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Preface

This monograph is part of a larger project, funded by the Government of Norway, on support to the Organization of African Unity (OAU) in the prevention and combating of terrorism. The subsequent joint OAU/ISS project seeks to:

- a. reflect on the implementation of relevant international instruments relating to the prevention and combating of terrorism at the level of the OAU, Regional Economic Communities and member states, and draft an agenda for action, including priorities and potential areas of assistance;
- b. provide an opportunity to critically review the implementation of UN Security Council Resolution 1373 (2001) and related instruments such as the 1999 Algiers Convention on the Prevention and Combating of Terrorism; and
- c. demonstrate and give practical effect to Africa's commitment and contribution in the global fight against terrorism.

The project includes intensive work by a small core of experts in Pretoria and Addis Ababa, working with a number of countries, on a draft African counter-terrorism agenda for action to complement the Algiers Convention.

The purpose of this publication is to highlight the impact of events subsequent to September 11th 2001 on Africa, the contribution that the continent is making to the global campaign against terrorism and the challenges faced in the process.

We would like to express our thanks to all who have collaborated to this publication, particularly to André Snyders from the Institute who had to do so under extreme time constraints.

Jakkie Cilliers & Kathryn Sturman
Pretoria
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CHAPTER 1

An Overview and Introduction

J Cilliers and K Sturman

Introduction

Terrorism is an age-old stratagem that has gained renewed international attention following the tragic attacks in Washington and New York in September 2001. Although the events of that day have come to be acknowledged as reflecting a watershed in international concern with the issue, the attacks of September 11th did not occur in isolation. Nor do these events reflect a sudden new threat, but the symbolic reaffirmation of a trend that had been evident for several years. Where terror had previously been an uncomfortable adjunct to anarchism, liberation wars, counter-insurgency campaigns and the battlefields of the Cold War, the events of that day took terrorism to a new, global level.

There is much evidence to indicate that the resurgence of global terror during the 1990s has its roots in the development of a covert alliance to counter and reverse Soviet expansion in Central-South Asia, Afghanistan in particular. A campaign that initially sought to draw the former Soviet Union into its own version of the American experiences in Vietnam, has today spawned any number of offshoots, coalescing around a new global target, the United States, Israel and those perceived to be their close allies. This line of argument does not try to attribute a single causal motive to the recent scourge of international terrorism. Rather it points to the interconnected nature of these events. It examines the extent to which these developments have provided a new impetus to the violent pursuit of radical objectives that feed upon latent and deep divisions along cultural and religious grounds.

After the Soviet withdrawal from Afghanistan in 1989, the contagion carried by returning veterans from the war in Afghanistan spread particularly rapidly in northern Africa. It soon affected Algeria, Egypt and Sudan. The ripple effects from that conflict would even add to the motivation for a wave of terrorist attacks in South Africa in the late-1990s.

In Algeria, tens of thousands of people died and several times this number were wounded, displaced from their homes or disappeared in the events that followed the cancellation of the 1992 elections. In one of its most gruesome episodes, 412 men, women and children were hacked to death on the night of December 29th, 1997 in three isolated villages in Algeria's Elizane region. Algeria has been in a state of virtual civil war since early 1992, as economic stagnation and massive unemployment in the post-independence bidonvilles or shantytowns that ringed its cities provided fertile seed for radicalisation. This was financed first by countries such as Saudi Arabia and later by largess from

Usama bin Laden and other radical private financiers. In the final years of the Afghan war, from 1986 to 1989, somewhere between 600 and 1 000 battle hardened Algerian nationals returned home. They provided a nucleus for the terrorist movement that would follow.

Only early and effective countermeasures from Tunisia, Libya, Egypt and other Sub-Saharan states managed to halt the spread of radical terror further afield. Despite these efforts, 58 foreign tourists and four Egyptians were massacred in Luxor, Upper Egypt, in November 1997, garnering international attention and damaging that country's vital tourist industry. The subsequent bombing of two American embassies in Nairobi and Dar es Salaam on August 7, 1998—and evident but unsuccessful attempts to destroy others in Kampala (as well as Bangkok and Tirana)—reflected the extent to which Africa, despite its oft reported global strategic marginalization, had been drawn into a new chapter in an old story. The international character of this threat was reflected in the US retaliatory cruise missile attack on a chemical factory in Khartoum, Sudan on August 20th, 1998. Further north, the summer 1995 assassination attempt on Egyptian President Husni Mubarak in Addis Ababa, Ethiopia, blamed on Al Itihad members, had already increased the tension between Egypt, Sudan and Ethiopia.

While the focus of this monograph is on Africa, terrorism is a global phenomenon. Four hundred people perished when a group of the Shah's opponents burned a cinema in Abadan during the last phase of the monarchy in Iran. There were 328 victims when Sikh terrorists exploded an Air India aircraft in 1985. Two hundred and seventy eight people died in the Lockerbie disaster in Scotland in 1988 and slightly less US marines lost their lives when suicide bombers in Beirut attacked their barracks in 1983. Hundreds lose their lives in the ongoing struggles in Palestine and Israel. The list is almost endless.

In retrospect it is clear that the terrorist threats in a number of countries in the Middle East, in the Magreb and the US Embassy bombings in Dar es Salaam and Nairobi were a preview of the events of September 11th, 2001. Apart from the widespread use of terror by local, national and regional groups, a global campaign had been underway for several decades by the time that the attacks on the World Trade Centre and other symbolic targets in the United States would focus the world's attention on the new threats of the post Cold War era. These events, seminal as they are, reflect public evidence of an intensifying global security problem that will demand a global response, including one from Africa and its constituent individual states.

Although this monograph and most contemporary writing on the subject focus on the international dimensions or manifestations of terrorism, sub-national terror and even state terror has been a long-standing feature of Africa and elsewhere. This is reflected in a number of contributions to this monograph that trace the international efforts dating back several generations to combat international and, when it suits particular political interests, domestic terrorism.

Global, and African, concerns about terrorism have obviously intensified in recent months, but have been evident for several years. As far back as 1992, OAU Heads of State and Government adopted a resolution [AHG/Res. 213 (XXVIII)] aimed at enhancing co-operation and co-ordination between Member States in order to fight the phenomenon of extremism. In 1994 in Tunis, the OAU Assembly adopted a Declaration on the Code of Conduct for Inter-African Relations [AHG/Decl. 2 (XXX)]. The Declaration rejected fanaticism and extremism, whatever their nature, origin and form, particularly those based on religion and terrorist acts, which were unreservedly condemned.

Also in 1994, in its Declaration on Measures to Eliminate International Terrorism, (Annex to Resolution 49/60 of 9 December 1994) the United Nations General Assembly condemned all acts of terrorism wherever and by whomever committed and that:

'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.'

The International Convention for the Suppression of Terrorist Bombings of 1997 [37 ILM 249] comes close to a general anti-terrorism convention. This Convention makes it an offence for any person to unlawfully and intentionally place or detonate an explosive device in a place of public use, state or government facility or transportation system with intent to cause serious bodily injury or extensive destruction.

The Organization of African Unity adopted the Convention on the Prevention and Combating of Terrorism (the Algiers Convention) at its 35th Ordinary Session of the Assembly of Heads of State and Government in July 1999 in Algiers. However, subsequent ratification and enactment of the Convention remain halting and slow—even after the events of September 11th, 2001.

It is against this background that the OAU is seeking to reinvigorate the African contribution to the global campaign against terrorism. The Constitutive Act of the African Union, 2000 has declared among its principles, in Article 4 (o), its demand for 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.' The various aspects discussed in this monograph seek to support this undertaking.

Defining Terrorism

A description and understanding of terrorism is easy. It is the unlawful, or threatened, use of violence against individuals or property to coerce and intimidate governments or societies for political, religious or ideological objectives. Translating this into a common, internationally accepted legal definition has, however, proven impossible. There are a number of reasons for this.

First is that the interpretation of the complex motivation and nature of a deed that at first blush appears to constitute an act of terrorism, loses clarity when placed within a particular historical, political, religious and ideological context. Interpretation of what constitutes terrorism is a function of the vantage point of the commentator—hence the adage that one person's terrorist is another person's freedom fighter.

Second, the specificities of national legislation demand different approaches to the crime. This is a particular problem in Africa where often outdated Francophone and Anglophone legal systems lie uncomfortably next to one another—unencumbered by modernisation since colonialism. This situation is exacerbated by the different approaches that States adopt in distinguishing between terrorism and other types of serious crime such as murder and sabotage. Most countries prefer an approach that restricts the domain of terrorism as narrowly as possible, rather than broadening the application of laws on organised crime, sabotage and sedition. South Africa in the post 1994 period would be one such example.

Others countries adopt a robust and forthright approach in their efforts to combat terrorism, defining and broadening the legal rubric that cover terrorism and those that perpetrate it. More often than not this is an approach common to countries that face a concerted threat from terrorists—one that invariably constrains civil liberties. Typically, the more serious the challenge, the greater the incentive to adopt specific measures and approaches to combat the problem. This is demonstrated by the decision by the United States to establish a special prison for suspected terrorists from Afghanistan in Guantanamo Bay and to resort to the use of military as opposed to normal legal

recourse in the aftermath of September 11th, 2001.

The most recent and comprehensive description of terrorism (as opposed to a legal obligation) is contained in the 'Common Position' adopted by the European Union on December 27th, 2001 [2001/931/CSFP]. Reflecting a recent trend, the Common Position makes a distinction between a terrorist act or deed, and terrorist persons, groups or entities. This is an important distinction since it provides some leeway in categorising specific actions as being of a terrorist nature, without the associated problem of classifying groups of movements as essentially terrorist in all their aspects. The Common Position reads, in part, as follows:

2. For the purposes of this Common Position, 'persons, groups and entities involved in terrorist acts' shall mean:

- persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,
- groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups or entities.

3. For the purpose of this Common Position, 'terrorist act' shall mean one of the following international acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

i. seriously intimidating a population, or

ii. unduly compelling a Government or an international organisation to perform or abstain from performing any act, or

iii. seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

- a. attacks upon a person's life which may cause death;
- b. attacks upon the physical integrity of a person;
- c. kidnapping or hostage taking;
- d. causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
- e. seizure of aircraft, ships or other means of public or goods transport;
- f. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological

and chemical weapons;

- g. release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
- h. interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
- i. threatening to commit any of the acts listed under (a) to (h);
- j. directing a terrorist group;
- k. participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge or the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph 'terrorist group' shall mean a structured group of more than two persons, established over a period of time and acting to commit terrorist acts. 'Structured group' means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

The EU Common Position constrains its understanding of what constitutes a 'terrorist acts' to international acts, in an effort to avoid the complexities associated with different national legal systems.

Terrorism may be distinguished from common law crimes and other offences because of the motivation for it being committed. Motivation is, of course, inherently subjective and the problem is invariably that training for today's just warrior may benefit tomorrow's terrorist. This was demonstrated in the events that followed the Soviet invasion of Afghanistan in 1979 and that country's withdrawal ten years later, following which the training of yesterday's liberators (consisting of various factions of the secret anti-Soviet Muslim army in Afghanistan) became terrorist training for a new international guerrilla brotherhood with global ramifications.

The Algiers Convention, 1999 excludes struggles for national self-determination from the definition of terrorism. According to Article 1(3):

3. "Terrorist act" means

- a. any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

* intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or

* disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or

* create general insurrection in a State.

- b. any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising or procurement or any person, with the intent to commit any act referred to in paragraph (a)(i) - (ii).

Article 3 provides as follows:

1. Notwithstanding the provisions of Article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including the armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
2. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.

The historical context of OAU Member States—many of whom fought liberation wars against colonial rule—explains where this qualification to their definition of terrorism comes from. During the Cold War and, particularly, the period of decolonisation, one country's terrorist was often another's freedom fighter. African wars of national liberation were supported by the Soviet bloc, the United States and its allies as well as developing countries, which argued that all methods employed to overthrow colonial, racist or alien regimes were permissible.

In this climate States could only reach consensus on narrowly defined aspects of terrorism. For example, the hijacking of aircraft and ships was criminalized and the taking of hostages and acts of terrorism aimed at diplomats were also prohibited by treaty. Even the events of September 11th 2001 could not induce a common international definition of terrorism within the UN Security Council.

One of many problems is that the targets for a terrorist attack may vary from State to State, from time to time and from attack to attack and would take into consideration the vigilance or relaxation of anti-terrorist measures related to the target. European concerns about future targets in the aftermath of the attacks on the World Trade Centre, including attacks on information systems, off shore oil rigs, attacks on nuclear installations and the like are well documented in the EU Common Position quoted above.

Targets are developed over time and reflect the premeditation of terrorist acts, but the common denominator remains the intimidation of a particular target community, often in an effort to induce particular retaliation calculated to fuel the flames upon which the original political, religious, ethnic, socio-economic or other motivations feed. Terrorists often direct their violence and threats at a group, people or symbol that may not be directly linked to their ultimate target, often a government, system, practice or ideology. In the process those that suffer injury and death are often innocent bystanders.

Despite the inability of the international community to provide a single accepted definition of terrorism, there are a number of common elements to the existing definitions:

- a. Terrorism can be perpetrated either by individuals, groups or by governments.

- b. The motivational factors of terrorists include rational consideration of goals and options—a cost benefit analysis. It is a planned event.
- c. Terrorism can exist in the name of political, religious, socio-economic or other belief systems.
- d. The objectives of terrorism are often fear, extortion and radical change. In this regard the process has three elements:
 - The act or threat of violence, including techno-terrorism and other serious economic crimes that are committed for a political or other non-profit motive
 - The emotional reaction or extreme fear on the part of the potential or future victim; and
 - The social effects that follow the violence.

Legal Framework

In adopting the Algiers Convention in 1999, OAU leaders accepted the need to promote human and moral values based on tolerance and the rejection of all forms of terrorism. Article 20 provides that the Convention shall enter into force after the fifteenth instrument of ratification has been deposited with the Secretary General of the OAU.

A number of contributions to this monograph reflect on various aspects of the Algiers Convention, rendering a detailed description of the legal instrument here superfluous. A glaring omission in the Convention, however, is the exclusion of any reference to enforcement mechanisms in the event of a State Party not acting in accordance with the provisions of the Convention, or of effective monitoring mechanisms by the OAU to measure the compliance of State Parties to their legal commitments. The only provision here is a limp requirement (in Article 2) to notify the Secretary General of the OAU of all the legislative measures that State Parties have taken and the penalties imposed on terrorist acts within one year of ratification of, or accession to, the Convention.

A particular focus of subsequent contributions to this monograph is Article 22 of the Algiers Convention. This effectively requires States to comply with the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples' Rights. Inevitably human rights and the protection of peoples' rights are interpreted as constraining or limiting the fight against terrorism. The opposite is, of course, much closer to the truth since it is exactly the active provision and the rigorous protection of these rights and liberties that drain the oxygen for terrorists and their sympathisers.

Following the terrorist attack on New York and Washington DC on September 11th, 2001, the United Nations Security Council at its 4385th meeting on September 28th, 2001, adopted Resolution 1373 in terms of Chapter VII of the Charter of the United Nations. All States (not just United Nation members) are bound in terms of international law to implement its operative provisions. Resolution 1373 reaffirmed Resolutions 1269 (1999) and 1368 (2001) as well as the principle established by the UN General Assembly (Resolution 2625 (XXV) 1970), namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organizing activities within its territory directed towards the commission of such acts.

According to Resolution 1373, any act of international terrorism constitutes a threat to international peace and security. It requires all States to take certain action concerning terrorism and established a

committee (the Counter-Terrorism Committee) of the Security Council to monitor implementation of the operative provisions of the Resolution. All States were required to report to the committee no later than 90 days from date of adoption, i.e. by December 27th, 2001. By this date 117 of the 189 UN Member States had provided national reports on the steps they had taken to implement the Resolution and by April 15th, 2002, 143 reports had been received and the Committee was following up with those countries that had not reported.

UNSC Resolution 1373 contains 18 sub-paragraphs, which constitute operative paragraphs 1 - 3. The principal features of Resolution 1373 are the criminalisation of the financing and other acts of support of terrorism, the freezing of accounts, the introduction of effective border controls and other measures to accelerate the exchange of operational information. In many ways UNSC Resolution 1373 sought to fast-track elements borrowed from the Convention for the Suppression of the Financing of Terrorism, which now became binding on all states, without the cumbersome process of signatures, ratification and reservations.

At the initiative of the President of Senegal, Mr Abdoulaye Wade, a conference of African Heads of State and Governments was held in Dakar on October 17th, 2001. At the closure of this conference, the Dakar Declaration against Terrorism expressing the concerns raised by the development of terrorism was adopted. According to this declaration, terrorism constitutes a blow to fundamental human rights, democracy and peace. The Summit expressed the wish to strengthen co-operation between States and the fight against terrorism in all its varieties and the Declaration provided for discussions and proposals concerning the formulation and adoption of an additional protocol to the Algiers Convention in accordance with the provisions of Article 21 of that Convention. Senegal would subsequently proffer such a draft Protocol to the General Secretariat of the OAU during April 2002 at a time that the thrust of that document had been overtaken by the initiative of the Secretariat to work towards the development of an Action Plan and possibly an additional Protocol.

On November 11th, 2001, shortly after the Dakar meeting, the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution held its 5th Extraordinary Session in New York and issued a Communiqué (Communiqué issued by the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution at its 5th Extra-Ordinary Session at Ministerial Level on 11 November 2001 in New York, USA). The Central Organ inter alia:

- a. Welcomed the adoption of United Nations Security Council Resolution 1373 as well as the Dakar Declaration and requested member States to ensure their effective follow-up and implementation.
- b. Urged member States to sign and ratify the existing International Conventions relating to terrorism and called upon State Parties to those Conventions to fully and effectively implement their provisions.
- b. It further urged OAU Member States to sign and ratify the Algiers Convention so as to ensure its early entry into force and stressed that terrorism, as a universal phenomenon constitutes a serious violation of human rights.
- c. Specifically welcomed the proposal made in Dakar to prepare a Draft Additional Protocol to the Algiers Convention in conformity with Article 21 of that Convention.

On April 10th, 2002, the International Convention for the Suppression and the Financing of Terrorism (1999) entered into force having received more than the required 22 ratifications. The Convention was adopted by the United Nations General Assembly in New York on December 9th, 1999 and was opened for signature on January 10th, 2000. As of April 2nd, 2002, 132 States had signed it and 26 States had completed the ratification process and become State Parties.

The Convention criminalizes the act of providing or collecting funds with the intention or knowledge that those funds will be used to carry out a terrorist attack, according to particular definitions, which are found in nine previously adopted anti-terrorist conventions, listed in an annex to the Convention. It adds substantial strength and enforcement opportunities to the network of interlocking Conventions on various aspects of terrorism created by the international community over the last 30 years. The Convention recognizes that financing is at the heart of terrorist activity and calls for efforts to identify, detect and freeze or seize any funds used or allocated for the purpose of committing a terrorist act. It also asks that States consider establishing mechanisms to use such funds to compensate victims or their families.

Key Issues

In considering the key challenges that should inform a comprehensive approach by the Member States of the African Union to combating terrorism, three concerns are paramount. The first relates the intimate connection between terrorism, arms trafficking, the international drug market, organized crime and money laundering. The second is the relationship between human and peoples' rights and combating terrorism. The third is the need to supplement and to operationalise the Algiers Convention in the light of recent developments. Each is discussed in turn below.

Dealing with the Supporting Mechanisms

Today, few instances of domestic terror occur in isolation from international linkages. The reach of global communications and television, have created additional opportunities and vulnerabilities for terror—demonstrated by the global impact of the events of September 11th. At the same time terrorists have also become more deeply embedded in international, as opposed to national, criminal, arms smuggling, drugs and financial networks while greater access to technology and weak control over nuclear and other weapons could place massive destructive power in the hands of dedicated anarchists.

Apart from the political or other motivational aspects, terrorism requires the practical means to translate radical intent into effect. These include:

- A suitable recruitment pool;
- Finances;
- Command, control, communications and intelligence;
- Training;
- Access to weapons and equipment to execute their terror;
- Logistic support including a safe haven for training and preparatory purposes, including individuals, groups and friendly regimes to provide passports, documents and propaganda support (the recognition of their cause and sympathy).

The same networks that have supported arms trafficking, mercenaries, drug trafficking, illegal human trafficking and money laundering often provide the means for terrorism—as they did for the various proxy wars fought in Africa and elsewhere during the Cold War. In the aftermath of that war large sections of the state-run networks engaged in transport, training, provision of arms and equipment, money laundering and the like were privatized—not only in the hope of a more peaceful globe, but

as part of the downsizing of the defence and security sectors that followed the collapse of the Berlin wall. Various studies have, for example, pointed to the extent to which support to the Afghan jihad helped to augment Afghanistan's production of drugs and ultimately, by 1998, placed the power to stifle or increase the production in the hands of the victorious Taliban. Here, as is the case in Central and South America and the Far East, the narcotics trade is as closely related to the fight against terrorism as is the ability for private financiers of terror and governments who wish to hide their engagement to launder money through institutions such as the now defunct Bank of Credit and Commerce International (BCCI).

Elsewhere, other connections have become equally relevant. In Africa the end of apartheid would spawn an aggressive private security industry, reflected in companies such as Executive Outcomes, that for a while gained market dominance over the more well established private security companies mostly operating from London. Mercenaries and terrorists obtain their arms through the same illegal or gray channels, launder their payments for these arms as well as their proceedings through networks that may be intimately connected with the drug market and need the same counterfeit experts to obtain passports, travel documents and access to controlled areas.

In fact, the relationship between terrorism and transnational crime is so close as to be reflected in UNSC resolution 1373 (article 4) that emphasised the need for increased regional and international co-operation against both terrorism and against transnational organised crime. UNSC Resolution 1373 therefore provides states with an incentive to sign the United Nations Convention against Transnational Organized Crime of 2000 (generally known as the Palermo Convention) and an obligation to prevent transnational organized crime to the extent that such crimes assist international terrorism.

Some of these linkages are demonstrated by the international focus (and progress) being made in cleaning up the opportunities for money laundering and the financing of terror through, amongst others. Africa is not unaffected by these measures. Included in the list of 19 countries of the Financial Action Task Force (FATF) that, according to the Task Force, do not support transparency and effective exchange of information in international financial transactions are Egypt and Nigeria. Included in the list of countries on the list of the Paris-based Organization for Economic Co-operation and Development (OECD) as international tax evasion destinations at the time of writing is Liberia.

