

# **Municipal law responses to the threat of international terrorism**

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## List of abbreviations

A	Series, Publication of the European Court of Human Rights
ACHR	American Convention on Human Rights
ACHPR	African Commission on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Report
AJIL	American Journal of International Law
AJPS	American Journal of Political Science
AM U Int'l .L .Rev	American University International Law Review
AM U Int'l.L.Rev &Pol'y	American University International Law Review and Policy
ANC	African National Congress
All ER	All England Law Reports
A Soc Rev	American Sociological Review
ASF	Avocats Sans Frontieres
ASIL	American Society of International Law
ASR	African Security Review
ASSAL	Annual Survey of South African Law
AU	African Union
B.C. Int'l .L. Rev	Boston College International Law Review
B.C. Int'l .L&Comp.L. Rev	Boston College International Law and Comparative Law Review
BCLR	Butterworths Constitutional Law Reports
B.Y.U PL. Rev	Brigham Young University Pre law Review
Cal.L.Rev	California Law Review
Cal.w Int'l .L .J	California Western International Law Journal
CAT	Committee Against Torture
CC	Constitutional Court
CD	Collection of Decisions of the European Commission on Human Rights
CE	Council of Europe
Chinese. J. Int'l L	Chinese Journal of International Law
Colum.J.Transnat'l	Columbia Journal of Transnational Law

CIA	Central Intelligence Agency
Den.J.Int'l L& Pol'y	Denver Journal of International Law and Policy
DR	Decisions and Reports of the European Commission on Human Rights
ECHR	European Court of Human Rights Reports
ECR	European Court Reports
ECRI	European Commission against Racism and Intolerance
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
EJLS	European Journal of Legal Studies
Emory Int'l. L. Rev	Emory International Law Review
ELR	European Law Review
Eur Ct Hr Series	European Court Human Rights Series
EWCA	England and Wales High Courts
FBI	Federal Bureau of Investigations
FICA	Financial Intelligence Centre Act
Fordham Int'l. L. J	Fordham International Law Journal
Fordham Urb. L. J	Fordham Urban Law Journal
F Supp	Federal Supplement
GA .J.Int'l & Comp L	GA Journal of International and Comparative law
GSLJ	Global Studies Law Journal
Harv. Hum. Rts. J	Harvard Human Rights Journal
Harv Int'l. L. J	Harvard International Law Journal
Harv. L. & Pol'y. Rev	Harvard Law and Policy Review
Harv. J. L & Pub. Pol'y	Harvard Journal of Law & Public Policy
HRLJ	Human Rights Law Journal
HRLR	Human Rights Law Review
IACHR	Inter-American Commission on Human Rights
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICJ	International Court of Justice
ICLR	International Criminal Law Review
ICLQ	International and Comparative Law Quarterly

ICCPR	International Covenant on Civil and Political Rights
IHHR	International Human Rights Reports
IJHR	International Journal of Human Rights
IMO	International Maritime Organisation
ILJ	Indian Law Journal
IRA	Irish Republican Army
IR	Irish Reports
ISR	International Security Review
J Comp PA	Journal of Comparative Policy Analysis
J Crim L & Criminology	Journal of Criminal Law and Criminology
JFJ	Journalists for Justice
JInt'l Bus& Law	Journal of International Business and Law
JInt Disp Settlement	Journal of International Dispute Settlement
J Int'l L P	Journal of International Law Politics
JIJ	Journal of International Justice
JTSA	Journal on Terrorism and Security Analysis
J.Nat L Security & Pol'y	Journal of National Security and Policy
JSREV	Journal of Strategic Review
J.Transnat'IL & Pol'y	Journal of Transnational Law and Policy
J.Urb & Cont .L	Journal of Urban and Contemporary law
MERCLJ	Mercantile Law Journal
Melbourne U. L .Rev	Melbourne University Law Review
Melbourne. J. Int'l .L	Melbourne Journal of International Law
Mich. J. Int'l. L	Michigan International Law Journal
N.Y.U.L .Rev	New York University Law Review
NILQ	Northern Ireland Law Quarterly
Nw .J. Int'l .L	North Western Journal of International Law
OAS	Organisation of American States
OAU	Organisation of African Unity
OJSS	Ozean Journal of Social Science
OSCE	Organisation for Security and Cooperation in Europe
PAC	Pan African Congress
PAGAD	People against Gangsterism and Drugs
PCIJ	Permanent Court of International Justice Reports

PLFP	Popular Front for the Liberation of Palestine
PMA	Prohibition of Mercenary Activities and Regulation of Activities in Country of Armed Conflict Act
POCA	Prevention of Organised Crime Act
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act
Proc	Proclamation
RES	Resolution
RICA	Regulation of Interception of Communication and Provision of Communication Related Information Act
RIPA	Regulation of Investigatory Powers Act
RSA	Republic of South Africa
SACR	South African Criminal Law Reports
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal of Human Rights
SAJMS	South African Journal of Military Studies
SALJ	South African Law Journal
Santa Clara J Int'l L	Santa Clara Journal of International Law
SAPL	South African Public Law
SAYIL	South African Yearbook of International Law
SCA	Supreme Court of Appeal
SIAC	Special Immigration Appeals Commission
SGJIntCompL	Singapore Journal of International Comparative Law
Stan. J.L.S	Stanford Journal of Legal Studies
Stell LR	Stellenbosch Law Review
SUA	Convention for the Suppression of Unlawful Acts against Safety of Maritime Navigation
SWA	South West Africa
Tex Int'l. L.J	Texas International Law Journal
TSAR	Tydskrif van Suid-Afrikaanse Reg
Touro Int'l. L. Rev	Touro International Law Review
UDF	United Democratic Front
UDHR	Universal Declaration of Human Rights
UNHCHR	United Nations High Commissioner for Human Rights

UCLAJ Int'l L&Foreign Aff	UCLA Journal of International Law and Foreign Affairs
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UN	United Nations
UNDOC	United Nations Office on Drugs and Crime
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UMiami Int'l&Comp.L.Rev	University of Miami International and Comparative Law Review
Rev	Review
USA	United States of America
U Tas .L.Rev	University of Tasmania Law Review
Vill .L.Rev	Villanova Law Review
Wash & Lee. L. Rev	Washington and Lee Law Review
WM & Mary Bill Rts .J	William and Mary Bill of Rights Journal
Wisconsin Int'l L. J	Wisconsin International Law Journal
WLR	Weekly Law Reports
Yale L. J	Yale Law Journal

## **ABSTRACT**

The question this thesis wish to address is “how does South African municipal law respond to the public international law prohibition on international terrorism?.” The international legal frame work countering the threat posed by international terrorism is not adequate as a result of the lack of a universally accepted definition of terrorism. South Africa has been having legislation countering terrorism since the apartheid era and the current democratic era.

The present legislation such as the Protection of Constitutional Democracy against Terrorist Related Activities Act 33 of 2004 is not adequate to effectively deal with the threat posed by international terrorism. In order to be able to prevent and combat the threat posed by international terrorism within its jurisdiction, South Africa is to learn relevant lessons from the USA and UK. The two states have been in the fore front in the fight against international terrorism and have legislation effectively dealing with terrorism in their respective jurisdictions. The two states have also shown the importance of the protection of human rights while fighting international terrorism. Enacting legislation adequate to deal effectively with the threat posed by international terrorism is of importance to South Africa. South Africa must also enter into international agreements that would enhance its ability to deal effectively with the threat of terrorism in its jurisdiction.

Key words: Terrorism, international terrorism, counter-terrorism, terrorist acts and human rights.



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# CHAPTER 1

## INTRODUCTION

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### **1.1. Background**

Over the last two decades, the world has witnessed a significant increase in the number of terrorist organisations and in terrorist activities. Terrorism is a threat to democratic institutions, sustainable development, and human rights.<sup>1</sup> Terrorism has a destabilising effect on civil society and poses a serious threat to legitimately constituted governments the world over.

Terrorist organisations are often groups that act to upset the *status quo* and in the main use violence to achieve their objectives.<sup>2</sup> These organisations are motivated by religious, political and ideological policies. Recently, the commission of terrorist acts has been accompanied by religious motivation. Terrorist organisations such as Al-Qaeda, Boko Haram, al-Shabaab and the Islamic State of Iraq and Syria (hereafter ISIS) use religion to justify the commission of their terrorist acts.<sup>3</sup> Terrorist organisations are found in different countries and sometimes work across national borders.<sup>4</sup> The globalisation of terrorism has helped terrorist organisations to network with one another and to allow terrorist groups to maximise their respective capabilities and effectiveness.<sup>5</sup> These organisations use infrastructure such as telecommunications, transport networks and banks to finance and network with one another with ease. International terrorist organisations like Al-Qaeda are represented in over sixty countries.<sup>6</sup>

The nature of terrorism is continually evolving. From their first emergence, terrorist organisations have used violence to instil fear and terror to achieve their political goals. Currently, the features and dynamics of terrorism include increased fatality, the targeting of civilians in public places, close association with religious fanaticism, the strategic use of atrocity propaganda, and threats of the use of weapons of mass

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<sup>1</sup> See Sadat 2004 *Washington University Global Studies Law Review* 136.

<sup>2</sup> See <http://www.sipri.org/yearbook/2003/files/siprit130> [date of use 20 May 2012].

<sup>3</sup> Rehman *Islam, Terrorism and International law* 180; see also Thackrah *Dictionary* 221; see further Agbibo 2013 *African Study Monographs* 70.

<sup>4</sup> Bassiouni 2002 *Harv.Int'l L.J* 84.

<sup>5</sup> Rosenthal *The evil of Terrorism* 149.

<sup>6</sup> Davis *The Global War* 62.



destruction.<sup>7</sup> These features are closely associated with, for example, the 11 September 2001 terrorist attack on the World Trade Centre which resulted in extensive infrastructural damage, killed many people, and left American citizens in fear.

Terrorist organisations can perpetrate international or domestic terrorism. International terrorism is defined as:

Violent acts that are dangerous to human life, in violation of criminal laws and occur primarily outside the territorial jurisdiction of the state where they are planned, for example terrorist acts planned by Al-Qaeda and executed in the United States.<sup>8</sup>

The 11 September 2001 terrorist acts were perpetrated by members of Al-Qaeda who were foreign nationals within the United States of America (USA) but who performed their terrorist acts within the USA. As the planning of and the training for their acts of terrorism took place outside of the USA, the perpetrators should be prosecuted under international criminal law. For example, the 'Times Square Bomber', an American citizen who was born in Pakistan and trained as a terrorist outside of the USA, and ultimately perpetrated terrorist attacks in the USA, was prosecuted for international terrorism.<sup>9</sup> The other incident of terrorist attacks that raised world concern is the 13 November 2015 in Paris where 129 people were killed.<sup>10</sup> Jenkins is of the view that international terrorism comprises of incidents that have international consequences.<sup>11</sup> In other words, incidents in which international terrorists strike at targets abroad in foreign states.<sup>12</sup>

Domestic terrorism is defined in the same terms as international terrorism save that the acts take place primarily within the territorial jurisdiction of the country where it

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<sup>7</sup> Cotler accessed at:  
<http://www.tandfonline.com/doi/pdf/10.1080/09546559808427454> [date of use 8 Oct 2013].

<sup>8</sup> Tabman accessed at:  
<http://www.michaeltabman.wordpress.com/2013/04/18international-vs-domestic-terrorism-a-primer> [date of use 13 Aug 2013].

<sup>9</sup> Friedman accessed at:  
<http://object.cato.org/publications/commentary/homegrown-failure-why-domestic-terror-threat-is-overblown.html> [date of use 14 Aug 2013].

<sup>10</sup> Anon accessed at:  
<http://journalistsresource.org/studies/international/conflicts/france-muslims-terrorism-integration-research-roudup> [date of use 30 March 2016].

<sup>11</sup> Jenkins accessed at:  
<http://www.rand.org/content/dam/rand/pubs/papers/2006/p6563.pdf> [date of use 4 Oct 2013].

<sup>12</sup> Jenkins accessed at:  
<http://www.rand.org/content/dam/rand/pubs/papers/2006/p6563.pdf> [date of use 4 Oct 2013].

is planned. Furthermore, the meaning of domestic terrorism may be simplified as violence that involves individuals or groups of terrorists whose activities are aimed at the government of the state without the involvement of any foreign element. For example, attacks committed by the 'Boeremag' with the aim of changing the *status quo* in the Republic of South Africa, would qualify as domestic terrorism.<sup>13</sup> Acts of domestic terrorism include planning, training, the acquisition of equipment to be used to commit acts of terror, and other activities directly or indirectly related to the acts of terrorism, and do not transcend into another state by internal terrorist organisations.

The USA Central Intelligence Agency (hereafter CIA) also distinguishes between transnational terrorism carried out by autonomous, non-state actors, and international terrorism carried out by individuals or groups controlled by sovereign states. While it is unproblematic to differentiate between international and domestic terrorism on the basis of the jurisdictional element, the terms international terrorism and transnational terrorism must not be confused as the distinction is more subtle.<sup>14</sup>

According to Falvey, the distinction between national and international terrorism can be drawn on the basis of the motive underlying the acts, the position or status of the victim, or the jurisdictional issues involved.<sup>15</sup> Combs, however, suggests that there is no difference between transnational terrorism and international terrorism in that both terms indicate terrorism involving different countries.<sup>16</sup>

There is the misconception that domestic terrorists are less capable of perpetrating violent acts than their international counterparts.<sup>17</sup> However, the only difference between these two classes of terrorist lies in their acts being committed from within or from outside of the state under siege.<sup>18</sup>

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<sup>13</sup> Schonteich 2003 *Monograph* 2.

<sup>14</sup> Thackrah *Dictionary* 76.

<sup>15</sup> Falvey *B.C Intl .L & Comp .L. Rev* 324.

<sup>16</sup> Combs *Terrorism* 163.

<sup>17</sup> Valla and Comcowich accessed at:

<http://www.jeffnorwitz.com/Documents/14%20Documents%20forgotten%20but%20not%20Go%20ne.pdf> [date of use 13 Aug 2013].

<sup>18</sup> Valla and Comcowich accessed at:

<http://www.jeffnorwitz.com/Documents/14%20Documents%20forgotten%20but%20not%20Go%20ne.pdf> [date of use 13 Aug 2013].

There is currently a shift in the nature of terrorism with arguments being raised as to the difference between an 'old' and a 'new' concept of terrorism. The old conception of terrorism is characterised by fewer attacks on civilians as compared to the new concept of terrorism. In terms of the old concept of terrorism, violence is targeted, proportionate in scope and intensity, and aimed at political objectives.<sup>19</sup> In terms of the new concept of terrorism, Laquer argues that it lacks clearly articulated political demands and relies rather on the threat of mass destruction.<sup>20</sup> This new form of terrorism evidences a high degree of technological and operational competence as seen in the increasing use of information and communication technologies which enable the 'new terrorist' to communicate with ease. New terrorists use a vast range of communication technologies in planning their terrorist activities with other terrorist groups.<sup>21</sup> Nowadays, terrorist organisations make use of computer networks to commit terrorist acts that harm human life or even sabotage national communication infrastructures.<sup>22</sup>

While terrorist acts are crimes, they differ from ordinary crimes in that they are aimed at achieving political goals. The acts are international in character as they are perpetrated in a particular state with their effects being felt in a different state. Acts of terrorism are directed against states and are intended to create terror in the minds of particular persons, groups of persons, or in the general public.<sup>23</sup> States do, therefore, need to protect themselves against all forms of terrorist attack.

In order to address the challenges posed by international terrorism, several instruments have been adopted at international level. These include the *International Convention for the Suppression of Terrorist Bombings*,<sup>24</sup> the *International Convention for the Suppression of the Financing of Terrorism*,<sup>25</sup> the *International Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation*,<sup>26</sup> the *International*

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<sup>19</sup> Steven and Benjamin 2000 *Survival* 165.

<sup>20</sup> Laquer *New Terrorism* 81.

<sup>21</sup> See Anon accessed at: [www.peacestudiesjournal.org.uk](http://www.peacestudiesjournal.org.uk) [date of use 7 Jul 2013].

<sup>22</sup> Cohen 2010 *J. Int'l Bus & Law* 6.

<sup>23</sup> Cassesse 1989 *ICLQ* 589-591.

<sup>24</sup> *International Convention for the Suppression of Terrorist Bombings* 1998.

<sup>25</sup> *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>26</sup> *International Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation* 1971.

*Convention for the Suppression of Unlawful Seizure of Aircraft*,<sup>27</sup> the *International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents*,<sup>28</sup> the *International Convention for the Suppression of Acts of Nuclear Terrorism*,<sup>29</sup> and the *International Convention on the Marking of Plastic Explosives for the Purpose of Detection*.<sup>30</sup>

The Americas have adopted the *Inter-American Convention against Terrorism*<sup>31</sup> and the *Organisation of American States Convention to Prevent and Punish Acts of Terrorism*<sup>32</sup> to deal with the threat of terrorism. The United Kingdom (UK) has taken steps better to combat international terrorism by becoming party to the *European Convention on the Suppression of Terrorism*,<sup>33</sup> the *Protocol Amending the European Convention on the Suppression of Terrorism*,<sup>34</sup> the *Convention Drawn Up on the Basis of Article K3 of the Treaty on European Union Relating to Extradition between Member States to the European Union*,<sup>35</sup> and the *Council of the European Union Framework Decision on Combating Terrorism*.<sup>36</sup> The UK has further taken up membership of the following institutions: the Organisation for Security and Cooperation in Europe (hereafter OSCE); the European Union (hereafter EU); and the Council of Europe. The Republic of South Africa has signed most of the international instruments relating to the prevention of terrorism. However, South Africa has yet to ratify these conventions. At domestic level, the government has enacted legislation such as the *Protection of Constitutional Democracy against Terrorist and Related Activities Act* 33 of 2004,<sup>37</sup> to address threat of terrorism. Whether or not this legislation is adequate in order to counter the threats of terrorism will be the focus point of this thesis.

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<sup>27</sup> *International Convention for the Suppression of Unlawful Seizure of Aircraft* 1970.

<sup>28</sup> *International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* 1973.

<sup>29</sup> *International Convention for the Suppression of Nuclear Terrorism* 2005.

<sup>30</sup> *International Convention on the Marking of Plastic Explosives for the Purpose Detection* 1991.

<sup>31</sup> *Inter-American Convention against Terrorism* 2002.

<sup>32</sup> *Organisation of American States Convention to Prevent and Punish Acts of Terrorism*.

<sup>33</sup> *European Convention on the Suppression of Terrorism* 1997.

<sup>34</sup> *Protocol Amending the European Convention on the Suppression of Terrorism* 2003.

<sup>35</sup> *Convention drawn up on the basis of Article K3 of the Treaty on European Union Relating to Extradition between the Members States of the European Union* 1996.

<sup>36</sup> *Council of the European Union Framework Decision on Combating Terrorism* 2002.

<sup>37</sup> *Protection of Constitutional Democracy against Terrorist Related Activities Act* 33 of 2004 (hereafter POCDATARA).

Despite the need for countries to minimise terrorist activities, there is still no universally accepted definition of terrorism. Although there are many international instruments that deal with terrorism, there is no single common definition of the concept. A precise definition of terrorism is important if states are to develop a uniform understanding of the problems facing them.

## **1.2. Area of focus**

### *1.2.1 Central research question*

In view of the need for states to protect themselves from all forms of terrorist activity, the main question which this research seeks to answer is: How can the Republic South Africa better protect itself against the threat of international terrorism without violating fundamental human rights?

### *1.2.2 Challenges*

- (1) There is still no universal definition of terrorism.
- (2) The so-called 'political offence exception' presents an obstacle to the successful prosecution of terrorist offences. The political offence exception prevents the extradition of persons accused of committing political offences to the jurisdiction where the offences have been committed for the purposes of prosecution.
- (3) Financing of terrorist activities is a serious problem which fuels the threat of terrorism.
- (4) There is no single international convention which effectively deals with the prevention of terrorism.
- (5) There is no appropriate forum in which to try terrorist offences.
- (6) There is inadequate international judicial cooperation in dealing with terrorist offences.
- (7) There is inadequate support for states to fight terrorism.

