their obligations under these human rights treaties, circumstances might arise where upholding certain rights may not be feasible. States should not be compelled to uphold all rights in situations of emergency, when this could cause their own demise.⁹⁹

Many countries have justified the use of counter-terrorism measures as being necessary to effectively counter terrorism. In doing so, it can be argued that certain rights may have to be derogated from in order to ensure security. Human rights law, notably Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR) and Article 27 of the American Convention on Human Rights, recognises that some rights can be derogated from in time of public emergency such as terrorism. In contrast, the African Charter does not contain a

⁹⁸ G. A. Resolution 54/164, *Human Rights and Terrorism*, 17 December 1999

⁹⁹ Martin Kunschak, 'Creating Legal Blackholes? Terrorism and Detention Without Trial: Towards a Changing Rule in International Law?' (2006) *M Phil Dissertation, Faculty of Law*, University of Cape Town, 19.

derogation clause.¹⁰⁰ However the Charter does contain claw-back clauses which permit states to derogate from international rights by reference to national law. Thus Article 6 of the African Charter provides that deprivation of liberty is to be in accordance with reasons laid out in national law.

Article 4 of the ICCPR permits States to take measures to derogate from certain rights set out in the Covenant ‘in times of public emergency which threatens the life of the nation... and to the extent strictly required by the exigencies of the situation’¹⁰¹. The Siracusa Principles¹⁰² define a threat to the life of the nation as one that:

- (a) Affects the whole of the population and either the whole or part of the territory of the State, and
- (b) Threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.

Some rights are classified as non-derogable, which must be respected at all times and in all circumstances. Under international law, non-derogable rights include the right to life and prohibition of torture, cruel, degrading and inhuman treatment, prohibition of discrimination, prohibition of the arbitrary deprivation of life, prohibition of slavery, the principle of legality with regard to crimes and punishment, freedom of thought, conscience and religion.¹⁰³

¹⁰⁰ Article 6 of the African Charter reads in part: ‘Everyone shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for the reasons and conditions previously laid down by law...’

¹⁰¹ Article 4, ICCPR.

¹⁰² United Nations, Economic and Social Council, U.N. 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).

¹⁰³ Article 4, ICCPR.

The Human Rights Committee (HRC)¹⁰⁴ in General Comment 29 has noted that a fundamental requirement for any measure derogating from the ICCPR is that such measure be limited to the extent strictly required by the exigencies of the situation. Additionally, the derogation measures cannot be inconsistent with a State's international obligations, whether based on treaty or general international law.

In General Comment 20, the HRC has emphasised with regard to Article 7 of the ICCPR relating broadly to the prohibition of torture that:

“The text of article 7 [of the ICCPR] allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force ... [N]o justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons.”¹⁰⁵

As a result of counter-terrorism measures, it is emerging that these non-derogable rights are under threat. Counter-terrorism measures may not derogate from these non-derogable rights even in times of emergency.

The HRC has consistently warned that any derogations made should conform to the requirements of the ICCPR and be in line with a state's human rights obligations. In its observations on the United Kingdom of Great Britain and Northern Ireland, the HRC noted:

...with concern that the State Party, in seeking *inter alia* to give effect to its obligations to combat terrorist activities pursuant to Resolution 1373 of the Security Council, is considering the adoption of legislative measures which may have potentially far-reaching effects on rights guaranteed in the Covenant, and which, in the State Party's view, may require derogations from human rights

¹⁰⁴ The Human Rights Committee comprises of 18 experts from all parts of the world and oversees the application by member States to the *International Covenant on Civil and Political Rights (ICCPR)*.

¹⁰⁵ HRC General Comment No 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003), para 3.

obligations. The State Party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the ICCPR.¹⁰⁶

States often use the requirement of security as an excuse for violating or not complying with international human rights standards. For example it has been argued that national security concerns outweigh certain individual rights.¹⁰⁷ However, international human rights instruments such as the African Charter require that, in the exceptional circumstances where it is permitted to limit some rights for legitimate and defined purposes other than emergencies, the principles of necessity and proportionality must be applied.¹⁰⁸

The African Commission on Human and People's Rights in *Media Rights Agenda and Constitutional Rights Projects v Nigeria*¹⁰⁹ noted that the reasons for possible limitations 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.

States have a duty to fulfil their obligations under human rights treaties but in certain circumstances upholding certain human rights standards may not be possible. As seen above, international human rights law takes cognisance of this and provides for derogations which must however meet certain strict standards.

3.4 The States Duty to Ensure the Security of Persons within its Jurisdiction

¹⁰⁶ Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, CCPR/CO/73/UK;CCPR/CO/73/UKOT, 5 November 2001, para 6.

¹⁰⁷ See the American case of *Hamdi v Rumsfeld*, 316 F 3d 450 (4th Cir. 2003).

¹⁰⁸ See Article 6, African Charter recognising the right to freedom from arbitrary arrest and detention.

¹⁰⁹ *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Comm. No. 105/93, 128/94, 130/94, 152/96, (2000) AHRLR 200 para 67-70.

States have a duty to protect persons within their jurisdiction from terrorism and this duty is entrenched within international systems.¹¹⁰ The Human Rights Committee (HRC) in *Delgado Paez v. Colombia*¹¹¹ which stated with regard to Article 9 of the International Covenant on Civil and Political Rights on security:

States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.

The jurisprudence of the Inter- American Court on Human Rights¹¹² on the states duty to protect is significant. In *Velasquez Rodriguez v Honduras*¹¹³ the Inter-American Court on Human Rights stated that governments have a duty to respond in the same manner to all serious violations, whether the perpetrator is an official, a non-state actor or a person whose status is not known. The Inter-American court defined the duty to prevent as *inter alia* including:

... those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages ... Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a

¹¹⁰ Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

¹¹¹ *Delgado Paez v. Colombia*, Case No. 195/1985, 12 July 1990.

¹¹² The Inter- American Court on Human Rights is composed of seven nationals of the member states of the Organization of American States, elected in an individual capacity. Convention, Art. 52(1). Its adjudicatory jurisdiction consists of cases submitted by the Commission or by a state party concerning "the interpretation and application of the provisions of this Convention. See Thomas Buergenthal, 'The Inter-American Court of Human Rights', (1982) 76 *AJIL* 231.

¹¹³ *Velasquez Rodriguez v Honduras* Series C, No. 4, 28 ILM 291 (1989).

breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.¹¹⁴

Article 27 (2) of the African Charter provides a limited legitimate reason for limitation to the rights and freedoms and this includes collective security, morality and common interest.

The Inter-American Court on Human Rights in *Asencios Lindo et al*¹¹⁵ acknowledged the duty of States to provide security but warned that in doing so, the State should never derogate from its corresponding duty to protect human rights. It stated *inter alia*:

The State's national and international obligation to confront individuals or groups who use violent methods to create terror among the populace, and to investigate, try, and punish those who commit such acts means that it must punish all the guilty, but only the guilty. The State must function within the rule of law...¹¹⁶

This section demonstrates that the state is not only required to protect the well-being of its people, but also to ensure other privileges such as a democratic government, the maintenance of law and order and the protection of the basic fundamental human rights of all people¹¹⁷.

3.5 Freedom and Security: Striking a Balance

The conflict between security and human rights and fundamental freedoms such as the freedom of movement, expression; the right to privacy and life, can be seen in the persistence of 'governments' who very often invoke laws that restrict these freedoms as

¹¹⁴ *Ibid*, para 175.

¹¹⁵ *Asencios Lindo et al* Case 11.182, Report N° 49/00, *Asencios Lindo et al*., Annual Report of the IACHR 1999.

¹¹⁶ *Ibid*, para 58

¹¹⁷ Bernard Bekink, 'A Dilemma of the Twenty-First Century State: Questions on the Balance between Democracy and Security', (2005) 5 *African Human Rights Law Journal*, 406 at 410.

part of their counter terrorism strategy. The need for these laws to comply with states' obligations under international law is very often overlooked.¹¹⁸

The need for balancing these two ideologies has been referred to by a number of commentators. Clive Walker puts forward an argument for a balancing of rights rather than a balancing of values. In this regard he views security as a right rather than a value. He therefore posits that instead of working towards balancing rights and the need for security, we ought instead to be looking into balancing rights including the right to security. He justifies this argument with three suppositions. Firstly he argues that achieving a balance within rights is feasible as security can be identified as an element within certain rights such as the right to life. Secondly, he argues that identifying security as part of the human rights regime means that it would be less likely for governments to derogate from other absolute rights and freedoms in favour of security and thirdly he argues that viewing security as a right would validate the need for anti-terrorism laws as these would protect the right for liberal democracies to defend their existence and values.¹¹⁹

Despite various views on balancing of values or balancing of rights, it is clear that what is required is respect for human rights. The UN Special Rapporteurs and Independent Experts have expressed alarm at the growing threats against human rights from counter terrorism measures.¹²⁰ They have gone to recall that certain rights are non-derogable in accordance with the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and further that any measures of derogation from other rights guaranteed by the Covenants should be made in strict conformity with the international human rights regime.¹²¹

¹¹⁸ See Clive Walker, 'Clamping Down on Terrorism in the United Kingdom', (2006) 4 *Journal of International Criminal Justice*, 1137 at 1147.