Elsewhere the relationship between the illegal arms market, support to rebel movements and terror has been a long standing one, reflecting the extent to which the same merchants that provided weapons and ammunition to Africa's various rebel movements, irrespective of ideology or orientation, provide arms to terrorist cells, networks and supporters, often assisted by the trafficking of valuable natural commodities such as diamonds and coltan.

Transnational organized crime, money laundering, arms trafficking, drug trafficking and human trafficking are all areas in which there have been recent attempts to internationally regulate such phenomena including the provisions of the Palermo Convention, the Ottawa process (regarding anti-personnel landmines), the establishment of a UN Conventional Arms Register, the 2001 General Assembly meeting on the small arms and others. Through the years Africa has considered and developed common positions that reflect its determination to counter and contain those mechanisms and practices that facilitate terrorism. Examples include the Dakar Declaration on the Prevention and Control of Organized Transnational Crime and Corruption, 1998 and the Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, 2000.

Although the preamble to the Algiers Convention recognised the growing links between terrorism and organised crime, including the illicit traffic of arms, drugs and money laundering, the Convention does not specifically deal with these issues.

Terrorism and Human Rights

The events of September 11th 2001 have had a global impact—especially in the attitude of the United States towards a number of authoritarian regimes and countries. Of these, the transition of Pakistan's General Pervez Musharraf from pariah to ally must be the most remarkable. The US, a global power of unparalleled reach and influence, is now subordinating all other objectives and priorities to the central strategic goal of defeating terrorism. These developments also have their impact in Africa where relations with countries such as Libya and Sudan (accused by the US of being guilty of state support to terrorism) and others such as Angola and Somalia have undergone important changes. Most important, however, is a return to Cold War partisanship and the near abandonment of multilateralism, the promotion of democracy and advancement of human rights. Patterns of foreign aid, military aid in particular, are being adjusted accordingly.

In implementing UNSC Resolution 1373 and the provisions reflected in the Algiers Convention, Africa will find itself facing a range of challenges apart from competing legal traditions and practices. What should be avoided is a situation in which the human rights regime is considered suspended until international terrorism has been 'dealt with'. There is no indication that the current vigilance against international terrorism, and more particularly, transnational organised crime, will ever become unnecessary. Both the body of human rights law as well as the developing regime against terrorism and transnational organised crime are therefore intended to last in the long term and to create a peaceful, just society, both internationally and domestically. This is a particular focus of some of the contributions to this monograph.

The dilemma for Africa is the need to act against terrorists as a national security risk without destroying the often tenuous rule of law that exists in many of our constituent states. There is a need to ensure that those legal tools do not undermine values that are fundamental to democratic society—liberty, the rule of law, and the principles of fundamental justice—values that lie at the heart of the international and African constitutional orders, international instruments and United Nations Security Council resolutions which are binding on African States. The African Charter of Human and Peoples' Rights, in force since October 1986, has already been ratified by almost all African states and can be expected to inform the development of constitutional human rights law in Africa.

This exposes Africa to potential conflicts between two or more competing legal regimes. For example, Article 12 of the Convention against Transnational Organized Crime, for example, requires States to enact domestic laws that grant wide powers of confiscation, freezing or seizure of property or proceeds derived from organized crime. This would include the power to seize property where illegitimately obtained property has been intermingled with that derived by legitimate means. In either case, the onus will rest with the alleged offender to show that the property seized derived from lawful activity. It is important to note that article 7(1) read with articles 3 and 14 of the African (Banjul) Charter protects the right of property, the right to have one's case heard before a court and the right to be presumed innocent until proven guilty.

To some these contradictions are latent in the Algiers Convention when read with associated African positions. For example, Article 3(1):

"the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as

terrorist acts." This sits uncomfortably with the Grand Bay Declaration on Human Rights signed by the OAU in the same year (1999), Article 8(q), which defines terrorism (for whatever motives) as a violation of human rights.

In the end it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing Africa's commitment to those values reflected in the Banjul Charter. Africa's challenge is to implement agreements and legislation that effectively combat terrorism while conforming to the requirements of international human rights law and international commitments. Provisions contained in the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the African Charter on Human and Peoples' Rights (1982) must be respected and the rights contained therein protected.

Operationalising and Supplementing the Algiers Convention

The Algiers Convention was adopted prior to September 11th 2001, the adoption of United Nations Security Council Resolution 1373 (2001) and the coming into force of the International Convention for the Suppression of the Financing of Terrorism (1999). To some the international developments since the attack on the World Trade Centre and on Washington D.C. require a revision of all the anti-terrorism efforts that went before. This is an extreme view, and not one shared by most. It is self-evident that UNSC Resolution 1373 is unprecedented. It was adopted in terms of Chapter VII of the Charter of the United Nations and reflects no less than an attempt at global legislation.

In terms of international law all States are obliged to comply with its provisions, although the extent of detail compliance remains unclear at best. These include the requirement to criminalize the financing of terrorism, to freeze funds and other financial or economic resources of persons who commit or attempt to commit terrorist acts or participate in such acts. The Algiers Convention does not deal with the issue of the criminalisation of the financing of terrorism and the related issues but since this is the focus of the much more comprehensive Convention for the Suppression of the Financing of Terrorism of 1999, probably not anything that requires action by Member States of the African Union.

Articles 4 and 5 of the Algiers Convention provide for areas of co-operation between States to give effect to the other provisions of the Algiers Convention. States are required to exchange information, assist with regard to procedures for the investigation and arrest of suspected terrorists, exchange studies and research and expertise on how to combat terrorist acts and provide technical assistance in order to improve their scientific, technical and operational capacities. State Parties are required to prevent their territories from being used as a base for the planning, organization or execution of terrorist acts. They are to co-ordinate with regard to illegal cross-border transportation, importation, export, stockpiling and use of arms, ammunition and explosives.

Borders, customs and immigration points are to be developed and strengthened in order to pre-empt any infiltration by perpetrators of terror. States are to ensure when granting asylum, that the asylum seeker is not involved in any terrorist act and to either extradite or arrest and try perpetrators of terrorist acts. These judicial provisions will shortly be supplemented by the proposed OAU Conventions on Extradition and on Mutual Legal Assistance. The former is already at an advanced stage of work and should be presented to the Council of Ministers for recommendation to Heads of State shortly. The OAU Convention on Mutual Legal Assistance has a longer road ahead, still having to be presented to experts for discussion and finalization.

Perhaps the biggest shortfall in Africa's engagement in the global campaign against terrorism is the absence of an effective and efficient continental mechanism to support the required co-operation between States, to give effect to the purposes and objects of the Algiers Convention, to implement its

operative provisions and to assist the Member States of the proposed African Union to comply with their international law and continental obligations. This is not a challenge limited to this Convention, but common to a number of African instruments and one that the newly established Commission of the African Union should address as an urgent issue.

Perhaps most important, unlike initiatives such as those regarding drugs and refugees, African leaders have yet to agree to an Action Plan to translate their commitments regarding the Algiers Convention into action, to mobilise the resources for such an Action Plan and to monitor its compliance. This endeavour, more than most, is one worthy of concerted action by African leaders.

Conclusion

This monograph and the writings therein reflect largely on what can be termed 'international terrorism', as opposed to domestic or sub-national terror. Terrorism is neither necessarily international or sub-national, although the present campaign targets terrorist groups that have what US President Bush has termed 'global reach'. In Africa, particularly in Algeria, Sudan, Somalia and previously in Sierra Leone and Liberia terrorist acts have become a recurring feature of essentially local conflicts—even if their actions sometimes have wider regional and global consequences. The danger, from the perspective of many, is the tendency to conflate all into a global war on terrorism, often with the real intention by governments and others to suppress political demands for some level of self-determination, political engagement or recognition of certain rights.

In some cases US and international support for tough action by governments may result in the escalation of conflicts and further polarisation within the countries concerned. In cases where terrorist acts are characteristic of essentially local conflicts experience suggests that security measures alone will not end the violence and that some form of political accommodation and settlement will be equally required.

African governments have always faced the dilemmas in balancing security interests and support for democracy and human rights. The events of September 11th, 2001 have shifted these balances, not always with predictable results. New opportunities for peace have emerged in some countries, in part a reflection of the adage that security is a prerequisite for development. In others international punitive action may exacerbate the tenuous degree of local stability that may exist as is the case in Somalia.

What is self-evident is that without a functioning, nationally recognised central government, failed and weak African states provide a safe haven for domestic and international terrorism alike. No military operation can make these countries safe if not linked with a process aimed ultimately at reconciliation and the reconstruction of a functioning state with a government in control of its territory, both urban and rural, and its land, sea and aerial borders. Above all, strong international engagement to bring peace internally and to reconstruct failed, weak and undemocratic states is the strategic challenge facing Africa and the international community.

CHAPTER 2

Terrorism and Human Rights in Africa

S Jagwanth and F Soltau

Introduction

'The promotion and protection of human rights is central to an effective strategy to counter terrorism.'¹ Inherent in this statement are two important and inter-related dimensions. Firstly, the need to ensure that measures designed to combat terrorism do not impermissibly limit human rights and fundamental freedoms and, secondly, the recognition that terrorism puts under threat the full enjoyment of civil liberties and human rights. The need to ensure that the fight against terrorism remains vigilant to the protection of entrenched human rights has been the subject of much academic, international and non-governmental commentary. Equally, the link between terrorism and the achievement of human rights has received increasing attention. The progress report of the United Nations Special Rapporteur on Terrorism and Human Rights points out that 'there is probably not a single human right exempt from the impact of terrorism'.²

This chapter focuses on the first perspective. However, a full discussion of the topic needs also to consider that the need to combat terrorism is closely linked to the achievement of human rights in Africa. The OAU Convention on the Prevention and Combating of Terrorism adopts this approach. The preamble to the Convention declares its concern for the dangers which terrorism poses to the stability and security of states. It notes that terrorism is a serious violation of human rights, 'and in particular the rights to physical integrity, life, freedom, security' and socio-economic development. It also highlights the adverse impact of terrorism on the 'lives of innocent women and children [who] are most adversely affected by terrorism'.³ Resolution 36/7 adopted by the Commission on the Status of Women also declares its 'profound concern' about the 'persistent acts of violence perpetrated in various countries by armed groups and by drug traffickers who terrorise the population and threaten in particular the safety and lives of women and children.'⁴ We submit that like armed conflict, terrorism often targets vulnerable groups such as women and girls disproportionately.⁵ This includes acts of rape and the use of sexual slavery as a method of terror. It is beyond the scope of this chapter to pursue the link between instability caused by terrorism and the equality of men and women, a phenomenon which is extremely well documented under both domestic and international law.⁶ In more general terms, we note the extent to which acts of terrorism may affect the rights to life, dignity, liberty, equality, freedom from torture, as well as a number of social and economic rights. From this perspective, in the adoption of anti-terrorism laws, states must be seen to be responding to their affirmative duty under international law to promote and protect the human rights of all their citizens.

It is important that the difference between terrorism and armed conflict is borne in mind. As the Special Rapporteur on Terrorism and Human Rights points out, international humanitarian law, which includes the laws of war, applies to situations of armed conflict, whether international or civil. Acts of war consistent with this body of law are neither criminal nor terrorist acts.⁷ Practically, this means that a combatant captured in a civil war obtains prisoner-of-war status and may not be prosecuted, unless accused of war crimes. In situations of armed conflict, international humanitarian law provides protection, including fair trial rights.

This chapter is divided into three parts. The first part deals with the relevant international and selected domestic initiatives to combat terrorism. The countries selected for the study were based on accessibility of information, new anti-terrorism initiatives and the extent to which their legislation illustrated the main human rights concerns. The second part of the chapter covers relevant human rights protections in Africa. In the light of these protections, the final part outlines some of the human rights concerns and issues which arise from counter-terrorism instruments.

Initiatives to combat terrorism

International Initiatives

A number of regional and international anti-terrorism conventions pertain to African states. The first

international conventions on terrorism were designed to criminalize specific types of terrorist acts, such as the hijacking of aircraft.⁸ Work has continued on this basis, with United Nations General Assembly adopting the International Convention for the Suppression of the Financing of Terrorism on 9 December 1999. Despite a more conducive environment post September 11, efforts to arrive at a comprehensive convention on international terrorism have stalled largely over political issues relating to the definition of terrorism. At the regional level there is the important OAU Convention on the Prevention and Combating Terrorism, 1999. The Convention contains a comprehensive definition of what constitutes a 'terrorist act', but avoids a politically contentious issue by excluding from the definition struggles waged by peoples for liberation or self-determination, in accordance with international law.⁹ Also at the regional level, the League of Arab States, which counts 9 African states among its 22 members, has adopted the Arab Convention for the Suppression of Terrorism.¹⁰ The Organization of the Islamic Conference, of which a number of African states are members, has also adopted a convention against terrorism.¹¹ At the regional and sub-regional level there are further mechanisms and arrangements to combat terrorism, such as intergovernmental cooperation, which fall outside the scope of this chapter.

Resolution 1373 of 28 September 2001, which the Security Council adopted under the binding provisions of chapter VII of the United Nations Charter, requires states, *inter alia*, to criminalize the financing of acts of terrorism.¹² Essentially, the Council fast-tracked elements borrowed from the Convention for the Suppression of the Financing of Terrorism, which became binding on all states, without the cumbersome process of signatures, ratification and reservations. This amounts to law-making and is an exceptional exercise of the Council's powers under the Charter. The Council also called upon states to become parties to relevant counter-terrorism conventions.

The Convention for the Suppression of the Financing of Terrorism is the most recent international convention adopted on terrorism. According to the Convention a person commits an offence by providing or collecting funds with the intention or in the knowledge that they are to be used to carry out, firstly, any act falling within the scope of 9 earlier international counter-terrorism treaties, and, secondly,

'[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.'¹³ This cautious expansion in the definition of what constitutes an offence is taken even further in the OAU Convention. Briefly, a terrorist act is any act that may cause serious injury or death to any person or group of persons, or may cause damage to public or private property and is calculated or intended to, among other things, intimidate, or coerce any government, the general public or segment thereof, to do or abstain from doing any act.¹⁴ Similarly, acts to disrupt any public service or create a general insurrection in a state are also defined as terrorist acts. Secondly, the promotion, sponsoring, contribution to, attempt and threat, with intent to commit any of the earlier specified acts, is a terrorist act.

On the other hand, the Arab Convention for the Suppression of Terrorism defines terrorism as

'[a]ny act or threat of violence whatever its motives or purposes, that occurs in the advancement of [a]...criminal agenda and seeking to sow panic among people among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property...or seeking to jeopardize a national resource.'¹⁵ These definitions will be revisited below, in the discussion of the intersection between

anti-terrorism norms and human rights guarantees.

Domestic Initiatives

Pursuant to paragraph 6 of Security Council resolution 1373 discussed above, states were required to report to the Counter-Terrorism Committee, a subsidiary organ of the Council, on steps taken to implement the resolution. While the Committee has no powers of sanction, the establishment of this novel body signals the seriousness of the Council in relation to international terrorism. A number of African countries submitted reports on the anti-terrorism measures in place in their respective countries.¹⁶ With a few exceptions, most countries have not yet passed new legislation pursuant to resolution 1373, and reported to the Committee on legislation and other measures which have been in place for a number of years. These cover a broad range of areas, including measures to deal with money laundering and organised crime and laws relating to border controls and refugees. Many countries have recently established executive national bodies tasked with the responsibility of ensuring that they adhere to their obligations under the Security Council resolutions on terrorism. These countries include Botswana, the DRC, Malawi and South Africa.

Other countries, including Mauritius, Nigeria and South Africa, have started the process of putting in place new legislation to combat terrorism since September 11. Mauritius recently passed the Prevention of Terrorism Act 2 of 2002. In Nigeria, the Anti-Terrorism, Economic and Financial Crimes Act is presently before Parliament. And in South Africa, the new Anti-Terrorism Bill is designed to replace the apartheid era Internal Security Act, the latter being limited to crimes of terrorism committed against the state. The proposed South African Bill, currently distributed as a discussion paper for general comment, has been criticised for a number of its provisions which, it is asserted violate South Africa's own constitution as well as international human rights law. In particular these arise from the definition of what constitutes a terrorist act, and from the detention without trial provisions. The definition of a terrorist act in the draft Bill is based on that contained in the OAU Convention.¹⁷ The Bill also authorises detention without trial—which must be authorised by a judicial officer—for the purposes of interrogation for up to 14 days. A detainee would not be able to approach a court to be released or to apply for bail.

In Mauritius, the Prevention of Terrorism Act 2002 was signed into law amidst much criticism that it is too draconian, has a rigid and overly wide definition of what constitutes an act of terrorism and violates basic rights of suspects and accused persons.¹⁸ The legislation has an extensive definition of what constitutes an act of terrorism in section 3. It is not only an offence to carry out or threaten an act of terrorism, but also to omit doing anything reasonably necessary to prevent an act of terrorism. A person arrested in terms of the Mauritian legislation may be held in custody for up to 36 hours without having access to any person other than a police officer above a certain rank.¹⁹ The trial may also be closed to the public. The Act provides that a court may exclude from the trial any person other than the parties and their legal representatives.²⁰

In Egypt, terrorism is defined as

'any use of force or violence or any threat or intimidation to which the perpetrator resorts in order to carry out an individual or collective criminal plan aimed at disturbing the peace or jeopardising the safety and security of society and which is of such a nature as to harm or create fear in persons or imperil their lives, freedoms or security; harm the environment; damage or take possession of communications; prevent or impede the public authorities in the performance of their work; or thwart the application of the Constitution or of laws or regulations.'²¹

Egypt's definition of terrorism is similar to that found in the Arab Convention. The Human Rights

Committee set up under the ICCPR noted that the definition of terrorism in the Egyptian Penal Code was 'so broad that it covered a wide range of acts of differing gravity.' 242 In Egypt, the death penalty may be imposed for crimes of terrorism. Under the 1981 Emergency Law, Egypt also makes use of special military courts for the prosecution of alleged terrorist activity, which continues to 'infringe on a defendant's normal right under the constitution to a fair trial before an independent judiciary.' 23 The Emergency Law allows detention without charge for up to 30 days. There is no maximum limit to the length of detention if the judge continues to uphold the legality of the detention order. The Emergency Law also permits the executive to issue a warrant of arrest for an individual who may pose a danger to security and public order. It has been said that 'this procedure nullifies the constitutional requirement of showing that an individual likely has committed a specific crime to obtain a warrant from a judge or prosecutor'.24 The military courts are headed by military officers appointed by the minister of defence. The decisions of the military courts are reviewed by other military judges and subject to confirmation by the President, who in practice delegates this task to a senior military officer. State Security Emergency Courts share jurisdiction with military courts over crimes affecting national security.25

The Algerian legislation defines an act of terrorism as 'any offence targeting State security, territorial integrity or the stability or normal functioning of institutions through any action seeking to' inter alia, spread panic or create a climate of insecurity, disrupt traffic or freedom of movement on roads, harm the environment or impede the activities of public authorities or institutions.26 A person may be placed in custody for the purposes of 'criminal investigation needs' for crimes relating to terrorism for up to 12 days. Pre-trial detention, while described as an exceptional measure, in relation to terrorism can be extended 5 times for a period of four months at a time by a judicial officer.27 As in Egypt, the death penalty may be imposed.

The human rights regime

International protection

The International Bill of Rights—consisting of the Universal Declaration of Human Rights, and two the Covenants, on Civil and Political Rights, and Economic, Social and Cultural Rights—is the bedrock of human rights guarantees and standards. The International Covenant on Civil and Political Rights (ICCPR) fleshes out the relevant parts of the Universal Declaration. Of the 148 States Parties to the Covenant, 44 are from Africa.28 The African Charter on Human and Peoples' Rights, also known as the Banjul Charter, which entered into force on 21 October 1986, has been ratified by all member states of the OAU.

The African Charter, like the ICCPR, recognizes and protects the fundamental civil and political rights: equality before the law (article 3); the right to dignity, and the prohibition of slavery, torture, cruel, inhuman and degrading punishment (article 5); fair trial rights, such as the right to be presumed innocent (article 7); freedom of expression (article 9); and freedom of association (article 10). However, unlike the ICCPR, the Charter contains no derogation clause for emergencies; article 4 of the ICCPR makes it possible, in a time of public emergency threatening the life of the nation, for states to derogate from their obligations 'to the extent required by the exigencies of the situation'. No derogation is permitted, among others, from the prohibition against torture, cruel and inhuman treatment, the right not to be deprived of life arbitrarily, and the prohibition against slavery. In the absence of a general derogation clause, rights in the Charter are either not restricted, or are limited by so-called 'claw-back clauses'. Thus, article 9(2) provides that '[e]very individual shall have the right to express and disseminate his opinions within the law' [italics added]. Such limitations may deeply erode the rights in question because there is no criteria are set for permissible limitations of the fundamental rights contained in the Charter. Not all rights are subject to claw-back clauses; several important rights, such as the right to dignity and the prohibition of torture (article 5), as well as the

fair trial provisions (article 7) are not restricted.

As originally conceived, the African Charter was not possessed of an enforcement mechanism, such as the European Court of Human Rights which is entrusted with enforcing the European Convention on Human Rights. However, article 30 of the Charter established the African Commission on Human Rights 'to promote human and peoples' rights and ensure their protection in Africa.' Pursuant to article 62 parties are required to submit reports on a two-yearly basis 'on the legislative and other measures taken with a view to giving effect to the rights and freedoms' entrenched in the Charter. Factors outside the control of the Commission, such as the infrequency or total lack of reporting, and the paucity of information contained in state reports, among things, have hamstrung the reporting system as a means to monitor and improve the observance of Charter rights.²⁹

The Commission may investigate complaints levelled by individuals against states. Article 58 foresees investigation of 'special cases which reveal the existence of a series of serious or massive violations'. In practice the Commission has investigated complaints and made recommendations to the state(s) concerned. The Commission has proceeded cautiously in interpreting its powers. A major advance came in 1993, when it adopted a less restrictive interpretation of the confidentiality provisions, and began to mention in its annual reports the states against which complaints had been made. Recent reports contain a summary of the allegations, the response received from the State Party, the law, and the Commissions decision.³⁰ This begins to deal with one of major weaknesses identified in the Commissions working methods.³¹ Overall, a lack of publicity of its activities, caution on the part of Commissioners, and a shortage of resources have hampered the Commission's work. Enforcement procedures are entirely unsatisfactory, consisting of no more than reporting to the Assembly of Heads of State and Government of the OAU. The establishment of the African Court on Human and Peoples' Rights, provided for in a protocol to the African Charter, presents an important opportunity to truly develop the protections in the Charter.³² If and when the court is established, the African Commission will be one of the parties entitled to submit cases to it. Complaints by individuals are possible, but depend on the states choosing to recognise this optional jurisdiction. How many states will do so remains to be seen. The role of the Commission will become even more crucial, and it will have to assert itself as the protector of human rights on the African continent.