### *1.2.3 Aims and objectives*

The aims of the study are to:

- (1) identify the role of international law in the fight against terrorism;
- (2) examine the historical context of the national counter-terrorism responses of the Republic of South Africa, the USA and the UK;
- (3) critically analyse the importance of the rule of law and a human-rights based response to international terrorism;
- (4) examine the legality of the criminalisation of terrorism in domestic and international legal regimes; and
- (5) investigate measures that may be adopted to enhance the efficacy of the municipal law enforcement processes in combating international terrorism.

### *1.2.4 Hypothesis*

- (1) The international legal framework against terrorism is inadequate.
- (2) National legislation intended to fight terrorism is not adequately implemented.
- (3) The accession to and application of international instruments aimed at combating terrorist acts are insufficient.
- (4) South Africa has signed, but is yet to ratify, most of international conventions relating to terrorism.

### *1.2.5 Assumptions*

- (1) Terrorism threatens the peace and security of the international community.
- (2) Terrorism violates fundamental human rights and the rule of law.
- (3) The present municipal legislative measures are inadequate to combat terrorism.

### **1.3. Research methodology**

The research comprises a literature study of relevant South African and international textbooks, journal articles, electronic material, case law, statutes, and international instruments. The comparative method is used to compare the South African, the USA and the UK domestic-law responses to the combatting of international terrorism. In addition, the comparative legal method is used to ascertain the legally relevant lessons that South Africa can learn from the UK and the USA in its efforts to combat terrorism.

### **1.4. Study outline**

To address the research question posed in this study, Chapter Two opens with a review of various definitions of terrorism. The term terrorism has been defined differently by many states, organisations and academics, without agreement being reached with regard to an internationally acceptable definition. It is important to have a common definition of terrorism to be able effectively to counter international terrorism.

Chapter Three analyses the international legal framework governing terrorism. The important role played by customary international law in the fight against international terrorism is interrogated. The encroachment by states on the fundamental human rights of their subjects in the effort to fight terrorism and the protection of these human rights and the rule of law in the fight against terrorism is assessed. The resolutions of organisations such as the United Nations, are investigated to determine their role in the fight against terrorism. The chapter also analyses conventions which deal with a number of specific aspects of terrorism such as hijacking,<sup>38</sup> the sabotage of aircraft,<sup>39</sup> the taking of hostages,<sup>40</sup> terrorist

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<sup>38</sup> *International Convention for the Suppression of Unlawful Seizure of Aircraft* 1970.

<sup>39</sup> *International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971.

<sup>40</sup> *International Convention against Taking of Hostages* 1979.

bombings,<sup>41</sup> attacks on internationally protected persons,<sup>42</sup> the financing of terrorism,<sup>43</sup> and terrorism in maritime navigation.<sup>44</sup>

Chapter Four examines country-specific regional counter-terrorism approaches adopted in the USA, the UK and South Africa.

Chapters Five and Six deal with the legal framework of counter-terrorism legislation in the USA and the UK, the two states at the forefront in the fight against terrorism. The Republic of South Africa can learn relevant lessons that may find application in its area of jurisdiction and so enhance its current counter-terrorism legislation. Chapter Seven of the study examines pre- and post-apartheid counter-terrorism legislation in the Republic of South Africa. The chapter analyses counter-terrorism legislation such as the *Internal Security Act*,<sup>45</sup> the POCDATARA,<sup>46</sup> the *Financial Intelligence Centre Act* (hereafter FICA)<sup>47</sup> and the *Prevention Organised Crime Act* (hereafter POCA).<sup>48</sup> The focus of the chapter is on whether South African counter-terrorism legislation is adequate to combat terrorism.

The final chapter offers broad conclusions and recommendations that may strengthen South Africa's legal response to terrorism.

The research of this thesis was completed on 31 March 2015 except in a few instances where new developments could not be ignored because of their importance to the research.

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<sup>41</sup> *International Convention for the Suppression of Terrorist Bombings* 1988.

<sup>42</sup> *International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* 1973.

<sup>43</sup> *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>44</sup> *International Convention for the Suppression of Unlawful Acts against Safety of Maritime Navigation* 1988.

<sup>45</sup> *Internal Security Act* 74 of 1982.

<sup>46</sup> POCDATARA 33 of 2004.

<sup>47</sup> FICA 38 of 2001.

<sup>48</sup> POCA 121 of 1998.





## CHAPTER 2

### DEFINITION OF TERRORISM

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#### **2.1 Introduction**

This study focuses on assessing how South African municipal law responds to the public international law prohibition on international terrorism. As indicated in the previous chapter, international terrorism is a worldwide problem. The globalisation of terrorism demands that legal responses aimed at preventing and combatting international terrorism should find general application both nationally and internationally. However, states are still facing the problem of defining terrorism. Falvey suggests that in order to reach a definition which will find general application in all states, there must be international cooperation amongst states.<sup>1</sup> Many states and organisations have come up with definitions of terrorism to suit their needs, but none of those definitions has found international acceptance. Defining terrorism will help ease the problem of identifying acts of terrorism. The identification of acts of terrorism will, in turn, enable the various governments to enact legislation aimed at countering terrorism. The purpose of this chapter is to analyse existing definitions of terrorism critically with a view to establishing some of the uncertainties inherent in existing definitions.

#### **2.2 Different definitions of terrorism**

In order to define terrorism, it is important first to understand the meaning of the word 'terror.' According to the *Oxford English Dictionary* the word terror means extreme fear, the use of terror to intimidate people.<sup>2</sup> On the other hand, *Readers' Digest Word Power* explains that terror is derived from a Latin word, 'terrere', which means to frighten.<sup>3</sup> The *Oxford English Dictionary* goes further and defines a terrorist as a person who uses violence and intimidation in the pursuit of political aims. Different definitions of terrorism acknowledge the use of violence to achieve

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<sup>1</sup> Falvey 1986 *B.C Int'l L.J & Comp .L. Rev* 323.

<sup>2</sup> Hanks *Oxford English Dictionary* 1480.

<sup>3</sup> Trumble *et al Readers' Digest* 1012; see also Blishchenko and Zhadnov *Terrorism* 18.

desired objectives, but the perspectives differ depending on when and where terrorist acts are committed.<sup>4</sup>

The first international attempt to define terrorism was in 1937 by the League of Nations in the *Convention for the Prevention and Punishment of Terrorism*.<sup>5</sup> The Convention defines terrorist acts as those criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, a group of persons, or the general public. Although the 1937 Convention does not exactly define what terrorism is, it does attempt to identify terrorist acts. The Convention failed to receive the required number of ratifications and was ultimately abandoned.

A study on the definition of terrorism found that there were already 199 definitions in use and these definitions encompassed 22 different definitional elements.<sup>6</sup> The definitional elements include the use of violence, force, political persecution, fear, terror, threat, effects and anticipated reactions, victim targeted differentiation, purposive, planned, systematic, organised actions, method of combat, strategy, tactic, extra normality, in breach of accepted rules, without humanitarian constraints, coercion, extortion, induction of compliance, publicity, arbitrariness, impersonal, random character, indiscrimination, civilians, non-combatants, neutrals, outsiders as victims, intimidation, innocence of victims, group, movement, organisation as perpetrator, symbolic aspects, demonstration to others, incalculability, unpredictability, unexpectedness of occurrence of violence, clandestine covert nature, repetitiveness, serial or campaign character of violence, criminal and demands made on third parties.<sup>7</sup> However, with the changing nature of terrorism, the definitions had to find a broader application, and this made the definitions even vaguer. There are a few problems that have been identified in defining terrorism such as, for example, how widely should the offence be defined; the relationship

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<sup>4</sup> Thackrah *Dictionary* 75.

<sup>5</sup> See [www.undoc.org/undoc/en/terrorist/index.html](http://www.undoc.org/undoc/en/terrorist/index.html) [date of use 26 Jul 2013]. According to the *Convention for the Prevention and Punishment of Terrorism* 1937, the expression *acts of terrorism* means "criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public." See also Young 2006 *B.C Int'l L & Comp .L .Rev* 36-37.

<sup>6</sup> Waschefort 2000 *SAPL* 458.

<sup>7</sup> Schmidt and Jongman *Political Terrorism* 5.

between terrorism and the use of force by states in response to the threat posed by international terrorism; and lastly, the relationship between terrorism and human rights, that need to be considered.<sup>8</sup>

On the international plane, terrorism is understood to include attacks on diplomatic staff, hostage taking, hijacking, some forms of money laundering, and offences committed against maritime vessels and civil aviation.<sup>9</sup> Furthermore, terrorism is a term used to describe various human rights violations committed by both state and non-state actors, and it has been applied to specific forms of warfare directed at civilian populations.

The position taken in different national policies further complicates the challenge of reaching consensus on what constitutes terrorism. For example, according to President Bush of the USA, the war on terrorism is expanded to include the possibility of war against a sovereign state perceived to pose a terrorist threat to the international community.<sup>10</sup>

There are two common albeit not entirely satisfactory approaches to defining terrorism. In the first instance, 'terrorist' is a label attached to a particular non-state enemy.<sup>11</sup> Consequently, in accordance with this approach, terrorist organisations are groups that act to upset the *status quo* by means of the use of armed force or violence. The problem with this approach is that it is ideological and depends on the characterisation of the goals rather than the methods of terrorism. According to the second approach, terrorism constitutes indiscriminate or disproportionate use of violence against civilian targets. This means that what has been tolerated or lauded by the international community such as the attacks by liberation movements like the African National Congress falls in this category of terrorism. This is the rationale behind the belief that the general definition of terrorism is neither under-inclusive nor over-inclusive.<sup>12</sup> However, according to Cassese, insurgents can no longer

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<sup>8</sup> Shaw *International Law* 1159.

<sup>9</sup> See Simpson accessed at: <http://www.sipri.org/yearbook/2003/files/sipriYBO> [date of use 12 Sept 2012].

<sup>10</sup> Schmidt 2003 *Mich. J.Int'l L* 213.

<sup>11</sup> Simpson accessed at: <http://www.sipri.org/yearbook/2003/files/sipriYBO> [date of use 12 Sept 2012].

<sup>12</sup> Ganor accessed at: <http://www.ict.org.il> [date of use 7 Aug 2013].

resort to terrorism and still be regarded as freedom fighters.<sup>13</sup> Whilst it is a fact that terrorism is a difficult term to define, the difficulty is associated with the activity which is inherently subjective. The targets of terrorist attacks are not the victims who are killed during the attacks, but rather governments and the general population whom the terrorist wishes to endanger, instil fear in, or intimidate.<sup>14</sup>

The failure to adopt a universally acceptable definition of terrorism at the international level can, in the main, be laid at the door of political factors, for example, an attempt to exclude fighters from liberation movements from the ambit of the offence of terrorism. In this vein, the USA refused to consider the members of the Irish Republican Army (hereafter the IRA) as terrorists, while the UK regarded the same IRA as a terrorist organisation.<sup>15</sup> In the case of the Republic of South Africa, the African National Congress and other banned political movements were labelled terrorist organisations by the South African government during the apartheid era, while the 1994 democratic government regards such political parties as liberation movements and not as terrorist organisations. The POCDATARA<sup>16</sup> excludes liberation movements as terrorist organisations from its ambit. As a result of the lack of political consensus, there is a plethora of different definitions at both national and regional levels.<sup>17</sup> Each jurisdiction has its own approach to defining terrorism in accordance with its own laws. In addition, the problem of the definition of terrorism is compounded by lack of uniformity with regard to the political exception clause when it comes to the extradition of perpetrators of terrorist acts. According to the political exception clause, once an act of terrorism is regarded by a state as politically motivated, the perpetrator cannot be extradited to stand trial in another state.<sup>18</sup>

Certain authors argue that the difficulty in adopting a single definition results from the fact that the agreement on the need for a definition is not matched by an agreement on what the content of the definition should be.<sup>19</sup> There are also strong

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<sup>13</sup> Cassesse *International Law* 467.

<sup>14</sup> Cronin 2002 *International Security* 32.

<sup>15</sup> Lawson 2011 *OJSS* 143.

<sup>16</sup> POCDATARA 33 of 2004.

<sup>17</sup> Cachalia 2010 *SAJHR* 511.

<sup>18</sup> Carberry 1999 *GLSJ* 697.

<sup>19</sup> See Waschefort 2000 *SAPL* 458; see also Sorel 2003 *EJIL* 370.

arguments that terrorism is a crime under customary international law even though it has not been formally defined as a crime under the Rome Statute or other international treaties.<sup>20</sup> The reason is that terrorist acts overlap to a certain degree with crimes against humanity.<sup>21</sup>

Many governments and state departments use different definitions of terrorism.<sup>22</sup> The USA alone has nineteen definitions or descriptions of terrorism. For instance, from the perspective of the Federal Bureau of Investigations (hereafter FBI) terrorism is defined as:

The unlawful use of force and violence against persons or property to intimidate or coerce government, civilian population or only a segment thereof, in furtherance of political or social objectives.<sup>23</sup>

The USA Department of State defines terrorism in one of its annual reports as:

Premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents.<sup>24</sup>

Furthermore, Title 18 of the USA Federal Criminal Code defines terrorism as:

The activities that involve violent or life-threatening acts that are a violation of criminal laws of the United States or any State and appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and which occur primarily within the territorial jurisdiction of the United States and which occur primarily outside the territorial jurisdiction of the United States if international.<sup>25</sup>

Although the *Patriot Act*<sup>26</sup> is one of the important terrorism-fighting pieces of legislation in the USA, it defines terrorist activities rather than terrorism *per se*. In terms of the *Patriot Act*, terrorist activities include: threatening, conspiring or attempting to hijack planes, boats, buses or other vehicles; threatening, conspiring or attempting to commit acts of violence against any protected persons such as

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<sup>20</sup> Findlaw accessed at: <http://www.codes.lp.findlaw.com/com/uscode/18> [date of use 30 Sept 2013].

<sup>21</sup> Waschefort 2007 *SAPL* 450.

<sup>22</sup> Lawson 2011 *OJSS* 140.

<sup>23</sup> See Anon accessed at: <http://www.azdema.gov/museum/famousbattles://pdf/Terrorism%20Defintions%20072809pdf> [date of use 21 Oct 2013].

<sup>24</sup> See Anon accessed at: <http://www.state.gov/documents/organization/31932pdf> [date of use 28 Apr 2014].

<sup>25</sup> Findlaw accessed at: <http://www.codes.lp.findlaw.com/com/uscode/18> [date of use 30 Apr 2014].

<sup>26</sup> *Patriot Act* 2001.

government officials; and any crime committed with the use of any weapon or dangerous device, when the intent of the crime is determined to be the endangerment of public safety or substantial property damage rather than mere personal monetary gain.<sup>27</sup>

In an effort to bolster measures to prevent terrorism in the USA, the US Attorney-General defined terrorism<sup>28</sup> as activities that:

1. involve violent acts or acts dangerous to human life that violate federal, state, local or tribal criminal law, or would violate such law if committed within the USA or a state, local, or tribal jurisdiction;
2. appear to be intended:
  - i) to intimidate or coerce a civilian population;
  - ii) to influence the policy of a government by intimidation or coercion; or
  - iii) to affect the conduct of a government by assassination or kidnapping; and
3. occur entirely outside the USA, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear to be intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

A major problem posed by the myriad of definitions of terrorism in the USA is the lack of consistent clarity on what constitutes terrorism. In line with this lack of clarity, the USA Congressional Sub-Committee found that every government agency with counter-terrorism functions used a different definition of terrorism. It was the view of the Congressional Sub-Committee that the government agencies should agree to use a single definition to ensure clarity on what constitutes terrorist activity.<sup>29</sup>

It is also argued that a single definition of terrorism should be flexible and adaptable enough to cover all acts deemed to be terrorist in nature. The definition of terrorism in terms of the UK *Terrorism Act*<sup>30</sup> is regarded as a model that is both flexible and adaptable.<sup>31</sup> Under the UK *Terrorism Act*, terrorism is defined as:

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<sup>27</sup> See Anon accessed at: <http://azdema.gov.museum/famousbattles/pdf/Terrorism%20Definitions%20072809pdf> [date of use 21 Oct 2013].

<sup>28</sup> See Anon accessed at: <http://www.justice.gov/ag/readingroom/guidelinespdf> [date of use 7 Oct 2013].

<sup>29</sup> USA Congress accessed at: <http://www.fas.org/irp/congress/2002-rpt/hpsci-thso702.html> [date of use 7 Oct 2013].

<sup>30</sup> S 1 of the *Terrorism Act* 2000.

<sup>31</sup> Waschefort 2000 *SAPL* 472.

The use of threat for the purpose of advancing a political, religious and ideological cause of action which (a) involves serious violence against any person or property (b) endangers the life of any person; or (c) creates a serious risk to the health or safety of the public or a section of the public.

The European Union has also attempted to define terrorism in its *Framework Decision on Combating Terrorism* 2002. Article 1 of the *Framework Decision on Combating Terrorism* provides that terrorist offences are certain criminal offences set out in a list largely comprising serious offences against persons and property that, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of seriously intimidating a population; or unduly compelling a government or international organisation to perform or abstain from performing any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.<sup>32</sup>

The pre-1994 South African *Terrorism Act*<sup>33</sup> does not define terrorism but instead defines a terrorist as:

Any person who (a) with intent to endanger the maintenance of law and order in the Republic or any portion thereof, in the Republic or elsewhere commits any act or attempts to commit or conspires with any other person to aid or procure the commission of or to commit, or incites, instigates, commands, aids, advises, encourages or procures any other person to commit any act; or (b) in the Republic or elsewhere undergoes, or attempts, consents or takes any steps to undergo any training which could be of use to any person intending to endanger the maintenance of law and order, and who fails to prove beyond a reasonable doubt that he did not undergo or attempt, consent or take any steps to undergo, or incite, instigate, command, aid, advise, encourage or procure such other person to undergo such training for the purpose of using it or causing it to be used to commit any act likely to have any of the results referred to in subsection (2) in the Republic or any portion thereof; or (c) possesses any explosives, ammunition, fire-arm or weapon and who fails to prove beyond reasonable doubt that he did not intend using such explosives, ammunition, fire-arm or weapon to commit any act likely to have any of the results referred to in subsection (2) in the Republic or any portion thereof.<sup>34</sup>

The South African government approved a new counter-terrorism policy against terrorism in which terrorism is defined as:

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<sup>32</sup> See Anon accessed at: <http://www.zdema.gov/museum/famousbattles/pdf/Terrorism%20Definitions%20072809Pdf> [date of use 21 Oct 2013].

<sup>33</sup> *Terrorism Act* 83 of 1967.

<sup>34</sup> S 2 of the *Terrorism Act* 83 of 1967.



An incident of violence or the threat thereof, against a person, a group of persons or property not necessarily related to the aim of the incident, to coerce a government or civil population to act or not to act according to certain principles.<sup>35</sup>

In terms of the POCDATARA<sup>36</sup> a terrorist activity covers any act committed in or outside of South Africa which involves systematic, repeated or arbitrary use of violence by means of systematic, repeated or arbitrary release into the environment of dangerous or harmful substances that endanger the life of any person or persons, causes serious bodily injury to or kills any person or persons, causes serious risk to the health or safety of the public, causes destruction of or substantial damage to any property, natural resource, or environmental or cultural heritage, is designed to disrupt seriously any essential service, causes any major economic loss; or creates a serious public emergency situation or general insurrection in the Republic. According to the POCDATARA,<sup>37</sup> the purpose of the terrorist activity should by its nature and context reasonably be regarded as being intended to:

Threaten the unity and territorial integrity of the Republic; intimidate, or to induce or cause feelings of insecurity within the public or a segment of the public, with regard to its security, including its economic security or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public or domestic or intergovernmental organisation or body to do or abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles whether the public or the person, government, body or organisation or institution referred to in sub paragraphs (ii) or (iii) as the case may be, is inside or outside the Republic; and the activity must be committed for the purpose of the furtherance of an individual or collective political, religious, ideological or philosophical motive, objective cause or undertaking.