¹¹⁹ *Ibid.*, 1147.

¹²⁰ Joint Statement by UN Special Rapporteurs and Independent Experts (Geneva, 2003), E/CN.4/2004/4, Annex 1.

¹²¹ *Ibid.*

3.6 Conclusion

This chapter has demonstrated that states have a dual obligation, firstly to take measures to protect persons within their jurisdiction from acts of terrorism and secondly to uphold human rights obligations even while taking steps to ensure security from terrorism and this duty to uphold human rights applies also to persons suspected of carrying out terrorist attacks. This means that measures aimed at combating terrorism also have their justification in human rights. However, this chapter has also demonstrated that these measures may also encroach upon the rights of individuals such as the right not to be subjected to torture, inhuman or degrading treatment; fair trial rights, and freedom of association. They may also undermine the rule of law in general. There is need therefore to balance the need for public security and individual freedom and rights.

This chapter has shown that international law, as reflected both in international and regional treaties and documents, posits that counter-terrorism measures themselves must always be undertaken within the framework of the rule of law and human rights. Some rights are non-derogable. These include the rights not to be subjected to torture, the right to life, and freedom of conscience. These rights may not be derogated from even in times of emergency caused by acts of terrorism. As regards the rights that are derogable, states have an obligation to ensure that derogations and limitations to these rights are proportional to the measures at hand. The next chapter analyses the case law of international human rights bodies and selected domestic courts with a view to demonstrating how the conflicting needs of public security and the protection of individual rights are adjudicated and reconciled.

CHAPTER 4

SELECTED CASE LAW ON BALANCING SECURITY NEEDS WITH HUMAN RIGHTS

4.1 Introduction

The previous chapter revealed that balancing security and human rights is of the utmost importance to states facing the threat of terrorist attacks. This chapter seeks to show on a practical level how this balance may be achieved and analyses the relevant jurisprudence from the Human Rights Committee (HRC) and the United Kingdom (UK) and the United States (US). The HRC is the primary monitoring body within the UN system of human rights with powers to receive petitions pertaining to violations of civil and political rights. It has on several occasions been seized with matters pertaining to terrorism. The UK and the US are among the few countries that have been victims of terrorist attacks in recent years. They are also at the forefront of the war on terror. Both countries have been faced with litigation challenging the legislative and other measures they have taken in countering terrorism. The decisions of their courts in this regard are of great value to countries that have just embarked on enacting legislation in this area as these decisions provide insights into what may be permissible and what may not be.

4.2 Fair Trial

International law and the case-law of human rights treaty bodies and courts contain valuable indications on the type of measures that may be adopted to counteract terrorist acts within the framework of the rule of law and human rights principles.

This section focuses on specific human rights abuses committed by governments as part of their counter-terrorism measures. It focuses on the right to fair trial with a focus on detention and discrimination issues which have been a major cause of concern and provides a summary of how selected domestic jurisdictions have dealt with human rights

violations. The right to fair trial¹²² is fundamental to the rule of law. It draws its jurisprudential basis from the rule of law, understood as conformity to obligatory universal legal rules that check arbitrary and unaccountable power. Under the Universal Declaration of Human Rights, 1948 (UDHR), provisions of which are considered as customary international law, the right to fair trial and rule of law principles are both recognised. The Universal Declaration of Human Rights provides for protection against arbitrary arrest, detention or exile under Article 9 while the right to fair trial is recognized under Article 10, which provides that ‘[e]veryone is entitled in full equality to a fair and public hearing by an independent tribunal, in the determination of his rights and obligations and of any criminal charge against him.’

Article 7 of the African Charter on Human and people’s Rights guarantees the right to fair trial with the following elements:¹²³

- (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws and customs in force;
- (b) The right to be presumed innocent until proven guilty by a competent court or tribunal;
- (c) The right to defence, including the right to be defended by counsel of his choice;
- (d) The right to be tried within a reasonable time by an impartial court or tribunal

International standards provide that all arrested or detained persons should be brought promptly before a judge or judicial authority so that their rights can be protected. Article 9(1) of the ICCPR¹²⁴ provides that ‘[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention.’

¹²² The right to fair trial is concerned with both procedural fairness (being informed of charge, speedy trial) as well as substantive fairness (presumption of innocence, right to counsel). It enshrines the values of legality and of a legal system based on rights of individuals to certain treatment by the state.

¹²³ Article 7, African Charter.

¹²⁴ Article 9, ICCPR.

4.3 The UN Human Rights Committee

The HRC has considered cases in relation to terrorism and counter-terrorism measures and to some extent the impact of these measures on human rights. *Polay Campos v Peru*¹²⁵ involved incommunicado detentions. The author,¹²⁶ Polay Campos was subjected to incommunicado detention for 10 months and during that time denied access to legal counsel and kept in conditions that amounted to torture. The HRC observed that the detention violated various provisions of the ICCPR relating to inhuman treatment and human dignity.¹²⁷

The 1981 case of *Cabreira Estradet v Uruguay*¹²⁸ involved the detention and torture of the author's son by the Government of Uruguay on terrorism charges. The HRC did not address the issue of terrorism but concluded that the terms of the victim's detention violated Article 10 of the ICCPR.

The HRC in several other communications found that the State while carrying out various counter-terrorism measures violated certain human rights principles enshrined in the ICCPR.¹²⁹

In a 2005 communication, *Mohammed Alzery v Sweden*¹³⁰ the victim, an Egyptian national fled his country in 1994 and sought asylum in Sweden in 1999 on political grounds. The Swedish government in 2001 after seeking guarantees from the Egyptian government decided that the author should not be granted a residence permit in Sweden on security grounds. Although in the light of the circumstances and the author's contentions as to his past conduct, his fear of persecution was considered to be well founded, entitling him protection in Sweden, the Government decided to exclude him

¹²⁵ *Polay Campos v Peru*, HRC 577/1994.

¹²⁶ The HRC refers to victim's or applicants as 'authors'.

¹²⁷ Articles 7 and 10 of the ICCPR.

¹²⁸ *Cabreira Estradet v Uruguay*, HRC105/1981.

¹²⁹ See *Domukhovskiy v Georgia* HRC 623/1995 *Arredondo v Peru*, HRC 688/1996, *Karker v France* HRC 833/1998.

¹³⁰ *Mohammed Alzery v. Sweden*, HRC1416/2005.

from refugee status.¹³¹ The Government made its decision on the basis of intelligence services information that the author was involved, in a leading position and role, in the activities of an organization implicated in terrorist activities. The author alleges that after the government issued the deportation decision, he was detained by Swedish security forces and denied access to legal counsel and subjected to torture and later deported from Sweden with the assistance of American CIA officers and handed over to Egyptian security forces. The HRC as with the other communications focused on the allegations of human rights violations by the Government of Sweden against the author. In its decision, the HRC held Sweden responsible for violations of Article 7 of the ICCPR and in particular the right not to be subjected to torture and cruel and inhuman treatment.

The HRC case law on terrorism is limited and restricted to specific human rights violations such as torture or illegal detention. The case law is also lacking in the sense that it does not establish legal principles concerning the balancing of rights with counter terrorism measures. The HRC fails to set out the legal framework in which states can carry out counter-terrorism measures while respecting their human rights obligations. The UN General Assembly in its Resolution on Human Rights and Terrorism recommended that treaty bodies should take into account the consequences of the acts, methods and practices of terrorist groups.¹³² However while the HRC has not specifically determined the question of balancing human rights and security interests, the obligation of states to comply with their human rights obligations while countering terrorism is a point that emerges from an analysis of communications.

The European Court on Human Rights (European Court) on the other hand has directly addressed the question of balancing a state's security needs with its human rights obligations. In the 1989 case of *Soering v United Kingdom*¹³³ the European Court referred to the search for a 'fair balance between the demands of the general interest of

¹³¹ *Ibid*, para 3.8.

¹³² UN General Assembly in its Resolution on Human Rights and Terrorism, UN GA A/RES/29/185, para 6.