Domestic Trends

The trend towards constitutionalism, multi-party democracy and the entrenchment of human rights on the African continent picked up steam during the 1990's. Many countries, including Algeria, Cameroon, Côte D'Ivoire, Djibouti, Ethiopia, Guinea, Liberia, Malawi, Mali, Mauritania, Mozambique, South Africa and Zambia held multi-party elections in this decade. In addition, many African countries adopted constitutions with entrenched fundamental rights during this time. These include Botswana, Ethiopia, Ghana, Guinea, Guinea-Bissau, Malawi, Mali, Mauritania, Mozambique, Namibia and South Africa.³³ The vast majority of countries in Africa have elaborate constitutions, with civil and political rights, including the rights to gender equality, freedom of expression and fair trial rights contained in them. In addition, many countries have economic and social rights in their constitutions, including environmental rights. At the regional level, there have been moves recently towards recognising the rule of law and the protection of human rights. The New Partnership for Africa's Development (NEPAD), drafted by the governments of Algeria, Egypt, Nigeria, Senegal and South Africa, declares 'the expansion of democratic frontiers and the deepening of the culture of human rights' to be its foundational pillars. Under NEPAD, African leaders undertake the responsibility of 'promoting and protecting democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory government at the national and sub-national levels'. The provisions of the treaty establishing the African Union strengthened the commitment of its member states to human rights, including an investigation into the establishment of a court of justice.

However, constitutions and Bills of Rights cannot in themselves guarantee the protection of human rights. Constitutionalism and the protection of human rights in Africa continues to have mixed success. Political and social unrest and instability continues in many parts of Africa and human rights abuses by both state and non-state actors are well-documented, even in countries with entrenched constitutional and statutory human rights protections. This phenomenon needs to be urgently addressed, and it is submitted, cannot be allowed to be exacerbated in the name of combating terrorism.

Reconciling the fight against terrorism and human rights

In the light of the human rights instruments discussed above, we now move on to highlight some of the human rights concerns which arise from both international and domestic initiatives to combat terrorism. In particular we deal with the following: the definition of terrorism; detention without trial; the right to a fair trial, including the use of closed trials and the use of special courts; and the death penalty. We also deal briefly with the right to freedom of expression and privacy.³⁴ In analysing these issues, we examine the extent to which such measures are a justifiable and legitimate suspension or limitation of rights under international law. Both under international and domestic law, rights may be limited, suspended or derogated from under certain circumstances. While the principle of proportionality is inherent in most domestic instruments, there may be a great degree of variation in the manner in which domestic courts would respond to the constitutionality of domestic anti-terror measures. This would depend on a number of factors, ranging from the courts' constitutional jurisdiction to their already-developed jurisprudence on political questions and deference to the elected branches of government. Thus, in this section we focus exclusively on permissible limits on rights provided for in the ICCPR and the African Charter.

As a starting point it must be noted that the permissible derogations under the ICCPR are very limited. As stated above, there are a number of non-derogable rights. In addition article 4 of the ICCPR allows derogation from its provisions only 'to the extent strictly required by the exigencies of the situation.' Any derogation measure must in addition be of an exceptional nature, subject to regular review and must not involve discrimination.³⁵ In addition, the African Commission on Human and Peoples' Rights has interpreted the Charter to neutralise the most egregious effects of the so-called "claw-back" clauses that restrict a number of important rights in the Charter. It has held 'that 'claw-back' clauses must not be interpreted against the principles of the Charter'³⁶ and that '[t]he 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... [A] limitation may never have as a consequence that the right itself becomes illusory.'³⁷

The principles of proportionality and necessity are inherent under international law. Thus, outside of emergency situations, it is also permissible to limit rights for legitimate purposes if the measures taken are proportional to the objective, and is the least intrusive means to achieve the objective.³⁸ While we believe that measures to combat terrorism must be seen as part of part of the state's obligation to promote and protect human rights, we also endorse the view that 'all measures to counter terrorism must be in strict conformity with international law, including international human rights standards.'³⁹

Definitions of Acts of Terrorism

A common theme that runs through both the international and domestic instruments to combat terrorism is the broad range of conduct defined as terrorism. The starting point for many definitions of terrorism is a violent act committed with the purpose of intimidating a population or compelling a

government to do or abstain from doing something. Thus, the basic concept of the definition in the OAU Convention rests on these two pillars: first, the commission of an act that causes or may cause death or injury; second, that the act was intended to intimidate the government, the population or disrupt any public service. The Arab Convention contains an arguably broader definition of terrorism.⁴⁰ As pointed out earlier, there is also much similarity between these definitions and those found in domestic law.⁴¹

The broadness and vagueness of the definition of acts of terrorism needs attention and cannot be seen to be a legitimate limitation of rights. 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.⁴² In addition, the definitions appear to cover a wide range of activity, and overlap significantly with other existing common law or statutory crimes in many countries. Under the definition of the OAU Convention, a strike by teachers or municipal workers—an action that could be interpreted as being 'calculated' to 'disrupt a public service'—in the course of which some incidental damage is caused to public or private property, could be construed as a 'terrorist act'.

Since the classification of conduct as an act of terrorism is frequently accompanied by an abridgement of procedural and fair trial safeguards, it is all the more crucial that the crime is precisely and restrictively defined. This is even more so when it is punishable by death. How to define terrorism is of course a particularly vexed issue—the Special Rapporteur on Terrorism and Human Rights notes that the 'definitional problem is the major factor in the controversy regarding terrorism'.⁴³ We do not believe that broad definitions of acts of terrorism can be justified. Since counter-terrorism is designed to address specific conduct, the necessary definitions ought to be delineated with precision.

Detention Without Trial

As outlined above, in their efforts to combat terrorism, some countries have provided for detention without trial. In addition, the Arab Convention provides that persons may be detained without trial for up to 60 days pending extradition.⁴⁴ Prolonged detention without charge or trial is a drastic erosion into the right to liberty and must be seen as a measure of last resort. Under any circumstances, compelling reasons need to present before resorting to detention without trial because of its potential for the use of torture. In this regard, article 11 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment requires States Parties to keep under 'systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest and detention' with the aim of preventing any cases of torture.⁴⁵ The Human Rights Committee, commenting on article 9 (liberty and security of the person) of the ICCPR, has stated that the period of custody before an individual must be brought before court may not exceed a few days.⁴⁶

Much conduct that potentially constitutes terrorist acts falls short of the 'compelling reasons' requirement. In addition, it is clear that the 'adequate safeguards' requirement may also frequently be absent. The Human Rights Committee, addressing the question of derogations from rights under article 4, held that

'States Parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance.... through arbitrary deprivations of liberty or by deviating from fundamental principles of a fair trial, including the presumption of innocence.' ⁴⁷

Further, the Committee underlined that for non-derogable rights to be upheld, recourse to a court to decide the legality of detention had to be preserved when a state decided to derogate from the

Covenant.

Concerns about detention arise in relation to the conventions, because they require a state to 'take the appropriate measures under its national law' to ensure the presence for the purpose of prosecution of a person alleged to have committed a terrorist act.⁴⁸ Measures under national law are not an adequate safeguard. The conventions do mandate certain protections, such as access to a lawyer, but these must be supplemented by the provisions of international human rights law.

Right to a Fair Trial

Special/Military Courts

A number of countries provide for special or military courts to try terrorist offences. The trial of civilians before military courts raises questions, although it is permissible under the ICCPR. Problems also arise in relation to the independence of military courts and special tribunals. The Committee Against Torture has criticised military courts where it has found that they are subordinate to the head of the executive branch.⁴⁹ In its decision on the trial of Ken Saro-Wiwa and others in Nigeria, the African Commission held that the trial violated Article 7(1)(d) because the composition of the tribunal, established under the Disturbances (Special Tribunals) Decree No. 2 of 1987, was at the discretion of the executive branch.⁵⁰ The Commission held that

'[r]emoving cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch necessarily compromises their impartiality, which is required by the African Charter. This violation of the impartiality of tribunals occurs in principle, regardless of the qualifications of the individuals chosen for a particular tribunal.'

A violation of article 7(1)(a) was also found, because the only avenue for appeal or review was the ruling council of the Federal Military government, composed exclusively of members of the armed forces.

Special tribunals must be an exceptional measure, used only because of the inability of the ordinary criminal justice system to speedily and effectively bring a suspected terrorist to book. Where they are seen to be necessary, such tribunals must conform to the requirements of a competent, independent and impartial tribunal, and give effect to fair trial rights.

Death penalty

Article 4 of the African Charter provides that no one 'may be arbitrarily deprived' of the right to life. As mentioned earlier, a large number of African countries retain the death penalty. The OAU Convention on the Prevention and Combating of Terrorism requires States Parties to proscribe terrorist acts, punishing them with penalties 'that take into account the grave nature of such offences'. While acts of terrorism may be very grave, states should bear in mind that the death penalty is an extreme exception to the right to life and should be applied only to the most serious crimes.⁵¹ Further, under the ICCPR, the Human Rights Committee has 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]'.⁵² In many cases the lack of procedural safeguards makes the imposition of the death penalty a clear and unjustified violation of international law.

Both the counter-terrorism conventions entrench the principle of extradite or punish.⁵³ The extradition provisions of the conventions have the potential to clash with the human rights

commitments by states not to extradite alleged offenders to jurisdictions where they could face the death penalty.⁵⁴

Other rights

A number of other human rights issues also arise from the international and domestic regime designed to deal with terrorism. Articles 3 and 4 of the Arab Convention deal with surveillance and monitoring systems and the creation and development of databases and information on combating terrorism. In a similar vein, Article 4(b) and (e) of the OAU Convention deal with monitoring and data collection on terrorist elements and groups. Given that the scope of what constitutes terrorist elements of acts is extremely broadly defined, these provisions may constitute a serious violation of the right to privacy and may include the monitoring and collection of information on peaceful and non-criminal activity.⁵⁵ Under some domestic laws, search and seizure provisions may also constitute an unjustifiable limitation on the right to privacy.

The right to freedom of expression may also be implicated under the conventions. The clearest example of this arises from the definition of what constitutes a terrorist act. Under article 3(b) of the OAU Convention for example, the definition of a terrorist act is defined to include any promotion, sponsoring... incitement, encouragement ... or procurement' of such act. Again, it would be difficult to justify such a blanket and far-reaching limitation of the right and unless it is carefully tailored to meet the ends of fighting terrorism, would not be permissible under either the ICCPR or the African Charter.

This part of the chapter has looked at the extent to which measures designed to combat terrorism constitute a violation of certain rights. It is important that states, when adopting such measures, be vigilant about ensuring the continued protection of rights. In this regard, states may find the listed guidelines suggested by the High Commissioner for Human Rights useful.⁵⁶ In this document, specific criteria are set out for the balancing of human rights protection and the combating of terrorism.

Conclusion

This chapter has argued that acts of terrorism may cause grave human rights violations. An effective response is thus called for. Conflict, of which terrorism is a particularly virulent strain, has both immediate and long-term causes. In the short term, legal measures are the international community's response to the manifestation of terrorism. These must be consonant with the human rights protections enshrined in international law. Otherwise the very conditions necessary for long-term stability, and fostered and nurtured by the respect for human rights, will not exist.

CHAPTER 3

Reconciling the Fight Against Terrorism and Organized Crime with Banjul

CH Powell and IA Goodman

Two legal regimes

A new body of law is burgeoning. The development of an anti-crime and anti-terror regime is supported by the Security Council and is finding expression in international treaties such as the UN Convention on the Suppression of the Financing of Terrorism (1999) and the UN Convention against Transnational Organized Crime (2001). On the regional front, Africa has produced the Dakar

Declaration on the Prevention and Control of Organized Transnational Crime and Corruption in 1997 and the OAU Convention on the Prevention and Combating of Terrorism (hereafter the Algiers Convention) in 1999.

In describing Africa's engagement with this problem, we approach terrorism and transnational, organized crime as interrelated aspects of an as yet undefined, but obvious, threat to the peace, security and well-being of the globe. As this paper will illustrate, terrorism cannot be divorced from organized crime. While the extent of international terrorism in Africa has arguably been limited, it has not been absent. Furthermore, the potential for African countries to serve as a safe haven for training and incitement for global terror has received considerable recent media attention. The challenge that Africa faces in respect organized crime is much more obvious. Some analysts have come to refer to the criminalization of economies whilst others have expressed grave concern about the extent to which organized criminal activity have become indistinguishable from the governance practices of selected African states.

As this paper will demonstrate, there are considerable areas of conflict between the anti-terror/anti-organized crime regime on the one hand and a human rights regime on the other. The co-existence of two legal systems, one to counter organized crime/terrorism and one to expand the domain of international human rights law, makes it imperative to explore the tension between them in a jurisprudentially coherent manner.

In this paper, we first describe the similarities and differences between the anti-terrorism and anti-organized crime regime on the one hand and international human rights law on the other. In the first two sections we set out the main sources of legal obligation in treaty and customary international law. In order to identify the areas of conflict between the legal regimes (anti-terror/anti-organized crime and human rights) we summarise the applicable law, devoting particular attention to trial rights and property rights. We then identify some central conflicts between the anti-crime and the human rights systems. A substantial part of this paper suggests legal criteria and practical considerations to describe the proper relationship between the anti-terror/anti-organized crime legal regime on the one hand and human rights law on the other, and suggests solutions for the specific conflicts we have identified. The final section draws our findings together and suggests the general direction which Africa might best take in the interests of harmonizing these sometimes contrasting requirements.

International human rights law

The two main sources of international law are treaty and custom.¹ Whereas treaties create obligations only for the signatory states, rules of custom are binding by virtue of their general acceptance either by the entire community of states or by a region. Treaties, if accepted widely enough, can pass into custom.² In this way a body of treaties are binding on African states either as treaty or customary law, or both. The most important of these is the African Charter on Human and Peoples' Rights and Duties (Banjul Charter) that was adopted in 1981 and came into force in 1986. The Banjul Charter is reaffirmed by the Constitutive Act of the African Union (1999), which promises to promote and protect human and people's rights. The Constitutive Act provides us with a clear picture of the direction that African states intend to take in the area of human rights law. It clearly envisages a broader source of human rights norms than the Banjul Charter. At least for interpretive purposes, it incorporates the Universal Declaration on Human Rights and the Charter of the United Nations, and its reference to 'other relevant human rights instruments' integrates other human rights instruments either drawn up, or signed, by African states.

Apart from being a source of treaty law, the Banjul Charter serves as regional customary law, having been signed by 53 of the 543 African states. The Universal Declaration of Human Rights is not only incorporated by reference into the Constitutive Act of the African Union, but is also accepted as

customary international law. And finally, the International Convention on Civil and Political Rights (1966) is often viewed as customary international law. Globally, it has 114 signatories to date, and in Africa itself it may be seen as a source of local or regional customary obligations⁴ as it has been ratified by 41 of the 54 African states.

There are three areas of human rights law that are of particular importance in the area of international strategies to combat terrorism and its corollary, organized crime, namely property, privacy and the assumption of protection of accused persons.

First, property is guaranteed as a right in the Banjul Charter and the Universal Declaration of Human Rights.⁶ No one may be arbitrarily deprived thereof, and incursions into this right may be justified only by the public interest. The notions of arbitrariness and proportionality often contained within the formulation of the right to property offers states some discretion in their protection of the right. Many African states have constitutional protection against expropriation without compensation,⁷ and these provisions will guide the application of the rights. The constitutional provisions would exclude ad hoc confiscation of property.

Closely linked to property is the right to privacy.⁸ This right is violated when documents and correspondence are interfered with, or where there is unlawful search and seizure. Most of the conventions afford privacy protection and it is posited as a right in many domestic constitutions.⁹

Thirdly, all the instruments listed above provide extensive measures for the protection of accused persons. The treaties recognise that those under suspicion are most vulnerable to oppression by the state and that safeguards must be created to promote their rights throughout the trial process.

The most basic right of the accused is to be seen as a person before the law¹⁰ and to be entitled to its equal protection.¹¹ This is the essential component of many other trial rights, because people deprived of recognition by the law will not gain access to the compendium of rights at all. The right to protection by the law entails a right to an effective remedy,¹² for which competent bodies must be set up by law. The composition of such a body is particularly important where the trial is criminal in nature. Because arbitrary detention and arrest must be avoided,¹³ accused persons are entitled to a public trial within a reasonable period of time¹⁴ by an independent, competent and impartial body.¹⁵ This essentially sets up a criminal justice system that respects and promotes human rights.

There are further requirements that protect each individual as his or her case is tried. All accuseds must be presumed innocent until proven otherwise,¹⁶ and a case of guilt must be made without relying on the accused incriminating him or herself.¹⁷ An additional principle is that every person is entitled to legal assistance of his or her choice.¹⁸ Failure to provide legal assistance may mean that a trial is unfair, and thus below the required human rights standard.

These rights vest in everyone and are activated when a person is charged with a crime. They are recognised (albeit to varying degrees) in all three of the conventions under consideration. The International Covenant on Civil and Political Rights and, to a lesser extent, the Universal Declaration of Human Rights, also afford exceptional rights to refugees and asylum seekers.¹⁹

The international regime to combat organized crime and terrorism

Any claim by the anti-crime and anti-terror regime to customary international law status must be treated with caution. Although treaties prohibiting specific acts popularly understood as 'terrorist' date back to the 1960's, the search for a single, global definition has only gained impetus since September 11, 2001. However, the binding force of anti-terror and anti-crime measures has been ensured by the UN Security Council. Under Chapter VII of the UN Charter, the Security Council

may pass provisions binding on all members of the UN. The Council expressly used these powers in articles 1-2 of UN Security Council Resolution 1373 of 2001. The instructions contained within these articles are therefore binding on all Member States of the United Nations.

UN Security Council Resolution 1373 sets up the general model for anti-terror legislation. It prohibits states from providing any support of whatever kind to terrorist groups, and insists that states prevent terrorist acts through early warning systems,²⁰ mutual assistance in investigation and prosecution and the establishment of justifiable criminal offences within the domestic criminal justice system.²¹ It adds that all these measures must conform to international human rights standards.²²

In declaring terrorism a threat to international peace and security, the Council notes that there is an intimate connection between terrorism and transnational organized crime,²³ especially money laundering, illicit drug trades, illegal arms-trafficking and illegal movement of potentially deadly substances. It therefore emphasizes the need for regional and international responses to this phenomenon. States are further called on to sign all "relevant international conventions and protocols relating to terrorism", including by name the Convention for the Suppression of the Financing of Terrorism (December 1999).²⁴

The system of international treaties dealing with terrorism generally reflects the Security Council requirements. Its central aim is to strengthen state and international measures to a point where terrorism and organized crime are eradicated. This is done by a range of tactics which aim, either directly or indirectly, to prevent violent attacks. The prosecution of terrorists is a secondary measure which is triggered only once the main aim has not been achieved. This division is definitively illustrated in the Arab League Convention for the Suppression of Terrorism (April 1998), which explicitly separates preventative measures from methods of suppression of violent crime. It is again important to note that organized crime and terrorism are understood as being inherently linked, and substantially similar. The methods used to counteract crime generally are equally applicable to each. Thus, the principles and procedures laid down in the OAU Convention for the Prevention and Combating of Terrorism, the Convention for the Prevention of the Financing of Terrorism, the Arab Convention for the Suppression of Terrorism and the United Nations Convention against Transnational Organized Crime together set out a fairly uniform approach to eliminating certain forms of terrorism, as well as international and transnational crime.

First and foremost, no one may belong to either a criminal or a terrorist group.²⁵ Liability here is extended to cover anyone, including a government, who supports such a group, either by financing, funding or supplying arms or refuge to terrorists. In rights terms, the most onerous method of discouraging the financing of international crime is the prescription of measures that allow for the freezing and seizure of assets or resources. The Convention on the Suppression of Financing of Terrorism allows such seizure for benefits related to terrorism, and envisages states drawing up specific agreements to enable sharing these benefits, or using them to provide relief to victims. Similarly, the Convention on Prevention of Transnational Organized Crime permits signatory states to appropriate proceeds into a fund, which will then be used to develop and strengthen technical procedures, especially within developing states which would otherwise be unable to maintain the standard required. The Arab League Convention, however, seems directly opposed to these measures of confiscation, and specifically sets out that any property or proceeds seized may be used in evidence provided there is a guarantee that they will be returned.²⁶

These measures aim to create a sophisticated system, which will make maneuvering almost impossible for criminals and thereby increase state security, but this in turn depends upon wide signature and adherence to the Conventions. Unless this uniform approach applies, certain states may

continue to act as safe havens²⁷ and illicit activity will continue under their protection. The Convention places a heavy emphasis on effective border control through the careful checking of travel documents and visas.²⁸ This allows specific crimes, for example human trafficking, to be detected, but more generally creates safeguards to prevent the abuse of refugee status and asylum seeking. Interpol is expected to play an active role in this, and an early warning system will have to be developed.²⁹

The secondary level of rules deals with situations where violence or crime has not been prevented and states must react to identify and prosecute the perpetrators. Both terrorism and transnational organized crime are considered to be serious offences for which punishment must be harsh.³⁰ All signatories are required to create specific crimes within their domestic criminal justice systems,³¹ including corruption, money laundering and the obstruction of justice. States are faced with a decision to prosecute or extradite persons accused of terrorism or organized crime, and may not choose to grant the accused reprieve from trial proceedings.³² The Convention on the Suppression of Financing of Terrorism and the Arab League Convention are particularly careful in this regard: they forbid terrorist acts being considered as either fiscal or political crimes, since this may render them non-extraditable offences.³³ Extradition is further made possible by provisions that extend state jurisdiction over crimes so that more states would be entitled, on various grounds, to make extradition requests.³⁴

Under the Arab League Convention, accused persons may be held for up to 60 days without being tried pending extradition.³⁵ This amounts to detention without trial. Although the other conventions do not specifically authorise detention without trial, it is not explicitly excluded. The UK and South Africa propose to incorporate detention without trial in their legislation, evidently in terms of their treaty obligations. These states provide for detention, not pending extradition, but for the purposes of interrogation. Both suspected offenders and witnesses may be subjected to this form of detention.³⁶

Whether it is prosecution within the capturing state or extradition that leads to trial of the accused, states are expected to cooperate with one another. There are various requirements for information exchange, and technological improvements must be made to facilitate these.³⁷ This aspect is emphasised in the OAU Convention on the Prevention and Combating of Terrorism which creates procedures for mutual legal assistance. It requires states to provide the 'best possible' ³⁸ assistance through setting up and allowing jurisdiction to a commission rogatoire.³⁹ Similarly, the Arab Convention for the Suppression of Terrorism dedicates an entire section to judicial delegations,⁴⁰ designed to perform judicial processes in one state on behalf of another.