The POCDATARA<sup>38</sup> does not define terrorism, but instead defines a terrorist activity as follows:

Any act committed in or outside the Republic, which involves the systematic, repeated or arbitrary release into the environment by any means or method, any dangerous, hazardous, radioactive or harmful substance or organism, any toxic chemical; or any microbial or other biological agent or toxin; endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person or any number of persons, causes serious

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<sup>35</sup> See <http://www.humanrightsinitiative.org/publications/nl> [date of use 29 Aug 2013].

<sup>36</sup> S 1 of the POCDATARA 33 of 2004.

<sup>37</sup> S 1 (xxv) b – c of the POCDATARA 33 of 2004.

<sup>38</sup> S 1 of the POCDATARA 33 of 2004.

risk to the health or safety of the public or any segment of the public, causes destruction of or substantial damage to any property, natural resource or the environmental or cultural heritage, whether public or private, designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service.

The United Nations Security Council has defined terrorism as:

Criminal acts, including those against civilians, these acts are committed with intent to cause death or serious bodily injury or the taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or abstain from doing any act that constitute offences within the scope of and as defined in the international conventions and protocol relating to terrorism, are under no circumstance justifiable by considerations of political, philosophical, ideological, racial, ethnic, religious or other similar nature and calls upon all states to prevent such acts and if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.<sup>39</sup>

In 1994 the United Nations General Assembly (hereafter UNGA) adopted the *Declaration on Measures to Eliminate International Terrorism*.<sup>40</sup> This UN Declaration provides that state members of the UN are to reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable. However, the Declaration again does not define terrorism. Rather, it refers to terrorism as criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons.<sup>41</sup> The other problem experienced is the determination of whether the crime is committed for a political purpose and is not purely a criminal offence.<sup>42</sup> The position adopted by the UN exempts from its definition of terrorism activities which derive from the inalienable right to self-determination and independence of people under colonial and racist regimes, particularly the struggle of national liberation movements.<sup>43</sup> While terrorism is rejected, self-determination is acceptable although it is unclear whether the violence used in attaining it, is justified.<sup>44</sup> Self-determination includes the right to

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<sup>39</sup> United Nations accessed at: [http://www.un.org/ga/search/viewdoc.asp?symbol=S/RES1566\(2004\)](http://www.un.org/ga/search/viewdoc.asp?symbol=S/RES1566(2004)) [date of use 13 Aug 2013].

<sup>40</sup> *Declaration on Measures to Eliminate International Terrorism* 1994.

<sup>41</sup> Halberstam 2003 *Colum .J.Transnat'l* 576.

<sup>42</sup> Cassese *International Criminal Law* 19.

<sup>43</sup> Thackrah *Dictionary* 76.

<sup>44</sup> Crawford *Brownlie's Principles* 300; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ 136 where the International Court of Justice found that Israel must respect the right of the Palestinian people to self-determination and its

form a new state while people subjected to a colonial rule do have the right to be independent.<sup>45</sup> It is, however, unfortunate that the laws adopted to prohibit terrorist behaviour left many loopholes for terrorist offenders to exploit and escape complicity. For example, a UN resolution adopted in 1999 prohibits, amongst others, any 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 organisation to do or to abstain from doing any act.<sup>46</sup>

The *International Convention on the Physical Protection of Nuclear Material*<sup>47</sup> also sets out offences regarded as terrorism as follows:

A threat to use nuclear material to cause death or serious injury to any person or substantial property damage, to commit an offence in order to compel a natural or legal person, international organisation or state to do or to refrain from doing any act.<sup>48</sup>

In terms of the *International Convention for the Suppression of Terrorist Bombing*<sup>49</sup> it is 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.<sup>50</sup> This definition attempts to be inclusive of all acts identified as acts of terrorism.

The *International Convention for the Suppression of the Financing of Terrorism*<sup>51</sup> provides that:

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international obligations under humanitarian law and human rights law.

<sup>45</sup> Crawford *Brownlie's Principles* 141; see also article 1(1) of the *International Covenant on Civil and Political Rights* (hereafter ICCPR) which provides that all people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

<sup>46</sup> UNGA res 54/109 1999 accessed at: <http://www.un.org/law/cod/finterr.htm> [date of use 23 Aug 2013]; see also article 2(b) of the *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>47</sup> *International Convention on the Physical Protection of Nuclear Material* 2005.

<sup>48</sup> Art 7 of the *International Convention on the Physical Protection of Nuclear Material* 2005.

<sup>49</sup> *International Convention for the Suppression of Terrorist Bombings* 1997.

<sup>50</sup> Art 2 of the *International Convention for the Suppression of Terrorist Bombings* 1997.

<sup>51</sup> *International Convention for the Suppression of the Financing of Terrorism* 1999.

Any person commits an offence within the meaning of the convention if that person by any means, directly or indirectly, unlawfully and wilfully provides or collects funds with the intention that they should be used or in the knowledge that they are to be used in full or in part in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the United Nations twelve counter- terrorism conventions; or
- (b) Any 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 an act, by its nature or context, is to intimidate a population, or compel a government or an international organisation to do or abstain from doing any act.<sup>52</sup>

The above definition attempts to include and criminalise all acts that fall within the ambit of a terrorist act.

Ganor defines terrorism as:

An international use of, or threat to use violence against civilian targets in order to attain political aims.<sup>53</sup>

Therefore, according to Ganor, the important elements to be considered in a generally applicable definition are: the use or threat to use violence; the aim of the activity should always be political; and civilians should be the target. The author contends that the reason underlying the commission of the act, be it ideological, religious, or political, is not relevant in defining terrorism. In his view the definition of terrorism should be broad so as to include state-sponsored terrorism.

Schmidt and Jongman define terrorism as:

An anxiety-inspiring method of repeated violent action, employed by a semi clandestine individual group, or state actors, for idiosyncratic, criminal, or political response, whereby in contrast to assassinations, direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly or selectively from a target population and serve as message generators. Threat and violence based communication processes between terrorists (organisations), (imperilled) victims, and main targets are used to manipulate the main target (audience) turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion or propaganda is primarily sought.<sup>54</sup>

The above definition of terrorism does not describe a criminal act as an act distinct from the crime.

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<sup>52</sup> Art 2(1) of the *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>53</sup> See <http://www.ict.org.il/Researchpublications/tabid/64/ArticLsid/432> [date of use 20 Aug 2013].

<sup>54</sup> Schmidt and Jongman *Political Terrorism* 28.

Gibbs defines terrorism as:

Illegal violence or threatened violence directed against human or non-human objects, provided that it was undertaken or ordered with the view to altering or maintaining at least one putative norm in at least one particular unit or population, it had secretive, furtive and or clandestine features that were expected by the participants to conceal their personal identity and or their future location, it was undertaken or ordered to further the permanent defence of some area, it was not conventional military action, and it was perceived by the participants as contributing to the normative goal previously described by including fear of violence in persons (perhaps an indefinite category of them) other than the immediate target of the actual or threatened violence and or by publicising dome cause.<sup>55</sup>

According to Falvey, terrorism is defined as:

Intentional acts of violence committed for the purpose of coercing or intimidating policy makers in order to effect a policy change.<sup>56</sup>

The definition proffered by Falvey is broad and takes into consideration the diversity of terrorist acts and the states in which terrorists act.

The above discussion demonstrates that, because states have different political objectives, it has not been possible to reach consensus on a definition of terrorism. The reaffirmation of the inalienable right to self-determination and the legitimacy of the struggles of national liberation movements, further limit consensus on the definition of terrorism. In practical terms, the *modus operandi* of some national liberation movements highlights that one man's terrorist could be considered another's freedom fighter.<sup>57</sup> It is nevertheless clear that existing agreement on the need for an all-embracing definition does not translate into reality. Therefore the lack of agreement on this aspect results in continuing legal dispute as to what a correct and satisfactory definition should be.<sup>58</sup> The concept of terrorism constitutes a phenomenon that is complex and multi-faceted and cannot readily be subjected to the rigid confines of a semantic definition. Notwithstanding the failure to arrive at a common definition of terrorism, it remains important that in all jurisdictions, terrorism be regarded as a crime and be punished.

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<sup>55</sup> Gibbs 1989 *American Sociological Review* 330.

<sup>56</sup> Falvey 1986 *B.C Int'l L.J & Comp .L. Rev* 323.

<sup>57</sup> Dugard *International Law* 166.

<sup>58</sup> Sorel 2003 *EJIL* 370.

### **2.3 The common features of the definition of terrorism**

Although problems are encountered in adopting an internationally common definition amongst states, there are common features in the different definitions reviewed above. The first common feature that runs through these definitions is the use of violence. Although the various sources share the view that violent action or threat thereof is an indispensable feature of terrorism, not every violent action can be considered a terrorist act, for example war or riot.<sup>59</sup> Secondly, the definitions reviewed share the view that terrorism is driven by the need to achieve political goals, for example changing the *status quo* of a government.<sup>60</sup> For example, the September 2001 USA terrorist attacks by Al- Qaeda were fuelled by the political goal of eliminating the presence of USA in the Middle East.<sup>61</sup> Thirdly, the definitions reviewed show that fear and the psychological impact of the terrorist acts are aimed at exaggerating the strength of the terrorists and the importance of their cause. The final common feature of the definitions reviewed is that civilians or non-combatants are the target of a terrorist act.<sup>62</sup>

### **2.4 The ambiguity of terrorism**

The term terrorism has in the main been used to identify individuals or groups of a population who oppose the government of the day. However, in Thackrah's view, terrorism is committed by a group and not an individual.<sup>63</sup> This view is supported by Jenkins where he states that perpetrators of terrorism are generally members or an organised group.<sup>64</sup> The groups may differ in size. Be that as it may, a terrorist does not remain a terrorist indefinitely because as soon as the objective has been achieved, a terrorist becomes known as a liberator.<sup>65</sup> This is why authors like Ganor say that one man's terrorist is another's freedom fighter.<sup>66</sup> However, according to the

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<sup>59</sup> Thackrah *Dictionary* 75; See also Paust 1975 *GA J Int'l L & Comp L* 434.

<sup>60</sup> Cohen 2010 *J. Int'l Bus & Law* 3.

<sup>61</sup> Ruby accessed at: [www.asp-sppsi.org/pdf/asopla.pdf.file](http://www.asp-sppsi.org/pdf/asopla.pdf.file) [date of use 14 Apr 2014].

<sup>62</sup> See Gross 2001 *UCLA .J. Int'l L & Foreign Aff* 97; See also Paust 1975 *G.A. J Int'l L & Comp L* 434.

<sup>63</sup> Thackrah *Dictionary* 201.

<sup>64</sup> Jenkins accessed at: <http://www.rand.org/content/dam/rand/pubs/papers/2006/p6563.pdf> [date of use 7 Aug 2013].

<sup>65</sup> Sorel 2003 *EJIL* 2.

<sup>66</sup> Ganor accessed at: <http://www.ict.org.il> [date of use 7 Aug 2013].

definition offered by Dugard, terrorism is an individual or collective act.<sup>67</sup> It is, however, difficult to distinguish between the different forms of terrorism and terrorists. For example, terrorists whose aim is clearly defined, such as fighting for independence, and those terrorists whose aims are more obscure, such as a struggle for civilization which includes religious, cultural or political objectives. Terrorists with nationalist aims such as the IRA fought for Northern Ireland's independence from the UK. Radical Islamic groups are the main example of religiously-motivated terrorists. For example, Jihadists who believe that in order to reach their understandings of heaven, they must die in battle against their oppressors. Such terrorists interpret quaranic laws to justify killing in defence of God's laws which condemn homosexuality and abortion.<sup>68</sup>

Some governments label all acts perpetrated by political opponents as terrorist acts while often, anti- government extremists claim to be victims of government terror. The latter category includes liberation movements who suffer oppression from government security forces.<sup>69</sup> The labelling of different acts as terrorism thus appears to depend on the unilateral or subjective point of view held by individual states, or an individual terrorist or terrorist group. Therefore, in Jenkins's view, the term terrorism implies the moral judgment of one party that can label the opponent a terrorist and successfully manage to persuade others to adopt its moral point of view.<sup>70</sup>

According to Ganor, the term terrorism is superfluous when describing the actions of sovereign states because, in terms of international conventions, any deliberate attack on civilians during wartime by military forces is defined as a war crime.<sup>71</sup> When the attack is directed against the civilian population, the act is defined as a

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<sup>67</sup> Dugard *International Law* 166.

<sup>68</sup> Valla and Comcowich accessed at:[http://www.jeffnorwitz.com/Documents/14%20Documents5%20forgotten%20forgotten % 20 but % 20not%20gone.pdf](http://www.jeffnorwitz.com/Documents/14%20Documents5%20forgotten%20forgotten%20but%20not%20gone.pdf) [date of use 13 Aug 2013].

<sup>69</sup> See Jenkins accessed at:<http://www.rand.org/content/dam/rand/pubs/papers/2006/p6563.pdf> [date of use 7 Aug 2013].

<sup>70</sup> See Jenkins accessed at:<http://www.rand.org/content/dam/rand/pubs/papers/2006/p6563.pdf> [date of use 7 Aug 2013].

<sup>71</sup> Ganor accessed at: <http://www.ict.org.il> [date of use 7 Aug 2013].

crime against humanity.<sup>72</sup> However, when the attacks are carried out by politically motivated individuals or groups, the acts are regarded as unlawful and lack legitimacy. This is why the USA State Department defines terrorism as the deliberate use of violence against non-combatants. This definition is still not appropriate because it designates attacks on non-combatant military personnel as terrorism.<sup>73</sup> Therefore, for states to be able to define terrorism, an agreement which binds all states to stop supporting terrorist organisations must be negotiated. The non-support of terrorist organisations will result in the slogan of one man's terrorist is another man's freedom fighter no longer finding application. This will, in turn, prevent terrorist organisations claiming to be freedom fighters. There will, therefore, be no basis on which to exclude the acts of freedom fighters which violate citizens' rights from the definition of terrorism. Views have also been voiced that although a uniform definition of terrorism is necessary, the definition should serve political ends. For example, states which sponsor terrorism wish to influence the international community to define terrorism in terms that would exclude states which support terrorism aimed at achieving political objectives. The definition would then absolve states which support terrorism of responsibility for sponsoring and fuelling terrorist violence.<sup>74</sup>

Furthermore, the vague parameters of what constitutes terrorism makes it difficult for states to adopt a standard, internationally recognised definition of terrorism. Whilst it is difficult to reach consensus on the common definition of terrorism, an objective definition is not only possible, it is indispensable to any serious attempt to combat and prevent terrorism.<sup>75</sup>

## **2.5 The need for a universally accepted definition of terrorism**

The lack of a universally acceptable definition of terrorism has made it impossible for international law to criminalise acts of terrorism. This challenge is compounded by the failure of countries such as the USA to adopt counter-terrorism policies and practices that are consistent with international human rights law. It is also said that

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<sup>72</sup> Dugard *International Law* 180.

<sup>73</sup> See Ruby accessed at: [www.asp-sppi.org/pdf/asopola.pdf](http://www.asp-sppi.org/pdf/asopola.pdf) [date of use 14 Apr 2014].

<sup>74</sup> Ganor accessed at: <http://www.ict.org.il> [date of use 7 Aug 2013].

<sup>75</sup> Helmreich accessed at: <http://www.jcpa.org/ji/vp466.htm> [date of use 7 Oct 2013].



the offence of terrorism unnecessarily duplicates other crimes such as assault, public violence, malicious damage to property, intimidation, murder, sedition, and treason.<sup>76</sup>

Certain authors, Ganor for example, claim that an objective definition of terrorism should be based on accepted international law principles. International law principles control behaviour that is permitted in conventional law between nations during war or conflict. Conventions differentiate between soldiers who attack their military opponents and war criminals who attack civilians. Therefore, guerrilla warfare would be distinguished as the deliberate use of violence against the military in order to achieve political, ideological and religious goals. The distinction between the military attack on the opponents, and attacks by guerrillas on the military and civilians would consequently lead to terrorism being defined as the deliberate use of violence against civilians in order to achieve political, ideological and religious goals.<sup>77</sup> Of importance is that the use of violence against civilians is prohibited in terms of the international human rights law.<sup>78</sup>

However, ensuring an appropriate definition of terrorism is the key to an effective international approach to the fight against terrorism. A universally accepted definition is important because it would harmonise the operation and interaction of overlapping domestic criminal jurisdiction.<sup>79</sup> A universally accepted definition would further enhance intelligence sharing and international cooperation.<sup>80</sup> United Nations Security Council (hereafter UNSC) resolution 1373, obliges member states to fight terrorism. However, without the necessary common understanding of what constitutes terrorist acts by member states, it may be difficult to comply with the obligation to counter terrorism.<sup>81</sup> It is therefore important to have a common definition providing a common jurisdiction worldwide. The need for a common jurisdiction is based on the fact that the mobility of international terrorists enables them to select their *situs* of operation and to strike targets outside the borders of the

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<sup>76</sup> Cachalia 2010 *SAJHR* 514.

<sup>77</sup> Ganor accessed at: <http://www.ict.org.il> [date of use 7 Aug 2013].

<sup>78</sup> Cachalia 2010 *SAJHR* 532.

<sup>79</sup> Young 2006 *B.C. Int'l L. Rev* 32.

<sup>80</sup> Carberry *GSLJ* 711.

<sup>81</sup> UNSC res 1373 of 2001 accessed at: <http://www.un.org/press/en/2001/sc/7158doc.htm> [date of use 17 Jun 2015].

country from which they are operating. This implies that the aim of a universally accepted definition of terrorism should be to criminalise and curb the spread of terrorism in different jurisdictions.

## **2.6 Chapter summary**

There have been many attempts by scholars, experts, states and government departments to define terrorism with a view to identifying and countering which acts qualify as terrorist offences. Each state has its own definition of terrorism based on its individual political objectives. This is why states cannot reach a universally acceptable definition. To complicate matters further, in states such as the USA, government departments also have their own conflicting definitions of terrorism to enable them to execute their mandate to prevent terrorism. For example, the USA State Department and the FBI operate under use of different definitions of terrorism. International organisations such as the UN, too, have their own definitions of terrorism which are not internationally accepted. The UN international conventions against terrorism, such as the *International Convention for the Suppression of Terrorist Bombings*<sup>82</sup> and the *International Convention for the Suppression of Acts of Nuclear Terrorism*,<sup>83</sup> attempt to define acts of terrorism. It appears that the definition of terrorism put forward by the *International Convention for the Suppression of Financing of Terrorism*<sup>84</sup> has not received international acceptance by all countries.<sup>85</sup> However, all the UN conventions aim to define terrorism although they identify different acts.<sup>86</sup>

Furthermore, the uncertainty as to the distinction between a terrorist and a freedom fighter makes it difficult to find a single definition of terrorism applicable on the international plane. Some states regard violence by freedom fighters as legitimate and therefore not to be criminalised. The failure of states to arrive at a

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<sup>82</sup> *International Conventions for the Suppression of Terrorist Bombings* 1997.

<sup>83</sup> *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005.

<sup>84</sup> *International Convention for the Suppression of Financing of Terrorism* 1999.

<sup>85</sup> The *International Convention for the Suppression of Financing of Terrorism* 1999 has 187 states parties but only 132 states ratified the Convention. See United Nations accessed at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-II&chapter18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-II&chapter18&lang=en) [date of use 13 May 2016].