¹³³ *Soering v United Kingdom* (1989) 11 EHRR 413.

the community and the requirements of the protection of an individual's fundamental rights.¹³⁴

In the 1996 case of *Chahal v United Kingdom*,¹³⁵ the United Kingdom sought to deport the applicant, who was an Indian citizen, from the UK on grounds of national security. Chahal was seeking asylum in the UK from India on political grounds and he feared his life would be in danger if he returned to India. The UK argued before the European Court that the government was entitled to balance the applicant's interest as a refugee against the risk he posed to national security. The court rejected this argument and held that Article 3 of the ECHR prohibiting torture and inhuman and degrading treatment would be violated if Chahal was deported.¹³⁶ The relevance of this case to this discussion is the fact that the Court restricted the UK government's ability to take executive action in the interests of national security.¹³⁷ The Court considered the UK's human rights obligations in this case as superior to the potential threat to the country's national security.

4.4 The United Kingdom

The United Kingdom has had a long history of terrorism and counter terrorism efforts as a result of the conflict in Northern Ireland which involved terror attacks being carried out within England and other parts of the United Kingdom.¹³⁸ The British courts have had occasion to make rulings on the counter-terrorism actions of the Government and the constitutionality of the anti-terrorism legislation.

¹³⁴ *Soering v United Kingdom*, para 89

¹³⁵ *Chahal v United Kingdom* (1996) 23 EHRR 413.

¹³⁶ Article 3 of the ECHR prohibits *inter alia* torture and inhuman and degrading treatment. In *Soering v UK* the European Court held that Article 3 would be infringed if a person was extradited to a country where there were reasonable grounds to believe that he would suffer such treatment.

¹³⁷ The Rt Hon Lord Phillips, 'Terrorism and Human Rights', University of Hertfordshire Law Lecture, 19th October 2006. Available at http://www.judiciary.gov.uk/publications_media/speeches/2006/sp191006.htm. (Accessed on 14th September 2007).

¹³⁸ See Mark Sidel, *More Secure Less Free: Antiterrorism Policy and Civil Liberties after September 11*, (2004: USA, University of Michigan Press), 147. More recently, the UK has borne the brunt of attacks from Islamic fundamentalists linked to international terrorist organisations such as *al Qaeda*.

In *A v Secretary of State for the Home Department*,¹³⁹ nine applicants brought a challenge against the decision of the Court of Appeal¹⁴⁰ made on 25 October 2002. The event leading to this case was the enactment of the Anti-terrorism Crime and Security Act¹⁴¹ in 2001 after the September 11 attacks in the United States. This Act was passed with the objective of expanding antiterrorism provisions and to fill in the gaps in the existing counter terrorism arena. The House of Lords ruled that the Part 4 of the Anti-Terrorism Act¹⁴² was discriminatory and incompatible with the European Convention on Human Rights and further pointed out that the Act permitted detention of individuals who sympathised with terrorist activity abroad but who were no threat to the United Kingdom.¹⁴³ The court ruled that indefinite detention of non-citizens was discriminatory both under British law and under international law.¹⁴⁴

The ruling of the court appeared to redress the issue of violation of rights but subsequently, the British government imposed even more restrictions on human rights and fundamental freedoms with the enactment of the 2005 Prevention of Terrorism Act¹⁴⁵ which *inter alia* allows either the judiciary or the Secretary of State to impose obligations on individuals suspected but not proven to be involved in terrorist activity. These are known as control orders and refer to restrictions that the Home Secretary or the courts ‘consider necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity’. These control orders may derogate from human rights principles.

¹³⁹ *A v Secretary of State for the Home Department* [2005] WLR 87.

¹⁴⁰ *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335.

¹⁴¹ Anti-terrorism Crime and Security Act, 2001 (Cap 24) UK.

¹⁴² Part 4 of the Act allowed the Home Secretary to certify a person as a suspected international terrorist if he reasonably believed that the person's presence in the UK was a threat to national security and reasonably suspected that he or she was an international terrorist. If the person was subject to UK immigration control and was not a British national or had no right of abode, he or she could be removed from the UK and detained pending removal under immigration legislation. If a point of law which wholly or partly related to an international agreement (for example, where removing a person to his or her country of origin would render him or her liable to torture contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)) prevented a person's removal or departure temporarily or indefinitely, the Act permitted their detention.

¹⁴³ Keith Starmer, ‘Setting the Record Straight: Human Rights in an Era of International Terrorism’ (2007) *European Human Rights Law Review*, 123.

¹⁴⁴ *A vs Secretary of State*, (note 141), 124.

¹⁴⁵ Prevention of Terrorism Act, 2005, (UK).

In April 2006, the High Court of England declared Section 3 of the Prevention of Terrorism Act of 2005 relating to control orders¹⁴⁶ to be incompatible with the right to fair trial under Article 6 of the European Convention on Human Rights (ECHR).¹⁴⁷ However, this judgment was reversed in part by the English Court of Appeal which ruled that the applicant's rights under Article 6 had not been infringed.¹⁴⁸

4.5 The United States

The US Patriot Act¹⁴⁹ was the first major anti-terrorism legislation after 9/11. The general effect of this Act was to provide the executive with increased authority to act against forms of crime and terrorism that had been defined very broadly. The Act defines terrorism in sweeping terms to include acts dangerous to human life and intended to influence the policy of the government by intimidation or coercion. This definition has caused some controversy due to its vagueness.

This legislation, as well as others following it, has been criticised for its discriminatory treatment of non-citizens, increased violation of the right to privacy through wiretapping of communications and secret searches as well as discrimination against people on ethnic and religious grounds. Under this Act, thousands of immigrants of Arab and Muslim background were detained between 2001 and 2002.¹⁵⁰ The most far reaching consequence though was the detention of persons suspected of terrorism at Guantanamo Bay.¹⁵¹ Under a resolution adopted by the US Congress in on 18 September 2001, the executive was authorised to use 'necessary and appropriate force' against persons responsible for the

¹⁴⁶Section 3 of the Prevention of Terrorism Act relates to supervision orders under this Act (passed in response to the House of Lords' decision in *A v Home Secretary*, above). The court held that the procedures under Section 3 merely allowed the court to review the legality of the secretary's decision to make a detention order and that that was conspicuously unfair.

¹⁴⁷ *Secretary of State for the Home Department v MB* [2006] EWHC 1000.

¹⁴⁸ *Secretary of State for the Home Department v MB* [2006] EWCA Civ. 1140.

¹⁴⁹ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. This Act was signed into law by the President on October 26th, 2001.

¹⁵⁰See Mark Sidel, *More Secure, Less Free: Antiterrorism Policy and Civil Liberties after September 11*, (2004: USA, University of Michigan Press), 16.

¹⁵¹ Guantanamo Bay is situated in Cuba and is 45 square miles leased to the USA for an indefinite number of years. Originally used for trading purposes, the Bay has been used as a detention centre by the US military for prisoners of war and persons captured during armed conflict and fairly recently for persons suspected of terrorist activities.

9/11 attacks. Under this resolution, military commissions were set up to prosecute individual terrorists for violations linked to terrorist activities.

The US Supreme Court has in a number of significant cases reviewed the executive's counter-terrorism actions. In the US, the Constitution protects the human rights of the individual from executive abuse. Some of the most controversial components of the US government's anti-terrorism policies include the use of military tribunals to try civilians for offences against the laws of war. Specifically, since 9/11 a number of applications have been brought before the Supreme Court by families of detainees suspected of terrorist involvement.

*Rasul v Bush*¹⁵² tested the right of the detainees at Guantanamo Bay to obtain access to US courts (common law *habeas corpus* rights). The key issue was whether the US federal courts had jurisdiction over Guantanamo which is situated outside the sovereign territory of the US and whether non-citizens held in custody at Guantanamo Bay had a right to file petitions for *habeas corpus* writs. The court in its ruling decided firstly that it did have jurisdiction over Guantanamo Bay on the basis that the US exercised plenary and exclusive jurisdiction over that territory. Secondly the court ruled that in a petition for a writ of *habeas corpus* a distinction cannot be made between a citizen and a non-citizen; this right applied to all indiscriminately. The court held the right to petition for a *habeas corpus* writ to be an absolute right and in so doing reinforced indirectly the right to fair trial for the detainees. This ruling is of particular significance to the human rights arena as it relates to the right to fair trial and the action of the judiciary in reviewing the actions of the executive.

An important decision by the US Supreme Court, *Hamdi v Rumsfeld*,¹⁵³ concerned a US citizen, Hamdi, who had been declared 'an illegal enemy combatant' by the US government and detained without trial at Guantanamo Bay and then later transferred to a military prison in the US. The court held that Hamdi could not be held indefinitely by the

¹⁵² *Rasul v Bush*, 124 S.Ct. 2686 (2004).