The actions of these delegations include hearing witness testimony, effecting judicial documents, executing search and seizures and obtaining relevant documents.⁴¹ Whilst it is asserted that such delegations must act in accordance with the domestic legislation of the host state, it remains unclear how they will be constituted, and which branch of government will effect these actions.

The tension between the regime against terrorism, organized crime and human rights law

The anti-crime Conventions summarised above and UN Security Council Resolution 1373 specifically hold that none of the rules developed may impact on the maintenance of human rights standards.⁴² The Algiers Convention and the Arab League Convention clearly exclude self-determination struggles from the definition of terrorist acts,⁴³ and the provisions of the Convention on the Suppression of the Financing of Terrorism do not apply to civil unrest.⁴⁴ However, despite the apparent deference to human rights shown by the anti-crime legislators, there are extensive conflicts between the anti-crime/anti-terrorist and human rights regimes. In this section we demonstrate six specific examples of conflict between the two regimes. They are, first, that the anti-crime regime allows the state to deprive people of their property. Secondly, the onus borne by

individuals who attempt to recover their property from the state can amount to a reverse onus of proof. Thirdly, individuals may be forced to allow access to their records to the point of self-incrimination. Fourthly, the public may be excluded from judicial and quasi-judicial hearings. Fifthly, the anti-terror regime allows for detention without trial. Finally, a problem underlying many of the areas of conflict is that the executive is empowered to act at the expense of control over it by the judiciary.

The anti-terror regime mandates the confiscation of property which may be connected to certain crimes, whereas the human rights regime affirms the right not to be deprived of one's property. Even in cases where expropriation is allowed within the state, it must be subject to equitable compensation, and for the public benefit. Property rights are intimately linked to trial rights in this context. Seizure of property as a preventative measure against crime is often posited not as a punitive but as a civil measure.⁴⁵ Once the confiscation is characterised as civil, the state is entitled to make incursions into property rights, without having to follow up a confiscation with a criminal charge. This means that the onus lies with the alleged criminal to show that the property is not linked to criminal activity, a difficult requirement to meet. To the extent that this creates a reverse onus, it violates the right against self-incrimination and the right to a fair trial.⁴⁶ Furthermore, property in the African context is often subject to communal ownership. Even if the property is not communally owned,⁴⁷ various parties may have other legal rights vested in it. A confiscation in this context will prejudice not only the accused, but also innocent third parties. Rules of standing or interests of speed and efficiency may mean that procedures for hearing these third party claims are not in place.⁴⁸

A human-rights friendly approach to property seizure is found in the Arab League Convention. This allows the confiscation of property if it is to be used in evidence, provided it is returned to the accused (even where conviction ensues).⁴⁹ This manifests reliance on traditional criminal investigation methods, but in the context of the international anti-crime regime, may still be problematic. The various conventions make provisions for bank records to be scrutinised by the police, and also allow investigation of records held by the alleged offender. This means that he or she may be required to answer questions or make statements which lead to the admission of property into evidence. This, again, may constitute a violation of the right against self-incrimination. This problem has been recognised in South African jurisprudence, where the content of such a disclosure was not permitted to be used as evidence against the person making the disclosure.⁵⁰

The infringement of trial rights may occur in a myriad of ways, and the effects may range from minor to extensive enough to vitiate the fairness of the trial. The anti-terror regime occasionally excludes the public from hearings, based on the fact that the material under consideration goes to national security. The logic of such a measure is clear, but nevertheless is contrary to the requirements of the human rights regime. If this is combined with the provisions made for extra-territorial investigation, the effect is far-reaching. Commissions rogatoires (established under the Algiers Convention) may not necessarily be competent or impartial bodies to deal properly with the matters with which they are entrusted. The judicial delegations provided for in the Arab League Convention are even more problematic. States may undertake various judicial procedures from hearing witnesses to examining evidence, but are not specifically required to ensure that these processes are undertaken by a branch of the judiciary.

Perhaps the most serious problem is the option of detention without trial. This is, rightly, the least widely supported measure in the international instruments. As we note above, only the Arab League Convention specifically allows for 'provisional detention', although this is only pending an extradition. Detention without trial is not, however, explicitly rejected by the other conventions, which have been interpreted to allow for detention without trial by the UK and South Africa.⁵¹

Underlying many of these conflicts is what we call the 'executive-minded' approach to the prevention of crime. Although it surfaces where-ever the executive is given wide discretion and extensive, unchecked powers, it is also prevalent where laws are vaguely phrased. The lack of a definition for terrorism and of criteria to identify members of a terrorist group open a path for discriminatory action. The charging of a person under terrorist or organised crime laws will mean that the state may take a course involving various rights infringements. Where this is done to establish or consolidate power against an opposition group, it will amount to persecution of a group and will violate the very essence of human rights law.

Harmonization

Applicable legal criteria

The goals of the two regimes, those to combat terrorism and organized crime on the one hand, and human rights on the other, should ideally coincide. The Algiers Convention provides a particularly poignant motivation for the fight against terrorism: the preamble to the Convention states that terrorism affects women and children most adversely; it infringes rights to life, physical integrity, freedom and security, and impedes the realisation of socio-economic rights.

The Convention further stresses that terrorism is inherently contrary to notions of tolerance, and restricts a state's sovereignty and self-determination. While some of these motivations strike us as slightly whimsical,⁵² this passage illustrates the union which, in theory at least, exists between the two legal regimes. The message behind the Algiers Convention is that the human rights dream of a free, secure and prosperous society can only be achieved if the major forms of crime (in this case terrorism and organized crime) are eradicated.

The tension between human rights requirements and anti-terror/organized crime regimes is a function of the methods by which these two systems attempt to achieve their goals. At first glance they are irreconcilable: the former attempts, first and foremost, to ensure freedom by protecting the individual against the state, and the latter seeks to destroy crime/terrorism through a procedure that gives the state power over the individual. Nominally the regimes are mutually exclusive—one can only ever operate by suppressing the other. Exactly where the line is to be drawn between the two regimes might seem to be a matter of policy rather than law.

Our argument goes to the guidance which law itself can provide to drawing this line. Applied with sensitivity, each body of law can support the other. As we have indicated above, most of the anti-terror/anti-organized crime conventions insist that they leave established human rights law untouched—although they do not say how. On the other hand, the international human rights regime itself contains principles to demarcate the limits of its own norms.

Some of the rights contained in the applicable rights instruments are internally limited—that is, the relevant article itself sets out situations in which the right may be restricted (such as the right to property in the Banjul Charter). However, even where the right itself is phrased in absolute terms, it is subject to the general limitation clauses contained within the Universal Declaration on Human Rights (in article 29) and the International Covenant of Civil and Political Rights (in article 19(3)), and therefore within customary law.⁵³ The criteria for permissible derogation, as synthesised from the Universal Declaration and the International Covenant, are that the right must (a) be provided by law, (b) serve a legitimate purpose, and (c) be necessary in a democratic society.

From our description of the common goal of the two bodies of law, it would seem that the purpose that the anti-terror/anti organized crime regime serves is legitimate and that criterion (b) above is therefore satisfied. We will need to examine, however, whether the proposed measures can in fact

serve the goal of a free, secure and prosperous society. We need, in particular, to check what the practical effect of the anti-terror provisions will be in the African context.

To fulfil the criterion 'provided by law' (criterion (a) above), it is not enough that the infringement is provided for in a treaty (a source of 'law'). The infringement also needs to be formulated in such a way that it satisfies the substantive requirements of a 'law'.

Two main issues emerge here. The first is that some of the terms in the relevant treaties and UN Security Council Resolution 1373 may be too broad to serve as reliable guidelines for acceptable behaviour and are therefore too vague to count as 'law'. This is a requirement emphasised in the case law of various legal systems: '[A] norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.' 54

We submit that there is a second problem connected to the 'law' criterion. From our sketch of the anti-terror regime above, it is clear that this body of rules is an almost complete legal system in itself. If this legal system is incorporated in its entirety, without sensitivity to the legal system on which it is superimposed, what will the effect be on the legal system that it supplants? This question relates to the interrelationship between the international and indigenous legal systems, as well as to the effectiveness of the imported legal regime.

The third criterion for a permissible restriction on a right (criterion (c) above) is that the restriction be 'necessary in a democratic society'. This criterion asks whether there are less restrictive means available to achieve the same goal. We must obviously enquire whether there are other mechanisms by which the gains won by the anti-crime regime might be attained with less cost to human rights. At the same time, the issue of general effectiveness emerges again, because, if the anti-terror/organized crime regime is not effective, it can hardly be 'necessary'. If it cannot achieve its goal, it is, indeed, irrelevant, not only unnecessary, to the goal.

Factual analysis

Thus far, Africa has, on the whole, been spared terror attacks in the September 11, 2001 sense. Indeed, the only two recent terror attacks that fit the usual Western conception of 'terrorism' have been directed at American embassies (the bombings in Nairobi and Dar-es-Salaam). Africa's insistence on fighting this form of terrorism therefore arises more from her role in the global community than from any urgent need to face a local problem. On the other hand, most African states have been suffering prolonged sectarian violence throughout the 20th century. These civil wars have often been fought with little if any regard for humanitarian law and included war crimes such as indiscriminate attacks on civilians, conscription of child soldiers and outrages on civilians and prisoners of war. The difference between 'Western' terrorism and the terror of unrestrained military activity is that the African form is still an ancillary tactic of guerrilla or even, occasionally, of conventional warfare, aimed primarily at gaining benefits such as control of territory, governmental resources or lines of supply for weapons or food. However, to the extent that war in Africa is conducted by intentionally spreading terror amongst the population and destabilising both civilian communities and civilian government, there is an overlap with the form of terrorism that the West is trying to suppress. Africa has certainly felt, and is still affected by the trauma of terror and disregard for human life.

The same methodology, however, cannot serve to fight both forms of terror. The anti-terror system mandated by UN Security Council Resolution 1373 and elaborated by the associated conventions we have described can only be used where the state has a legitimate monopoly on the use of force.

Where a government has no democratic pedigree, particularly if it is oppressive or facing strong resistance, its claim to mechanisms to counter this threat may exacerbate the internal strife by arbitrarily increasing the clout which one illegitimate faction enjoys over another.

This particular danger is well illustrated by the role which organized crime plays in a number of African states. Power struggles, particularly violent power struggles, often result in a symbiotic relationship between political and criminal groups. Organized crime provides the means to access the resources through which military campaigns are fought: weapons can be bought (often against drugs, diamonds or other illegal forms of trade) and transported through covert channels. Organized criminal networks become particularly useful during a military campaign when there is an arms embargo in place (as is the case with UNITA in Angola). However, both established governments (such as that of Liberia) and rebel movements (such as the Revolutionary United Front) form links with organized crime in the management of their conflicts.⁵⁵

Another result of factional power struggles is the 'shadow' state phenomenon found in Africa. The term is used when the 'visible' leaders and government officials rely on informal, personal linkages, often with criminal connections, to maintain control of the state machinery. It is a recipe for institutionalised corruption when the real power in a state does not vest in the official government, because members of the government can maintain their precarious grip on power only by serving the demands of their true power base. In the worst cases, the state itself has been described merely as a private resource⁵⁶ and political life as the management of factional intrigues for personal gain.⁵⁷ Organized crime does not, however, require corruption on so grand a scale. The experience of the Special Investigating Unit in South Africa has been that, for each organized crime operation it has uncovered, there has been a government official on the organisation's payroll.⁵⁸ The official is in many cases extremely low ranking, but the link between corruption (and therefore government) and organized crime is central to a proper analysis of the problem.

In contrast to the relative paucity of 'classical' terrorism in Africa, organized crime is an enormous problem on the continent. There are 32 organized crime groups in South Africa alone.⁵⁹ Surveys reveal that, in nine of the fourteen Member States of the Southern African Development Community that were included in the research, the crimes of dealing in counterfeit banknotes, arms smuggling, vehicle theft and hijacking are well established. Other forms of organized crime widespread in eight of these nine countries included drug trafficking, forgery and smuggling of ivory and rhino horn.⁶⁰ There is evidence that sub-Saharan Africa has become pivotal in international drug smuggling, functioning as a staging post for heroin to North America and cocaine to Western Europe. Drug trade routes have been identified through Nigeria, Togo, Côte d'Ivoire, Cape Verde, Sierra Leone, Liberia, Mauritania, Zimbabwe, South Africa, Ghana, Senegal, Ethiopia and Kenya.⁶¹ Fraud and money laundering occur on a massive scale.⁶² The illegal export of diamonds, gold, precious minerals, agricultural products and game meat is increasing.⁶³ The prevalence of these forms of crime is shocking in itself, but is also frightening as an indication of the growing criminal infrastructure. Once the mechanisms for organized crime are in place, the business of crime can diversify. In Western Europe, for example, networks previously specialising in drug smuggling have reportedly begun to use their expertise to smuggle illegal migrant workers.⁶⁴ Part of the evident resurgence in human trafficking in Africa may relate to the war crime of forcing young people in particular to serve in a military campaign, witnessed in such countries as Angola, Mozambique, Uganda and Sudan. Some military factions have moved from recruiting soldiers by force, to slavery for the purposes of economic production. The unspeakable logic leads inevitably to the sale and export of captured slaves, already reported in Sudan.⁶⁵

Earlier in this paper we described the legal system by which international law attempts to prevent and suppress transnational, organized crime. The emphasis is on prevention, via quick detection of

possible criminal operations, co-operation across borders to aid and speed up investigation, and the blocking of resources that will be used for criminal purposes. Some African states do not have sufficient legislation to provide for such a system, particularly the mutual assistance required between nations. In these cases, the international model may provide a useful blueprint for the municipal system, but only if the municipal system can move from paper to practical implementation. This is an important caveat. A structure similar to the international anti-crime regime is often already present on paper within the various African systems of criminal law and procedure, but it is not effectively enforced.⁶⁶ We have already noted that corruption may play a role in this regard, but the problem is also largely one of capacity. The legal framework may not be applied in practice due to various practical obstacles: the legal mechanisms may be too expensive, too cumbersome, too time-consuming or simply too-little known. Staff who handle mutual assistance matters, such as extradition, often have no formal training in this area and carry out the tasks as an addendum to other work.⁶⁷ A survey conducted by the Institute for Security Studies in the SADC region demonstrates that the type of improvements for which these states request funding in their fight against transnational crime generally focuses on the nuts and bolts of investigative technique rather than the often sophisticated procedures of the international regime to combat organized crime. A common request for international aid from the SADC countries has been aimed at training detectives, strengthening border control and developing the technical ability to draft the necessary legislation.⁶⁸

Even in countries with a relatively strong criminal legal system and with more effective crime-fighting resources, the wholesale importation of a legal regime with little sensitivity to the law already in force has been strongly criticised.⁶⁹ Importing an entire legal system at the expense of the existing law may prove particularly costly in the context of a state with a weak crime-fighting system, as it may further undermine the already fragile legitimacy enjoyed by the local authorities. The new set of mechanisms, imposed from above, may increase reservations about the crime-prevention system without providing either a legitimate or a working alternative.

The lack of legitimacy of the existing authorities is an impediment to the entire anti-crime system, as it impacts upon the key mechanisms by which this system aims to work. As we have illustrated, the emphasis of the anti-crime and anti-terrorist regime is prevention rather than prosecution of past crimes. Prevention requires speed and effectiveness. In the case of the fight against terrorism, the authorities may have to act immediately to prevent catastrophic events and massive loss of life. Where organized crime is concerned, the actual crime in question may not—necessarily—be of life-threatening importance. But, given the speed at which money can be transferred and information conveyed from one country to another, the most effective way to prevent crime in the long-term is by immediately freezing assets related to crime the moment they are identified. The way that the anti-crime regime often achieves the necessary speed, however, is by widening the discretion and increasing the powers of the authorities that have to act.

The resulting executive mindset is controversial even in the Western context, but potentially fatal in a state where the government has dubious democratic credentials and therefore suffers low legitimacy. An approach which concentrates power in the hands of government officials, allowing them to decide which crimes to prosecute and when and what to confiscate, both increases the potential for corruption (and thereby supports, rather than suppresses, organized crime and international terrorism) and also weakens public support and participation if the government is perceived as partisan.

If the main impediment to an effective anti-crime system is the lack of legitimacy of the state, then measures that improve the legitimacy of the state are indispensable to the success of the regime as a whole. As a corollary, any provision which detracts from the legitimacy of the public authority or encourages the abuse of power, is detrimental. In the arena of organized crime and terrorism, the best

response to poor performance by the state might not be the imposition of 'new' laws but the strengthening of laws already in place. This entails improving the functioning, rather than the power, of the executive arm of the state.

Proposals for the delineation of specific rights

We submit that, in general, the anti-crime regime should be narrowly interpreted where-ever it allows for unchecked executive action. In the property arena, such executive action would be the confiscation of property which may be connected to a crime. To determine legally whether this deprivation of property is permissible, we have to examine generally whether it is in the public interest and, in individual cases, whether it is arbitrary. This enquiry will entail a consideration of the proportionality between the deprivation of the property and the goal pursued by the deprivation.

While the general goal of crime-fighting is legitimate, we need to examine how the confiscation assists this goal. The public benefit aspect is open to interpretation, but we suggest that it would require either that benefits devolve on the confiscating state or, if the funds are to accrue to a supranational fund, that control over that fund is transparent and that the criteria determining distribution from that fund are clear. The advantage of speed can be maintained by allowing for provisional confiscation, which must be confirmed by a court.

A court is the most appropriate body to decide whether confiscation is 'arbitrary'. Once the matter is before a court, we would argue that the reverse onus of proof cannot be sustained. Despite legislative attempts to categorise seizure of property as 'civil', a significant body of law and legal writing has concluded that confiscation can have far reaching effects and is ultimately penal in nature.⁷⁰ On this basis, it is more appropriately categorised as a criminal measure and should only be permitted after the owner of the property has been convicted. Whereas some courts have occasionally allowed a reverse onus of proof to pass constitutional muster in order to facilitate the practical difficulties experienced by the state in proving its case, this is a dangerous general principle. If the problem stems from the capacity of the state to conduct effective investigations, it would be a better long-term remedy to improve this capacity—and thereby the legitimacy of the relevant authority—than to factor its incapacity into the limitations of a right.

The last property-related limitation we need to consider is the right of an accused not to incriminate him- or herself. While this is technically a trial right, it is infringed in the crime-fighting/anti-terrorism context by forcing individuals to allow government officials access to their property in the form of bank records, etc. In this case the balance between the two legal regimes may be met if the information so gathered cannot be used against the owner of the property in a criminal trial. This safeguard, known as a 'use indemnity', is only sufficient in cases where the self-incrimination arises from access to property. Where, by contrast, witnesses or suspects are actually forced to speak, we submit that the infringement of dignity is too great for a use indemnity to cure the human rights violation.

There does not appear to be any justification whatsoever for detention without trial for the purposes of interrogation. The potential for abuse is simply too terrifying, particularly in weak, undemocratic states. In the context of an unchecked or weakly controlled executive, detention without trial for the purposes of interrogation is a doorway to torture, which is a non-derogable right.⁷¹ Detention pending extradition may be a necessary measure, and far less intrusive of the detainee's rights. A legal system which allows for such detention but includes regular visits, controls and access to judicial officers would probably satisfy the minimum requirements of both legal regimes.⁷²

Excluding the public from hearings, particularly where the hearing is not conducted by a judicial organ, further promotes an executive-minded approach. There is a lack of both transparency in, and

control over, the state organs exercising power. Where national security is genuinely threatened by the information (and one must, as a starting point, accept the executive's word for this) the worst aspects of executive-mindedness could possibly be cured by a system of appeals, allowing several judicial officers to consider at least the evidence itself and possibly also whether publication thereof threatens national security.

Furthermore, there does not appear to be any justifiable reason to erode the general control that the judiciary exercises over the executive. The main purpose behind unchecked executive action is to allow for speedy responses to emergencies. However, as we have argued above, speedy, irreversible action, is particularly necessary in the case of terrorism. Organized crime does not require irreversible action by the executive. Measures can therefore be taken when necessary by the executive but confirmed later by a court. As Africa does not have a pressing problem with 'classical' terrorism, but suffers instead from fragmented and weak state structures, the judiciary should rather maintain control.

Earlier, we identified vaguely-worded laws as an element of executive-mindedness. We have already argued that vague laws are inherently inimical to a human rights system, particularly if used as a lever to enhance executive control over the state. However, they are also self-defeating in practice. If laws have vague definitions combined with informal regulatory procedures that result in broad infringements of rights, judicial practice will generally restrict interpretation of such laws to make them as narrowly applicable as possible (although this will depend on the particular court's willingness to subjugate human rights to the effective prevention and control of crime). In the context of an anti-crime/anti-terrorist regime, this may mean that the rules are rendered meaningless as courts attempt to maintain control over executive power.

Conclusion

The growth of the 'new' anti-terror law suggests that the nature of the Security Council seems to be changing. This body was initially understood as an 'executive' body, empowered to respond to immediate threats to world peace in a short-term manner. However, it has recently begun to use its chapter VII powers in more long-term forms. In the 1990's it set up judicial structures (the International Criminal Courts set up by Security Council Resolutions 827 of 1993 and 955 of 1994) and this millennium it seems to be spearheading the creation of a legal regime. Security Council Resolution 1373 of 2001 provides states with a strong incentive to sign both the UN Convention on the Suppression of the Financing of Terrorism as well as the UN Convention against Transnational Organized Crime. It also imposes an obligation on states to prevent transnational crime to the extent that such crimes assist international terrorism.