<sup>86</sup> Chira 2013 *JTSA* 35.

comprehensive definition of terrorism has led to the adoption of what may be referred to as 'piecemeal legal measures' in an attempt to prevent and combat terrorist acts. However, while terrorism presents an elusive phenomenon, the vague nature of terrorism as a concept, makes it difficult to define despite the many similarities or common features it evidences. Lastly, it seems that states will not be able to formulate an acceptable definition of terrorism in the near future. It nevertheless seems logical that the following elements are crucial in determining what constitutes an act of terrorism:

- (a) conspiring, inciting, instigating, encouraging, aiding, assisting, advising, or in any other manner;
- (b) the intentional and unlawful use of violence, force, threat, intimidation or coercion;
- (c) against a civilian population or sector of the population;
- (d) or damaging property owned by the state or privately;
- (e) with intent to influence the policy of a government or political organisation;
- (f) in order to advance the political, religious or ideological aspirations of the perpetrator, organisation, or state.

In Chapter Three the international legal framework governing terrorism will be discussed.

## CHAPTER 3

### INTERNATIONAL LEGAL FRAMEWORK GOVERNING TERRORISM

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#### ***3.1 Introduction***

The previous chapter critically reviewed some definitions of terrorism. It established that the absence of a universally acceptable definition of the phenomenon makes it difficult to criminalise terrorism in international law. This further limits the effectiveness of international responses to terrorism. The aim of this chapter is critically to analyse the efficacy of the international legal framework (conventions, resolutions, protocols, and other measures) adopted by the United Nations General Assembly UNGA and UNSC to counter terrorism.

To this end, the chapter is divided into seven sections. The first section examines the role of customary international law in the fight against terrorism. This part of the chapter argues that customary international law plays an important role in dealing with the threat of international terrorism, particularly as regards what states see as peremptory norms by which they are bound. The second part evaluates the role of the United Nations (hereafter UN) in the fight against terrorism. The resolutions of the UNGA and UNSC are investigated to determine their role in this regard. The third part evaluates the effectiveness of international instruments adopted to address the problem of terrorism, and the fourth part evaluates the role of the International Criminal Court (hereafter ICC) in the fight against terrorism. Some states are of the view that the ICC is the appropriate forum for the prosecution and punishment of terrorist acts, while states like the USA oppose this view. The resistance to submit to the jurisdiction of the ICC arises from the perception that the court will encroach on the jurisdiction of the different states' national courts. The different views by different states hamper progress in finding a solution which can effectively deal with the threat of international terrorism.

The fifth part evaluates the role of the International Court of Justice (hereafter ICJ) in the fight against terrorism, while sixth evaluates the role of the ICJ in the fight against terrorism. The last part evaluates the role of international human rights

instruments in the protection of human rights in the fight against terrorism. It is argued that fundamental human rights should not be sacrificed in this process.

### **3.2 The role of customary international law in the fight against terrorism**

Customary international law is relevant in the fight against terrorism and regards terrorism as a crime against humanity.<sup>1</sup> Customary international law comprises of two elements namely: *corpus* or *usus*, which is a usage or practice that has evolved over a period of time; and an *animus* or *opinio iuris*, which is the sense of being legally bound to observe the practice.<sup>2</sup> There must be a constant and uniform usage of custom for states to be bound by it.<sup>3</sup> The terms usage and custom are often used interchangeably, however they should not be confused. While usage does not have legal obligations, custom does have the necessary legal obligations.<sup>4</sup> In the *Asylum* case<sup>5</sup> the important question was whether the practice of granting asylum to political refugees in Latin American countries was a customary rule. The ICJ concluded that there had been inconsistency in the granting of political asylum as the relevant conventions had been ratified by some states and rejected by others. In addition to the requirement of consistency, the practice must have a sufficient number of participating states to allow it to be classified as being of general application.

Customary international law also dictates that if the practice is generally and consistently applied by states out of courtesy or habit, but not because they consider it to be a legal necessity, it may be considered an international usage, but will not amount to customary international law. The application of a custom must be based on a sense of legal obligation. This aspect was dealt with in the *North Sea Continental Shelf* case<sup>6</sup> where the ICJ held as follows:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief

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<sup>1</sup> Crawford *Brownlie's Principles* 26.

<sup>2</sup> Crawford *Brownlie's Principles* 26.

<sup>3</sup> Conte accessed at: <http://www.lawfoundation.org.nz> [date of use 15 Aug 2012]; see also *Asylum Case (Columbia v Peru)* 1950 ICJ Rep 266 at 276-277.

<sup>4</sup> Crawford *Brownlie's Principles* 23.

<sup>5</sup> *Asylum Case (Columbia v Peru)* 1950 ICJ Rep 266.

<sup>6</sup> *North Sea Continental Shelf* 1969 ICJ Rep 34; see also *West Rand Central Gold Mining Co v R* 1905 2 KB 391 at 470 where the court held as follows "it must be proved by satisfactory evidence that the alleged rule is of such a nature, and it has been so widely and generally accepted that it hardly be supposed that any civilised state can repudiate the rule."

that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief of the existence of subjective element is implicit in the very notion of *opinio iuris*. States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not itself enough.

The court further held in *Nuclear Tests Case (Australia and New Zealand) v France*<sup>7</sup> that:

Declarations made through unilateral acts may have the effect of creating legal obligations.

It is therefore clear that custom has an important role to play as a source of new rules of international law where the international community experiences a change in new areas untouched by judicial decisions, legal writings, or treaties.<sup>8</sup>

The development of a body of peremptory principles or norms from which no derogation is permitted, for example, the right to life, is of significant importance in the development of laws to fight terrorism. *Jus cogens* is a norm accepted by the international community of states as a norm from which no derogation is permitted.<sup>9</sup> A treaty will be void if it conflicts with a *jus cogens* norm, for example the *jus cogens* on the absolute prohibition of torture. In *Siderman de Blake v Republic of Argentina*<sup>10</sup> the USA Court of Appeals for the Ninth Circuit ruled that the right to be free from official torture is a fundamental and universal right deserving of the highest status under international law which is a norm of *jus cogens*. In *Prosecutor v Furundzija*<sup>11</sup> the Appeals Chamber of the International Tribunal for the Former Yugoslavia held as follows in connection with *jus cogens*:

The *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.

Furthermore, the prohibition is designed to deter, indicating that the prohibition of torture is an absolute value from which nobody should deviate. According to Janis,<sup>12</sup> *jus cogens* functions like a natural constitutional law rule that is so fundamental that

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<sup>7</sup> *Nuclear Tests Case (Australia and New Zealand) v France* 1974 ICJ 253 at 267.

<sup>8</sup> Shearer *Starke's International Law* 31.

<sup>9</sup> Art 53 of the *Vienna Convention on the Law of Treaties* 1969

<sup>10</sup> *Siderman de Blake v Republic of Argentina* 965 f 2d 699 at 715-717 (9<sup>th</sup> Cir 1992).

<sup>11</sup> *Prosecutor v Furundzija* IT 95-17/1 2002 at 138, 140 - 154.

<sup>12</sup> Janis *International Law* 67.

states cannot avoid its force. The implication is that even if a treaty were to be concluded to counter terrorism and it conflicted with the prohibition on torture, the treaty would be void. In addition, under *jus cogens*, states are obliged to protect their subjects against harm as a consequence of terrorist attacks.<sup>13</sup>

Therefore, customary international law takes the place of international human rights treaties where the treaties do not enjoy universal ratification. Customary law therefore binds states that are not parties to the human rights treaties as long as the norm has become a rule of customary international law.<sup>14</sup> Furthermore, customary international law, international human rights law and international criminal law overlap. International criminal law defines and punishes serious international crimes such as terrorism and crimes against humanity.<sup>15</sup> Therefore, both international human rights law and international criminal law uphold the values of human life and dignity.

According to the UNGA, terrorism is criminal and unjustifiable wherever it is committed, irrespective of the political, philosophical, ideological, racial, religious or any other consideration that may be invoked to justify it.<sup>16</sup> By defining terrorism as a crime, the UNGA opted for the criminal law approach rather than the war model in the fight against terrorism. Fighting terrorism by means of penal provisions implies that terrorist acts are criminalised before any terrorist act takes place. For example, the UNSC resolution 1373 of 2001 provides that states shall prevent and suppress the financing of terrorist acts, shall refrain from providing any form of support, active or passive, to entities or persons involved in the commission of terrorist acts, including suppressing recruitment of members for terrorist groups.

According to Van der Vyver, terrorism comprises wilful acts of violence directed against civilians with the intention that the resulting terror will serve as the instrument through which the perpetrators seek to intimidate their intended target or

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<sup>13</sup> Silverberg *International Law* 456.

<sup>14</sup> Viljoen *International Human Rights* 27.

<sup>15</sup> Viljoen *International Human Rights* 31; see also Dugard *International Law* 31.

<sup>16</sup> Larbode accessed at: [www.unafci.or.jp/english/pdf/R5-No71/No71-06VE-Larbode2pdf](http://www.unafci.or.jp/english/pdf/R5-No71/No71-06VE-Larbode2pdf) [date of use 13 Aug 2012].

government to submit to certain political, ideological or religious demands.<sup>17</sup> According to the author, for the offender to be prosecuted for committing a crime, the crime must be clearly defined and be included by the international agreement on the jurisdiction of the International Criminal Tribunal.<sup>18</sup> In terms of international criminal law, criminalisation of terrorist offences includes the creation of offences against state-sponsored terrorism that can be perpetrated by states against other states. Therefore, the international criminal legal framework specifies that terrorist acts are serious criminal offences and penalises such offences in accordance with their seriousness.<sup>19</sup>

### **3.3 The role of the United Nations in the fight against terrorism**

Even before the 2001 terrorist attacks on the USA, the UNGA had already been charged with the responsibility of fighting terrorism by means of resolutions aimed at eliminating the threat of international terrorism.<sup>20</sup> In December 1993, the UNGA adopted a resolution dealing with terrorism and human rights.<sup>21</sup> The resolution called upon states parties to comply with international human rights norms when implementing counter-terrorism measures. In another resolution,<sup>22</sup> the UNGA asserted that:

The General Assembly is mindful of the need to protect human rights of and the guarantees for the individual in accordance with the relevant international human rights principles and instruments particularly the right to life.

Reaffirming that all measures to counter terrorism must be in strict conformity with international human rights standards Security Council of the United Nations calls upon States to take all necessary and effective measures in accordance with international standards of human rights to prevent, combat and eliminate all acts of terrorism wherever and by whomever committed.

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<sup>17</sup> Van der Vyver 2010 *Emory Int'l .L.Rev* 527.

<sup>18</sup> Van der Vyver 2010 *Emory Int'l .L. Rev* 527.

<sup>19</sup> Ford 2009 *Monograph* 33.

<sup>20</sup> Joseph and Mc Beth *Research Handbook* 515.

<sup>21</sup> UNGA res 48/122 of 1993 accessed at: <http://www.un.org/documents/ga/res/48/a48r122.htm> [date of use 18 Jun 2015].

<sup>22</sup> UNGA res 50/186 of 1993 accessed at: <http://www.un.org/documents/ga/res/50/a50r186.htm> [date of use 18 Jun 2015].



The *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* resolution<sup>23</sup> affirms that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee law, and humanitarian law. Of importance is that the resolutions of the UNGA do not carry the same weight as international conventions or the decisions of the UNSC.<sup>24</sup> Article 10 of the *Charter of the United Nations* provides that the resolutions and declarations of the UNGA are only recommendatory with regard to powers and functions of the General Assembly. As a result, the UNGA resolutions are regarded as soft law.<sup>25</sup> The UNSC resolutions, on the other hand, may be both soft and hard law. Soft law does not have a binding effect but is only advisory in nature.<sup>26</sup> These resolutions fall in the ambit of Chapter VI of the United Nations Charter and deals mainly with peaceful settlement of disputes. For example, the UNSC resolution 1373/2001 which obliges states parties to take steps to prevent the commission of terrorist acts.<sup>27</sup> Hard law are resolutions with a binding effect in terms of Chapter VII of the United Nations Charter and do have a binding effect on states. Chapter VII resolutions deals mainly with threats to the peace, breach to peace and acts of aggression. When necessary Chapter VII resolutions permits the use of force to restore peace.

### 3.3.1. *The United Nations Commission on Human Rights*

UNGA resolution 2002/35<sup>28</sup> calls upon the United Nations High Commissioner for Human Rights (hereafter UNHCHR) continuously to monitor compliance with the protection of human rights in the fight against terrorism; to make general recommendations to the various countries concerning the measures taken by them to fight terrorism; and to keep advising and assisting countries on request. The UNHCHR commended the efforts of the different UN human rights bodies and mechanisms and concluded that neither the treaty body system, nor special

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<sup>23</sup> UNGA res 52/219 of 2002 accessed at: [www.un.org/ga/documents/gares52/res52219.htm](http://www.un.org/ga/documents/gares52/res52219.htm) [date of use 14 Aug 2013].

<sup>24</sup> Joseph and Mc Beth *Research Handbook* 517.

<sup>25</sup> Viljoen *International Human Rights* 28.

<sup>26</sup> Oberg 2006 *EJIL* 885.

<sup>27</sup> UNODC accessed at: <http://www.undoc.org/documents/terrorism/publications/FAQ/English.pdf> [date of use 10 May 2014].

<sup>28</sup> UNGA Resolution 2002/35 accessed at: [www.coe.int/d/dgh/standardsetting/victims/Res2002-35.pdf](http://www.coe.int/d/dgh/standardsetting/victims/Res2002-35.pdf) [date of use 13 Aug 2014].

procedures of the UNHCR provides for the universal, comprehensive and timely monitoring of national counter-terrorism measures and their conformity with international human rights standards.<sup>29</sup>

The Human Rights Commission resolution 2005/80<sup>30</sup> provides for the appointment of a Special Rapporteur on the promotion and protection of human rights and freedoms while countering terrorism. The resolution reaffirms that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee, and humanitarian law. The resolution further reaffirms that it is imperative that in countering terrorism, all states work together to uphold and protect the dignity of individuals and their fundamental freedoms, as well as democratic practices and the rule of law.

The UN Sub-Commission Committee on the Promotion and Protection of Human Rights Special Rapporteur on Terrorism and Human Rights,<sup>31</sup> in its 2004 Report, focused on states' reactions to terrorism which also impact upon human rights. The focus on human rights resulted in the task of the UN Sub-Commission Rapporteur being extended so as to develop a version of principles and guidelines on terrorism and human rights. The Sub-Commission Rapporteur's report on the duties of states regarding terrorist acts reads as follows:

All States have a duty to promote and protect human rights of all persons under their political or military control in accordance with all human rights and humanitarian law norms. The report includes the protection of human rights in the fight against terrorism.

Of utmost importance is that the report goes further to provide that:

Any exceptions or derogations in the human rights law in the context of counter-terrorism measures must be in strict conformity with the rules set out in the applicable international or regional standards. States may not institute exceptions or derogations unless that State has been subjected to terrorist acts that would justify such measures. States shall not invoke derogation clauses to justify taking hostages or to impose collective punishment.

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<sup>29</sup> See Heinz and Arend accessed at: [www.institute-fuermenschrechte.de](http://www.institute-fuermenschrechte.de) [date of use 13 Aug 2013].

<sup>30</sup> Human Rights Resolution 2005/80 accessed at: <http://www.ohchr.org/EN/Issues/Terrorism/pages/SRTerrorismindex.aspx> [date of use 14 Aug 2013].

<sup>31</sup> Conte accessed at: <http://globalcenter.org/wp-content/uploads2008/01/human-rights-handbook.pdf> [date of use 1 Aug 2013].

The United Nations High Commission for Human Rights *Guidelines Report for 2002* (hereafter UNHCHR Guidelines) recognises the counter-terrorism obligations imposed upon states by the UNSC and reaffirms that such action must be in compliance with international law human rights principles. The UNHCHR Guidelines further confirm that human rights law allows a balance to be struck between enjoyment of rights and freedoms and the legitimate concerns for national security through the limitation of rights in specific and defined circumstances. In paragraphs 3 and 4, the Guidelines outline rules on how to formulate counter-terrorism measures which may require the limitation of human rights, as follows:

Where the limitation is permitted, the laws authorising the restrictions should use a precise criteria and may not confer an unfettered discretion on those charged with their execution. Therefore for the limitation of rights to be lawful such a limitation must:

Be prescribed by law; be necessary for public safety and public order like the protection of public health or morals and for the protection of the rights and freedoms of others and serve a legitimate purpose; not impair the essence of the right; be interpreted strictly in favour of the rights at issue; be necessary in a democratic society; conform to the principle of proportionality; be appropriate to achieve their function and be an instrument which might serve the protective function; be compatible with the object and purposes of human rights treaties; not be discriminatory; and not to be applied arbitrarily.

### 3.3.2. *The United Nations Security Council*

The UNSC is the primary organ of the UN charged with the duty of addressing the threat of terrorism by ensuring peace and security within the international community.<sup>32</sup> The UNSC ensures peace and security by adopting resolutions condemning terrorist attacks.<sup>33</sup> For example, the UNSC adopted resolution 1456<sup>34</sup> which urges member states to support anti-terrorism initiatives and legal instruments, in particular the *International Convention for the Suppression of the Financing of Terrorism*.<sup>35</sup> It is nevertheless true that the UNSC was responsible for these functions even before 11 September 2001 when the terrorist attacks on the USA took place. For example, in December 1988, Pan-Am flight 103 crashed in the

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<sup>32</sup> Cowling 2005 *SAYIL* 53.

<sup>33</sup> Ruperez accessed at: <http://www.un.org/en/sc/ctc/docs/statements/2006-02-cted-lecture.pdf> [date of use 10 May 2014].

<sup>34</sup> UNSC res 1456/2003; See also Schott 2007 *NWU J Int'l L* 1.

<sup>35</sup> *International Convention for the Suppression of the Financing of Terrorism* 1999.

village of Lockerbie in Scotland as a result of a bomb explosion.<sup>36</sup> Libyan terrorists accepted responsibility for the attack. Therefore, in January 1992 in resolution 731,<sup>37</sup> the UNSC condemned the Libyan government for its failure to surrender those suspected of carrying out the terrorist attack. In March 1992, UNSC resolution 748/92 was adopted. This resolution characterised the Libyan actions as a threat to international peace and security and, having invoked Chapter VII of the *Charter of the United Nations*, imposed a multiplicity of sanctions on the Libyan government. Furthermore, resolutions 883/93<sup>38</sup> and 1192/98<sup>39</sup> were adopted to strengthen resolution 748/92.<sup>40</sup> The adoption of these resolutions led to the handing over of the two Libyans who were suspected of bombing the Pan-Am flight to the Scotland where they were later tried and convicted under Scottish law.<sup>41</sup>

In terms of resolution 1189/1998, the UNSC imposed economic sanctions on the government of Afghanistan and demanded that the Taliban government terminate its support for international terrorism and extradite Bin Laden.<sup>42</sup> In addition to resolution 1189<sup>43</sup> the UNSC adopted resolution 1267/1999<sup>44</sup> which provided for the establishment of a committee known as the Al-Qaeda and Taliban Sanctions Committee to monitor compliance with the sanctions imposed.<sup>45</sup>

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<sup>36</sup> Goldstone and Simpson 2003 *Harv. Hum. Rts. J* 16; See also Bantekas and Nash *International Criminal Law* 239.

<sup>37</sup> UNSC res 731/1992 accessed at: <http://daccess-dds-ny.org/doc/RESOLUTION/GEN/NR0/010/90/IMG.pdf> [date of use 18 Jun 2015].

<sup>38</sup> UNSC res 883/1993 accessed at: [http://www.un.org/en/ga/search/viewdoc.asp?symbol=S/RES883\(2003\)](http://www.un.org/en/ga/search/viewdoc.asp?symbol=S/RES883(2003)) [date of use 18 Jun 2015].