¹⁵³ *Hamdi v Rumsfeld*, (2004) 542 US 507.

US government without the assistance of a lawyer and without recourse to neutral arbitral proceedings.

In *Hamdan v Rumsfeld*,¹⁵⁴ the Supreme Court confirmed the US government's authority to detain American citizens who were suspected of having fought against the United States but rejected the treatment of these citizens as unlawful enemy combatants on the President's orders. This decision hinged on a precedent *Mathews v Eldridge*¹⁵⁵, which provided minimum constitutional guarantees to detainees such as right to legal advice and legal counsel and the use of civilian tribunals to determine their combatant status.¹⁵⁶ The Supreme Court ruling also held that military commissions set up by the US government to try detainees at Guantanamo Bay violated international human rights law and international humanitarian law provisions, specifically the four Geneva Conventions.¹⁵⁷ In declaring unlawful the government's military commissions, the Court in *Hamdan v Rumsfeld* declared that even a state of war does not grant the President a 'blank check' violate human rights law.

4.6 Conclusion

The jurisprudence of the HRC demonstrates that the state is held accountable for violation of human rights principles even in emergency situations such as potential terrorist attacks. This clearly underlies the fact that it is not permissible for states to derogate from their human rights obligations even in emergency situations. The HRC has also found some measures taken in the name of security to be contrary to certain human rights.

The US and the UK jurisprudence on terrorism and human rights demonstrate that the executive's powers in terms of counter-terrorism measures are kept in check by the

¹⁵⁴ *Hamdan v Rumsfeld*, 126 S. Ct. 2749 (2006).

¹⁵⁵ *Mathews v Eldridge* 424 U.S. 319 (1976).

¹⁵⁶ See Michael C Dorf, 'The Orwellian Military Commissions Act of 2006', (2007) *Journal of International Criminal Justice*, 12 at 14.

¹⁵⁷ The four 1949 Geneva Conventions and the 1977 Additional Protocols identify two classes of persons during international armed conflict: civilians and combatants. Persons classified as combatants are immune from criminal prosecution for activities that comply with the laws and customs of war.

judiciary where they infringe on human rights principles. The two countries differ very little with regard to the legal constraints on the counter-terrorism. In the United States the constraint on over-exertion of the executive is chiefly the Constitution of the United States of America while in the United Kingdom the constraint is the European Convention on Human Rights.

The next chapter analyses critically the anti-terrorism laws enacted in three East African countries – Kenya, Tanzania and Uganda – and their compatibility with constitutional and international human rights norms.

CHAPTER 5

ANTI-TERRORISM LEGISLATION ON HUMAN RIGHTS IN EAST AFRICA

5.1 Introduction

This chapter analyses critically the anti-terrorism legislation adopted in Kenya, Tanzania and Uganda.¹⁵⁸ The overriding question is whether these laws meet international human rights standards and constitutional requirements alluded to in chapters 2, 3 and 4. It seeks to lay out the main features of the antiterrorism legislation, identify points of similarity and difference and, lastly, identify the key human rights concerns that this legislation has raised. The last section of this chapter recommends the adoption of a regional approach to countering terrorism with the expectation that human rights are more likely to be respected at a supra-national level.

The Acts to be analysed are the Tanzanian Prevention of Terrorism Act, No 21 of 2002¹⁵⁹ (Tanzanian Act) and the Ugandan Anti-Terrorism Act, 2000 (Ugandan Act).¹⁶⁰ Kenya has yet to enact antiterrorism legislation but the government has drafted the 2003 Suppression of Terrorism Bill (Kenyan Bill) which will be considered as Kenya's legislation for purposes of this study.¹⁶¹

5.2 Definition of Terrorism

All three Acts criminalise terrorism in similar terms. The objective of the various pieces of legislation is to suppress acts of terrorism and generally to provide for the punishment of persons who plan, instigate, support, finance or execute acts of terrorism; to prescribe

¹⁵⁸ The 2002 Suppression of Terrorism Bill (Kenya), the 2003 Prevention of Terrorism Act (Tanzania) and the 2002 Anti-Terrorism Act (Uganda).

¹⁵⁹ The Prevention of Terrorism Act, No 21 of 2002 which came into force on 15 June 2003.

¹⁶⁰ The Anti-Terrorism Act, 2002 which came into force on 7th June 2002.

¹⁶¹ In April 2003, the Kenyan government published a draft 'Suppression of Terrorism Bill', only to withdraw it after harsh criticism from human rights groups and Kenyan Muslim communities. The Bill has not been reintroduced into Parliament for debate as at August 2007 but it appears that an amended version of the Bill will be reintroduced in the near future. For purposes of this dissertation reference will be made to the Kenyan Bill drafted in 2002.

terrorist organizations 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 associate with or facilitate the activities of terrorist organizations.¹⁶²

The Kenyan Bill defines terrorism as ‘the use or threat of action where - the action used or threatened - (i) involves *serious* violence against a person; (ii) involves *serious* damage to property.’¹⁶³ This definition has been criticised as being too imprecise, broad and vague¹⁶⁴. The terms used to define terrorism, ‘serious violence’, ‘serious damage’, ‘serious risk’ and ‘serious interference’, are imprecise and vague. More uncertainty is created by provisions relating to use of firearms. Thus for example, the use or threat of action which involves firearms is deemed to constitute terrorism whether or not it is designed to influence the Government or to intimidate the public or whether it is made for the purpose of advancing a political, religious, or ideological cause.¹⁶⁵ This makes it difficult to distinguish ordinary criminal conduct involving the use of firearms (such as robbery or murder) and terrorism.¹⁶⁶

Terrorism is defined in the Ugandan Act¹⁶⁷ as any act involving serious violence against a person or serious damage to property, an act that endangers life, creates a serious risk to the health or safety of the public; and which is designed to influence the Government or intimidate the public with the aim of furthering the advancement of a political, religious, social or economic aim.¹⁶⁸

¹⁶²See Preamble, Kenyan Bill read together with the Preamble of the Tanzanian Act and Preamble, Ugandan Act.

¹⁶³ Section 3, Suppression of Terrorism Bill (Kenya), emphasis mine.

¹⁶⁴ See Kathurima M’Inoti, ‘The Role of National Human Rights Institutions and Civil Society in Preventing the Adoption of Unacceptable National Security Legislation’ Paper presented at ICJ Biennial Conference, 27th-28th August 2004. Available at www.icj.org. (Accessed on 19 August 2007).

¹⁶⁵ Section 3 (1) Suppression of Terrorism Bill (Kenya).

¹⁶⁶ *Ibid.*

¹⁶⁷ Anti-Terrorism Act of 2002 (hereinafter Uganda Act).

¹⁶⁸ Section 7, *Ibid.*

The Tanzanian Act fails to define the offence of terrorism and instead enumerates various elements that would amount to terrorism.¹⁶⁹ Section 4 (2) of the Tanzanian Act mirrors the Kenyan Bill¹⁷⁰ in providing that acts designed to intimidate, compel or influence the government amount to crimes of terrorism.¹⁷¹ This section is particularly vague as it provides that acts that damage the country or an international organisation *or* is intended to influence, intimidate, destroy the government *or* involves attacks upon life, physical integrity or the liberty of a person, all amounts to terrorist acts. It is not clear whether these acts should be committed in connection with the others to be considered a terrorist offence.

In contrast to the Kenyan and Tanzanian legislation the Ugandan Act comprehensively lists out activities that constitute the offence of terrorism if carried out with certain objectives.¹⁷² Part III of the Ugandan Act lists various terrorist offences under the Act. These include offences of provision or collection of funds to commit terrorist acts,¹⁷³ collection of property or provision of property and services for the commission of terrorist acts,¹⁷⁴ use of property for commission of terrorist act,¹⁷⁵ arrangement for retention or control of terrorist property,¹⁷⁶ dealing with property owned or controlled by terrorist groups,¹⁷⁷ giving or soliciting support to terrorist groups for the commission of terrorist acts,¹⁷⁸ harbouring of persons committing terrorist acts, recruitment of persons into terrorist groups or to participate in terrorist acts, promotion or facilitation of the commission of terrorist acts in Foreign States, promotion of offences.

¹⁶⁹ Section 4 (3), Prevention of Terrorism Act, No. 21 of 2002 (hereinafter Tanzanian Act). These offences include infliction of harm, murder, serious damage to property, the use of firearms or explosives.

¹⁷⁰ Section 3, Kenyan Bill.