An interesting parallel to the executive impetus behind the development of an international anti-crime regime is the ever stronger role that this regime seems to expect the executive to play within each state and region. Whatever the merits and dangers of such a trend elsewhere, the constitutional infrastructure is not necessarily prepared for such a strong executive role in Africa.

In the long term, an effective response to crime in Africa will, by its very nature, promote human rights. This can only happen, however, if the region is prepared to be patient and create the legal and practical infrastructure at least in parallel to its fight against crime. What should be avoided is a situation in which the human rights regime is considered suspended until international terrorism has been 'dealt with'. There is no indication that the current vigilance against international terrorism, and more particularly, organized transnational crime, will ever become unnecessary. Both the body of human rights law as well as the developing regime against terrorism and organized crime are therefore intended to last in the long term and to create a peaceful, just society, both internationally and domestically. If either legal regime supplants the other, the long-term goal of peace, prosperity

and justice will be threatened.

CHAPTER 4

Terrorism and its Effect on Refugee and Extradition Law

A Katz

Introduction

The laws concerning the investigation and prosecution of terrorists in a world in which humans move across borders with ease is a complex issue in practice. Globalisation and the resultant increase in the movement of humans across national borders together with the increase in the scale of transnational terrorism have affected refugee law as well as the law relating to extradition. In brief, persons involved in serious criminal activity must be brought to justice no matter where they are found. At the same time refugees should continue to be protected. But questions may arise as to whom it is that should be regarded as a refugee in light of the changing global circumstances.

This chapter begins with an introduction to refugee and extradition law, which is followed by a description of the legal regime relating to terrorism in Africa as it relates to refugee and extradition law. The legal regime is principally contained in two instruments: the Algiers Convention on the Combating and Preventing of Terrorism (1999)¹ ("the Algiers Convention") and United Nations Security Council Resolution 1373 (2001)² ("UNSC Resolution 1373"). Both instruments deal with both refugee and extradition issues. An analysis of the facts and the judgment of the Constitutional Court in South Africa concerning the "removal" of a Tanzanian asylum seeker involved in terrorism in Dar es Salaam from South Africa to the United States of America will follow. A general comment on possible steps that may assist in the challenge terrorism presents in respect of refugee issues and extradition in the wake of the attacks on New York and Washington on 11 September 2001 and the recent history of terrorism in Africa constitutes a conclusion.

Refugee law

International law recognises the principle that States are obliged to refrain from forcibly returning to a State a person who is recognised as a refugee.³ The term refugee has been defined by generally accepted principles of international law. A refugee is a person who is outside the country of his nationality or, in the case of a person who has no nationality, is outside any state in which he last habitually resided, and is unable or unwilling to avail himself of the protection of that country, because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership of a particular group or political opinion. In Africa by virtue of the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (1969) a person may also qualify as a refugee if owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either part or the whole of his country of origin or nationality he is compelled to leave his place of habitual residence.⁴ In commemoration of the 30th anniversary of the OAU Convention, a Ministerial Meeting on Refugees⁵ accepted that the grant of asylum is a peaceful and humanitarian act in conformity with the African tradition of hospitality.

A refugee flees his country of origin for a variety of reasons and his destination is irrelevant. He flees to avoid danger. Implicit in the ordinary meaning of the word 'refugee' is the sense that the person concerned is worthy of being, and ought to be assisted, and if, necessary, protected from the causes and consequences of his flight. On the other hand, in the case of a 'fugitive' from justice, the person fleeing criminal prosecution for violation of the law in its ordinary meaning is often excepted from

the category of refugee.

The obligation to offer asylum to a refugee is an exception to the general rule of international law respecting a State's sovereignty to determine without interference from other States who may enter and remain in its territory. A well-founded fear of persecution on the ground of a person's political opinion is a recognised basis for a successful claim of asylum. However, a State may deny asylum to a person who has committed a crime against the peace, a war crime, a crime against humanity, a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations even if such crime is a political one.⁶ In *T v Secretary of State for the Home Department*⁷ a member of the Front Islamique du Salut (FIS) responsible for placing a bomb at Algiers Airport, which killed ten people applied for asylum in the United Kingdom. The House of Lords in considering whether it was a political offence by implication excluded terrorism as a political offence. It was stated:

"A crime is a political crime for the purpose of art 1F(B) of the 1951 Convention if, and only if: (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or government target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injury of members of the public".

Although States are required under international law to provide protection by way of asylum to persons who flee persecution on the grounds of political opinion, this protection does not extend to terrorists, even though the motivation for the acts committed by them may be political.

States must also consider, in deciding whether to expel or remove a terrorist, whether there is a substantial reason to believe that the terrorist will face human rights abuses, and specifically torture in the receiving State. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides⁸ that no State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.⁹

Despite the principle that a terrorist does not receive protection in terms of international law relating to refugees, terrorists may not be removed from a State to face torture in the receiving State. This principle has been accepted worldwide. In Canada, a member and fundraiser of the Liberation Tiger of Tamil Eelam (LTTE), an organisation alleged to engage in terrorist activity in Sri Lanka, was detained with a view to deportation. In a challenge to the deportation on the basis that he would face torture in Sri Lanka if deported, the Supreme Court of Canada was required to consider the issue of deporting an alleged terrorist to possible torture.¹⁰

It accepted that there was no universal definition of terrorism, but stated that the manifest evil of terrorism including the random and arbitrary taking of lives needed to be balanced against the fundamental values to a democratic society. Liberty, the rule of law and the principles of fundamental justice had to be protected. To sacrifice these values to defeat terrorism would not serve the interests of justice or the values of liberal democratic societies. The Court ruled that Suresh may not be deported to face torture even though he did not qualify for asylum because of his alleged involvement in terrorism.

The challenge for States is to provide safe havens to genuine refugees without allowing their

territories to be abused by terrorists to avoid justice. The international and continental legal regimes relating to refugee issues must be considered and adapted where necessary to give effect to these principles in light of increased transnational terrorist activity.

Extradition

The law of extradition is conceptually and practically different to that relating to refugees and deportation. Whereas refugee law relates to States expelling (deporting) foreign nationals, extradition concerns the delivery of an accused or a convicted individual to the State where he is accused of, or has been convicted of, a crime, by the State on whose territory he happens for the time being to be.

International law does not recognise any general duty on the part of States to surrender criminals by way of extradition. In practice, therefore, the return of criminals is secured by means of extradition agreements between States. Extradition agreements may be either bilateral or multilateral. Extradition involves basically three elements: acts of sovereignty on the part of two states; a request by one State to another State for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial or sentence in the territory of the requesting State.

Deportation, unlike extradition, is essentially a unilateral act of the deporting State in order to get rid of an undesired foreign national. The purpose of deportation is achieved when such a foreign national leaves the deporting State's territory. Significantly, the destination of the deportee is irrelevant to the purpose of deportation. It is often easier and quicker to deport a foreign national rather than engaging in what can be a complex extradition process. This can tempt States to deport an alleged terrorist to a State to stand trial rather than extradite the person as, it would appear, happened in the case of Mohamed discussed below.

Where deportation and extradition coincide in effect, difficulties can arise in practice in determining the true purpose and nature of the act of delivery. The important distinguishing feature between extradition and deportation is the purpose of the State delivery act. Deportation to achieve extradition is regarded as "disguised extradition" and universally accepted as unlawful.

There are a number of factors obstructing extradition. Many States exercise personal jurisdiction over their nationals for offences committed abroad and exempt their own nationals from extradition. Unlike African States with an Anglophone legal tradition, African States with a Francophone tradition, often apply this rule and many refuse absolutely to extradite their own nationals. The principle of double criminality requires that the conduct claimed to constitute an extraditable crime should constitute a crime in both the requesting and the requested State. It is not necessary that the offence should have the same name in both States, provided that it is substantially similar. The crime of terrorism may present particular problems in this respect reflected in the different ways States may define the crime of terrorism. The principle of speciality requires an extradited person to be tried only for the offence for which he was extradited, unless the extraditing State consents to a prosecution for another crime. Thus, a person extradited for murder may not be tried for terrorism unless the surrendering State consents thereto. A person may not be extradited in respect of an offence of which he has already been acquitted or convicted by the requested State. This confirms the internationally accepted principle of *autrefois - acquit or convict*.

Extradition law and practice generally exempt political offenders from extradition. This rule had its origins in the 19th century, when the governments of the new liberal democracies refused to return political dissidents to the despotic States of the ancien regime. The principal justifications advanced for the rule are, first, that States should not intervene in the internal political conflicts of other States by assisting in the rendition of political opponents of the government; and, secondly, that political offenders, unlike ordinary criminals, threaten only the criminal justice system of the State from

which they have fled and not of the State granting asylum. Over the years the romantic image of the political dissident fighting for democracy has been tarnished by the political terrorist fanatically determined to overthrow the regime of another State by all means, including hostage taking and hijacking and more recently bombings. As a result the political offence exception has become highly controversial and courts have sought to define the political offence in such a way that it excludes the political terrorist but does not abandon the protection of the genuine political dissident. Courts considering extradition throughout the world have experienced great difficulty in deciding when an offence is one of a political character. Clearly, treason and sedition are political offences. Problems arise in the case of ordinary crimes, such as murder or robbery, however, when they are politically motivated.

International terrorism presents a particular problem for extradition, as most transnational acts of terror are politically motivated and fall within the tests traditionally laid down for the political offender. Modern treaties, multilateral and bilateral, tend to expressly provide that acts of international terrorism shall not be treated as political offences for the purposes of extradition.¹¹ The Algiers Convention as well as bilateral extradition treaties recently signed between various African States reflects this trend.¹²

The Algiers Convention (1999)

The Algiers Convention deals comprehensively with extradition, but only touches on the issue of refugees in Article 4(2)(g), which concerns areas of State co-operation. It provides that State Parties shall ascertain, when granting asylum, that the asylum seeker is not involved in any terrorist act. This obligation is consistent with general international and continental refugee law.

Concerning extradition generally, Article 4(2)(h) provides that States shall arrest the perpetrators of terrorist acts and try them, or extradite them in terms of the provisions of extradition treaties between the States. It further provides that in the absence of an extradition treaty, States shall consider facilitating the extradition of persons suspected of having committed terrorist acts. This is consistent with the general international law principle that States may extradite persons in the absence of an extradition treaty, but do not have an obligation to do so.

Extradition is dealt with extensively in Part II of the Algiers Convention, in Articles 8 to 13.

Article 8 provides for the general conditions upon which extradition shall be granted. States are entitled to indicate to the Secretary General of the OAU the grounds upon which extradition may be refused, and shall indicate the legal basis in its national legislation or international conventions, which excludes such extradition. Extradition shall not be granted if final judgment has been passed upon the person in respect of the terrorist act or acts for which extradition is requested. If the alleged terrorist is not extradited, then States shall be obliged, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution.

Article 9 requires States to include as an extraditable offence any terrorist act as defined in the Algiers Convention. Articles 10 and 11 deal with the diplomatic procedures for the processing of extradition requests, and the required documentation supporting such requests. Article 12 deals with urgent cases and the issue of provisional arrests.

Article 13 deals with the situation when a State receives more than one request for extradition. It also requires States to seize and transmit all funds and related materials purportedly used in the commission of the terrorist act to the requesting State. Such funds, incriminating evidence and related materials shall be submitted even if, for reasons of death or escape of the alleged terrorist, the

extradition cannot take place.

Significantly, in terms of Article 6(4) requires State Parties shall take such measures as may be necessary to establish jurisdiction over terrorist acts in cases where the alleged offender is present in its territory and it does not extradite the person to any of the State Parties which will exercise jurisdiction over the alleged terrorist.

The provisions of the Algiers Convention relating to refugee and extradition law and practice do not deviate from the general international and continental provisions concerning these issues. They merely spell out the terms and legal mechanisms already in existence. However, the fact that States are required to prosecute or at least exercise jurisdiction over alleged terrorists who they do not extradite is an important step in the efforts to subject terrorists to justice.

United Nations Security Council Resolution 1373

UNSC Resolution 1373 is binding on all States (including non-members of the UN) because it was adopted in terms of Chapter VII of the UN Charter. It deals directly with refugee and extradition issues, and recognises the link between the two regimes.

Operative paragraph 2(c) requires States to deny safe haven to those who finance, plan, support, or commit terrorist acts. In particular, States shall, by virtue of paragraph 2(g), prevent the movement of terrorists or terrorist groups by effective border controls and controls on the issuance of identity papers and travel documents, through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.

States are required to prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.

States are required to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice. This effectively requires States to extradite or prosecute alleged terrorists or accomplices, and requires States to exercise criminal jurisdiction over alleged terrorists even if the usual jurisdictional pre-requisites are not present. This mirrors the development provided for in Article 6(4) of the Algiers Convention.

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

UNSC Resolution 1373 recognises the link between the grant of refugee status and extradition. States are called upon to ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts, and that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists.¹³

Mohamed v President of the Republic of South Africa¹⁴

Khalfan Khamis Mohamed, a Tanzanian national, lived in South Africa from August 1998 to October 1999. He had entered South Africa on the basis of a forged passport in the name of Zahran Nassor Maulid. Under this name, he applied for refugee status. The deception was discovered by an agent of the Federal Bureau of Investigation who recognised him as a suspect in bomb attacks on United States embassies in Nairobi and Dar es Salaam.

During October 1999 South African immigration officials and FBI agents arrested him in Cape Town and interrogated him. He admitted that he had taken part in the bombing in Dar es Salaam. Mohamed said that he had obtained a visitor's visa from the South African High Commission in Dar es Salaam the day before the bombings and left Tanzania by road the day after. Travelling via Mozambique he entered South Africa as an asylum seeker under his assumed name, and, on spurious grounds, lived and worked quietly in Cape Town.

In the meantime, he had been indicted in the Federal District Court for the Southern District of New York. The grand jury had been sitting in New York since the mid-nineties investigating the activities of Al Qaeda, founded, led and financed by Osama bin Laden. The grand jury concluded that the attacks were the work of Al Qaeda in its international campaign of terror against the United States and its allies. It indicted fifteen men including Mohamed.

Mohamed allegedly expressed the wish to be removed to the United States, instead of Tanzania to where, in the ordinary course as a prohibited person,¹⁵ he would have been deported. He was subsequently, and very rapidly, taken from South Africa directly to New York to face a criminal trial for the Dar es Salaam bombing. Because he was surrendered to the United States without a condition that he should not be subject to the death penalty, the United States Federal Court accepted that he was "death eligible".¹⁶ While in New York and now facing the capital charges, Mohamed launched an application in the South African Courts seeking an order declaring his deportation to be unlawful in that it was in fact a disguised extradition and that it was in any event unlawful because the South African authorities had not stipulated that as a condition of his removal the United States authorities would not seek or carry out the death penalty. This was so because the death penalty was unlawful in South Africa and effectively meant that South Africa indirectly had a hand in him facing the that penalty. The South African Constitutional Court ruled in favour of Mohamed against the South African government. Its judgment considered authorities worldwide in deciding that Mohamed had been unlawfully removed from South Africa.

In particular, it rejected the government's claims to have deported and not to have extradited him as irrelevant. Reference was made to the Torture Convention as well as to the European Convention on Human Rights. It concluded that the South African Constitution requires South Africa to avoid being a party to the imposition of cruel, inhuman or degrading punishment, including the death penalty, whether directly or indirectly. For South Africa to have deported Mohamed to face the death penalty was a violation of Mohamed's right to life and his right not to be subject to cruel or unusual punishment.

One of the precedents relied upon in the judgment is that of *Hilal v United Kingdom*, a case dealing with the deportation of a Tanzanian citizen from the United Kingdom to Tanzania. The European Court of Human Rights held that Hilal's deportation to Tanzania violated his rights because he would face a serious risk of being subject to torture or inhuman or degrading treatment in Tanzania.

Mohamed asked the South African Court to order the South African government to request the United States to refrain from executing him. The Court declined to so order the South African government but instead ordered that a copy of the judgment be transmitted to the New York Court. After conviction as result inter alia of his confession, the United States jury sentenced Mohamed to life imprisonment

One of the many lessons learnt from the Mohamed saga is that the important and justifiable desire of States to co-operate in the area of terrorism must not allow them to act unlawfully. If extradition procedures are undesirable then consideration must be given to amending those procedures. It is

unlawful to utilise deportation procedures to effect an extradition. Similarly, States must ensure that they do not violate the inalienable rights of persons, even indirectly, in their desire to bring alleged terrorists to justice as it would appear happened in the Mohamed saga.

Conclusion

Economic development requires the free movement of goods, services and people into and out of Africa as well as across borders within the continent. More persons are moving across borders and those that move are doing so more frequently. This development requires improved and upgraded administration in border control and immigration matters in general. It also allows the potential for criminals to escape justice in one country by moving to another or hiding where the legal regime provides protection from prosecution. This requires the international and regional arrangements concerning extradition to be effectively implemented and upgraded where necessary.

At the same time persons continue to be persecuted on account of their race, nationality, religion, membership of a particular group or political opinion in many African states. War crimes, crimes against humanity and genocide continue to be committed, thus many humans require protection by way of asylum from/in those? States to which they flee. Indeed, it is incumbent upon all States to avoid sending persons to their possible death, torture or unlawful persecution. Of course, there is no difficulty with States extraditing persons in order for them to be prosecuted in the requesting State. However, there must be a consideration of whether the intended prosecution is really persecution for an unlawful purpose.

Globalisation has not only brought about an increase in the movement of humans across borders but also caused an increase in transnational crime, and more particularly international terrorism. It is imperative that international crime, like national crime, be dealt with firmly. Crime weakens economies, limits development and in the African context it discourages much needed foreign investment. African States have a direct interest in the combating and suppression of crime, and particularly the crime of terrorism. States thus have an obligation to their own nationals and the international community in general to put in place measures that combat and prevent crime and particularly terrorism. In April 2001 an Experts' meeting was held in Addis Ababa to consider the Draft African Convention on Extradition and the Draft African Convention on Mutual Legal Assistance in Criminal Matters.¹⁷ The introduction of these African agreements for the purpose of preventing and combating crime is a welcome development. However, there appears to be a need for a consideration of speeding up the process of adopting these important instruments.

But in enacting laws and adopting international and continental agreements to counter terrorism States must ensure that the rights of individuals are not violated, including the right to a fair and just opportunity to assert claims for asylum. Similarly, those persons subject to requests for extradition must be allowed to oppose any application for their surrender in extradition in an administratively just manner.

Ultimately, the tension between the inclusion of human rights in the extradition process and the demand for effective international co-operation in the suppression of crime mirrors the tension in many national legal systems between the "law and order" and human rights approaches to criminal justice. In international society, as in domestic society, it is necessary to strike a balance between the two to establish a system in which crime is suppressed and human rights are respected.

Terrorist acts violate the dignity of all persons, not just those are physically injured. There can be no dignity in a world where terrorists can act with impunity and avoid justice. The challenge is to draft and implement laws, international and domestic, that effectively combat terrorism and conform to the requirements of civilisation and respect for the dignity of every person.

CHAPTER 5

South Africa's Operational and Legislative Responses to Terrorism

H Boshoff and M Schönteich

Introduction

Between 1994 and the end of 2000 South Africa's legislative capital, Cape Town, was plagued by numerous bombings, drive-by shootings and assassinations. Initially, most of this violence occurred in the context of internecine gang warfare and vigilante action against criminal gangs and suspected drug dealers. However, after mid-1996 the motive for some of the violence changed. It would appear that the violence was no longer solely committed by gangs battling for territory, or by vigilantes in their attempts to eliminate suspected drug dealers. This new violence sought to create a climate of fear and terror among the citizens of Cape Town.

After mid-1998, bomb attacks and assassinations occurred not only in the gang-ravaged areas on Cape Town's impoverished periphery, but also in the city centre and tourist destinations of Cape Town itself. The violence—primarily bombings—increasingly began to target the state in the form of police stations, courts and personnel of the justice system, as well as popular tourist and entertainment areas, restaurants and the Cape Town International Airport.

At the time of writing no group had claimed responsibility for the bombings. Government ministers responsible for security and justice have, however, laid the blame firmly at the door of People Against Gangsterism and Drugs (Pagad), a vigilante group formed in late 1995 as a response to high levels of crime, particular wide-scale drug trafficking in and around Cape Town.¹ Within a year of its establishment two factions appeared within the organisation: a moderate Pagad factions focused on fighting crime and drug dealers, and a 'Pagad-Qibla' faction made up of militant populists and Muslim fundamentalists who interpreted the fight against drugs as a jihad or holy war. During the late 1990s the Pagad-Qibla faction successfully took control of the organisation as a whole.²

Operationally the state responded effectively to the abovementioned violence, in stabilising the internal security situation in the Western Cape. Through special intelligence-driven joint police and defence force operations the security forces contributed to a significant reduction in terrorist related incidents by the end of 2000. This chapter evaluates the successes of five distinct operations—Operations Recoil, Saladin, Good Hope, Crackdown and Lancer—launched by the security forces to combat urban terrorism, criminal gangs and other forms of crime in the Western Cape.