<sup>39</sup> UNSC res 1192/1998 accessed at: <http://www.treasury.gov/resource-center/sanctions/documents/748.pdf> [date of use 17 Jun 2015].

<sup>40</sup> UNSC res 748/1992 accessed at: <http://www.treasury.gov/resourcecenter/sanctions/Documents/748.pdf> [date of use 17 Jun 2015].

<sup>41</sup> Goldstone and Simpson 2003 *Harv. Hum. Rts. J* 16.

<sup>42</sup> Moeckli 2008 *Tex Int'l L.* 165.

<sup>43</sup> UNSC res 1189/1998 accessed at: <http://wwwun.org/en/ga/search/viewdoc.asp?symbol+S/RES1189> [date of use 18 Jun 2015].

<sup>44</sup> UNSC res 1267/1999 accessed at: <http://www.un.org/sc/committees/1267/infrormation.shtml> [date of use 20 Aug 2015].

<sup>45</sup> Schmitt 2003 *Mich.J.Int'l L* 542.

On 12 September 2001, after the terrorist attacks on the USA, the UNSC adopted resolution 1368/2001<sup>46</sup> which called upon all member states to work together “to bring to justice, the perpetrators, organisers and sponsors” of terrorist acts, and to redouble their efforts to prevent and suppress terrorist acts. In terms of resolution 1373/2001<sup>47</sup> the UNSC called on all states to take urgent action to prevent and suppress all active and passive support for terrorism and to fully comply with the relevant resolutions of the UNSC, namely resolutions 1390/2002 and 1455/2003.

The UNSC further called upon states to:

Become party, as a matter of urgency, to all relevant international conventions and protocols relating to terrorism, in particular the 1999 *International Convention for the Suppression of the Financing of Terrorism*, and to support all international initiatives taken to that end, and to make full use of the sources of assistance and guidance which are becoming available;<sup>48</sup> assist each other to the maximum extent possible, in the prevention, investigation, prosecution and punishment of acts of terrorism, wherever they occur; cooperate closely to implement fully the sanctions against terrorists and their associates, in particular Al-Qaeda and the Taliban and their associates as stated in Resolutions 1267,<sup>49</sup> 1390<sup>50</sup> and 1455,<sup>51</sup> to take urgent action to deny them access to the financial resources they require to carry out their actions; and to cooperate with the Monitoring Group established pursuant to Resolution 1363.<sup>52</sup>

In terms of the decision made under Chapter VII of the *Charter of the United Nations*, compliance with the terms of resolution 1373/2001 is mandatory for all states members of the UN. The terms of the chapter of the *Charter* provides as follows:

All States shall prevent and suppress the financing of terrorist acts and criminalize the wilful provision or collection, by means, directly or indirectly, of funds with the intention that the funds should be used to carry out terrorist acts.

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<sup>46</sup> UNSC res 1368/2001 accessed at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NO1/533/82/pdf> [date of use 18 Jun 2015].

<sup>47</sup> UNSC res 1373/2001 accessed at: <http://www.un.org/press/en/2001/sc/7158doc.htm> [date of use 17 Jun 2015].

<sup>48</sup> Dugard *International Law* 487-488.

<sup>49</sup> UNSC res 1267/1999 accessed at: <http://www.un.org/sc/committees/1267/information.shtml> [date of use 18 Jun 2015].

<sup>50</sup> UNSC res 1390/2002 accessed at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NO2/21/02/pdf> [date of use 18 Jun 2015].

<sup>51</sup> UNSC res 1455/2003 accessed at: [http://www.org/en/ga/search/view-doc.asp?symbol=S/RES1455\(2003\)](http://www.org/en/ga/search/view-doc.asp?symbol=S/RES1455(2003)) [date of use 18 Jun 2015].

<sup>52</sup> UNSC res 1363/2001 accessed at: [www.un.org/Docs/scres/2001/sc2002.htm](http://www.un.org/Docs/scres/2001/sc2002.htm) [date of use 18 Jun 2015].

Furthermore, states must freeze the funds and other financial assets or economic resources of persons who commit, participate in, or facilitate the commission of terrorist acts. The funds to be frozen include funds of entities owned or controlled directly or indirectly by terrorist organisations or members of terrorist organisations.<sup>53</sup>

In addition, states must prohibit subjects from making any funds, financial assets or economic resources, or financial or other related services, available directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled directly or indirectly by such persons and associated persons and of persons and entities acting on behalf of or at the direction of such person.<sup>54</sup>

UNSC resolution 1540/2004<sup>55</sup> imposes an obligation on states parties to refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery. States are thus under an obligation to adopt and enforce effective laws to implement the obligations and to establish domestic controls to prevent the proliferation of weapons of mass destruction.

### 3.3.3. *United Nations Security Council as a law-making organ*

As an international organisation, the UN is bound to respect international law. The UNSC, as one of its organs, is also under the obligation to ensure respect for the general rules of international law.<sup>56</sup> Under international law, the UNSC does not have legislative powers.<sup>57</sup> Only states through the adoption of treaties and the creation of customary law by means of *usus* and *animus opinio iuris* can create international law.

This notwithstanding the abovementioned, it has emerged that although the UNSC is a political organ, it does not follow a purely political approach, but also advances a

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<sup>53</sup> Para 1(c) of the UNSC res 1373/2001 accessed at: <http://www.un.org/press/en/2001/sc/7158doc.htm> [date of use 17 Jun 2015].

<sup>54</sup> Para 1 (d) of UNSC res 1373/2001. Accessed at: <http://www.un.org/press/en/2001/sc/7158doc.htm> [date of use 17 Jun 2015].

<sup>55</sup> UNSC res 1540/2004 accessed at: [www.disarmament2.un.org/committee1540/index.html](http://www.disarmament2.un.org/committee1540/index.html) [date of use 28 Feb 2014].

<sup>56</sup> Reinisch 2001 *AJIL* 851; see also Dugard *International Law* 488.

<sup>57</sup> Szasz 2002 *AJIL* 901.

quasi-judicial approach to the maintenance and restoration of world peace. Consequently, through its recent approach to counter-terrorism, particularly after the September 2001 USA terror attacks, in terms of which it adopts resolutions calling upon all states to refrain from committing specified acts that promote terrorism, the UNSC is seen as performing legislative functions. This view is supported by Bianchi<sup>58</sup> who argues that resolution 1373 is in itself a piece of legislation. Therefore, by adopting obligatory measures of an abstract and general character addressed to all states, the UNSC acts as a lawmaker.<sup>59</sup> Talmon,<sup>60</sup> too, supports this view and argues that in terms of resolution 1373, states are obliged, without delay, to freeze funds and other financial assets of persons who commit or attempt to commit terrorist acts.<sup>61</sup> A further resolution of the UNSC with the force of law is resolution 1267/1999<sup>62</sup> which obliges member states to identify individuals and entities suspected of involvement with the Taliban and Al-Qaeda terrorist organisations for blacklisting. In terms of the resolution, the listed members and entities have no recourse to an independent and impartial body to refute the allegations against them. Only the Al-Qaeda Sanctions Committee of the UNSC is empowered to consider any delisting.<sup>63</sup>

In terms of articles 25 and 48(i) of the *Charter of the United Nations*, the UNSC can adopt decisions that are binding on UN member states even though non-member states are not bound by the resolutions. Article 2(6) requires the UNSC to ensure that non-member states act in accordance with the principles as set out in article 2 necessary for the maintenance of international peace and security.<sup>64</sup>

Furthermore, the UNSC depends on the UN member states to implement its anti-terror resolutions, and this depends on the willingness of states to incorporate the resolutions in their domestic legal systems. By so incorporating the resolutions in

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<sup>58</sup> Bianchi 2006 *JIJ* 1047.

<sup>59</sup> Bianchi 2006 *JIJ* 1049.

<sup>60</sup> Talmon 2005 *AJIL* 176.

<sup>61</sup> Cowling 2005 *SAYIL* 54.

<sup>62</sup> UNSC res 1267/1999 accessed at: <http://www.un.org/sc/committees/1267/information.shtml> [date of use 18 Jun 2015].

<sup>63</sup> De Wet 2013 *Chinese. J. Int'l L* 2.

<sup>64</sup> Art 29 of the *Charter of the United Nations*; see also Cowling 2005 *SAYIL* 54.



their domestic legal systems, states have to subject the resolutions so incorporated to adjudication and enforcement procedures.

It is argued that by adopting anti-terrorism resolutions with obligatory effect on states, the UNSC executes its main function which is to maintain peace and security.

### **3.4 International law instruments against terrorism**

International law instruments adopted by the UN against international terrorism play an important role in preventing and combating the threat of international terrorism in that they indicate the intention by states to agree on matters of prevention of international terrorism. There are, however, relatively few international instruments signed by states with the objective of preventing and combating particular forms of international terrorism. The following discussion examines measures adopted by states as members of the UN specifically to counter international terrorism.

#### *3.4.1 Declaration on Measures to Eliminate International Terrorism 1994*

The preamble to the *Declaration on Measures to Eliminate International Terrorism*<sup>65</sup> stresses the need to strengthen international cooperation between states and between international organisations, agencies, regional organisations, and the UN in order to prevent, combat and eliminate terrorism. In terms of the Declaration, terrorist acts are criminal acts that are unjustifiable wherever and by whomever committed. The Declaration acknowledges the increase in terrorist attacks by means of bombs, explosives or other lethal devices, and asserts the need to supplement existing legal instruments in order specifically to address the rise in terrorist attacks. States parties of the UN condemned all acts, methods and practices of terrorism as criminal and unjustifiable, including those which jeopardise friendly relations amongst states and people, and threaten the territorial integrity and security of states.<sup>66</sup> The Declaration calls upon all states to adopt further measures in accordance with relevant provisions of international law, including international standards of human rights, to prevent terrorism and to strengthen international cooperation in combating terrorism.

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<sup>65</sup> *Declaration on Measures to Eliminate International Terrorism* accessed at: <http://www.org/documents/ga/plenary/a54615.pdf> [date of use 16 March 2013].

<sup>66</sup> Art 1 of the *Declaration on Measures to Eliminate International Terrorism* 1994.



Furthermore, the Declaration provides 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, cannot under any circumstances be justified irrespective of political, philosophical, ideological, racial, ethnic, religious or any other considerations that may be invoked to justify them.<sup>67</sup> In order to combat the growing international character and effects of terrorism, states resolved to strengthen their cooperation in the fight against terrorism. National states agreed to cooperate in the areas of exchange of information concerning the prevention and combating of terrorism, the implementation of relevant international conventions, and the conclusion of mutual agreements governing judicial assistance and extradition.<sup>68</sup>

In accordance with the Declaration, states that have not yet become parties to the international conventions and protocols relating to the different aspects of international terrorism, are encouraged to consider becoming members in order to cooperate with other states in preventing and combating terrorism.<sup>69</sup> Lastly, the Declaration emphasises the need to pursue efforts aimed at the elimination of all acts of terrorism by strengthening international cooperation and progressive development of international law and its codification, including the improvements of coordination between the United Nations and other relevant organisations.<sup>70</sup>

### *3.4.2 Draft Comprehensive Convention on International Terrorism as a Response to the Terrorism Threat 1994*

While states agree on the importance of eradicating international terrorism, there are still difficulties which have prevented states from taking a comprehensive approach. States still disagree on the following aspects, *inter alia*, a legal definition of terrorism, and the relationship between terrorism and the acts of national liberation movements. It is, however, true that the negotiations on the *Draft Comprehensive Convention on International Terrorism*<sup>71</sup> which started in 1994, are still underway. After the 11 September 2001 American terrorist attacks, negotiations on the *Draft*

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<sup>67</sup> Art 3 of the *Declaration on Measures to Eliminate International Terrorism* 1994.

<sup>68</sup> Art 6 of the *Declaration on Measures to Eliminate International Terrorism* 1994.

<sup>69</sup> Art 8 of the *Declaration on Measures to Eliminate International Terrorism* 1994.

<sup>70</sup> Art 12 of the *Declaration on Measures to Eliminate International Terrorism* 1994.

<sup>71</sup> *Draft Comprehensive Convention on international Terrorism* 1994 accessed at: <http://www.ilsa.org/jessup08/basicmats/unterrorism.pdf> [date of use 16 March 2013].

*Comprehensive Convention on International Terrorism* were accelerated with the objective of finding an effective solution to the eradication of terrorism globally. According to the Draft Convention, the act of terrorism is defined as:

A person's unlawfully and intentionally causing or threatening to cause violence by means of firearms, weapons, explosives, any lethal devices or dangerous substances which results or is likely to result, in death or serious bodily injury to a person, a group of persons or serious damage to property, whether for public use, a State or Government facility, a public transportation system or an infrastructure facility or environment when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act...<sup>72</sup>

This definition of acts of terrorism includes a person who attempts to commit such an offence, and anyone contributing to the commission of the offence or participating as an accomplice in its commission.<sup>73</sup>

The Convention obliges states to cooperate in the prevention and punishment of acts of terrorism. In addition, the Convention requires states parties to establish criminal offences within their domestic jurisdictions, which includes the creation of terror, insecurity, or fear. In terms of the Convention no offence can be used to justify motives of a political, ideological, philosophical, racial or religious nature.<sup>74</sup>

Furthermore, in an effort to eradicate international terrorism, the Convention obliges states parties to refrain from organising, instigating, encouraging, facilitating, financing, assisting or even participating in the commission of terrorist activities. States parties must therefore ensure that their territories are not used for the preparation of and the training activities by international terrorist organisations.<sup>75</sup>

Lastly, the Convention requires states in whose jurisdiction a terrorist act has been committed, to investigate the perpetrator's involvement in the commission of the offence and, if required, to detain the perpetrator for the purpose of extradition. If the perpetrator is not extradited, the state is obliged to prosecute such a person.<sup>76</sup>

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<sup>72</sup> Art 2 of the *Draft Comprehensive Convention on International Terrorism* 1994.

<sup>73</sup> Art 2 of the *Draft Comprehensive Convention on International Terrorism* 1994.

<sup>74</sup> Art 6 of the *Draft Comprehensive Convention on International Terrorism* 1994.

<sup>75</sup> Art 9(1)(a) of the *Draft Comprehensive Convention on International Terrorism* 1994.

<sup>76</sup> Art 7 of the *Draft Comprehensive Convention on International Terrorism* 1994.

The following instruments are specialised conventions aimed at preventing and combating international terrorism.

### *3.4.3 International Convention on Offences and Certain other Acts Committed on Board Aircraft 1963*

The above Convention is one of the old conventions directed at combating terrorism. South Africa became a party to the Convention by accession on 26 May 1972. The Convention applies to offences that may jeopardise the safety of an aircraft or person or property on board.<sup>77</sup> Therefore, the aircraft commander may, when he or she reasonably believes that a person has committed an offence on board, restrain that person or take any other reasonable measures in order to safeguard the aircraft, passengers, crew members, or property. The commander of the aircraft may authorise the crew members to assist in restraining a person alleged to have committed an offence on board, but is not entitled to authorise passengers to assist in the restraint.<sup>78</sup> The restraint measures applied may not be continued beyond any point at which the aircraft lands, unless the authority of the territory in which the aircraft has landed refuses the person disembarkation.<sup>79</sup> The Convention does not apply to aircraft used in military, customs or police duty.

A person who has disembarked in terms of article 8, or has disembarked after committing an offence on an aircraft, and who wishes to continue with his or her journey, shall be free to proceed to any destination of his or her choice unless his or her presence is required by the law of the state of landing for the purpose of extradition or criminal proceedings. The person so disembarked shall be accorded treatment no less favourable for his or her protection and security, than that accorded by his or her national state.<sup>80</sup> Furthermore, for purposes of extradition, the offences committed on an aircraft registered in a contracting state shall be treated as

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<sup>77</sup> Art 1 of the *International Convention on Offences and Certain other Acts Committed on Board Aircraft* 1963.

<sup>78</sup> Art 6 of the *International Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963.

<sup>79</sup> Art 7 of the *International Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963.

<sup>80</sup> Art 15 of the *International Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963.

if they had been committed not only at the place where they took place, but also in the territory of the state of registration of the aircraft.<sup>81</sup>

While taking measures to investigate or arrest or exercise jurisdiction with regard to any offence committed on board an aircraft, states must pay due regard to the safety and other interests of air navigation, and must act in such a manner which avoids unnecessary delay of the aircraft, passengers, crew or cargo.<sup>82</sup> The Convention obliges states parties to establish jurisdiction as state of registration over offences committed on board aircraft registered in that state in order to prosecute offences committed on board aircrafts.<sup>83</sup> States parties to the Convention are also obliged to take appropriate measures to restore the control of the aircraft to its lawful commander when a person on board has unlawfully by force or threat, seized, interfered with, or exercised control over an aircraft in flight.<sup>84</sup>

In order to give effect to this Convention, the South African parliament passed the *Civil Aviation Offences Act*<sup>85</sup> which criminalises the interference with aircraft in flight or endangering the crew or passengers, including aviation equipment. In support of this Act, the court in *S v Hoare and Others*<sup>86</sup> stated the following:

The *Civil Aviation Offences Act* 10 of 1972 does not make hijacking a specific offence nor does it seek to distinguish between different types of unlawful interference in the operations of civil aviation, for example, between cases where the motive is self-preservation and cases involving political or financial black mail or violent intimidation. The Act treats virtually every unlawful interference with the smooth operation of civil aviation with utmost seriousness and takes little or no account of the motive for such interference, as can be readily appreciated when it is observed that the act imposes a minimum sentence of five years

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<sup>81</sup> Art 16 of the *International Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963.

<sup>82</sup> Art 17 of the *International Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963.

<sup>83</sup> Art 3 of the *International Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963.

<sup>84</sup> Art 11 of the *International Convention on Offences and Certain Other Acts committed on Board Aircraft* 1963.

<sup>85</sup> *Civil Aviation Offences Act* 10 of 1972.

<sup>86</sup> *S v Hoare and Others* 1982 4 SA 865 (NPD)871F-H; see also *S v Jeffers* 1975 4 SA 657 (W) where the court held that section 2(b) of the *Civil Aviation Act* 10 of 1972 provides that any person who destroys an aircraft in service or wilfully causes damage to such an aircraft which renders it incapable of flight, or which is likely to endanger its safety in flight, contravenes the *Civil Aviation Act*; see further *S v Jeffers* 1976 2 SA 636 (A) where the appeal by the appellant was dismissed and the conviction on contravening the provisions of section 2(a)(iii) of the *Civil Aviation Act* 10 of 1972 was confirmed in that the appellant interfered with the members of the crew of the aircraft thus endangering the safety of the aircraft in flight.

imprisonment for any contravention of section 2 (1) of the Act regardless of the motives of the perpetrator.

#### *3.4.4 International Convention for the Suppression of Unlawful Seizure of Aircraft 1970*

The *International Convention for the Suppression of Unlawful Seizure of Aircraft*<sup>87</sup> was adopted to suppress or combat unlawful acts of seizure or exercise of control over an aircraft in flight, in a way that jeopardises the safety of persons or damages property that results in the undermining of the safety of civil aviation. South Africa ratified the Convention on 30 May 1972. The Convention criminalises the boarding of an aircraft unlawfully by force or threat or by a form of intimidation. Seizing or exercising control over the aircraft, or an attempt to perform any act, are also offences.<sup>88</sup>

The Convention further provides that states parties should take measures necessary to establish jurisdiction over the offence and any act of violence caused against the passengers or crew members committed by the offenders in the following cases: when an offence is committed on board an aircraft registered in that state; or when the aircraft on board of which the offence is committed, lands in that territory with the offender on board; when the offence is committed on board an aircraft leased without crew to a lessee who has his or her principal place of business or if the lessee has no such place of business, his or her permanent residence.<sup>89</sup> In accordance with the Convention, states parties are obliged to establish jurisdiction over the offence where the offender is present in its territory, and in instances where the offender is not extradited. However, in *United States v Yunis*,<sup>90</sup> the USA District Court exercised jurisdiction over a Lebanese national who had hijacked a Jordanian aircraft with USA nationals on board. The offence could be deemed to be included as an extraditable offence in any extradition agreement that exists between states parties. Of utmost importance is that state parties to the Convention are to assist each other in criminal proceedings brought in respect of the offences mentioned in article 4 of the Convention.