¹⁷¹ See Article 1, AU Terrorism Convention.

¹⁷² These objectives include influencing the government or intimidating the public for a political, religious, social or economic aim.

¹⁷³ Section 7, Ugandan Act.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Section 12, Ugandan Act.

¹⁷⁸ Section 11, Ugandan Act.

The definitive provisions of the Ugandan and Tanzanian Acts and the Kenyan Bill create the offence of terrorism. This definition bears the common elements, that is, the act (*actus reus*), intention (*mens rea*), and finally the motivation.¹⁷⁹ These definitions appear to cover a wide range of activities and overlap significantly with other existing common law or statutory crimes. The only difference seems to be the motivation for the action. For instance, causing injury or damage to someone is an offence under the criminal law but causing injury or damage to someone with the intention of compelling government to do or refrain from doing something is a terrorist act. Such a broad definition runs contrary to the principle of legality. By virtue of this principle, all measures taken by States must be prescribed by law and set sufficient precision so as to preclude arbitrary or discriminatory enforcement. A basic tenet of the principle of legality is that legislation should not be vague and should define with reasonable precision the ambit of prohibited conduct.¹⁸⁰ With a vagueness existing in the terms used in the anti-terrorism legislation, there is the possibility that acts that do not amount to terrorism could be considered terrorist acts under these laws.

What is common in all three pieces of legislation is that they rely on vague, ambiguous and imprecise definitions whereby it is possible to criminalise legitimate forms of exercising fundamental liberties, peaceful political and/or social opposition and lawful acts.¹⁸¹ The UN Human Rights Committee has perceived this to be a problem. In one of its country observations in respect of an anti-terrorist law, it noted that that the:

...definition of terrorism contained in that law is so broad that it encompasses a wide range of acts of differing gravity. [In the Committee's opinion,] the definition in question should be reviewed ... [a]nd stated much more precisely,

¹⁷⁹Cathy Powell, *Terrorism and Governance in South Africa and Eastern Africa*, 2006. Unpublished paper on file with the author (hereinafter Cathy Powell).

¹⁸⁰ See Solomy Bossa and Mulindwa, Titus *The Anti-Terrorism Act, 2002 (Uganda): Human Rights Concerns and Implications*, paper presented to the International Commission of Jurists, 15 September 2004 available at http://www.icj.org/news.php3?id_article=3517&lang=en (Accessed on 26 April 2007)The principle of legality prevents the government from abusing its enemies using the criminal justice system. It maximizes personal freedom by minimizing the risk that someone can break a law without being aware of it.

¹⁸¹ See Cathy Powell, (note 179). See also Solomy Bossa, (note 180), and Kathurima M'Inoti (note 164).

especially in view of the fact that it enlarges the number of offences which are punishable with the death penalty.¹⁸²

Acts that amount to terrorism offences in the Act are listed in all the pieces of legislation.¹⁸³ All three pieces of legislation attempt to codify international treaty law as well as common law crimes and share similarities.¹⁸⁴ The offences amounting to terrorism include the provision of financial assistance to terrorists or terrorist groups,¹⁸⁵ membership of terrorist groups¹⁸⁶ and soliciting and giving support to terrorist groups for the commission of terrorist act.¹⁸⁷ In addition to prohibiting certain acts, the Tanzanian Act imposes duties on citizens to disclose information relating to offences and terrorist acts in addition to provisions to prevent entry and order the removal of persons,¹⁸⁸ power to refuse refugee applications,¹⁸⁹ provision of information relating to passengers of Vessels and aircrafts and persons entering and leaving the Country.¹⁹⁰

The three pieces of legislation all relax the rules of evidence required to prove these offences. Generally, under criminal laws, the onus of proof lies on the prosecution and not the accused. The Tanzanian Act reverses this presumption of innocence by placing the onus of proof on the person accused of being a member of a terrorist organisation and not on the prosecuting authority. Under the Ugandan Act, the onus of proving innocence is placed on a person charged with financing a terrorist organisation to prove that he or she was ignorant of the organisation's status.¹⁹¹ Similarly the Kenyan Bill reverses the presumption of innocence.¹⁹²

¹⁸² Concluding observations of the Human Rights Committee: Egypt, CCPR/C/79/ Add.23, 9 August 1993, para. 8.

¹⁸³ Sections 4-8, Kenyan Bill, Section 7, Ugandan Act, Sections 4-10, Tanzanian Act.

¹⁸⁴ These include murder, hijacking, kidnapping, bombing, destruction of property. Section 7, Ugandan Act, Sections 2(c) and 3 of the Tanzanian Act.

¹⁸⁵ Section 13, Tanzanian Act, Section 13, Ugandan Act.

¹⁸⁶ Section 25, Tanzanian Act, Section 11, Ugandan Act.

¹⁸⁷ Section 18, Tanzanian Act, Section 11 Ugandan Act.

¹⁸⁸ Section 46, Prevention of Terrorism Act (Tanzania).

¹⁸⁹ Section 47, Prevention of Terrorism Act (Tanzania).

¹⁹⁰ Section 45, Prevention of Terrorism Act (Tanzania).

¹⁹¹ Section 13, 14, Ugandan Act.

¹⁹² Sections 4,6,7 of the Kenyan Bill.

As stated above, the Acts and the Bill do not give a clear definition of what constitutes the crime of terrorism. The wording in the legislation is vague and open to interpretation that may restrict the enjoyment of rights and freedoms.

Criminal conduct requires a precise legal definition before an offence can be said to have been committed.¹⁹³ This principle is formulated as a Latin maxim *nullum crimen sine lege, nulla poena sine lege*. No person can be punished for an act that was not specifically defined as a criminal act under the criminal law at the time the act was committed. This means that crimes must always be precisely defined so as to avoid arbitrary enforcement. Article 15 of the International Covenant on Civil and Political Rights (ICCPR) provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

5.3 Arrest and Detention

All three pieces of legislation include arrest and pre-trial detention provisions as a way of dealing with the threat of terrorism.

The Kenyan Bill provides that a police officer of or above the rank of police inspector may direct that the person arrested be detained in police custody for a period not exceeding 36 hours from his arrest, without having access to any person other than a police officer or government medical officer.¹⁹⁴ The Bill restricts the right of access to legal counsel during the 36 hour detention if the police officer has ‘reasonable’ grounds to believe that exercise of the right to consult a legal adviser would lead to interference with or harm to evidence connected with an offence under the legislation’¹⁹⁵. This provision restricts the enjoyment of the right to fair trial in terms of denying access to

¹⁹³ Commonwealth Human Rights Initiative, *Terrorism, Policing and Human Rights*, (2007) CHRI Human Rights Report, available at http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/default.htm (Accessed on 14th September 2007).

¹⁹⁴ Section 30, Kenyan Bill

¹⁹⁵ Section 30 (2) *Ibid*

legal counsel. This is in clear violation of international standards that recognise the right of detainees to legal counsel after arrest.¹⁹⁶

The Tanzanian Act provides that a police officer of or above the rank assistant superintendent or an immigration officer or member of the Tanzanian intelligence service may arrest without warrant any Person who has committed or is committing or whom he has reasonable grounds for suspecting to have committed or to be committing an offence under the Act.¹⁹⁷ Section 29 goes further to override the provisions of the Criminal Procedure Act that requires police officers to obtain a warrant.

Under international law, States have an obligation to strictly comply with all international standards and constitutional standards concerning deprivation of liberty.¹⁹⁸ Deprivation of liberty can only be done within the ambit of the law. Preventive detention laws are regarded as irregular and their use justified for only a temporary period and only then in face of a clear and present danger to the state.¹⁹⁹ Preventive detention is provided for under the criminal justice systems of the three countries.²⁰⁰ The Tanzanian Preventive Detention Act provides for indefinite detention without trial. Unfortunately the three East African countries have a long history of abuse of detention laws.²⁰¹

5.4 Freedom of Expression and Freedom of Association

In East Africa, heavy restrictions have been imposed on freedom of opinion and expression, on civil society institutions in general and human rights organisations in particular. The freedom of association is curtailed with many restrictions placed on the formation, the joining and attendance of meetings of organisations. The discretion given

¹⁹⁶ Human Rights Commission, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 135 (2003), para 9. See also Principle 7 of the United Nations Basic Principles on the Role of Lawyers. Available at <http://www.hri.ca/uninfo/treaties/44.shtml>, (Accessed on 14 August 2007).

¹⁹⁷ Section 28, Tanzanian Act.

¹⁹⁸ Articles 4,9,10 of the ICCPR, Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Standard Minimum Rules for the Treatment of Prisoners; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Code of Conduct for Law Enforcement Officials.