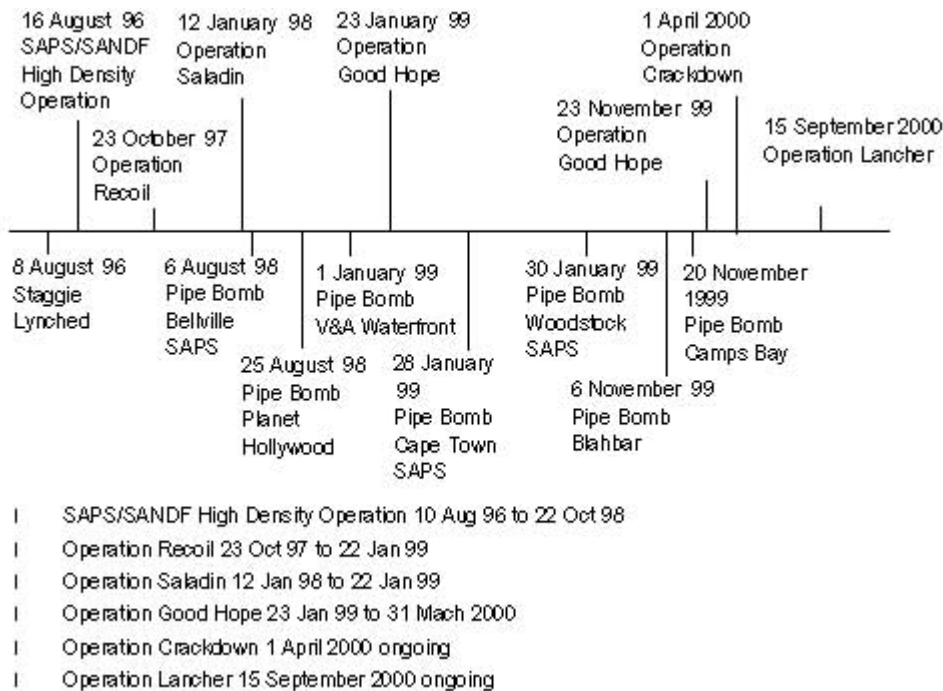
In early 2001 the minister of safety and security, the late Steve Tshwete, and the minister of justice and constitutional development, Penuell Maduna, argued that new anti-terrorism legislation was necessary to prevent South Africa becoming a 'safe haven' for international terrorists. While South Africa's parliamentary process inhibits the rapid promulgating of laws it is likely, especially in the aftermath of the terrorist acts in the United States on 11 September 2001, that a draft Anti-Terrorism Bill will become law during the second half of 2002.³ In the interim numerous pieces of legislation are on the South African statute books that can be used to combat terrorism and related criminal behaviour. Both the draft Anti-Terrorism Bill and selected pieces of exiting anti-terror legislation are discussed later in this chapter.

Operational Response

In early 1996 the South African Police Service (SAPS) and the South African National Defence Force (SANDF) jointly responded to the terrorist threat in the greater Cape Town area through the National Operational Co-ordinating Committee (NOCOC) mechanism to execute special counter-terrorism operations.⁴

The response of the security forces (SAPS/SANDF) can best be discussed against the background of a timeline indicating acts of urban terrorism and the security force action taken to counter them. The timeline clearly shows five distinct operations launched by the security forces: Operations Recoil, Saladin, Good Hope, Crackdown and Lancer (Figure 1).

Figure 1: Timeline: The Operational Response of the State



Operation Recoil

On 16 October 1997, a meeting took place between then-president, Nelson Mandela, and several cabinet ministers, as well as the national commissioner of the SAPS and the chief of the SANDF. The meeting focused its attention on the security and crime situation in the Western Cape, specifically the Cape Flats (an impoverished and crime-ravaged area on Cape Town's periphery).

Operation Recoil was launched in October 1997, to counter growing levels of insecurity and inter-gang warfare in the greater Cape Town area. Pagad attacks for the period January to August 1997 accounted for 111 incidents, whereas gang-to-gang violence accounted for 75.

Operational concept

The operational concept that was decided upon during the joint NOCOC/POCOC Western Cape planning meeting included the following: an intelligence-driven factor; a high-density crime prevention factor; investigating task groups, and co-ordination and visible force levels.

INTELLIGENCE-DRIVEN FACTOR OF OPERATIONAL RECOIL

The operation was intelligence-driven, and comprised the following intelligence focus areas:

- crime patterns to determine 'hot spots', and tactical intelligence for high-density⁵ and crime-prevention operations;
- intelligence for the purpose of court-directed investigations; and
- intelligence provided by specialised investigation units to be utilised for any of the above purposes.

HIGH-DENSITY CRIME PREVENTION FACTOR FOR OPERATION RECOIL

The high-density crime prevention and visibility operations were conducted by:

- a crime prevention task team (crime prevention and visibility);
- a visible gang unit (crime prevention);
- public order policing (high-density operations); and
- the South African army (high-density operations).

INVESTIGATING TASK GROUPS OF OPERATION RECOIL

The investigation of the operation were conducted by a gang and Pagad investigation task group, and specialised investigation units concentrating on areas with gang activities, and conflict between Pagad and gangs.

Co-ordination and visible force levels of Operation Recoil

The co-ordination of Operation Recoil was handled in the following way:

- co-ordination of the operation was conducted through the NOCOC and POCOC structures;
- intelligence co-ordination was implemented by a Provincial Intelligence Co-ordinating Committee (PICOC) to co-ordinate with the POCOC structure; and
- members from NOCOC visited the POCOC for joint planning and evaluation sessions on a regular basis.

The visible force levels required by Operational Recoil led to an integrated operational capacity that was expanded to include more than 1,000 members of the South African National Defence Force, the public order police, Pagad visible task team members, and gang investigation unit members.

The success of Operation Recoil

The concept of Operation Recoil was built on the principle of flooding flashpoint areas with high-density security force deployment by way of mobile visible patrols as well as cordon and search operations, in order to flush out criminals at such flashpoint areas. This strategy also improved the SAPS' ability to synchronise and focus high-density deployment in flashpoint areas, as determined by weekly crime pattern analyses submitted by crime information managers at SAPS station and area levels, as well as strategic crime tendency analyses conducted by the intelligence co-ordinate structures.

From October 1997 to January 1998, the visible high-density contingent of Operation Recoil netted a total of 7,437 arrests, inclusive of certain serious crime categories.

Operation Saladin

By early January 1998, it seemed that the specific focus of Pagad had changed and that pipe bomb attacks and drive-by shootings aimed at the police, drug dealers and Muslim businessmen were on the increase. The response of the state necessitated a more intelligence-driven operation: Operation Saladin, which was formed within Operation Recoil, and was aimed at detecting and monitoring the perpetrators of acts of urban terrorism in both gangs and Pagad.

Operation Saladin was activated on 12 January 1998, to ensure a decrease in incidents of urban terrorism in the Western Cape. The operation involved both operational and intelligence members from the SAPS, SANDF and NIA (National Intelligence Agency).

Operation concept

Operation Saladin consisted of a detection and monitoring element made up mainly of SAPS intelligence field workers and SANDF observation teams. The aim was to monitor suspects and, once a movement indicating a possible attack was detected, to inform the Joint Operational Centre (JOC) Cape Town, which would in turn manoeuvre the deployed forces available in the area concerned. A quick reaction force would also be directed to intercept suspected potential perpetrators before they reached their target or, if that was not possible, to then intercept the perpetrators on the return from their target. A further element of the operation entailed the deployment of high-density forces of Operational Recoil in the proximity of the intended target, to act as an additional deterrent to would-be perpetrators. Central to the whole concept was the JOC. By centralising all the factual information at the JOC, senior officers in the JOC were able to manoeuvre available forces to apprehend would-be perpetrators at short notice (Figure 2).

Figure 2: Operational Concept: Operation Saladin



Objectives

The objectives of Operation Saladin were:

- to detect and monitor perpetrators of acts of urban terrorism in both gangs and Pagad;
- to provide early warning, on-the-spot operational intelligence, visible policing, and to assist with POCOC operations;
- to frustrate the access of perpetrators of urban terrorism to their intended targets; and
- to ensure the effective interception of perpetrators of acts of terrorism both before and after

attacks.

The success of Operation Saladin

The successes of Operation Saladin were that while it acted as a deterrent to prevent acts of urban terrorism and gang-related violence, it also led to the arrest of people involved in acts of terrorism.

However, during December 1998 and January 1999, the nature of the threat of urban terrorism changed in emphasis and target. The new hazard was accompanied by threats from Pagad spokespersons against members of both the security and intelligence forces. The increasing selectivity of the perpetrators and urban terrorism became evident in a number of attacks aimed specifically at the security forces and at business.

The shift in emphasis by perpetrators of urban terrorism to target both the security forces and the public at large was met with a change in emphasis by the security forces. The rapid response by the security forces to this new threat resulted in a modification of the operational concept, and was achieved by combining operations Recoil and Saladin into one operation: Operation Good Hope.

Operation Good Hope

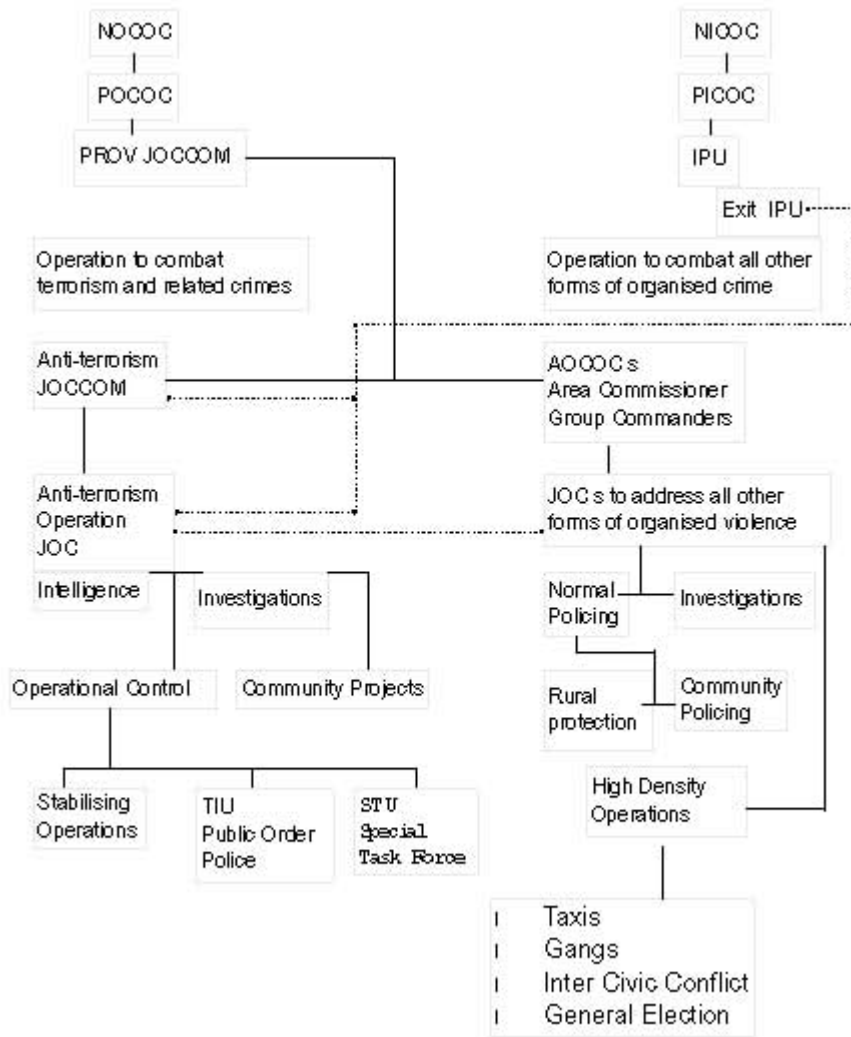
The attacks during December 1998 and January 1999 aimed at the SAPS and also at civilians in the Western Cape resulted in a change of strategy to counter urban terrorism. Operation Good Hope was launched in January 1999.

Operational concept—an integrated approach

Operation Good Hope required an immediate increase in security force levels that were extended to include more than 1,200 members, inclusive of SAPS/SANDF members, but excluding the local station police in Cape Town.

The new operational concept that was decided upon during the joint NOCOC/POCOC Western Cape planning session on 20 January 1999 was planned to be: intelligence-driven in specifically focused areas; investigative; protective of specific targets; in liaison with communities, and co-ordinated by NOCOC/POCOC Western Cape (Figure 3).

Figure 3: Operational Concept: Operation Good Hope



Intelligence-driven aspect of Operation Good Hope

The intelligence-driven aspect of the operation focused on both tactical intelligence gathering, and dedicated court-directed intelligence gathering. The operation was executed by focusing on establishing operations regarding urban terrorism, tactical intervention regarding urban terrorism and crowd management, and high-risk operations regarding urban terrorism.

Investigate aspect of Operation Good Hope

Investigations focused on:

- urban terrorism (pipe bombs, drive-by shootings);
- actions resulting from crowd management; and
- other cases regarding identified suspects.

Protection and liaison-related aspects of Operation Good Hope

Protection tasks for political and other targets (investigators, politicians and so on) were co-ordinated by the national and provincial protection services. Community liaison stemming from information gatherers within each community would initially be supported by the facilities provided by existing intelligence-gathering structures.

Success of Operation Good Hope

It is clear from the operational concept that the new strategy was focused on tactical intelligence gathering and dedicated court-directed intelligence gathering.

This strategy resulted in a major decline in acts of urban terrorism in the Western Cape and the arrest of individuals involved in such acts. During the period January 1999 to January 2000, the forces involved in Operation Good Hope executed several operations (Table 1).

Table 1: Success achieved by Operation Good Hope

Arrests for various crimes*	4,014
Firearms recovered	489
Vehicles recovered	327
Ammunition recovered	5,803

*Operation Good Hope was an operation focused on urban terrorism, not 'crime-prevention' per se, which explains the lower figure of arrests made.

There is a remarkable decline in acts of urban terrorism, as well as gang-related incidents, comparing 1998 with 1999, and with 2000, and also during an increase in specifically gang-related violence. In 2000, there were 437 incidents of gang violence in which 160 people were arrested. Pagad-related incidents were the lowest during 2000, with 22 incidents and 15 arrests. It is thus clear that the state's response to curb urban terrorism was successful.

The biggest problem experienced during the start of Operation Good Hope were the co-ordination of tactical intelligence between the role players, as well as those of the investigation units. Although the strategic concept behind the operation depended on intelligence-driven operations, the initial drive for Operation Good Hope was based on intelligence generated by the operational personnel. As the operation proceeded, the intelligence flow also improved, resulting in positive arrests in connection with urban terrorism and gang-related crime.

Operation Crackdown

In his speech at the opening of parliament in early 1999, President Thabo Mbeki stated that 'multi-disciplinary' interventions would be introduced in areas of high crime concentrations, including all crimes of violence. All POCOC's were thereby asked to execute integrated high-density, intelligence-driven operations in the identified crime-combating zones, from April 2000 to April 2001, in a operation known as Operation Crackdown.

Operational concept

The concept comprised two main strategies. These were the serious and violent crime stabilisation or geographical approach, and the organised-crime strategy, both of which would be supported by multi-disciplinary interventions in the cases of high crime areas.

- Serious and violent crime/geographical approach: a geographical approach was followed, concentrating on the geographical 'hot spots', clustered into crime combating zones.
- Organised crime approach: a process was implemented to identify syndicates having the highest impact on organised crime.
- Multi-disciplinary interventions: this approach ensured that the social sector concentrated its socio-economic development and social crime prevention efforts in the same areas as the security forces.

The Crime Combating Task Group consisted of a:

- stability component (public order police, crime prevention, air wing, special task force);
- intelligence component (crime intelligence with the support of other intelligence agencies);
- investigation component (detective services in co-operation with other agencies such as the Scorpions);
- crime prevention component;
- communication component (SAPS Communication Services in co-operation with other role players); and
- legal component (SAPS legal officers).

The operations responsible for Task Group components included intelligence, investigations, stability reaction, crime-prevention communication, normal policing, monitoring and evaluation. The entire operation was co-ordinated by the NOCOC.

Success of Operation Crackdown

During the first three months of Operation Crackdown, from 1 April 2000 to 23 July 2000, noticeable successes were achieved in the eastern and western metropolitan areas of the Western Cape (Table 2).

Table 2: Successes of Operation Crackdown in the Western Cape

Vehicles recovered	621
Revolvers recovered	365
AK-47 assault rifles recovered	2

R1/R4/R5s recovered	3
Shotguns recovered	11
Ammunition recovered	2,928

The Task Team had to concentrate on taxi and bus violence in the Western Cape, during March to April 2000. Changing the mission from concentrating on gangs and Pagad violence, to taxi and bus violence, was easy. This is one of the advantages the Crime Combating Task Team has in addressing and stabilising any type of violent crime with terrorism-type modus operandi.

Operation Lancer

On 15 September 2001, after the 11 September 2001 terrorist attacks in the United States, Operation Lancer was launched in the Western Cape as a precaution for any possible terrorists attacks on United States interest in South Africa. The operation was then expand to covered the whole of South Africa. Operation Lancer managed to reduce Pagad related incidents to only nine during 2001.

The operational concept was based on:

- intelligence gathering aimed at successfully prosecution in court;
- investigation; and
- prevention of attack by Pagad and its supporters on United States interests.

Common sense strategy to prevent urban terrorism

The planning of anti-terrorism actions can be executed in two phases: pre acts-of-terrorism reduction, and post acts-of-terrorism recovery.

Reduction: pre acts-of-terrorism phase

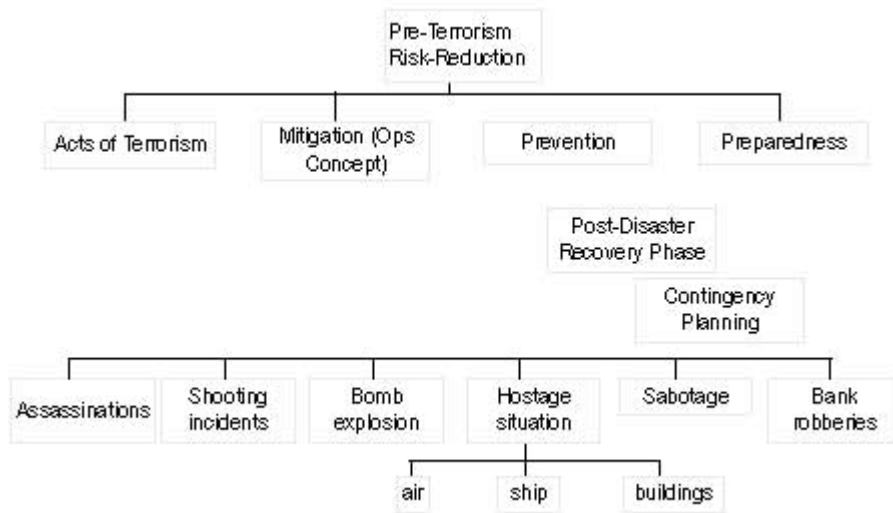
The pre acts-of-terrorism phase includes prevention, mitigation and pre-preparedness. The most important element of the pre acts-of-terrorism phase is prevention. Prevention can be achieved if intelligence is available. Prevention is 'targeted' if intelligence has identified the time and place of the planned attack. The steps of targeted prevention are straightforward: isolate the target from the terrorists (or the terrorists from the target), or sabotage their plans. Then arrest the terrorists as soon as all the possibilities of determining their plans, associates and supplies have been exploited.

The element of mitigation is to ensure a lessening of resources: the terrorists must be denied resources and information—for training, weapons and explosives. This can be done by executing high-density and targeted operations aimed at weapon caches. Terrorists must also be denied the support they need, such as safe houses, money and materials. Finally, in order to prepared, personnel must be trained and willing to use immense investigative resources to investigate any terrorist activities targeting South Africans. It is also vital that investigations are prosecution-focused.

Recovery: post act-of-terrorism phase

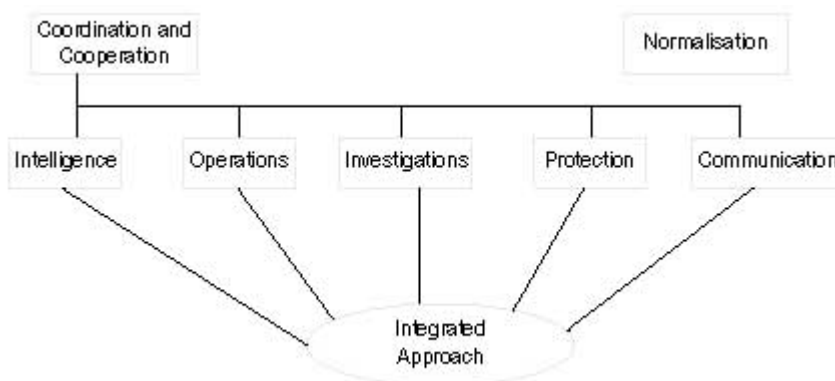
The post acts-of-terrorism phase includes contingency planning for assassinations, shooting incidents, bomb explosions, hostage situations, sabotage and kidnapping. 'Pre acts-of-terrorism' refers to those actions executed to prevent terrorism, to mitigate it and to prepare for acts of terrorism. 'Post acts-of-terrorism' refers to those actions executed after acts of terrorism have occurred. A strategy for anti-terrorism acts can visually be explained as follows (Figure 4).

Figure 4: An Anti-Terrorism Strategy



The strategy currently used in South Africa has been operationalised in an anti-terrorism operational concept based on co-ordination and co-operation between the following entities: intelligence, operations, investigations, protection and communication. The operational concept is co-ordinated within the Joint Operational and Intelligence Structure (Figure 5).

Figure 5: Anti-Terrorism Operational Concept



Proposed anti-terrorism operational concept

The most important principle of an anti-terrorism operational concept is to co-ordinate an operation with an integrated approach. This can be done within the National Operational Co-ordinating Mechanism, including all the disciplines of the SAPS, SANDF, NIA and the South African Secret Service (SASS), as well as any other government department that needs to be involved. The intelligence community is responsible for gathering tactical and co-ordinated, court-directed intelligence.

Operations based on intelligence are executed to stabilise a focus area, conduct tactical intervention

regarding urban terrorism and crowd management, and effectively control high-risk operations. Investigations are conducted with the specific intention of ensuring successful prosecutions.

Legislative Response

In October 1998 the South African Law Commission, a statutory law reform agency, appointed a project committee on security legislation.⁶ The project committee is conducting a wide-ranging review of South African security legislation, with a focus on:

- reviewing terrorism and sabotage legislation so that the country's obligations in respect of international terrorism are fulfilled;
- the protection of classified information in the possession of the state;
- granting the state greater powers in intercepting and monitoring communications;
- economic espionage that poses a threat to national security;
- the protection of property and personnel of foreign governments and international organisations in South Africa; and
- hostage taking that seeks to compel any government to do, or abstain from doing, any act.

Anti-Terrorism Bill

In mid-2000, the Law Commission released a draft Anti-Terrorism Bill. The draft bill seeks to integrate the country's numerous pieces of anti-terrorism legislation into one comprehensive law that addresses the issue of terrorism on a broad basis.⁷ The law commission motivates its support for one all inclusive anti-terrorism statute on the ground that there is a world-wide trend to create specific anti-terrorism legislation based on international instruments relating to terrorism.