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<sup>87</sup> *International Convention for the Suppression of Unlawful Seizure of Aircraft* 1970.

<sup>88</sup> Art 1 of the *International Convention for the Suppression of Unlawful Seizure of Aircraft* 1970.

<sup>89</sup> Art 4 of the *International Convention for the Suppression of Unlawful Seizure of Aircraft* 1970.

<sup>90</sup> *United States v Yunis* no 2 681 F Supp 896 1988.

A Protocol Supplementary to the *Convention for the Suppression of Unlawful Seizure of Aircraft* was adopted in 2010 to improve the application of the 1970 Convention. The purpose of this Protocol was to supplement the *Convention for the Suppression of Unlawful Seizure of Aircraft* by broadening the scope of its application to cover different forms of aircraft hijacking which include the use of modern technology. Certain provisions of the *Beijing Convention*<sup>91</sup> in relation to a threat or conspiracy are incorporated in this Protocol. The Protocol requires states parties to criminalise new emerging threats to the safety of civil aviation, including the use of an aircraft as a weapon to commit terrorist acts, or the use of dangerous material to attack an aircraft or other targets on the ground.<sup>92</sup> The Protocol further obliges state parties to criminalise the transportation of biological, chemical, and nuclear weapons and related material.<sup>93</sup> This Convention has also been incorporated into South African law through the *Civil Aviation Act* 10 of 1972 which criminalises interference with an aircraft in flight or endangering the flight crew, passengers and other aviation facilities.

#### *3.4.5 International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971*

Due to the growing threat of violence against civil aviation, and the 1967 hijacking of TWA Flight 840, the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*<sup>94</sup> was adopted in 1971. The International Civil Aviation Organisation (hereafter ICAO) also adopted a resolution on additional technical measures to be taken for the protection of the security of international civil air transport in 1971. In addition, the ICAO has issued a security manual with the aim of assisting states in taking measures to prevent acts of unlawful interference with civil aviation.

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<sup>91</sup> *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* was adopted on 10 September of 2010.

<sup>92</sup> See [www.asi.mag.com](http://www.asi.mag.com) [date of use 5 March 2014].

<sup>93</sup> "The Beijing Convention of 2010 on the *Suppression of Unlawful Acts Relating to International Civil Aviation: An Interpretive Study*" accessed at: <http://link.springer.com/article/10.1007/s12198-011-0062-7> [date of use 16 March 2013].

<sup>94</sup> *International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971 accessed at: <https://treatise.un.org/doc/db/Terrorism/co3-english.pdf> [date of use 4 March 2014]; see also Abeyratne R accessed at: <https://treatise.un.org/doc/db/Terrorism/co3-english.pdf> [date of use 16 March 2013].

The *Convention for the Suppression of Unlawful Seizure of Aircraft* 1970 was developed in response to the increased hijacking of aircraft. The Convention was therefore limited to the offences of unlawful seizure of aircraft which were inadequate to deal effectively with the acts of unlawful seizure of aircraft.<sup>95</sup> The *Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation* in bolstering steps against seizure of aircraft, requires states parties to criminalise the unlawful and intentional performance of an act of violence by any person against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; or to place an explosive device on an aircraft or attempt such act; or to be an accomplice of a person who performs or attempts to perform such acts.<sup>96</sup> In terms of the Convention, an aircraft is considered to be in flight at any time from the moment when all its doors are closed following embarkation, until the doors are opened for disembarkation. In the case of a forced landing, the flight is deemed to continue until the competent authorities assume responsibility for the aircraft and for the persons and property on board.<sup>97</sup>

States parties to the Convention are obliged to establish jurisdiction for the prosecution and punishment of the offences in instances where the offences occur within the territory of a particular state, or a state of registration of the aircraft, or where the aircraft lands while the offender is still on board. Jurisdiction can also be established in the territory from where the aircraft is leased.<sup>98</sup> In order to enhance the objectives of the Convention a new instrument, the *International Convention on the Suppression of Unlawful Acts Relating to Civil Aviation* was adopted in 2010. The aim of this new Convention is to prohibit the act of using civil aircraft to discharge biological, chemical, and nuclear weapons or similar substances to cause death, injury or damage, or an act of using such substances to attack civil aircraft. The Convention further criminalises, *inter alia*, the act of using civil aircraft as a weapon to cause death, injury or damage, cyber-attack on air navigation facilities, conspiracy

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<sup>95</sup> Saul *Research Handbook* 61.

<sup>96</sup> Art 3 of the *International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971.

<sup>97</sup> Art 2 of the *International Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation* 1971.

<sup>98</sup> Art 4 of the *International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971.

to commit an offence, or a threat to commit an offence. In *S v Bergman*<sup>99</sup> the accused was convicted of contravening the provisions of section 2(2) (b) of the *Civil Aviation Act* 10 of 1972 in that he communicated information that his luggage contained a bomb which he knew to be false or incorrect. The communication of false information was held to have interfered with the operation of the aircraft.

The *International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* is supplemented by the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*.<sup>100</sup> The Protocol provides for additional offences against a person at an airport, and further prohibits the destruction or damage of airport facilities or aircraft not in flight.<sup>101</sup>

#### *3.4.6 International Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction 1972*

The above is one of the conventions that was not specifically adopted to combat terrorism. The Convention, nevertheless, plays an important role in the fight against the threat of international terrorism. The prohibition and destruction of weapons of mass destruction denies terrorist organisations access to the arms that enable them to perpetrate criminal acts. The preamble to the Convention provides that:

In order to achieve effective progress toward general and complete disarmament, including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimination through effective measures, state parties will facilitate the achievement of general and complete disarmament under strict and effective control.

It is important and urgent to eliminate from the arsenals of states, weapons of mass destruction because individuals employed by governments, and who are in possession of such weapons, can use them for terrorist purposes.

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<sup>99</sup> *S v Bergman* 1984 1 SA 182 (C) at 183 paras F - G.

<sup>100</sup> *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation* 1988.

<sup>101</sup> Art 2 of the *Protocol to the Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation* 1988.



The Convention imposes an obligation on states parties to undertake never in any circumstance to develop, produce, stockpile or otherwise acquire or retain, microbial or other biological agents or toxins whatever origin or method of production of types and in quantities that have no justification for protective or peaceful purposes.<sup>102</sup> Furthermore, the Convention prohibits weapons and equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.<sup>103</sup> States parties further resolve to destroy or to divert for peaceful purposes all agents, toxins, weapons, equipment in their possession or control.<sup>104</sup> The Convention further obliges states parties to undertake not to transfer to any recipient directly or indirectly, and not to assist, encourage or induce any state or international organisation to manufacture or acquire agents, toxins, weapons or equipment mentioned in article 1 of the Convention.<sup>105</sup> South Africa signed the Convention on 24 August 1972 but did not ratify it.

#### *3.4.7 International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973*

The above Convention<sup>106</sup> was adopted by the UNGA on 14 December 1973 as one of the sectoral anti-terrorism conventions. This Convention came into existence as a response to the kidnapping and killing of diplomatic agents. The main purpose of the Convention was to afford all persons entitled in terms of international law to special protection from any attack on his or her person, freedom and dignity.<sup>107</sup> The Convention requires that persons alleged to have committed attacks against

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<sup>102</sup> Art 1 of the *International Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and their Destruction* 1972.

<sup>103</sup> Art 1 of the *International Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and their Destruction* 1972.

<sup>104</sup> Art 2 of the *International Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and their Destruction* 1972.

<sup>105</sup> Art 3 of the *International Convention on the Prohibition of the Development, Production and Stockpiling of Weapons of Bacteriological and Toxin and their Destruction* 1972.

<sup>106</sup> *International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* 1973; see also Blischenko and Zhdanov *Terrorism* 116.

<sup>107</sup> *International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* 1973.

diplomats and other internationally protected persons must be extradited or prosecuted.<sup>108</sup> In terms of the Convention internationally protected persons include:

(a) A Head of State, including any member of a collegial body performing the functions of the Head of State; a head of government or a Minister of Foreign Affairs, whenever any such person is in a foreign state including members of his or her family who accompany him or her; (b) any representative or official of a state or any official or other agent of an international organisation of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity as well as members of his family forming part of his household.<sup>109</sup>

In *United States v Iran*<sup>110</sup> members of the American diplomatic and consular staff were detained and taken hostage in Tehran. The premises of the embassy were also occupied by Islamic militants. The ICJ held that the Islamic Republic of Iran, by not taking measures to protect American diplomats, violated the obligations owed by it to the USA in terms of the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* 1973.

The Convention further obliges states parties to establish jurisdiction over crimes set out in article 2,<sup>111</sup> and to ensure that the alleged offenders in their territories are made available for prosecution or extradition. While the Convention makes provision for extradition, it does not do away with the political offence exception.<sup>112</sup> The political offence exception allows states to refuse to extradite if the offence

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<sup>108</sup> Art 7 of the *International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* 1973.

<sup>109</sup> Art 1 of the *International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* 1973.

<sup>110</sup> *United States v Iran* 1980 ICJ Rep 3.

<sup>111</sup> Art 2 provides for the following offences: "The intentional commission of (a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person;(b) A violent attack upon the official, the private accommodation or the means of transport of an Internationally protected person likely to endanger his person or liberty;(c) A threat to commit any such attack; (d) An attempt to commit any such attack; and (e) An act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law. Provisions of art 2(2) further obligates each State party to make these crimes punishable by appropriate penalties which take into account their grave nature; and article 2 (3) provides that paragraphs 1 and 2 of the article in no way permit States Parties to derogate from the obligations under international law to make all appropriate measures to prevent other attacks on the person, freedom or dignity of an internationally protected person."

<sup>112</sup> Article 8 of the *International Convention on the Protection and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* 1973.

committed is politically motivated.<sup>113</sup> Although a generally accepted definition of a political offence exception was laid down in *In re Castioni*,<sup>114</sup> the USA court held that to allow the political offence exception there are three requirements that must be complied with: first, there must be a political revolt; secondly the act on which the extradition request is based must be incidental to the political unrest; and thirdly, there must be political or ideological motivation for the commission of the offence.

The UNGA has also instituted a reporting procedure under which states parties must report on the measures they have implemented to enhance the protection, security and safety of diplomats and consular missions and representatives, including missions and representatives of international organisations and other representatives of such organisations.<sup>115</sup> The Convention was adopted by the UNGA on 14 December 1973 but the Republic of South Africa became a party thereto on 23 September 2003. The Convention has been incorporated in South African law by means of the *Diplomatic Immunities and Privileges Act*.<sup>116</sup>

#### *3.4.8 International Convention against the Taking of Hostages 1979*

Hostage taking has been used by terrorist organisations as a weapon to compel states to change the *status quo*. Hostages are usually innocent civilians who do not have connections with terrorist organisations. Control of hostages allows terrorist organisations to extort concessions from governments. For example, in June 1976, an Air France aircraft carrying 257 passengers and twelve crew members from Tel Aviv to Paris, was hijacked by members of the Popular Front for the Liberation of Palestine (hereafter PLFP) terrorist organisation. Nationals of the USA and the UK were amongst the passengers who boarded the plane and were held hostage in

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<sup>113</sup> Falvey 1986 *B.C Int'l L & Comp L. Rev* 354; see also Paust 1975 *GA .J. Int'l L & Comp L* 431.

<sup>114</sup> *In re Castioni* 1891 1 QB 149; see also *In re Mackin* 668 F.2d 122 (2d Cir. 1981) where the court overruled the USA magistrate's decision that the political offence exception applied where England sought extradition of a member of the Provisional Irish Republican Army for bomb attacks on the British army; see also *Eain v Wilkes* 641 F.2d 504 (7<sup>th</sup> Cir 1981) where the court denied the use of the political offence exception in a case involving indiscriminate bombing of civilians because the applicant failed to show the link between the means employed and the target chosen.

<sup>115</sup> UNGA res 35/168 (1980) accessed at: <http://www.un.org/documents/ga/res/35/a35r168e.pdf> [date of use 18 Jun 2015].

<sup>116</sup> *Diplomatic Immunities and Privileges Act* 74 of 1989.

exchange for the release of 53 terrorists detained in Kenya, Switzerland and Israel.<sup>117</sup> The other hostage incident is the tragedy aboard West Germany's Lufthansa airliner in 1977. The hostages from the airliner were released in Mogadishu.<sup>118</sup>

The practice of hostage taking made it necessary for states to implement effective measures to eliminate this threat. One of such measures was the adoption of the *International Convention against the Taking of Hostages* by the UNGA on 17 December 1979. The Republic of South Africa became a party to the Convention by accession on 23 September 2003.

Article 1(1) of the Convention defines hostage taking, firstly, as the seizure or detention by a person of another person (hostage), and secondly, a threat to kill, injure or continue to detain a person unless a third party does or abstains from doing any act. The third party may be a state, an international organisation, a natural person or juristic person or a group of persons. The most important aspect of hostage taking is the compulsion of a third party to act or abstain from acting as a condition of the release of a hostage. The demands of the hostage takers are political in nature. In terms of the Convention, for the offence of hostage taking to be committed, the hostage taker and the hostage must be nationals of different states.<sup>119</sup>

The Convention obliges states parties to take all practicable measures to prevent preparations for hostage taking, more particularly, measures to prohibit the acts of those who encourage, instigate or organise hostage taking.<sup>120</sup> In addition, each state party must establish jurisdiction over Convention offences committed in its territory or on board a ship or aircraft registered in that state, by any of its nationals or by stateless persons residing in its territory, in order to compel the party to do or abstain from doing any act.<sup>121</sup>

#### *3.4.9 International Convention on the Physical Protection of Nuclear Material 1980*

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<sup>117</sup> Thackrah *Dictionary* 88-89.

<sup>118</sup> Blishchenko and Zhdanov *Terrorism* 156.

<sup>119</sup> Art 13 of the *International Convention against Taking of Hostages* 1979.

<sup>120</sup> Art 4 of the *International Convention against Taking of Hostages* 1979.

<sup>121</sup> Art 5(a)-(b) of the *International Convention against Taking of Hostages* 1979.

The above Convention<sup>122</sup> was adopted as a result of states' need to facilitate international cooperation in the peaceful application of nuclear energy and to avert potential dangers posed by the unlawful use of nuclear material by terrorist organisations. The objective of this Convention is to establish levels of physical protection of nuclear material used for peaceful purposes while in international nuclear transport, and provide for measures against unlawful acts with respect to nuclear material while in international transport including domestic use, transport and storage.<sup>123</sup> Offences relating to nuclear material are a matter of grave concern to states and as such, there is a need to adopt appropriate and effective measures to ensure prevention, detention and punishment for such offences.

States parties to the Convention are obliged to make punishable under their respective national laws, the intentional commission of offences prescribed under article 7 of the Convention with respect to nuclear material. The offences include the intentional commission of acts without lawful authority dealing with nuclear material causing or likely to cause a serious injury or death to persons; damage to property; theft or robbery of nuclear material; fraudulent obtaining of nuclear material, demands of nuclear material by means or use of intimidation, threats to use nuclear material to cause death or serious injury or damage to any person or property; and or threat to steal nuclear material to force a person, international organisation or a state to refrain from doing any act.

In terms of article 9 of the Convention, a state party in whose territory the alleged perpetrator or offender is present, shall take appropriate measures including detention, in accordance with its national laws to ensure the presence of the perpetrator for the purpose of prosecution or extradition. Article 11 places an obligation on states parties to extradite perpetrators of nuclear material offences. The Convention has been transformed into South African law by means of the *Nuclear Energy Act*.<sup>124</sup> The Act prohibits the export of any source material, special nuclear or restricted material, or any nuclear-related equipment and material without

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<sup>122</sup> *International Convention on the Physical Protection of Nuclear Material* 1980 accessed at: <http://www.iaea.org/publications/Documents/infrcirs/Others/inf274r1.shtml> [date of use 26 Feb 2013].

<sup>123</sup> Art 3(2) of the *International Convention on the Physical Protection of Nuclear Material* 1980.

<sup>124</sup> *Nuclear Energy Act* 46 of 1999.

the written authorisation by the Minister of the Department of Minerals and Energy.<sup>125</sup>

#### *3.4.10 International Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation 1988*

This *Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation*<sup>126</sup> was adopted to address increased incidents of piracy and armed robbery against ships.<sup>127</sup> This need was accelerated by the Achille Lauro incident where an American national was killed by terrorists on board ship in 1985.<sup>128</sup> Currently, piracy is no longer only a form of violence on the sea but also affects states and the international community at large.<sup>129</sup> The Convention was therefore adopted with the aim of combating unlawful acts that threaten passengers and crew on board ships.

In terms of the Convention, a ship is defined as any type of vessel whatsoever that is not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or other floating craft. Warships, ships owned or operated by a state when being used as a naval auxiliary or for customs or police purposes, or ships that have been withdrawn from navigation are not included in the definition provided by the Convention.

In an effort to combat violence against maritime navigations, the Convention prescribes the following offences:<sup>130</sup> the unlawful and intentional commission, attempt to commit threat to commit, or abet seizure or exercise control over a ship by force or threats, or any form of intimidation; or acts that are likely to endanger the safe navigation of the ship; an act of violence against a person on board; destroying a ship or damaging a ship or its cargo; placing or causing to be placed on ship a device or substance likely to destroy the ship; destroying or seriously

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<sup>125</sup> S 35(1) of the *Nuclear Energy Act* 46 of 1999.

<sup>126</sup> *International Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation* 1988.

<sup>127</sup> See Batenkas and Nash *International law* 47.

<sup>128</sup> Tuerk 2008 *U Miami Int'l .L & Comp .L .Rev* 337; see also Bohn *Achille Lauro Hijacking* 2.

<sup>129</sup> Treves 1998 *SGJIntCompLaw* 541.

<sup>130</sup> Art 3 of the *International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* 1988.

damaging maritime navigational facilities or seriously interfering with their operation; or communicating false information.

The Convention recognises that the offence can only be committed if the ship is in navigation or scheduled to navigate through or from waters beyond the outer limit of the territorial sea of a single state, or the lateral limits of its territorial sea with adjacent states. The Convention further applies where the offender or alleged offender is within the territory of a state party other than a state in whose waters the offence has been committed. In *Lotus (France v Turkey)*<sup>131</sup> a French ship collided with a Turkish ship (the *Boz Kourt*) on the high seas which resulted in the sinking of the *Boz Kourt*. Crew members and passengers lost their lives. The Commanding officer on the French ship was arrested, tried and convicted of culpable homicide. France objected to the jurisdiction exercised by Turkey arguing that only the flag state of the ship had jurisdiction over acts committed on board the ship. However, Turkey claimed that it had jurisdiction in that the effects of the collision were felt on the Turkish Ship, *Boz Kourt*, which was treated as Turkish territory.

In an attempt to prevent acts of terrorism, in November 2001, the International Maritime Organisation (hereafter IMO) called for the review of measures and procedures to prevent acts of terrorism that threaten the security of passengers and crew and the safety of ships under the Convention. During 2002, the IMO introduced additional offences concerned with terrorist activities taking place on a ship or which are directed toward a ship. These offences include the use of ships for transportation of substances to be used for mass destruction. The IMO Legal Committee also took further measures to consider other conventions and protocols related to terrorism in order to strengthen the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*. In 2005, a *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* was adopted.

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<sup>131</sup> *Lotus (France v Turkey)* 1927 PCLJ Rep Ser A no 10; see also *Mali v Keeper of the Common Jail of Hudson County (Wildenhaus case)* 120 US 1 1887 where the USA Supreme Court held that an American court had jurisdiction over a murder offence committed by a member of the crew on board a Belgian ship in an American port; see further *United States v Aluminum Co of Am* 148 F.2d 416 1945 at 443- 444 where the American Circuit Court held that any state may impose liabilities, even upon persons not owing it allegiance, for conduct outside its borders that has consequences within its borders which states reprehend; see McCarthy 1989 *Fordham Int'l L J* 302 where he mentions that states may practice passive personality jurisdiction.