¹⁹⁹ Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law*, (1993:Martinus Nijhoff, Dordrecht)291.

²⁰⁰ Preservation of Public Security Act, Cap 57, Laws of Kenya, Preventive Detention Act, 1962, Tanzania.

²⁰¹ Andrew Harding and John Hatchard (eds) (note 205).

by the Acts to the executive to declare organisations terrorist restricts this right even further. The Kenyan Bill makes it an offence to join organisations declared as such by the government²⁰² while Section 11 of the Ugandan Act criminalises the joining of a known terrorist group and even goes further to criminalise the attendance of meetings or address of meetings of declared terrorist organisations.

The Acts further limit the freedom of expression and freedom of association. Organisations are declared terrorist organisations on the discretion of the executive. These provisions raise the possibility of arbitrary and political decisions²⁰³. The Kenyan Suppression of Terrorism Bill seeks to greatly enhance the powers of the police over suspects, removes some key safeguards for suspects, alters some fundamental principles of a fair criminal trial and broadens the discretion of Government officials over enjoyment of basic constitutional rights²⁰⁴. Section 30 of the Kenyan Bill provides that suspects may be detained in police custody for a period not exceeding thirty-six hours from the time of arrest. Given that the Kenya has a poor human rights record in relation to detention without trial, there is a propensity for the abuse of this provision which has been criticised as being prohibitive. Amnesty International warned that this provision was drastic and ‘would amount to legitimising incommunicado detention and the increase the risk of torture, ill-treatment and disappearances.’²⁰⁵ Indeed Human Rights Watch has documented several instances of these human rights abuses in Kenya relating to detention. For example in December 2006, Kenyan security forces arrested more than 150 people suspected of a number of crimes including crimes linked to terrorism, and

²⁰² Section 10, Suppression of Terrorism Bill, Kenya .

²⁰³ Since the September 2001 terrorism attacks many countries have put in place anti-terrorism laws. As a result there have been many reports of the misuse of anti-terrorism legislation to harass political opponents. For example in July 2007, the government of El-Salvador brought terrorism charges against protestors against a government national plan to redistribute water. See Human Rights Watch, *El-Salvador Terrorism Law Misused Against Protestors*, July 31 2007. Available at <http://hrw.org/english/docs/2007/07/31/elsalv16545.htm> Accessed on 2 August 2007

²⁰⁴ Kathurima M’Inoti, (note 164)

²⁰⁵ Amnesty International. *Memorandum to the Kenyan Government on the Suppression of the Terrorism Bill*, (note 164), para 3 .

proceeded to detain them incommunicado and without charge or trial for several weeks.²⁰⁶

5.5 Expanded executive powers

A common characteristic in all three pieces of legislation is that the executive is given discretion to declare certain groups and individuals terrorists. Section 10 of the Ugandan Act gives the Minister in charge of security power to declare an organisation a terrorist organisation subject to confirmation by Parliament within 21 days of this decision.²⁰⁷ Once organisations are declared terrorist, they are listed under the Second Schedule of the Act. The Kenyan Bill provides that the Minister of Security can declare an organization a terrorist organization if the Minister ‘believes that it is ‘concerned in terrorism’²⁰⁸.

The risk with this is that this wide discretion may give cause for concern with regard to politically motivated declarations of terrorist organisations. No criterion is set for arriving at the conclusion that an organisation is a terrorist organisation. This discretion is too broad risking abuse with ease. Moreover the Bill does not afford an organisation an opportunity to be heard before it is declared a terrorist organisation or a mechanism for appeal or review of the Minister's declaration. Section 10 of the Kenyan Bill and Section 10 of the Ugandan Act go further and makes it an offence to become a member of a ‘declared terrorist organisation’. It is unclear whether this provision anticipates the possibility that person may be unaware of the declaration in place at the time of joining the organisation.²⁰⁹

The Tanzanian Prevention of Terrorism Act²¹⁰ has been singled out not only for vesting too much power to the police but also for absolving the police from any Criminal or Civil

²⁰⁶ Human Rights Watch, *Kenya Ethiopia and US Cooperate in Secret Detentions and Renditions*, 20 March 2007. Available at <http://hrw.org/english/docs/2007/03/30/kenya15624.htm>, (Accessed on 20th August 2007).

²⁰⁷ Section 10 (1) (2), Uganda Act.

²⁰⁸ Section 9 of the Suppression of Terrorism Bill (Kenya).

²⁰⁹ *Ibid* Section 10.

²¹⁰ Part V of the Tanzanian Act deals with the investigation of offences. It contains provisions in relation to powers of arrest, powers of Investigation in cases of urgency, intelligence gathering, power to intercept

proceedings where injury or death to any person or damage or loss of any property occurs in the exercise of such powers. Section 40 of the Kenyan Bill has one of the most draconian provisions. It empowers the police, custom officers or other officers if necessary to use ‘reasonable force’ for the purposes of the Bill. The Kenyan Bill²¹¹ indemnifies such officers from liability in any criminal or civil proceedings for having, by the use of force, caused injury or death to any person or damage to or loss of any property. It extends these powers and immunities to officers and persons other than police officers. This provision lacks reasonable justification. It is a fertile ground for impunity and blatantly violates the right to an effective remedy for acts violating fundamental rights.

Most of the arrests in Kenya as well as Uganda in relation to terrorism have been done in secrecy.²¹² Provisions in the antiterrorism legislation of the three countries are drastic and would amount to legitimising incommunicado detention, which can increase the risk of torture, ill-treatment and disappearances.²¹³

Since the 1998 attacks in Nairobi, the Kenyan government has been criticized for detaining persons without charge, torture, cruel and inhuman degrading treatment and harassment of family members and relatives of those suspected of terrorism²¹⁴.

The three countries are party to the ICCPR which provides at Article 9 that ‘no person shall be subjected to arbitrary arrest or detention’. The Constitution of Kenya²¹⁵ provides that no person shall be deprived of his personal liberty save as may be authorized by law, upon reasonable suspicion of his having committed or about to commit a criminal offence

communications and provides for the procedure for the admissibility of intercepted communications, detention of aircrafts and vessels and power to seize property used in Commission of terrorist acts.

²¹¹ Section 40 (3) Suppression of Terrorism Bill (Kenya).

²¹² See Amnesty International, ‘Kenya: *The Impact of Anti-terrorism Measures on Operations on Human Rights*’ 23rd March 2005. Available at <http://web.amnesty.org/library/index/engaf320022005>. (Accessed on 10 August 2007).

²¹³ See Amnesty International, *Memorandum to the Kenyan Government*, (note 164), para 3.

²¹⁴ See Amnesty International Report, ‘Kenya: *The Impact of Anti-Terrorism Operations on Human Rights*’ 23rd March 2005. Available at <http://web.amnesty.org/library/index/engaf320022005> (Accessed on 10 August 2007).

²¹⁵ Section 72 (3) (b) of the Constitution of Kenya, (Revised Edition 2000).

under the law of Kenya. The Constitutions of Tanzania and Uganda have similar provisions.²¹⁶ The Constitutions further provide that the person detained should be tried within a reasonable time. Although the phrase ‘reasonable time’ is not defined it can be determined by the circumstances of each case. The International Covenant on Civil and Political Rights and the African Charter as well as other international human rights instruments requires that that the detention period be ‘reasonable’. The jurisprudence of the African Commission on Human and People’s Rights on the reasonableness of time takes a case by case approach towards determining what length of time could be considered ‘reasonable’.²¹⁷ It is nowadays accepted that a person who has been arrested and detained in police custody should be charged within a period of 48 hours, or quite soon thereafter. If not charged, or when the evidence suggests a charge should not be made, the arresting authorities should in all cases set the detainee free, subject of course to police obligations to continue their investigations and to arrest and charge the suspect when finally able to.

5.6 Property Rights

One of the 13 multi-lateral UN anti-terrorism treaties, the International Convention for the Suppression of the Financing of Terrorism²¹⁸ (hereinafter the Financing Convention) criminalises the funding of terrorist activities and groups. The Convention further provides a number of measures that States should put in place to prevent terrorism including the identification, freezing and seizure of assets belonging to suspected terrorists.²¹⁹ Article 8 of the Convention reads thus:

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing

²¹⁶ Article 23, Ugandan Constitution, Section 23, Tanzanian Constitution.

²¹⁷ See for example *Annette Pagnouille (on behalf of Abdoulaye Mezou) v. Cameroon*, (39/90), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th and *Alhassan Abubakar v. Ghana*, (103/93), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th.

²¹⁸ International Convention for the Suppression of the Financing of Terrorism G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49. (hereinafter the Financing of Terrorism Convention).