Terrorism

The draft Anti-Terrorism Bill (hereinafter called 'the bill') proposes that anyone who commits a 'terrorist act' (including outside of South Africa) commits an offence and will be liable, upon conviction, to life imprisonment. The bill's definition of terrorist act is broad and includes any act which does or may endanger the life, physical integrity or freedom of any person, or causes or may cause damage to property, and is calculated to:

- intimidate, coerce or induce any government, persons or the general public;
- disrupt any public service, the delivery of any essential service to the public or to create a public emergency, or
- create unrest or general insurrection in any state.

The bill seeks to criminalise the actions of those who provide material support in respect of terrorist activities. For example, anyone who provides material, logistical or organisational support, knowing or intending that such support will be used in the commission of an offence in terms of the bill, is deemed to have committed a criminal offence. The same would apply to anyone who participates in the activities of a terrorist organisation. On conviction of such an offence, a penalty of up to 10 years imprisonment, without the option of a fine, is proposed. Moreover, anyone who conceals a person

knowing that that person intends to commit or has committed an offence in terms of the bill, also commits an offence. The proposed penalty for concealing such a person is the penalty for the offence that that person intended to commit or has committed.

The bill proposes that any person who is a member of a 'terrorist organisation' commits an offence through such membership and would be liable, on conviction, to imprisonment for up to five years without the option of a fine. The bill defines a terrorist organisation broadly as 'an organisation which has carried out, is carrying out or plans carrying out terrorist acts'. To secure a conviction under this provision the state would not have to prove that an accused knew that he was a member of a terrorist organisation. The state would merely have to prove membership of a terrorist organisation.⁸ The concern has been raised that the creation of such a membership offence could result in the prosecution of a member of a particular organisation even though such a person is unaware that the organisation is regarded as a terrorist organisation.⁹

Specific offences

The bill proposes that aircraft hijacking be regarded as a specific offence punishable, on conviction, by mandatory life imprisonment. The same penalty is also proposed for anyone convicted of taking someone hostage and threatening to kill, injure or continue to detain the hostage in order to compel a state, international governmental organisation or person to do or abstain from doing any act. The offence of endangering the safety of maritime navigation is also provided for in the bill, punishable by a fine or imprisonment of up to 20 years, or life imprisonment if somebody is killed as a result of the criminal conduct.

The bill provides for a number of offences in respect of internationally protected persons. That is, persons who enjoy immunities and privileges in terms of the Diplomatic Immunities and Privileges Act of 1989. The offences deal with attacks upon, and the murder and kidnapping of, internationally protected persons, and damaging or trespassing upon the property of internationally protected persons.

Specific offences in respect of nuclear terrorism are catered for in the bill. Anyone who unlawfully and intentionally possesses or uses radioactive material, or damages a nuclear facility with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment, commits an offence and is liable on conviction to life imprisonment. The same penalty is also proposed for accomplices to such offences.

Detention

The bill provides that a judge may issue a warrant of detention when, on the ground of information submitted under oath by a director of public prosecutions, 'there is reason to believe that any person possesses or is withholding from a law enforcement officer any information regarding any offence' contained in the bill. The bill proposes that a person be detained for interrogation until a judge orders his release, if satisfied that the detainee has satisfactorily replied to all questions under interrogation or that no lawful purpose is served by further detention. The detention period may, however, not be longer than 14 days.

Aware of the country's history of abuse of detention laws, the drafters of the anti-terrorism bill included various safeguards for detained persons in the bill. Thus, detainees have the right to choose a legal representative who is entitled to be present during the interrogation process, and to be visited by their medical practitioners. Any detained person must be brought before a judge within 48 hours of being detained and again after a further five days.

Moreover, the need for detention or continued detention must be motivated in relation to one or other of the following purposes:

- to compare fingerprints, do forensic tests and verify answers provided by the detainee;
- to explore new avenues of interrogation or to determine accomplices;
- to correlate information provided by the person in custody with relevant information provided by other persons in custody;
- to find and consult other witnesses identified through interrogation;
- to hold an identification parade;
- to communicate with other police services and agencies, or
- any other purpose relating to the investigation of the case approved by the judge.

Provide information

The bill proposes to place a duty on anyone who knowingly possesses any information, which may be essential to investigate any terrorist act, to provide such information to a law enforcement officer or public prosecutor. Intentionally withholding such information constitutes an offence leading on conviction to imprisonment for up to five years without the option of a fine. According to Amnesty International, the implementation of this provision could result in abusive prosecutions, given the broad definition of what constitutes a terrorist act. Moreover, the provision may be in breach of the right not to incriminate oneself, which is enshrined in international standards and the South African constitution.¹⁰

Special powers

A police officer of at least the rank of director may authorise that special powers are given to all uniformed police officers within his area of authority, provided there are reasonable grounds to do so to prevent a terrorist act. Uniformed officers may then stop and search any vehicle or person for articles that could be used for the commission, preparation or instigation of any terrorist act. Moreover, a police officer may exercise such powers whether or not he has any grounds for suspecting the presence of such articles.

Courts' jurisdiction

It is proposed that South African courts have wide jurisdiction in respect of offences created by the bill. For example, South African courts will have jurisdiction if:

- the perpetrator of the criminal act is arrested in South Africa, in its territorial waters or on board a ship flying the flag of South Africa, or an aircraft registered in South Africa;
- the criminal act has been committed in the territory of South Africa and the perpetrator of the criminal act is arrested in South Africa;
- the criminal act is committed outside of South Africa but the act is punishable in terms of South Africa's domestic law or South Africa's obligation under international law;

- the criminal act is committed against a South African government facility abroad;
- the criminal act is committed by a stateless person or refugee who has his habitual residence in South Africa, or
- the criminal act is committed against the security of South Africa.

Security legislation in South Africa

The South African statute books contain numerous laws that can be used to combat terrorism and related criminal activities. Available to the state are laws that:

- protect the country's internal security (much of it remnants of legislation enacted before 1994);
- permit the state to restrict gatherings and demonstrations;
- enhance the state's power to collect information on suspected terrorist organisations, and
- target terrorism's foot soldiers and sources of money: criminal gangs and organised criminal groups respectively.

Emergency situation

State of Emergency Act of 1997

The act provides for the declaration of a state of emergency in South Africa. According to the constitution, a state of emergency may be declared only when 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency, and the declaration is necessary to restore peace and order'.¹¹

The act permits the president, by proclamation in the *Government Gazette*, to declare a state of emergency for the whole country, or parts of the country. During a state of emergency, the president may make such regulations as are necessary or expedient to restore peace and order. Regulations governing the detention of persons must provide for international humanitarian organisations to have access to persons detained under such regulations. A declaration of a state of emergency may be effective for no more than 21 days, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time.¹²

Defence Act of 1957

The act contains various provisions relating to the combating of terrorism.¹³ These include the mobilisation of the Citizen Force, the Reserve and the commandos for:

- service in the prevention or suppression of terrorism;
- compulsory service outside South Africa for the prevention or suppression of terrorism;
- the safeguarding of the borders of South Africa for the prevention or suppression of terrorism;
- the commandeering of, amongst other things, buildings, vehicles, aircraft and equipment for

the prevention or suppression of terrorism, and

- assuming control over transport systems for the prevention or suppression of terrorism.

During operations for the prevention or suppression of terrorism the act empowers the president to enforce a censorship over postal, telephonic or radio communication, and over printed matter, photographs and drawings.

Terrorism, sabotage and intimidation

Internal Security Act of 1982

In terms of the act, a person is guilty of the offence of terrorism if he, inter alia, commits (or threatens to commit) an act of violence; or incites, aids, advises or encourages any other person to commit an act of violence with the intent to:

- overthrow or endanger the state authority in South Africa;
- achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the country, or
- induce the government to do or to abstain from doing any act or to adopt or abandon any particular standpoint.

The punishment for terrorism is the same as that which may be imposed for treason (that is, life imprisonment).

A person is guilty of the offence of sabotage if he, inter alia, commits (or attempts to commit) any act; or conspires with other persons to commit an act; or incites, aids, or advises other persons to commit acts with the intent to:

- endanger the safety, health or interests of the public anywhere in South Africa;
- destroy, pollute, or contaminate any water supply intended for public use;
- interrupt, impede or endanger the manufacture, storage, distribution or supply of fuel, power, water, or of medical, health, educational, police, fire-fighting, ambulance, postal, radio or television services, or any other public service;
- cripple or interrupt any industry generally, or the production, supply or distribution of commodities or foodstuffs, or
- impede or endanger the free movement of any traffic on land, at sea or in the air.

Upon conviction of sabotage, a person may be sentenced to imprisonment for up to 20 years.

The Internal Security Act makes it a criminal offence to harbour, conceal or fail to report to the police any person who has committed, or is intending to commit, acts of terrorism or sabotage. The act empowers the minister for safety and security to prohibit any gathering if he deems it necessary in the interests of the security of the state, or for the maintenance of the public peace, or to prevent hostilities between different population groups in the country.

Intimidation Act of 1982

The act is targeted at persons who intend to frighten, demoralise, or incite the public (or a particular section of the population) to do or abstain from doing any act. Any person who does any of these things and commits (or threatens to commit) an act of violence, is guilty of an offence and can on conviction be fined to an amount at the discretion of the court and/or to imprisonment for a period of up to 25 years. Persons who through their behaviour, speech or published writings seek to create fear in other people for their own safety, the safety of their property, or the security of their livelihood are guilty of an offence. Such persons can be fined up to R40 000 and/or imprisoned for up to 10 years.

Assisting and training terrorists

Criminal Law Second Amendment Act of 1992

The act prohibits any person from:

- taking part in the control, administration or management of any organisation;
- organising, training, equipping or arming the members or supporters of any organisation, or
- undergoing training in any organisation,

if the members or supporters of that organisation are organised, trained or armed in order to usurp some or all of the functions of the South African Police Service (SAPS) or the South African National Defence Force (SANDF). A contravention of this provision can lead to a fine or to imprisonment for a period of up to ten years.

A 1998 amendment to the Criminal Law Second Amendment Act prohibits a variety of acts connected with military, paramilitary or other similar operations.¹⁴ A contravention of this prohibition can lead to a fine as the court may deem fit to impose, or to imprisonment for a period of up to five years. It is prohibited for any person to:

- train anyone, or undergo any training, to conduct any military or paramilitary operation;
- train anyone, or undergo any training, to construct, manufacture or use any weapon, ammunition, or explosive for the purpose of: endangering life or causing serious damage to property, promoting any political objective, or for military or paramilitary purposes, or
- employ two or more persons trained, or intended to be trained, with a weapon, ammunition or explosive with the purpose of: endangering life or causing serious damage to property, promoting any political objective, or for military or paramilitary purposes.

The act defines 'political objective' as the bringing about of any constitutional, political, social, economic or industrial change in the country. Moreover, it includes the inducement of any person, including the national, provincial or local sphere of government, to do or abstain from doing any act, or to support or to oppose any person or action.

Regulation of Foreign Military Assistance Act of 1998

The act regulates the rendering of foreign military assistance by South African persons—both natural and juristic—including citizens, permanent residents and foreign citizens from within the borders of South Africa. The act prohibits anyone from recruiting, using or training persons for, or financing or engaging in, mercenary activity. Mercenary activity is defined as 'direct participation as a combatant in armed conflict for private gain'. It is also prohibited to render or offer any foreign military

assistance to any state or organ of state, group of persons, or other entity unless authorisation has been granted by the National Conventional Arms Control Committee. Such an authorisation is unlikely to be granted if it would, inter alia, 'support or encourage terrorism in any manner'.

Targeting the tools of terrorism

Armaments Development and Production Act of 1968

The act regulates the manufacture, possession and importation of armaments. The meaning of armaments is broadly defined to include 'bombs, ammunition or weapons, or any substance, material, components... of whatever nature capable of being used in the development, manufacture or maintenance of armaments'.¹⁵

In terms of the act the minister of defence may by notice in the Government Gazette prescribe that no armaments of a specific class or kind be imported into the country or moved inside the country. Moreover, that no specified armaments be developed or manufactured in the country. Armaments may also be classified according to the manner in which, or material from which, they are developed or manufactured. Anyone found guilty contravening such provisions is liable on conviction to a fine of R10 000 or up to 10 years imprisonment, or both the fine and imprisonment.

Explosives Act of 1956

The act regulates the manufacture, storage, transport, importation, exportation and the use of explosives. A 1997 amendment to the act holds that no person may manufacture, import, possess, sell, supply or export any plastic explosive that is not marked with a detection agent.¹⁶ A detection agent is a substance—as laid down by the United Nations Convention on the Marking of Plastic Explosives for the Purpose of Detection—which is mixed into an explosive to enhance its ability to be detected by vapour-detection means.

In terms of the act, 'inspectors of explosives' may at any time enter any explosive factory or storage facility for the purpose of inspecting it. Such inspectors may also remove samples of explosives, or ingredients of explosives, for the purposes of analysis and testing.

The act lays down minimum sentences for certain explosive-related offences. Any person who wilfully causes an explosion causing danger to life or property (but without killing anyone) is liable to imprisonment without the option of a fine for a period of between 3 and 15 years.

Dangerous Weapons Act of 1968

In terms of the act, a 'dangerous weapon' is any object, other than a firearm, which is likely to cause serious bodily injury if used to commit an assault. Anyone who is in possession of a dangerous weapon is guilty of an offence unless he can prove that he at no time had the intention of using the weapon or object for any unlawful purpose. The penalty for conviction of this offence is a fine or a period of imprisonment of up to two years.

The minister for safety and security may, by notice in the *Government Gazette*, prohibit any person or any person belonging to a specified class of persons from being in possession of a dangerous weapon. Such a prohibition may also be imposed in respect of a specified gathering or a specific type of gathering.¹⁷ Details of the circumstances under which such possession is prohibited, the time period for which the prohibition applies and the weapons covered by the prohibition must be specified in the notice. The act also provides for minimum sentences for violent offences involving

dangerous weapons.

Firearms Control Act of 2001

According to the act, it is an offence to possess a firearm without a licence. Anyone convicted of possessing an unlicensed firearm can be fined or imprisoned for up to 15 years. The possession of ammunition by a person who does not hold a licence in respect of a firearm capable of discharging that ammunition carries with it a maximum penalty of 15 years imprisonment. The possession of 'prohibited firearms' including fully automatic firearms, grenades, bombs and explosive devices is also a criminal offence. The penalty on conviction of possession of a prohibited firearm is a fine or a period of imprisonment of up to 25 years. Any police official may search any premises, vehicle, vessel or aircraft and seize any firearm and ammunition that is reasonably suspected of being held in contravention of the act.

Non-Proliferation of Weapons of Mass Destruction Act of 1993

The act provides for control over weapons of 'mass destruction', that is, a weapon designed to kill, harm or infect people, animals or plants through the effect of a nuclear explosion, or the toxic properties of a chemical or biological warfare agent.¹⁸ The act, which is administered by the department of trade and industry, establishes a non-proliferation council which controls all imports, exports and transfers of dual-use technologies, dual-use materials and dual-use items that can be used in the production and operation of weapons of mass destruction.

An inspector appointed by the council may at any reasonable time enter any premises where controlled goods are kept or are reasonably suspected of being kept. An inspector is given a variety of powers for the effective performance of his duties. A failure to comply with an inspector's lawful request is a criminal offence and is liable on conviction to a fine or to imprisonment for up to 10 years. Anyone convicted of the offence of falsely representing that any goods or activities fall outside the purview of the act is liable to a fine or imprisonment for up to 15 years.

Protecting specific places

National Key Points Act of 1980

The act empowers the minister of defence to declare a place or area as a national key point if it appears to the minister that such a place or area is so important that its loss, damage or disruption or immobilisation may prejudice the country, or whenever the minister considers it necessary or expedient for the safety of the country, or in the public interest. The owner of a national key point must, after consultation with the minister, take steps at his own expense to enhance the security of the key point to the satisfaction of the minister. The minister may make regulations to grant guards employed to protect national key points additional powers in respect of the searching of persons, the examination and seizure of articles and the arresting of persons. Anyone who furnishes information relating to the security measures at any national key point without being legally obliged or entitled to do so, is committing an offence and on conviction is liable to a fine of up to R10 000 and/or a sentence of up to three years of imprisonment.

Diplomatic Immunities and Privileges Act of 1989

The act gives effect to the provisions of the Vienna convention on diplomatic relations of 1961. The convention places a 'special duty' on the receiving state to take all appropriate steps to protect the premises of foreign missions against any intrusion or damage, and to prevent any disturbance of the peace of the mission. The receiving state is also obliged to take all appropriate steps to prevent any

attack on the person, freedom or dignity of a member of the diplomatic staff of a foreign mission.

Specific offences

Civil Aviation Offences Act of 1972

The act creates a number of offences relating to aircraft and airports. Anyone who:

- on board an aircraft unlawfully seizes control of the aircraft by force, threat of force or intimidation, or assaults someone on the aircraft, thereby endangering the safety of the aircraft;
- destroys or damages an aircraft which is likely to endanger its safety in flight;
- places on an aircraft a device which is likely to destroy or damage the aircraft and is likely to endanger its safety in flight;
- places at an airport a device which is calculated to endanger any person or any vehicle, aircraft, building or air navigation equipment;
- wilfully pollutes any aviation fuel, or
- performs any other act which may jeopardise the operation of an air carrier, the safety or good order of an airport,

is guilty of an offence and liable on conviction to a period of imprisonment of between 5 and 30 years. Anyone who communicates information that he knows to be false and by doing so interferes with the operation of an air carrier or an airport, is guilty of an offence carrying a penalty of imprisonment for up to 15 years, without the option of a fine.

Merchant Shipping Act of 1951

According to the act, no person may without a reasonable excuse do anything to obstruct or damage any equipment on a ship, or obstruct, impede or molest any of the crew in the navigation and management of the ship or otherwise, in the execution of their duties on the ship. Anyone convicted of contravening this provision can be fined or imprisoned for a period of up to one year. Moreover, it is illegal to go on board a ship without the permission of the ship's owner or the person in charge of the ship. Similarly, to remain on board a ship in a South African port after being required to leave by the owner, captain of the ship or police officer is an offence. In convicting a person of contravening either of these two provisions, a court may impose a fine or a period of imprisonment of up to three months.

Conclusion

It is no easy task for a liberal democracy to deal effectively with a sustained terrorist threat. Civil liberties, constitutionally entrenched rights and the rule of law come at a cost when it comes to fighting terrorism: the state has to expend considerable resources and patiently collect evidence over frustratingly long periods of time to convict the kingpins of a closely knit terrorist network.

The alternative is to apprehend and lock away suspected terrorists at all costs. This might seem the better way to some. However, to sacrifice individual rights and liberal values to combat acts of terror is to accept the terrorists' belief that the end justifies the means.

Operationally the state responded effectively in stabilising the internal security situation in the Western Cape. Through special intelligence-driven joint police and defence force operations the security forces contributed to a significant reduction in terrorist related incidents by the end of 2000.

South Africa's draft Anti-Terrorism Bill proposes to consolidate the country's security laws. The draft bill seeks to create an omnibus statute to address the issue of terrorism and a variety of related crimes in one piece of legislation. The draft bill contains some controversial provisions, notably proposals that terror suspects can be detained without charge for up to 14 days, and an excessively broad definition of terrorism. People who commit acts of terror should be punished to the full extent of the law, but not at the expense of sacrificing the very values which they seek to destroy.

CHAPTER 6

Terrorism in Algeria: Ten Years of Day-to-Day Genocide

M Boudjemaa

The toll exacted by terrorism in Algeria, estimated to be more than 100,000 dead and one million victims by the end of the year 2000, can on its own adequately indicate the extent of the drama that has affected the Algerian people. But mere statistics do not reveal the full horror of the reality: a terrorism in which the darkest and most barbaric compulsions of armed violence have been taken to their utmost limits. It is a movement that is genocidal in character, with no equivalent in Africa or the world, except perhaps the disastrous toll of the Khmer Rouge in Cambodia.

A religious political movement, whose roots go deep down into the contemporary history of Algeria since independence, embodies this terrorist violence. If endogenous and exogenous factors that gave birth to it are excluded, our attempts to gain a non-exhaustive comprehension of this phenomenon in Algeria leads us to a political and subversive movement that became the repository of this violence, which is the Islamic Salvation Front, known as the FIS (a political party dissolved on 14 March 1992).

Simplistic analyses place the onset of this terrorist violence at the interruption of the electoral process in January 1992, but the beginning and development of terrorism in Algeria precede this date.

As early as 27 November 1991, about ten soldiers of the Algerian army were savagely massacred in Guemmar (in south east Algeria) by an Islamic terrorist group, practically all of whose members had received training in camps in Afghanistan. This attack, the first of its kind, launched the terrorist campaign in Algeria and revealed to national public opinion the existence of groups structured, armed, trained and organised with the aim of seizing power to install a theocratic state. These groups called themselves the Armed Islamic Movement (MIA), with reference to a terrorist movement that had appeared in 1981, led by Mustapha Bouyali. At the political and ideological level, this movement was based on and inspired by a document called 'Jihad in Algeria', comprising 22 items of instruction to terrorist groups. It was written by the two principal leaders and founders of the FIS, Abassi Madani and Ali Benhadj.

The Armed Islamic Group (GIA) was created in the same period, with the aim of taking control of the organisational structure of the MIA and extending areas of terrorist activity to the whole of the national territory. The institution of a military command (Imarat), a political structure (Madliss echourra) and terrorists brigades and sections (katiba and serya) are the main forms adopted by the

GIA groups that have planned to install an Islamic state (Khalifat) in Algeria.

It was as a result of this organisation that terrorism was able to develop so speedily and violently. Between 1992 and 1997, the GIA conducted a series of violent campaigns against an unarmed population and a security service that had never faced such a phenomenon. Their actions included bombings, purposeful criminal acts, the massacre of isolated citizens, sabotage, rape, mutilation, torture and the systematic liquidation of any Algerian citizen who refused to support the extremist fundamentalist solution.

A bomb exploded in a cemetery on 1 November 1994, killing four young scouts and seriously wounding seven others, who had to have limbs amputated. The violence would escalate to a state of total, absolute terror, with no discernment, as even children were regarded as legitimate targets.

Thus factories, bridges, railways, schools and cultural centres have been systematically destroyed and burned, causing losses of over \$20 billion in 10 years. All those with a different religious view—including administrative officials, artists, journalists, working women (who were asked to stop working), doctors, teachers, farmers and men of religion (Imans—have been systematically eliminated.