The Protocol was an amendment to the 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* which came about as a result of the September 2001 terrorist attack on the USA. The objective of the Protocol was to increase the scope of the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* by providing an international treaty framework to combat and prosecute persons who use a ship as a weapon to commit terrorist attacks or to transport terrorists or cargo which is intended to be used as weapons of mass destruction.<sup>132</sup> The Protocol to the Convention is thus a tool to fight the proliferation of weapons of mass destruction in maritime transportation and further fight terrorism at sea.<sup>133</sup> Therefore, transportation of substances or materials on a ship knowing that they are to be used to cause or threat to cause death or serious injury or damage, or to further an act of terrorism, is criminalised. Furthermore, the transportation of persons who have committed an act of terrorism on a ship is prohibited.

In addition to the Protocol addressing maritime navigation, the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* was adopted in 2005. The adoption of this Protocol was based on the possibility of the seizure of oil or gas platforms by terrorists. The changing nature of terrorist threats that remains on the increase, makes it necessary for international law to adopt measures that are effective in combating terrorism at sea. Therefore, the objective of the Protocol was to provide similar protection to fixed platforms located on the continental shelf. A fixed platform is defined as:

An artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes.<sup>134</sup>

Article 2 of the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* 2005 provides that:

Any person commits an offence if that person unlawfully and intentionally seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; destroys a fixed platform

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<sup>132</sup> Tuerk 2008 *U Miami Int'l .L & Comp .L .Rev* 338.

<sup>133</sup> Tuerk 2008 *U Miami int'l .L & Comp .L. Rev* 367.

<sup>134</sup> Tuerk 2008 *U Miami Int'l .L & Comp .L. Rev* 353.



or causes damage to which is likely to endanger its safety; and Places or causes to be placed on a fixed platform, by means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety.<sup>135</sup>

A person also commits an offence if he or she threatens, with or without a condition, as provided for under a national law, with the aim of compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set out in article 2(1)(b) and (c), if that threat is likely to endanger the safety of a fixed platform.

Article 2(b) of the Protocol broadens a range of offences which have already been included. In terms of this article, a person commits an offence if he or she unlawfully and intentionally uses against or on a fixed platform any explosive, radioactive material or weapon in a manner that causes or is likely to cause death or serious injury or damage. Other offences include discharges from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, in such a manner that the quantity or concentration thereof causes or is likely to cause death or serious injury or damage or threatens to commit any of the offences provided by article of the Protocol. The purpose of the act should by its nature or context, be to intimidate the population or to compel the government to do or to abstain from doing a particular act.

Article 2 of the *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* 2005 outlines offences such as the unlawful and intentional injuring or killing of any person in connection with the commission of any of the offences, attempting to commit an offence, participating as an accomplice in the commission of the offence, and organisation or instructing others to commit an offence.

South Africa has not yet ratified the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* 1998, but has expressed its wish to become a member thereto. The Convention has also been co-opted into South African legislation by means of the *Merchant Shipping Act*.<sup>136</sup> In an attempt to

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<sup>135</sup> Art 2(1)(a)-(d) of the *Protocol for the Suppression of Unlawful Acts against the Safety of the Fixed Platforms Located on the Continental Shelf* 2005.

<sup>136</sup> *Merchant Shipping Act* 57 of 1951.

criminalise unlawful acts against maritime navigation the Act provides that no person shall, without reasonable excuse, do anything to obstruct or damage any of the equipment of any ship wherever registered, 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.<sup>137</sup> Section 327 of the *Merchant Shipping Act* provides for jurisdiction of South African courts dealing with offences committed on ships. The POCDATARA<sup>138</sup> also enhances the application of the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* 1988 by prohibiting offences relating to endangering the safety of maritime navigation.

#### *3.4.11 International Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991*

The above Convention was negotiated after the 1988 Pan Am flight 103 bombing.<sup>139</sup> The Convention was designed to control and limit the use of undetectable plastic explosives. For example, on 11 August 2006 terrorist suspects were arrested in the UK for plotting a terrorist attack. The terrorist plot was sophisticated in that the explosives to be used in the attack were difficult to detect. Consequently, the UK banned the carrying of hand luggage<sup>140</sup> on its airlines. In South Africa the national carrier, South African Airways, introduced measures to check luggage, including electronic devices, cosmetic liquids and gels to prevent any terror plots.<sup>141</sup> States parties are under an obligation to ensure effective control of unmarked plastic explosives such as those which do not contain the detection of agents specified in the Convention. In addition, the Convention requires states parties to take the measures necessary to prohibit and prevent the manufacture of unmarked plastic explosives and to: exercise effective control over the possession and transfer of unmarked explosives; prevent the movement of unmarked plastic explosives outside the territory; ensure that all stocks of unmarked explosives not under the control of the military or police are destroyed, marked or consumed; and ensure that all

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<sup>137</sup> S 320 of the *Merchant Shipping Act* 57 of 1951.

<sup>138</sup> S 10 of the POCDATARA 33 of 2004.

<sup>139</sup> Thackrah *Dictionary* 161.

<sup>140</sup> See Hubschle accessed at: <http://www.iss.org.za/static/templates/tmpl-html.php?node-Id=1449&slink-Id=3088&sl> [date of use 13 Jul 2013].

<sup>141</sup> See Hubschle accessed at: <http://wwiss.org.za/static/template/tmpl-html.php?node-Id=1449&slink-Id=3088&sl> [date of use 13 Jul 2013].

unmarked plastic explosives under the control of the military or police force are consumed, marked or destroyed, or are rendered permanently ineffective after a period of fifteen years. Where appropriate, thorough research and development should be conducted regarding methods of detection of explosives and other harmful substances that can cause death or bodily injury, consultations on the development of standards for manufacturing explosives in order to identify their origin in post blast investigations, exchange information on preventive measures, cooperation and transfer of technology, equipment and related materials. South Africa became a party to this Convention by accession on 1 December 1999 and gave it domestic effect through the *Explosives Amendment Act*.<sup>142</sup>

#### *3.4.12 International Convention for the Suppression of Terrorist Bombings 1997*

The *United Nations Convention on the Suppression of Terrorist Bombings* was adopted by the UNGA in 1998. The Convention was adopted after several bomb attacks, most notably the 1993 World Trade Centre bombings in New York<sup>143</sup> in which six people were killed and a thousand injured. The Convention criminalises the unlawful and intentional delivery, placing, discharging, or detonating of an explosive or other lethal device, into or against a place of public use, a state facility, a public transportation system or infrastructure facility, with the intent to cause death or bodily injury or extensive destruction, resulting or likely to result in a major economic loss.<sup>144</sup> Under this Convention, it is also an offence to attempt,<sup>145</sup> participate in,<sup>146</sup> organise or direct,<sup>147</sup> or act in common purpose to commit an offence<sup>148</sup> or any of the offences mentioned in article 2(1) of the Convention.

In terms of article 4 of the Convention, states parties must adopt measures necessary to establish criminal offences under their domestic laws as set out in the Convention, and to make those offences punishable by appropriate penalties which reflect the grave nature of such offences. The criminal acts involved should be

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<sup>142</sup> *Explosives Amendment Act* 42 of 1997.

<sup>143</sup> Thackrah *Dictionary* 130.

<sup>144</sup> Art 2(1) of the *International Convention for the Suppression of Terrorist Bombings* 1997.

<sup>145</sup> Art 2(2) of the *International Convention for the Suppression of Terrorist Bombings* 1997.

<sup>146</sup> Art 2(3)(a) of the *International Convention for the Suppression of Terrorist Bombings* 1997.

<sup>147</sup> Art 2(3)(b) of the *International Convention for the Suppression of Terrorist Bombings* 1997.

<sup>148</sup> Art 2(3)(c) of the *International Convention for the Suppression of Terrorist Bombings* 1997.

calculated to provoke a state of terror in the general public, a group of persons, or specific persons.<sup>149</sup> States are therefore required to assert jurisdiction over the Convention offences committed within their respective territories.<sup>150</sup> As a measure to prevent and combat international terrorism within its borders, the Republic of South Africa ratified this Convention in May 2003.

### *3.4.13 International Convention for the Suppression of the Financing of Terrorism 1999*

In 1996 the UN recognised the need to counter the financing of terrorism. In December 1998 the UNGA tasked the Ad Hoc Committee on Terrorism to draft a convention to counter the financing of terrorism. The *International Convention for the Suppression of the Financing of Terrorism* was ultimately adopted in 1999 with the aim of combating the financing of terrorist activities. A person commits an offence within the meaning of the Convention if by any means, he or she, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used, or in the knowledge that they are to be used, in full or in part, to carry out an act which constitutes an offence within the scope of and as defined in one of the treaties against international terrorism.<sup>151</sup> For example in *Almog v Arab Bank*,<sup>152</sup> the USA District Court ruled that financing suicide bombers in Israel contravenes international law. A person commits an offence in terms of the Convention if he performs any act intended to cause death or serious bodily injury to a civilian or to any person not taking an active part in the hostilities in a situation of an armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or international organisation to do or abstain from doing any act.<sup>153</sup> It is arguable that the provisions of article 2 of the Convention provide a definition of international terrorism. Furthermore, under the Convention, a person commits a terrorist offence if he or she participates as an accomplice in an offence constituting financing of unlawful terrorist acts, or organises

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<sup>149</sup> Art 5 of the *International Convention for the Suppression of Terrorist Bombings* 1997.

<sup>150</sup> Art 6 (1)(a) of the *International Convention for the Suppression Terrorist Bombings* 1997.

<sup>151</sup> Art 2(1)(a) of the *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>152</sup> *Almog v Arab Bank* 471 F. Supp 2d 257 ENDY 2007.

<sup>153</sup> Art 2(1)(b) of the *International Convention for the Suppression of the Financing of Terrorism* 1999.

or directs others to commit acts in contravention of the International *Convention for the Suppression of the Financing of Terrorism*.

Each state party must, in accordance with the Convention, undertake the measures necessary to establish as criminal offences under its domestic law the offences as set out in article 2, and make those offences punishable by means of appropriate penalties which take into account the nature of the offence. Therefore, a state party in whose territory the alleged offender is present must take appropriate steps to ensure the person's presence for the purpose of prosecution or extradition. A person who is detained or is serving a sentence in the territory of one state party and whose presence in another state party is requested for the purposes of testimony, identification, or providing assistance in obtaining evidence for the investigation or prosecution of offences under the Convention, may be transferred if the following requirements are met: first, if the person gives his or her own informed consent; and secondly, the competent authorities of both states agree, subject to the conditions as both may deem appropriate.<sup>154</sup> Such a person held in custody shall, in terms of the Convention, be guaranteed fair treatment, including the enjoyment of all rights and guarantees in conformity with the law of the state in the territory of which that person is detained, and the applicable international law including international human rights law.

In complying with the terms of the Convention, each state party must in accordance with its domestic law, take the measures necessary to enable a legal entity located in its territory or organised under its laws to be held liable when a person responsible for the management or control of that legal entity has in that capacity committed an act set out in article 2.<sup>155</sup> This means that a responsible person or a legal person like a company or officers in charge of a bank, can be held liable for the act of granting finance to terrorist organisations. Therefore, each state party must ensure that legal entities liable in terms of the Convention are subject to criminal, civil or administrative sanction which may include monetary sanctions.

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<sup>154</sup> Art 13(a) & (b) of the *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>155</sup> Art 5(1) of the *International Convention for the Suppression of the Financing of Terrorism* 1999.

States parties are further obliged to take appropriate measures in terms of their domestic laws, to identify and freeze or seize any funds used or allocated for the purpose of committing the offences outlined in article 2 above.<sup>156</sup> The freezing and seizure includes proceeds derived as a result of offences set out in article 2 for possible forfeiture. Since the 11 September 2001 USA terrorist attacks by Al-Qaeda, the UK has frozen the assets of over 100 terrorist organisations and twenty individuals. The terrorist organisations most frequently targeted are Al-Qaeda and the Taliban.<sup>157</sup>

In order to ensure effective cooperation in combating acts of terrorism in their territories, states parties are required to assist one another with criminal investigations or extradition proceedings in respect of the offences set out in article 2, and this would include assistance in obtaining evidence in their possession necessary for criminal proceedings. States parties are therefore obliged not to refuse a request for mutual legal assistance on the ground of, for example, banking confidentiality.

For purposes of extradition or mutual legal assistance, article 11 of the Convention excludes the offences as set out in article 2 from classification as political offences, as offences connected with a political offence, or as offences inspired by a political motive.<sup>158</sup> This means that a request for extradition or mutual legal assistance may not be refused on the basis of its having political elements. However, the provisions of the Convention must not be interpreted as imposing an obligation to extradite or to afford mutual legal assistance. If a requested state party has grounds to believe that the request for extradition for offences set out in article 2 has been made for the purpose of prosecuting or punishing a person on account of his or her race, ethnic origin, nationality, religion or political opinion, or that compliance with the request would cause prejudice to that person's position, the request may be refused.<sup>159</sup>

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<sup>156</sup> Batenkas 2003 *EJIL* 316; see also Sorel 2003 *EJIL* 372.

<sup>157</sup> Thackrah *Dictionary* 100.

<sup>158</sup> Sorel 2003 *EJIL* 372.

<sup>159</sup> Art 12 of the *International Convention for the Suppression of the Financing of Terrorism* 1999.

In terms of article 18 of the Convention, states parties must cooperate in the prevention of the offences as set out in article 2, by:

Taking measures, including if necessary, adopting domestic legislation to prevent and counter preparations for the commission of the offences in or outside their territories. These measures would include measures to prohibit illegal activities of persons, groups and organisations that encourage, instigate, organise or knowingly finance or engage in the preparation of offences as set out in article 2 of the Convention in their respective countries; and implementing measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest bank accounts are opened, and to pay special attention to unusual or suspicious money transactions and report transactions involving criminal activity.

The Republic of South Africa signed and ratified this Convention on 1 May 2003. As a domestic measure to combat the financing of terrorism and to fulfil its international obligations, South Africa enacted the POCDATARA.<sup>160</sup> The POCDATARA criminalises terrorist financing. Furthermore the FICA<sup>161</sup> was enacted to strengthen the prohibition on terrorism financing. The POCA<sup>162</sup> was promulgated to deal with organised crime syndicates and the forfeiture of proceeds derived from unlawful activities.

#### *3.4.14 International Convention for the Suppression of Acts of Nuclear Terrorism 2005*

In 1996 the UNGA tasked the ad hoc Committee on Terrorism with preparing a draft convention on the suppression of acts of nuclear terrorism. The preparation of the draft began in 1998. The Convention was ultimately adopted by the UNGA on 15 April 2005.<sup>163</sup> The purpose of the *International Convention for the Suppression of Acts of Nuclear Terrorism* is to strengthen the prevention of nuclear terrorism and to fill the gaps in the 1980 *Convention on the Physical Protection of Nuclear Material*. The Convention covers a wide range of acts and possible targets including nuclear power plants and nuclear reactors. Furthermore, the Convention deals with crisis

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<sup>160</sup> POCDATARA 33 of 2004.

<sup>161</sup> FICA 38 of 2001.

<sup>162</sup> POCA 121 of 1998.

<sup>163</sup> See [www.oecd-nea.org/law/nln/nlb-76/007\\_029.pdf](http://www.oecd-nea.org/law/nln/nlb-76/007_029.pdf) [date of use 4 March 2013].

situations of assisting states and post crisis situations of rendering nuclear material safe through the International Atomic Energy Agency (hereafter IAEA).<sup>164</sup>

In terms of the Convention, the possession and use of radioactive material or a device with the intent to cause death or serious bodily injury, or with the intent to cause substantial damage to property, constitutes an offence.<sup>165</sup> The Convention requires that, a person taken into custody for committing any of the offences created in terms thereof, must be afforded fair treatment. Fair treatment includes enjoyment of all rights and guarantees that conform to the law of a state in the territory of which the person is held. The rights afforded should also be in conformity with applicable international human rights law.<sup>166</sup> The Convention further provides that, on taking control of or seizing radioactive material, devices, or nuclear facilities used in the commission of the offence, a state party must take measures to: render the radioactive material, device or nuclear facility harmless; ensure that any nuclear material is handled in accordance with applicable IAEA safeguards; and have regard to physical protection recommendations and health and safety standards published by the IAEA.

Once proceedings arising from an offence set out in article 2 have been completed, the radioactive material or nuclear device must be returned to the state party to which it belongs, or to a legal person owning the radioactive material or device.<sup>167</sup> If a state party is prohibited by applicable national or international law from returning or accepting the radioactive material, device, or nuclear facility, the state party in possession of such shall continue to take steps as described in article 2, and the radioactive material, device or nuclear facility must be used for peaceful purposes only.<sup>168</sup> If it is not lawful for a state party in possession of the radioactive material, device, or nuclear facility to possess it, the state must ensure that the material,

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<sup>164</sup> UNDOC accessed at: <http://www.undoc.org/documents/terrorism/publications/FAQ/English.pdf> [date of use 10 May 2014].

<sup>165</sup> Art 2(1) of the *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005.

<sup>166</sup> Art 12 of the *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005.

<sup>167</sup> Art 18(2) of the *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005.

<sup>168</sup> Art 18(3)(a) of the *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005.



device, or facility is placed in the possession of a state for which such possession is lawful.<sup>169</sup>

If the radioactive material, device, or nuclear facility does not belong to any of the state party to the Convention, or to a national or resident of a state party, or was unlawfully obtained or stolen from the territory of a state party, or if no state is prepared to receive such items into its custody, a decision concerning its disposition shall be taken after consultation between states and any relevant international organisation.<sup>170</sup> Finally, states parties involved in the disposal or retention of radioactive material, device, or nuclear facility shall inform the Director-General of the IAEA of how such an item should be disposed of or retained.<sup>171</sup>

The following discussion is a short overview of the shortcomings of the above international conventions against terrorism.

### ***3.5 Shortcomings of the international law instruments against terrorism***

The above conventions form the basis for international cooperation aimed at upholding the rule of law while preventing and combating terrorism. However there are shortcomings in the operation of the conventions above.

First, all the international conventions on terrorism still encounter a serious problem in defining terrorism. Each of the conventions uses an operational type of definition of terrorism without consideration of the underlying political or ideological aim of the act by the perpetrator, or on the underlying basis for the attack. This is the reason why even states have, to date, been unable to agree on a workable definition of international terrorism. For example, the 2005 *SUA Protocol* does not define terrorism although it does establish measures to combat maritime terrorism.<sup>172</sup>

Secondly, the international conventions have focused mainly on the actions of the terrorist individuals and terrorist organisations. Consequently, states officials involved in sponsoring acts of terrorism are only regarded as giving assistance, rather than

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<sup>169</sup> Art 18(3)(b) of the *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005.

<sup>170</sup> Art 18(4) of the *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005.

<sup>171</sup> Art 18(6) of the *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005.

<sup>172</sup> *Saul Research Handbook* 87.

the main perpetrators of the acts of terrorism. As a result, they are not prosecuted for the commission of acts of terrorism. Thirdly, the conventions rely on a criminal enforcement approach to cooperation between state parties to the conventions to arrest and prosecute or to extradite perpetrators of acts of terrorism for prosecution in other relevant jurisdictions.<sup>173</sup>

### **3.6 The International Criminal Court and terrorism**

UNSC resolution 1368 of 2001 stresses the need for states to work together and cooperate closely to eradicate acts of terrorism. In order to achieve this objective, the resolution requires the successful prosecution of perpetrators of terrorist acts. The ICC, therefore, seems to offer an answer to the prosecution of terrorist acts.