²¹⁹ *Ibid*, Article 8.

the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

The Ugandan Act and the Tanzanian Act empower the state to use all necessary means to investigate terrorist activities and confiscate property belonging to people found to be supporting terrorism.²²⁰ The Ugandan Act provides that the government has power to dissolve any organization the Minister has designated as terrorist and further provides that once an organization is designated as terrorist, the government can seize its assets²²¹.

Section 10 (5) of the Ugandan Act provides that the Minister may by statutory order declare any terrorist organisation dissolved, order the winding up of the terrorist organisation and order the forfeiture to the State of the property and assets of the terrorist organisation. This at first glance appears onerous but the Act provides that the statutory instruments by which orders are made are subject to confirmation by the Ugandan

²²⁰ Section 10, Ugandan Act; Section 33, Tanzanian Act.

²²¹ Section 10, Ugandan Act.

Parliament within 14 days of being made.²²² However this legislative overview does not affect the previous operation of the instrument.

Section 12 (5) of the Ugandan Act vests in the Minister power to issue orders for the seizure and restraint of property, refusal of applications for registration and the revocation of registration of trustees linked to terrorist groups.

Section 26 of the Kenyan Bill empowers the police to seize and detain property used or suspected of being used to commit a terrorist offence without a warrant obtained from the court. The Ugandan Act provides for seizure of property without a criminal conviction. This is in violation of international provisions governing the seizure of property. The Financing Convention on which the national provisions are based only provides for asset seizure *after* a criminal conviction has been obtained.²²³ The three pieces of legislation provide for seizure of property to be done before a criminal conviction has been obtained. Further the Ugandan Act provides for the permanent forfeiture of property. This is a highly repressive provision lacking reasonable justification. In contrast to the Kenyan and Ugandan legislation, Sections 42 and 43 of the Tanzanian Act provides for judicial oversight over the seizure of property by the state.

5.7 The Death Penalty

The Ugandan Act prescribes the death penalty for the crime of terrorism as well as for the aiding and abetting of terrorism acts.²²⁴ The Kenyan and Tanzanian Acts while criminalising the aiding and abetting of terrorism acts, do not prescribe the death penalty.²²⁵

Comparative international law jurisprudence contests the legality of the death penalty viewing it as an act that violates the right to life, human dignity and is cruel, inhuman

²²² Section 10 (3), Ugandan Act.

²²³ Article 8, Financing of Terrorism Convention.

²²⁴ Sections 8 and 9, Ugandan Act.

²²⁵ Under the Tanzanian Act, penalties for offences under the Act range from 10-25 years imprisonment and under the Kenya's Bill a sentence of 10 years for certain offences is prescribed. See Sections 13,14,16,17,21 and 26 of the Tanzanian Act; and Sections 6,10 of the Kenyan Suppression of Terrorism Bill.

treatment. The UN Commission on Human Rights called upon all States that still maintain the death penalty to abolish the death penalty completely and, in the meantime, to establish a moratorium on executions; to progressively restrict the number of offences for which it may be imposed and, at the least, not to extend its application to crimes to which it does not at present apply; and lastly to make available to the public information with regard to the imposition of the death penalty and to any scheduled execution.²²⁶

The Human Rights Committee (HRC) has stated that Article 6 of the ICCPR '[r]efers generally to abolition in terms which strongly suggest... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life...'²²⁷ The HRC has also stated, that 'any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of ...the right to a fair trial]'. In many cases the lack of procedural safeguards makes the imposition of the death penalty a clear and unjustified violation of international law.²²⁸

However Article 6 of the ICCPR recognizes that the death penalty may be imposed for the 'most serious' crimes.²²⁹ Even though Uganda is not a state party to the Second Optional Protocol to the International Convention on Civil and Political Rights on the abolition of the death penalty, it may be argued that the lack of procedural safeguards present in the Anti-Terrorism Act makes the imposition of the death penalty an extreme punishment and thus an unjustified violation of international law.²³⁰ Having ratified the ICCPR, Uganda is obligated under its Article 6 to take measures to restrict application of the death penalty under its law, even if it does not abolish it *de jure*. As a general principle of international law, prescribed under the Vienna Convention on the Law of

²²⁶ Commission of Human Rights, *The Question of the Death Penalty*, Resolution 2005/59.

²²⁷ Human Rights Committee, General Comment 6, para 6. Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 127 (2003).

²²⁸ S Iagwanth and F Soltau, 'Terrorism and Human Rights in Africa' in Jakkie Cilliers and Kathryn Sturman, eds, *Africa and Terrorism: Joining the Global Campaign* (July 2002) ISS Monograph No 74.

²²⁹ Article 6 (2), ICCPR.

²³⁰ See S Iagwanth and F Soltau, 'Africa and Terrorism, Joining the Global Campaign', in Jakkie Cilliers and K Sturman (eds) *Terrorism in Africa*, (2002) ISS Monograph No 74.

Treaties,²³¹ there is a presumption that a State will not legislate contrary to its international obligations.

In summary, provisions of antiterrorism legislation in the three countries exhibit certain similar characteristics such as unprecedented powers to the executive which if unchecked, these powers may easily be abused and lead to violations of fundamental rights such as freedom of opinion, religion and association

5.8 A Sub-Regional Approach to Countering Terrorism

It was stated in Chapter One that the three East African countries under discussion share a similar history and legal systems. Since terrorism is a phenomenon that affects these countries similarly, what is needed is a sub-regional effort to counter terrorist threats. A regional and sub-regional focus on countering terrorism could well contribute to the development and maintenance of effective law-based criminal justice systems.²³² It has been noted that regional organisations can encourage members to accept the competence of the international and relevant human rights monitoring bodies as well as influencing member states to implement a human rights approach to countering terrorism.²³³

The anti-terrorism legislation in the three East African states provides for inter-country co-operation relating to mutual assistance and extradition. Kenya's Bill places an obligation on the head of police to disclose information to any competent authority of a foreign state relating to persons suspected of involvement in acts of terrorism.²³⁴ The Tanzanian Act authorises the Tanzanian chief of police to pass on information to foreign states if requested as long as the disclosure is within the parameters of law and not

²³¹ Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969).

²³² Center on Global Counter-Terrorism Cooperation, Discussion Paper, Workshop on Human Rights and Implementation of the UN Global Counter-Terrorism Strategy, (20-21 June 2007, Geneva, Switzerland).

²³³ UN General Assembly, *United Nations General Assembly Resolution 60/288*, A/RES/60/288, September 8, 2006.

²³⁴ Section 33 (1), Kenya Suppression of Terrorism Bill .

prejudicial to national security.²³⁵ The Ugandan Act makes the crime of terrorism an extraditable one.²³⁶

At the regional level, efforts have been made with the adoption of resolutions for the co-operation and co-ordination of counter-terrorism efforts among African States.²³⁷ A large number of initiatives have already been adopted in the national and intergovernmental spheres, or are being prepared. Most of these initiatives relate to the definition of the crime of terrorism, police and judicial co-operation and extradition. Effective counter-terrorism measures require dedicated resources and structures and co-ordination between various states and regions.²³⁸ Terrorism can not be addressed in isolation²³⁹ and inter-state intelligence structures are required to co-ordinate efforts to counter this phenomenon.

On 8th September 2006, all 192 member states of the UN General Assembly adopted the United Nations Global Counter-Terrorism Strategy²⁴⁰. It encourages ‘Member States, the United Nations and other appropriate international, regional and sub-regional organizations to support the implementation of the Strategy, including through mobilizing resources and expertise.’ The Strategy focuses on the concrete, practical contributions that the different parts of the UN system, as well as other multilateral bodies, including at the regional and sub-regional levels.

At the sub-regional level, East African countries have made steps to counter act the threat. The East Africa Counterterrorism Initiative (EACTI) was launched in 2003 and is

²³⁵ Section 37, Tanzanian Act.

²³⁶ Section 5, Ugandan Act.

²³⁷ OAU Resolution to Co-operate and Enhance Co-ordination Among Member States to fight extremism AHG/Res.213 (XXVIII), Declaration on the Code of Conduct for Inter-African Relations ,AHG/Decl. 2 (XXX), Convention on the Prevention and Combating of Terrorism (the Algiers Convention).

²³⁸ Goredama and Botha, ‘African Commitments to Combating Crime and Terrorism: A Review of Eight NEPAD Countries’ (July 2004) *African Human Security Initiative*, Paper 3. Available at www.africanreview.org. (Accessed on 10 August 2007).