Through the assassination of foreigners, the terrorists have also targeted women and men of religions other than Islam, even those that preach tolerance and forgiveness. Catholics, Protestants, both monks (seven of whom belonged to the Trappist Order) and high dignitaries of the church, have been killed, such as Bishop Claverie, who was killed in a bomb attack in Oran in August 1995.

The criminal logic of terrorism has also been directed against foreign interests in Algeria—more than 120 foreign citizens were killed in the early stages of the campaign. This wave of assassinations provoked the departure of many foreigners, as well as many airlines and foreign companies. This has to a certain extent achieved its aim: that of weakening the country economically and sustaining the mistrust of foreign partners.

In January 1995, the GIA also launched a campaign of bomb attacks in main cities. That was when a suicide bomber drove a car containing explosives into the headquarters of the national police on Amirouche Boulevard, killing 42 Algerians and wounding 265. Thousands of other attacks would follow, with an ever-increasing list of victims.

The circumstances that led to the formation of the GIA are to be found in the availability of a large fringe of Algerian terrorists in Afghanistan. Experts estimate that the GIA was created in the house of the Muhajirin in 1989 in Peshawar. It was from this town, located on the borders of Pakistan and Afghanistan, that the first hard core of "Algerian Afghans" launched their terrorist campaign against Algeria.

This link is all the more important since it marks, with the conclusion of the Afghan-Soviet war and the end of the division caused by the cold war, the emergence of the decision of Islamic groups to reproduce, intra muros, the conditions of a second Afghan war. From that moment, all the efforts of the groups originating in Afghanistan were aimed at reinforcing the hard cores of the GIA and waging a total, determined and implacable war against all layers of Algerian society.

The logic of the terror being imposed was aimed at destroying all capacity of resistance to the inauguration of a theocratic state, even though it contradicts the values of Islam as experienced in Algeria and the Maghreb. These veterans of Afghanistan, trained in the Afghan militias, returned to Algeria with the help of international networks, via Bosnia, Albania, Italy, France, Morocco or

Sudan.

Algeria, which has paid and continues to pay a heavy tribute to terrorism, has always called for the necessity of an international action to combat terrorism that would not just stop at the doors of Europe.

A terrorist, Mohamed Berrached, tried by an Algerian court, confessed in 1998 that Ousama Bin Laden, leader of El Qaida, was at the origin of the creation of the GSPC (Combat and Prediction Salafist Group), a dissident group of the GIA. One year earlier, in 1997, Algeria had experienced its worst massacres in the villages of Bentalha, Rais, Sidi Mhamed, Sidi Youcef or Relizane that caused, in the space of two months, the death of more than 3000 people.

Exceptional material means, including vast quantities of arms and money collected all over Europe, arrived from the principal European capitals. London, Paris, Berlin, Rome, Madrid, Geneva or Brussels were harbouring more than 5 000 Islamic activists who constituted the backbone of the Algerian terrorist networks abroad, of which the investigations following the September 11 attacks have only revealed the tip of the iceberg.

During all these years, terrorist networks were being deeply rooted in Europe in order to support the armed groups, taking advantage of the liberal laws in democratic countries. Many terrorists have been able to settle legally in Europe, where they have organised the financing of terrorism and the dispatch of arms.

Paradoxically, while Algeria was facing a destabilising movement that threatened the whole region, these terrorist groups enjoyed international support, active or passive, enabling the dispatch of arms, men and financial means to the terrorist networks in Algeria.

Fortunately, the involvement of the population in reaction against the atrocities, carried out on a huge scale by the terrorist groups, has forced them to retreat towards the mountains, where they are isolated from the population. They have begun to split up and their struggle has degenerated into acts of banditry and the settling of scores between rival factions. But in the opinion of the Algerian people, still subject to the capacity for harm of these terrorist groups, the toll of 100 000 dead is far from over.

NOTES

CHAPTER 2

1. *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, E/CN.4.2002/18 par 7.
2. *Progress report submitted by the Special Rapporteur on Terrorism and Human Rights* UN Doc E/CN.4/Sub.2/2001/31 par 102.
3. See the preamble to the OAU Convention on the Prevention and Combating of Terrorism, adopted at Algiers on 14 July 1999.
4. UN Doc E/CN.6/RES/36/7.
5. *See Fourth World Conference on Women Platform for Action Women and Armed Conflict*, p 3.

Available on the web at <www.un.org/womenwatch/daw/beijing/platform/armed.htm>.

6. See for example *Preliminary Report submitted by the Special Rapporteur on Violence Against Women* UN Doc E/CN.4/1995/42 at par 99-101; A E Ray, The shame of it: gender-based terrorism in the former Yugoslavia and the failure of international human rights law to comprehend the injuries, *American University Law Review*, vol 46, 1997, p 793; A Caiazza, Why gender matters in understanding September 11: women, militarism and violence, *Institute for Women's Policy Research*, 2001, p 1.
7. *Progress report submitted by the Special Rapporteur on Terrorism and Human Rights*, op cit.
8. For example, Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970.
9. Articles 2 and 3.
10. Adopted at Cairo on 22 April 1998, entered into force on 7 May 1999.
11. The Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999.
12. S/RES/1373 (2001).
13. Article 2(1)(a)-(b).
14. Article 1(3)(a).
15. Article 2.
16. These are available on the web at <<http://www.un.org/Docs/sc/committees/1373/>>.
17. See section 1 of South Africa's proposed Anti-Terrorist Bill in the report of the South African Law Commission Discussion Paper 92.
18. The passage of the legislation was so controversial that Mauritius had a change of presidency four times in one month-as successive presidents refused to sign the Bill into law on the grounds of its violation of human rights.
19. Section 27(1).
20. Section 29(3).
21. Egypt's report to the counter-terrorism committee. UN Doc S/2001/1237, p 4.
22. Quoted in Amnesty International, *The Arab Convention for the Suppression of Terrorism a Serious Threat to Human Rights*, AI Index IOR 51/001/2002 p 19-20. Available on the web at <www.web.amnesty.org/ai.nsf/recent/IOR510012002>.
23. US Department of State, *Country Reports on Human Rights Practices 2001—Egypt*, 4 March 2002.

24. Ibid.
25. Ibid.
26. See Algeria's report to the counter-terrorism committee, UN Doc S/ 2001/1280 p 6.
27. Ibid op cit 7-8.
28. As of 13 May 2002, 45 of 54 African States, including Morocco, are parties to the Covenant.
29. F Viljoen, State reporting under the African Charter on Human and Peoples' Rights: a boost from the south, *Journal of African Law*, vol 44, 2000, p 110.
30. See Annex V to the *Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1998 -1999*, Twenty-fourth and Twenty-fifth Ordinary Sessions, 26 April to 5 May, 1999: Banjul, Gambia. The Activity Report is available at <<http://www1.umn.edu/humanrts/africa/comision.html>>.
31. V O Nmechiele, Towards an African court of human rights: structuring and the court, *Annual Survey of International & Comparative Law*, vol 16, 2000, p 31; UO Umozurike, The African Charter on Human and Peoples' Rights, 1997, p 78-79.
32. The Protocol was adopted by the OAU Assembly at Ouagadougou, on 9 June 1998.
33. *Human Rights in Africa Law Series*, available on the web at <www.up.ac.za/chr/hrlas/hrlas.html>.
34. A number of other rights that may also be implicated, for example the right to property and the rights of refugees, are covered elsewhere in this monograph.
35. *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, op cit, par 11.
36. Decision of the African Commission, ACHPR/212/98, p 42.
37. Decision of the African Commission, ACHPR/105/93, 128/94, 130/94, 152/96 p 69-70.
38. *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, op cit, par 14.
39. UN Commission on Human Rights Resolution 2001/37 (2001).
40. See in particular Amnesty International *The Arab Convention for the Suppression of Terrorism a Serious Threat to Human Rights*, op cit, p 18-20.
41. For example South Africa and Egypt.
42. E Steyn, The Draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?, *South African Journal on Criminal Justice*, vol 14, 2001, p 184.
43. *Progress report submitted by the Special Rapporteur on Terrorism and Human Rights*, op cit,

par 25.

44. Articles 24 and 26.
45. M Cowling, The return of detention without trial? Some thoughts and comments on the draft anti-terrorism Bill and the Law Commission report, *South African Journal on Criminal Justice*, vol 13, 2000, p 354.
46. *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, op cit, par 15.
47. HRC General Comment 29 UN Doc CCPR/C/21 Rev.1, 2001 par 11.
48. OAU Convention, article 7; Suppression of Terrorist Financing, article 9.
49. Committee Against Torture: Egypt, UN Doc 12/06/94.A/49/44 par 88.
50. Decision of the African Commission, ACHPR/137/94, 139/94, 154/96 and 161/97.
51. *Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions*, UN Doc E/CN.4/2001/9 par 76.
52. HRC General Comment 29, op cit, par 15.
53. OAU Convention, article 8(4); Convention for the Suppression of Financing of Terrorism, article 10(1).
54. In this regard see for example the decision of the South African Constitutional Court in *Mohamed v President of the Republic of South Africa* 2001 (7) Buttteworths Constitutional Law Reports 685 (CC), which dealt with the obligation on the government to ensure that deportees are not sent to countries where they could face the death penalty.
55. See also for example section 25 of the Prevention of Terrorism Act 2002 (Mauritius) that has similar provisions.
56. Annex to the *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, op cit: 'Proposals for further guidance' for the submission of reports pursuant to par 6 of Security Council Resolution 1373'.

CHAPTER 3

1. The sources of international law are usually read from article 38 of the Statute of the International Court of Justice and comprise treaty, custom, general principles and, as subsidiary sources, legal decisions and the writings of jurists.
2. North Sea Continental Shelf cases *International Court of Justice Reports*, 1969, p 3.
3. This count of African states includes the Western Sahara.
4. See the Asylum Case *International Court of Justice Reports*, 1950, p 266 and Rights of Passage Cases *International Court of Justice Reports*, 1960, p 6 for examples of 'local' custom.

5. Note that we will not be dealing with the controversial question of whether the mere wide acceptance of a treaty, without extensive proof of accompanying practice, is enough to incorporate the treaty into customary international law.
6. Article 14 and article 17 respectively.
7. Including Angola, the Democratic Republic of Congo, Cameroon, Congo, Guinea, Eritrea, Ethiopia, Mozambique, Namibia, Rwanda, South Africa, Uganda and Zambia.
8. Protected in article 17 of the International Covenant on Civil and Political Rights (ICCPR) and article 12 of the Universal Declaration of Human Rights (UDHR).
9. For example, Angola, Democratic Republic of the Congo, Egypt, Guinea, Eritrea, Ethiopia, Malawi, Mali, Namibia, Rwanda, Uganda and Zambia.
10. Article 16 ICCPR, article 6 UDHR and article 3(1) of the African Charter on Human and Peoples' Rights (Banjul Charter).
11. Article 26 ICCPR, article 7 UDHR and article 3(2) of the Banjul Charter.
12. Article 2(3)(a) ICCPR and article 8 UDHR.
13. Under the Universal Declaration of Human Rights this extends further to exile. See article 9(1) ICCPR and article 9 UDHR.
14. Article 9(3) ICCPR.
15. Article 14(1) ICCPR, article 10 UDHR and article 7(1) of the Banjul Charter.
16. Article 14(2) ICCPR, article 11(1) UDHR and article 7(1) of the Banjul Charter.
17. Article 14(3)(g) ICCPR.
18. Article 14(3)(d) ICCPR and article 7(1) of the Banjul Charter.
19. Article 13 ICCPR and article 14 UDHR. Asylum and refugee rights are supported by a whole body of international refugee law, which is discussed in a separate paper and will not be dealt with here.
20. Article 2(b).
21. Article 2(e).
22. Article 3(f).
23. Article 4.
24. Article 3(d).
25. Article 2 SCR 1373 and article 5 of the Convention against Transnational Organized Crime

- and article 3 of the Arab League Convention.
26. Article 8 of the Convention on the Suppression of Financing of Terrorism, articles 12 to 14 of the Convention on the Prevention of Transnational Organized Crime, and article 20 of the Arab League Convention.
 27. Article 2(c) SCR 1373 and article 4(2)(a) of the Algiers Convention.
 28. Article 2(g) SCR 1373, article 4(3) of the Algiers Convention and article 18(2) of the Convention on the Suppression of Financing of Terrorism.
 29. Article 2(b) SCR 1373 and article 18 of the Convention on the Suppression of Financing of Terrorism.
 30. Article 2 of the Algiers Convention.
 31. Article 2(e) SCR 1373, articles 5, 6, 8 and 23 of the Convention against Transnational Organized Crime, article 2(a) of the Algiers Convention and article 2 of the Convention on the Suppression of Financing of Terrorism.
 32. Article 4 of the Convention against Transnational Organized Crime, article 8 of the Algiers Convention and article 11 of the Convention on the Suppression of Financing of Terrorism.
 33. Articles 12 and 13 of the Convention on the Suppression of Financing of Terrorism and article 2(b) of the Arab League Convention.
 34. Article 6 of the Algiers Convention.
 35. Articles 24 and 26 of the Arab League Convention.
 36. E Steyn, The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system? *South African Journal of Criminal Justice*, vol 14, Juta, Johannesburg, 2001, p 187.
 37. Articles 2(f) and 3(a) SCR 1373; article 5 of the Algiers Convention, article 18 of the Convention on the Suppression of Financing of Terrorism and article 4 of the Arab League Convention.
 38. Article 17.
 39. Articles 14 and 16 of the Algiers Convention.
 40. Section II, Articles 9-12.
 41. Article 9.
 42. Article 3(f) SCR 1373 and article 22(1) of the Algiers Convention.
 43. Article 3(1) of the Algiers Convention and article 2(a) of the Arab League Convention.
 44. Article 3 of the Convention on the Suppression of Financing of Terrorism.

45. As is the case in South Africa, the United States, the United Kingdom, Namibia, Australia and much of Europe. See A J Van der Walt, Civil Forfeiture of the Instrumentalities and Proceeds of Crime and the Constitutional Property Clause, *South African Journal of Human Rights*, vol 16, Juta, Johannesburg, 2000, p 1-45.
46. *National Director of Public Prosecution v Carolus* 1999 (2) Butterworths Constitutional Law Report, 607 (Supreme Court of Appeal).
47. T W Bennett, *Human Rights and African Customary Law*, Juta, Cape Town, 1999, p 129-132; T W Bennett, Terminology and Land Tenure in Customary Law, *Acta Juridica*, 1985, p 173; and M Gluckman, *Ideas and Procedures in African Customary Law*, Oxford University Press, Oxford, 1969, p 252-265.
48. The court in *Mohamed NO v Director of Public Prosecutions and Another* (Cape Provincial Division) (18 March 2002, unreported) noted that the rights of third parties to property linked to crimes can only be protected if they have some opportunity to be heard by the court.
49. Article 20 of the Arab League Convention.
50. *National Director of Public Prosecutions v Phillips* 2002 (1) Butterworths Constitutional Law Reports 41 (Witwatersrand Local Division).
51. E Steyn, *op cit*, p 187.
52. For example, it is debatable that terrorism affects women and children *in particular*.
53. The only norms from which the ICCPR permits no derogation are the prohibitions on torture, slavery, retroactive penal laws and the right to life.
54. *State President v Hugo* 1997 (6) Butterworths Constitutional Law Reports 708 (CC) par 99, citing *The Sunday Times v The United Kingdom* 17 (1979) 2 European Human Rights Review 245.
55. Another example is provided by the links that developed between organized crime and both sides during the anti-apartheid struggle. See generally S Ellis, The New Frontiers of Crime in South Africa, in J-F Bayart, S Ellis and B Hibou, *The Criminalization of the State in Africa*, Indiana University Press, Bloomington, 1999, p 49-68.
56. Bayart et al, *op cit*, p 81.
57. *Ibid*, p 21.
58. Interview with Willie Hofmeyr, Head of the Special Investigating Unit, 6 May 2002.
59. Lecture given by J Irish, Institute for Security Studies Seminar on Governance, Organized Crime and Corruption in the SADC region on 18-19 April 2002, Pretoria.
60. P Gastrow, *Organized Crime in the SADC Region: Police Perceptions*, [ISS Monograph 60](#), Institute for Security Studies, Pretoria, August 2001, p 64.

61. Bayart et al, op cit, p 9-10.
62. Bayart et al, op cit, p 17-18.
63. Bayart et al, op cit, p 18-19.
64. Bayart et al, op cit, p 14.
65. Bayart et al, op cit, p 19.
66. A Nasaba, Problems Encountered in Extradition and Mutual Assistance Practice: An African Perspective, Commonwealth Secretariat (ed), *International Co-operation in Criminal Matters: Balancing the Protection of Human Rights with the Needs of Law Enforcement*, 1998, p 129
67. Ibid, p 130.
68. P Gastrow, op cit, p 70.

Commenting on South African draft legislation against terrorism, Michael Cowling and Esther Steyn each criticises the Anti-Terrorism Bill for providing investigative and evidentiary mechanisms that are already contained within South African criminal procedure. See M Cowling, The Return of Detention without Trial? Some Thoughts and Comments on the Draft Anti-Terrorism Bill and the Law Commission Report, *South African Journal of Criminal Justice*, vol 13, Juta, Johannesburg, 2000, p 358-59; and E Steyn, op cit, p 188. On the substantive law, Jonathon Burchell has objected to the new wave of anti-terror and organized crime legislation on the ground that almost all 'terrorist acts' are already proscribed by South African criminal law (inaugural lecture delivered at the University of Cape Town on 24 April 2002).

69. *Freieremar SA v the Prosecutor-General of Namibia and Another* 1994 (6) Butterworths Constitutional Law Reports 73 (Namibia); *National Director of Public Prosecution v Basson* (Transvaal Provincial Division) (27 August 1999, SA, unreported); *Welch v United Kingdom* (1995) 20 European Human Rights Review 24; and *United States v Halper* 490 US 435 (1989) to name a few. See Van der Walt, op cit, for a full discussion.
70. *National Director of Public Prosecution v Carolus* 1999 (2) ***publication*** 607 (Supreme Court of Appeal).
71. See the suggestions for control over detention in M Cowling, op cit, p 358-59, although we would disagree with the article to the extent that we would never allow detention without trial for interrogation purposes.

CHAPTER 4

1. Adopted at the 35th Ordinary Session of the Assembly of Heads of State and Government on 14 July 1999 in Algiers, Algeria. As on 6 May 2002 eleven States had deposited instruments of ratification.
2. Adopted on 28 September 2001 in terms of Chapter VII of the Charter of the United Nations.
3. The principle known as 'non-refoulement' has crystallized into a rule of customary international law, see also Article 33 of the United Nations Convention Relating to the Status of Refugees

(New York, 1951) and the United Nations Protocol Relating to the Status of Refugees (Geneva, 1967).

4. Article 1(2) of the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).
5. The Khartoum Declaration of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa, adopted 14 December 1998, Khartoum, Sudan.
6. Article 1(F) of the UN Convention Relating to the Status of Refugees.
7. [1996] 2 All ER 865 (House of Lords).
8. Adopted by the United Nations General Assembly (Res 39148) on 10 December 1984 and entered into force on 26 June 1987.
9. Article 3(1) of the Torture Convention.
10. *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1; available on the Internet at <<http://www.lexum.umontreal.ca/csc-scc/en/html/suresh.en.html>>.
11. The International Convention for the Suppression of Terrorist Bombings (1998) expressly excludes the political offence as an obstacle to extradition.
12. For example Article 4 of the extradition treaty between Algeria and South Africa signed on October 2001 excludes acts of terrorism as defined in the Algiers Convention from the political offence defence to extradition.
13. Operative par 3(g).
14. 2001 (3) South African Law Reports 893 (Constitutional Court).
15. An 'illegal alien'.
16. Salim, a co-accused of Mohamed, was extradited to the United States from Germany subject to an assurance that the death penalty would not be imposed on him. The death sentence was not sought against him, unlike Mohamed.
17. *See Report of the Secretary General of the OAU at Expt/Afr/Conv/Extradition/Leg.Asst (I)*.

CHAPTER 5

1. M Shaw, Theatre of terror: Responding to the Cape bombings, *Crime and Conflict* 21, Spring 2000, p 5.
2. A Botha, The prime suspects? The metamorphosis of Pagad, in H Boshoff, A Botha and M Schönsteich, Fear in the city: Urban terrorism in South Africa, [ISS Monograph Series 63](#), September 2001, p 43.
3. W Hartley, SA 'has to speed up terrorism law', *Business Day*, 26 October 2001.
4. NOCOC is a mechanism set up for joint intelligence co-ordination on national and provincial

- level. It is known as the National Intelligence Co-ordinating Committee at the national level, and as the Provincial Intelligence Co-ordinating Committee at the provincial level.
5. 'High-density' refers to an operation where an area is flooded by SAPS/SANDF members executing patrols, roadblocks, and cordon and search operations.
 6. Review of Security Legislation, The Interception and Monitoring Act, discussion paper 78, project 105, South African Law Commission, Pretoria, 1998, p 1-3.
 7. Review of Security Legislation, note 12.
 8. Review of security legislation, terrorism: section 54 of the Internal Security Act no 74 of 1982, South African Law Commission, discussion paper 92, project 105, part 2, Pretoria, July 2000, p 216.
 9. Amnesty International, *op cit*, p 3.
 10. Amnesty International, *op cit*, p 3-4.
 11. Section 37(1) Constitution of the Republic of South Africa Act no 108 of 1996.
 12. *Ibid*, Section 37(2)(b).
 13. See chapter X, Defence Act no 44 of 1957, as amended.
 14. Section 23(2), Judicial Matters Amendment Act no 34 of 1998.
 15. Section 1, Armaments Development and Production Act no 57 of 1968, as amended.
 16. Section 8A(1) Explosives Act no 26 of 1956, as amended by Act no 83 of 1997.
 17. For example, in terms of Government Notice No 1633 of 1 October 1996, Government Gazette no 17490, the minister prohibited the possession of certain prescribed dangerous weapons at any gathering or at any public place. Dangerous weapons in terms of the prohibition included a spear, a knobkierrie (a kind of club), a knife with a blade longer than 10 centimetres, and a baton.
 18. Weapons of mass destruction are defined by the Chemical Weapons Convention, the Bacteriological Weapons Convention, the Nuclear Non-Proliferation Treaty and the Missile Technology Control Regime.