²³⁹ *Ibid.*

²⁴⁰ Available at <http://www.un.org/terrorism/strategy-counter-terrorism.html#resolution> (Accessed on 9th September 2007).

a US-led initiative to counter terrorism in the Horn and East African region.²⁴¹ The Initiative encompasses military training for border and coastal security, programs to strengthen control of the movement of people and goods across borders, aviation security, assistance for regional programs to curb terrorist financing, police training and an education program to counter extremist influence. There are separate programs to combat money laundering

Several opportunities for inter-state co-operation in counter terrorism efforts exist in the sub-region and the region. These include joint operations between police such as the East Africa Police Chiefs Co-operation Organisation (EAPCCO)²⁴². Member police agencies of the EAPCCO (which include Kenya, Tanzania and Uganda) entered into an agreement for co-operation and mutual assistance in combating crime.²⁴³

5.9 Conclusion

This chapter has revealed two challenges to human rights in the fight against terrorism. Firstly is the general approach to the issue of terrorism as a threat to human rights with a focus on the protection of ordinary citizens threatened by the unbridled power of the state, and secondly, a reflection on some aspects of the subversion of the rule of law in the context of anti terrorist operations.

An analysis of the legislation in the three countries reveals that the antiterrorism legislation infringes and in some cases violates constitutional and human rights principles. Some of these infringements include broad and vague definition of the crime of terrorism which undermines the principles of legal certainty and the presumption of

²⁴¹ See East Africa Counterterrorism Initiative Conference, Opening Remarks by William Pope, April 21 2004. available at <http://www.state.gov/s/ct/rls/rm/2004/31731.htm>, (Accessed on 11th September 2007). See also David H Shinn, 'Fighting Terrorism in East Africa and the Horn', (September 2004) *Foreign Service Journal*, 36.

²⁴² The member police agencies of the EAPCCO include Ethiopia, Kenya, Burundi, Djibouti, Eritrea, Tanzania, Rwanda, Seychelles, Sudan and Uganda.

²⁴³ Goredama and Botha, 'African Commitments to Combating Crime and Terrorism: A Review of Eight NEPAD Countries' *African Human Security Initiative*, Paper 3 1 July 2004. Available at www.africanreview.org. Accessed on 10 August 2007

innocence. The legislation also threatens freedom of expression and association. The Ugandan Act radically extends the scope of the mandatory death penalty to crimes other than murder and increases the risk that this penalty will be imposed following unfair trials. The Kenyan and Tanzanian legislation, however, can be commended for not imposing as harsh a punishment as the Ugandan Act.

The power of the state constitutes a major threat to human rights and therefore legal protection of rights should be the main focus on preventing state abuse. However, it is also important to recognize that non-state actors, in this case, terrorist groups, also threaten and violate human rights law just as governments do. The task of the governing authorities is therefore to balance security needs with human rights obligations as pointed out in Chapter 3. Fighting terrorism with another form of state terrorism will never succeed. This state terrorism takes the form of violation of citizen rights and suppression of civil society groups and trade unions through the enactment of legislation which contravenes the East African countries international human rights obligations as well as their constitutions.

All three countries have exhibited similar reactions to terrorism. For example, they have increased the state capacity to investigate, detain and punish suspects for offences relating to terrorism through the enactment of counter terrorism legislation²⁴⁴ and the setting up of administrative structures such as Anti-terrorist police units and National Counter terrorism centres. These new measures restrict certain fundamental freedoms and human rights all in the name of security.

²⁴⁴ Note that while Uganda and Tanzania have anti-terrorism legislation in place, Kenya's parliament has yet to pass the Suppression of Terrorism Bill drafted by the government.

CHAPTER 6

CONCLUSION

This study sought to analyse the compatibility of antiterrorism legislation in Kenya, Tanzania and Uganda with constitutional and human rights standards. It has established the existing international and African regional counterterrorism framework demonstrating the international obligation of these three states to implement antiterrorism legislation. The study has also analysed the concept of terrorism and revealed that terrorism threatens the integrity of the human rights project.²⁴⁵ Terrorism threatens state security and, thus, effective counterterrorism measures are required to prevent it or react to it to punish the perpetrators. However, counter-terrorism measures have involved limitation of human rights protection in various ways and well-established human rights principles are being ignored under the colour of national security.

Chapter 1 provided an introduction to the question of how terrorism impacts human rights with a focus on the East African region. The chapter further gave a brief outline of human rights and constitutional history in Kenya, Tanzania and Uganda. Chapter 2 laid out the international and regional legal framework on terrorism and the obligations of states to implement counterterrorism measures at the domestic level including antiterrorism legislation.

Chapter 3 developing on the international norms introduced in Chapter 2 addressed the impact of the international and national counter terrorism framework on human rights; and especially the erosion of fundamental freedoms and human rights by the State in the name of security. The chapter further introduced the conflict facing states on balancing the need for security with human rights obligations. It examined the international framework requiring states to protect individuals within the jurisdiction of the state on one hand, and the international obligations to respect human rights on the other hand.

²⁴⁵ For more on this subject and in particular the effect of terrorism on international human rights norms see Conor Gearty, *Can Human Rights Survive?* (2006: New York, Cambridge University Press).

Chapter 4 analysed several judgments from the Human Rights Committee (HRC), the US and the UK concerning balancing security and human rights. The chapter demonstrated that there is limited jurisprudence on terrorism and human rights. The cases analysed related to violation of specific human rights under anti-terrorism legislation or through counter-terrorism measures such as indefinite detention, torture and inhuman and degrading treatment. It was further demonstrated that the HRC has taken into account the question of balancing security interests under anti-terrorism legislation and a state's human rights obligations. This chapter also explored briefly the jurisprudence of the UK and the US on balancing the need for stringent counterterrorism measures with human rights and revealed that the courts consider the upholding of human rights principles of utmost importance even in the face of security concerns.

Drawing from court decisions from the HRC, the US and UK, this study demonstrated the need to uphold human rights and place them at the centre of the war in terror. Judicial oversight is needed to check the unbridled power of the executive in effecting counterterrorism measures.

Chapter 5 shows that the laws adopted as part of the East African states' counterterrorism obligations to a varying extent restrict human rights. These include the right to fair trial, freedom of expression and association and the right to property.

This study has analysed the compatibility of the anti-terrorism legislation in East Africa with human rights, especially the right to fair trial, freedom of association and the right to property. It has revealed that anti-terrorism legislation adopted in the three East African countries have the potential to undermine human rights norms and to unravel the progress made by these countries over the last decade in terms of human rights. The legislation under study vests unprecedented powers to the executive with regard to such matters as the banning of organisations and the listing of persons suspected of having terrorist links. If unchecked, these powers may easily be abused and lead to violations of fundamental rights such as freedom of opinion, religion and association.

The anti-terrorism legislation in East Africa exhibits a preference for national security at the expense of the protection of human rights of those suspected of or accused of terrorist activities. This is unfortunate. A more nuanced balanced must be struck between these two compelling needs. As this study has demonstrated, the view that the best and most effective way of countering terrorism is through swift executive action, unhampered by initial judicial and legislative oversight is misconceived.²⁴⁶ Anti-terrorism measures need to be implemented within a human rights framework in order for them to achieve their legitimate objective of preventing terrorism. The Constitutions of the three countries under study all protect human rights. Furthermore, these countries have made giant strides in moving away from an era of autocracy to democracy. The anti-terrorism legislation are retrogressive as they take away the gain that have been made by these countries in democratisation.

Apart from guaranteeing access to justice and judicial independence in matters that pertain to terrorism, it is critical that substantial amendments are made to these Acts in order to protect the rights of persons accused or suspected of terrorism. In particular, the powers of the executive must be reduced and be subjected to judicial oversight and terrorist crimes must be defined more precisely and clearly in conformity with the principle of legality (*nullum crimen sine lege*).

Other specific recommendations include the following:

- a) The definition of terrorism adopted should ensure clear definition of the conduct proscribed and this definition should as far as possible minimally restrict rights such as those of freedom of association, expression and peaceful assembly.
- b) The death penalty should be abolished permanently for all crimes including terrorist offences.
- c) Arrest and detention should be mandated only under a legal framework of recognizable criminal offences and within the internationally recognised fair trial standards.

²⁴⁶ Cathy Powell, (note 179).

- d) Systems of detention ought to be subjected to human rights standards including the entitlement of detained persons to challenge the lawfulness of detention (*habeas corpus*), the detained persons should be notified of the reasons for their detention and of their rights and allowed access to legal counsel and the location of the detention should not be kept secret.
- e) Judicial oversight over executive action under the antiterrorism ought to be included. For example there ought to be included a provision for judicial review of the executive's classifying terrorist organisations, review of detention of individuals under the legislation and of property confiscated under the legislation.

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