The ICC has jurisdiction over serious crimes in international law such as genocide, crimes against humanity, and war crimes except the crime of terrorism.<sup>174</sup> While the ICC has jurisdiction over these serious international law crimes, it is however not the primary responsibility of the Court to prosecute these crimes. It is still the responsibility of individual states exercising universal jurisdiction to prosecute the crimes.<sup>175</sup> In 1994, the International Law Commission's *Draft Statute for the International Criminal Court* proposed the inclusion of other crimes under the jurisdiction of the court, including terrorism. States like Algeria, India, Sri Lanka and Turkey also lodged a proposal that terrorism be considered as one of the international crimes to be subjected to the jurisdiction of the ICC as a crime against humanity.<sup>176</sup> However, countries like the USA opposed the proposal on the ground that terrorism was not well defined.<sup>177</sup> The failure to reach consensus on the definition of terrorism hampered the process of including terrorism under the jurisdiction of the court. Consequently, the prosecution of terrorist acts does not form part of the mandate of the court.

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<sup>173</sup> Trapp *Terrorism and International Law* 37.

<sup>174</sup> Thackrah *Dictionary* 132.

<sup>175</sup> Bantekas and Nash *International Law* 156.

<sup>176</sup> Proulx 2003 *AM U Int'l L. Rev* 1023.

<sup>177</sup> Cassese 2001 *EJIL* 994.

However, terrorist acts do fall within the definition of crimes that already fall within the jurisdiction of the court, notably crimes against humanity.<sup>178</sup> Crimes against humanity include murder and inhumane acts. However, in *Prosecutor v Balsaogajic and Jovic*,<sup>179</sup> the International Criminal Tribunal for the former Yugoslavia noted that while terrorising the civilian population is not mentioned in the *Statute of International Criminal Tribunal of Yugoslavia*,<sup>180</sup> prosecution of the crime of terrorism can be based on the prescription of acts or threats of violence, the primary purpose of which is to spread terror among the civilian population. The judgment in this case is of importance for bringing the prosecution of terrorism under the jurisdiction of the ICC notwithstanding the fact that prosecution of terrorism is not the primary responsibility of the court. Therefore, by prosecuting terrorism, the ICC will be extending its primary responsibility. However, the ICC does not have jurisdiction over crimes committed before its inception.

### *3.6.1 The importance of the International Criminal Court*

The divided opinion of the international community of states on the USA's campaign against terrorists in Afghanistan, indicates the lack of an internationally accepted approach to arresting and prosecuting terrorists. The inconsistency amongst states has further allowed terrorists successfully to avoid prosecution.<sup>181</sup> Furthermore, there has always been doubt as to the impartiality of the prosecution of the perpetrators of terrorist acts by a domestic court in a state that has suffered terrorist attacks. On the other hand, states whose nationals are the victims of terrorist attacks believe that the legal system of the other country will be lenient on the perpetrators.<sup>182</sup> Against this backdrop, it is argued that the prosecution of acts of terrorism by the ICC will broker impartiality. While the holding of the trial proceedings in domestic courts where the acts of terrorism occurred would be advantageous as regards witness accessibility, a trial before the ICC will be more beneficial for several reasons as discussed below.

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<sup>178</sup> Goldstone and Simpson 2003 *Harv. Hum. Rts.* .J 15.

<sup>179</sup> *Prosecutor v Balsaogajic and Jovic* IT 02 60 7.

<sup>180</sup> *Statute of International Criminal Tribunal of Yugoslavia* 1993.

<sup>181</sup> Lewis 2003 *B.Y.U P.L.* .Rev 15.

<sup>182</sup> Goldstone and Simpson 2003 *Harv. Hum. Rts.* .J 16.

### 3.6.2 Advantages of adjudication by the International Criminal Court

Under the *Rome Statute* no provision is made for the ICC to act as the court of first instance in the prosecution of terrorism-related crimes. The investigation and prosecution of the perpetrators of the crime of terrorism will still remain with domestic courts, and the ICC will only assist when domestic courts are not willing or not able to investigate and prosecute cases involving terrorism.<sup>183</sup> This ensures that the perpetrators of terrorism do not go unpunished. In this event, a single set of procedural and substantive laws will apply to all parties and proceedings that come before the court. The rationale behind this approach is that the laws applied by the court will be the product of the thorough negotiations by the states party to the *Rome Statute*.

The ICC has the power to prosecute those who fall within its jurisdiction only when the state on whose territory the crime was committed, or the state of which the accused is a national, is a state party to the court.<sup>184</sup> Therefore, states are encouraged to extradite and cooperate in the prosecution of suspected terrorists.<sup>185</sup> Of utmost importance is that the *Rome Statute* has various safeguards, checks and balances to ensure that the court acts in terms of the required transparency and openness to avoid casting doubt among those who are interested in the outcome of the case. Even if the home country of the accused is not a state party to the ICC, the country can still challenge the jurisdiction of the court before an impartial tribunal, or even participate in the trial proceedings of the court.<sup>186</sup> Furthermore, the highest standard of the trial proceedings is guaranteed in that the accused is entitled to compensation for wrongful arrest or detention.<sup>187</sup>

However, an obstacle in the effectiveness of the court in the prosecution of terrorism cases is that terrorism as a crime can only be included in the jurisdiction of the court by means of an amendment to the *Rome Statute*, and if such an amendment is achieved, the amendment will only be binding on states party to the *Rome Statute*

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<sup>183</sup> S 17(1)(a) & (b) of the *Rome Statute* 27 of 2002; see also Jessberger and Powell 2001 SACJ 347.

<sup>184</sup> Art 12(2) (a)-(b) of the *Rome Statute* 27 of 2002.

<sup>185</sup> Art 86 of the *Rome Statute* 27 of 2002.

<sup>186</sup> Art 19 of the *Rome Statute* 27 of 2002.

<sup>187</sup> Art 85 of the *Rome Statute* 27 of 2002.

who regard the amendment as binding.<sup>188</sup> The other problem encountered in including the crime of terrorism under the jurisdiction of the court is the lack of consensus on the definition of terrorism. It is a fact that different states have not agreed on the common definition of terrorism which could be used by the court to identify and prosecute perpetrators. The opposition to the jurisdiction of the court by the USA also dealt a fatal blow to the objective of prosecuting terrorist acts under the jurisdiction of the court. In opposing the jurisdiction of the court, the USA approached several states and requested that they sign an agreement that they would not surrender USA nationals to the jurisdiction of the court without the USA's permission. The recent attitude of the South African government towards the ICC is reflected in the rejection of the High Court's decision in the Omar Al Bashir case for failing to execute an arrest warrant on him and allowing him to leave the country.<sup>189</sup> Furthermore the AU is also planning to establish a regional criminal court in the form of the African Court of Justice and Human Rights to enable state parties to the AU to avoid the jurisdiction of the ICC.<sup>190</sup> Despite the problems that the court has encountered in including terrorism within its jurisdiction and its rejection by the AU states parties, the ICC remains the most appropriate forum to fight and combat terrorism.<sup>191</sup> This fact is learned from the transparency and impartiality of the court as it does not fall under the control of an individual state, but all states parties to the Rome Statute of the International Criminal Court.

### *3.6.3 The future of the International Criminal Court in combating terrorism*

The 11 September 2001 terrorist attacks on the USA by Al-Qaeda have clearly shown that terrorism is an international crime which needs to be addressed by the international community.<sup>192</sup> International terrorist organisations like Al-Qaeda operate globally and this aspect makes it difficult to deal with terrorist crimes at the domestic level. The ICC appears to be the appropriate forum to deal with terrorist

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<sup>188</sup> Dugard *International Law* 175.

<sup>189</sup> JFJ accessed at: <http://www.jfjustice.net/south-africa-threatens-to-withdraw-from-the-icc-as-last-resort> [date of use 07 Jul 2015].

<sup>190</sup> Tladi 2009 *SAYIL* 57.

<sup>191</sup> Goldstone and Simpson *Harv. Hum. Rts. J* 26.

<sup>192</sup> See Anon accessed at: [www.peacestudiesjournal.org.uk/dl/ICC%20and%20Terrorism.PDF](http://www.peacestudiesjournal.org.uk/dl/ICC%20and%20Terrorism.PDF) [date of use 11 Sept 2012].

crimes on an international level.<sup>193</sup> This is supported by the fact that efforts to deal with terrorism in domestic courts involve many delays which include the process of extradition, and controversy as to venue and the relevant law to be applied. Notwithstanding the fact that the ICC has been rejected by the USA, the Court is seen as an impartial and neutral forum to deal with international crimes.<sup>194</sup>

It is important to note that South Africa supported the establishment of the ICC at the 1998 Rome Conference. Pursuant to its commitment, South Africa enacted the *Implementation of the Rome Statute of the International Criminal Court Act* (ICC Act).<sup>195</sup> The ICC Act ensures that South Africa complies with its obligations as a state party to the *Rome Statute*. Section 4(3) provides that a South African court will have jurisdiction when a person commits a crime within the jurisdiction of the ICC outside of the Republic of South Africa, if that person is: a South African citizen; not a South African citizen but ordinarily resident in the country;<sup>196</sup> present in the territory of the Republic after the commission of the crime; and that person has committed a crime against a South African citizen who is ordinarily resident in the Republic of South Africa. Section 2 of the ICC Act further provides that a South African court charged with the duty of prosecuting a person responsible for the commission of an offence, shall apply "the Constitution and the law." Section 35 of South Africa's Bill of Rights dealing with the rights of arrested, detained and accused persons will apply in this instance.

It therefore seems appropriate that the ICC will be the quickest solution for the prosecution of terrorists with widespread international support and legitimacy.<sup>197</sup> Save for the fact that there is no universally accepted definition of terrorism, there is no reason why the prosecution of terrorist acts cannot be subjected to the jurisdiction of the ICC like any other international crimes. The court is designed

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<sup>193</sup> Gianaris 1992 *Fordham Int'l .L. J* 109.

<sup>194</sup> Bantekas and Nash *International Law* 379.

<sup>195</sup> *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002. (Hereafter the *International Criminal Court Act*.)

<sup>196</sup> See for example, in *S v Henry Okha*, a Nigerian citizen who had been residing in South Africa was prosecuted in the High Court for committing terrorist acts. Mkhize *The Star* 3; see also Anon accessed at: <http://www.aljazeera.com/news/africa/2013/201319374875972.html> [date of use 16 March 2013].

<sup>197</sup> See *Terrorism and the International Criminal Court* accessed at: [www.amicc.org/docs/terrorism.pdf](http://www.amicc.org/docs/terrorism.pdf) [date of use 16 March 2013].

specifically to prosecute serious crimes at international level to prevent mass atrocities.<sup>198</sup> However, it is apparent that the future of this court depends on the cooperation of states.

### **3.7 The International Court of Justice**

The ICJ is seen as the judicial arm of the UN. In terms of article 92 of the *Charter of the UN*,<sup>199</sup> the ICJ is the principal judicial organ of the UN. The ICJ has played an important role in resolving many cases, including the *Lockerbie* case<sup>200</sup> above. Therefore, even in cases relating to the contravention of the rules of international law that give rise to state responsibility for an internationally wrongful act like terrorism, the ICJ still has an important role to play. This court remains the only international court with general jurisdiction that covers disputes relating to states' responsibility for international terrorism. Article 37 specifically provides for matters between parties to the *Rome Statute* to be referred to the ICJ, which implies that only matters of state-sponsored terrorism may be adjudicated by this court.<sup>201</sup> It is, however, important to note that the jurisdiction of the court is not compulsory as it is based on the consent of the parties to the dispute, i.e. the applicant and respondent states.<sup>202</sup> This consent may be expressed in an *ad hoc* manner with reference to a prior dispute,<sup>203</sup> or it may be through a concession clause by which states agree to the jurisdiction of the court.<sup>204</sup> It is worth noting that, unlike the ICC, the ICJ has jurisdiction to adjudicate on matters where states or governments are involved.

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<sup>198</sup> Simmons and Danner *The International Criminal Court* 239.

<sup>199</sup> Art 92 of the *Charter of the United Nations* 1945.

<sup>200</sup> *Libya v UK* 1992 ICJ Rep 3.

<sup>201</sup> Art 37 of the *Statute of International Court of Justice* 1945 provides that: "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, between the parties to the present Statute, be referred to the International Court of Justice."

<sup>202</sup> Evans *International Law* 563.

<sup>203</sup> Art 36 (2) of the *Statute of the International Court of Justice* 1945. See also Trapp 2012 *J. Int Disp Settlement* 4.

<sup>204</sup> Art 36 (2) of the *Statute of the International Court of Justice* 1945. The article provides that states may recognise compulsory jurisdiction of the ICJ in advance, for legal disputes they have with any other state which has also accepted the court's jurisdiction. See also Trapp 2012 *J. Int Disp Settlement* 4.

Matters brought before the ICJ involve issues of sovereignty, treaty interpretation, and treaty violation.<sup>205</sup>

Of the 66 states that have accepted the compulsory jurisdiction of the ICJ in terms of article 36(2) of the *Statute*, more than one third of the states have entered reservations to the court's jurisdiction over certain types of dispute, such as disputes relating to the use of force.<sup>206</sup> To date, states that are usually charged with sponsoring international acts of terrorism, for example Afghanistan has made declarations in terms of article 36(3) of the *Statute of the International Court of Justice*.<sup>207</sup> However, none of the states designated by the United States of America as sponsors of international terrorism like Cuba, Iran and Syria, has filed for an optional clause declaration. States with terrorist organisations operating in their territories have also not accepted the compulsory jurisdiction of the court in terms of article 36(2) of the *Statute*. It is therefore clear that compromising clauses are the only reason for securing the court's jurisdiction over disputes involving state responsibility for crimes of international terrorism.

What follows is a detailed discussion of international human rights conventions and their effectiveness in the protection of human rights while fighting terrorism.

### ***3.8 International human rights conventions in the fight against terrorism***

While fighting terrorism states are expected to respect the rule of law and to protect human rights and comply with their international law obligations.<sup>208</sup> The following discussion focuses on the international instruments aimed at protecting human rights.

#### ***3.8.1 Universal Declaration of Human Rights 1948***

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<sup>205</sup> Dopplick date unknown accessed at: <http://www.insidejustice.com> [date of use 9 Dec 2014].

<sup>206</sup> Evans *International Law* 566.

<sup>207</sup> *Statute of the International Court of Justice* 1945.

<sup>208</sup> Art 55(c) of the *Charter of the United Nations* 1945 provides that the UN must encourage universal respect for and observance of human rights and fundamental freedoms for all.



The *Universal Declaration of Human Rights* (hereafter UDHR) was adopted and proclaimed by the UNGA on 10 December 1948.<sup>209</sup> The objective of this instrument was to promote global standards for the protection of human rights. The UDHR asserts that human rights are based on the inherent dignity of all members of the human family. It guarantees, *inter alia*, the right to life and security of the person;<sup>210</sup> the right to freedom from torture and degrading treatment;<sup>211</sup> and the right to seek and enjoy asylum from persecution.<sup>212</sup> Furthermore, the UDHR prohibits arbitrary arrest, detention or exile of persons.<sup>213</sup> It also guarantees full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of a person's rights and obligations, and of any criminal charge against a person.<sup>214</sup>

The UDHR provides that nothing is to be interpreted as implying that any state, group, or individual has a right to engage in any activity or to perform any act aimed at the violation of any of the rights and freedoms set out in the UDHR.<sup>215</sup>

### *3.8.2 International Covenant on Civil and Political Rights 1966*

The ICCPR was adopted in 1966 and entered into force in 1976. The ICCPR details the basic civil and political rights of all persons which amongst others include: the right to life; the right to liberty and freedom of movement; and the right to equality before the law.

In terms of the ICCPR, counter-terrorism measures must be consistent with the obligations under international and human rights law. However, the ICCPR does permit derogation from human rights.<sup>216</sup> For example, in times of public emergency where the lives of the nation are threatened, states parties may take measures derogating from their obligations to the extent strictly required by the exigencies of the situation. The ICCPR, however, provides that such measures should be consistent with states' obligations under international law, and should not involve discrimination

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<sup>209</sup> *Universal Declaration of Human Rights* adopted by UNGA res 217A(III)/1948.

<sup>210</sup> Art 3 of the UDHR 1948.

<sup>211</sup> Art 5 of the UDHR 1948.

<sup>212</sup> Art 14 of the UDHR 1948.

<sup>213</sup> Art 9 of the UDHR 1948.

<sup>214</sup> Art 10 of the UDHR 1948.

<sup>215</sup> Art 30 of the UDHR 1948.

<sup>216</sup> Art 4 of the ICCPR 1966.

solely on the grounds of race, colour, sex, language, religion or social origin.<sup>217</sup> However, the ICCPR specifically provides that there should be no derogations from articles 6,<sup>218</sup> 7,<sup>219</sup> 8,<sup>220</sup> 11,<sup>221</sup> 15,<sup>222</sup> 16<sup>223</sup> and 18.<sup>224</sup>

### *3.8.3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984*

Although the *Convention against Torture*<sup>225</sup> was adopted in 1987, it came to prominence as a result of the USA's abuse of the fundamental human rights of detainees in Iraq and Guantanamo Bay.<sup>226</sup> It obliges states parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture under their jurisdiction.<sup>227</sup> Article 1 of the Convention defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person the infliction of such severe pain is aimed at obtaining information or a confession from a person or a third party. Furthermore, the infliction of pain will be for the purposes of punishing a person for an act he or the third person has committed or is suspected of having committed. In line with the terms of the Convention, the pain or suffering must be inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.

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<sup>217</sup> Art 4(1) of the ICCPR 1966.

<sup>218</sup> Art 6 of the ICCPR 1966 provides that every human being has an inherent right to life. The right is protected by law and no one shall be arbitrarily deprived of his life.

<sup>219</sup> Art 6 of the ICCPR 1966 prohibits torture or cruel and inhuman or degrading treatment or punishment of anyone.

<sup>220</sup> Art 8 of the ICCPR 1966 provides that no one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.

<sup>221</sup> Art 11 of the ICCPR 1966 provides the right not to be imprisoned for non-fulfilment of a contractual obligation.

<sup>222</sup> Art 15 of the ICCPR 1966 provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when a criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

<sup>223</sup> Art 16 of the ICCPR 1966 provides everyone with the right to recognition everywhere as a person before the law.

<sup>224</sup> Art 18 of the ICCPR 1966 provides for the right to freedom of thought, conscience and religion.

<sup>225</sup> *Convention against Torture and other Cruel, Inhuman or Degrading Treatment* 1984 accessed at: <http://www.refworld.org/docid/3ae6b3a94html> [date of use 26 March 2014]. The Republic of South Africa ratified the Convention on 10 December 1998.

<sup>226</sup> Scott *International Law* 225.

<sup>227</sup> Art 2(1) of *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 accessed at: [www.ohchr.org](http://www.ohchr.org) [date of use 27 Apr 2014].

The *Convention against Torture* provides no grounds of justification for torture, either during times of war or in any public emergency.<sup>228</sup> Of particular importance, the *Convention against Torture* provides that torture, and any attempt to commit torture, must be criminalised by state parties.<sup>229</sup>

Furthermore, states parties are obliged not to expel, return or extradite a person to another state where there are substantial grounds for believing that such a person would be in danger of being subjected to torture.<sup>230</sup> Therefore, states parties are obliged to undertake to prevent in any territory under their jurisdiction, other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1. This section is aimed at acts which are committed by, at the instigation of, or with the consent of a public official or other person acting in an official capacity.<sup>231</sup>

States parties are also under an obligation to establish jurisdiction over the offences referred to in article 4 of the Convention in the following cases: when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state; when the alleged offender is a national of that state; and when the victim is a national of that state, if that state considers it appropriate.<sup>232</sup>

Each state party must also ensure that jurisdiction is established if it is alleged that the offender is present in any territory under its jurisdiction and it does not extradite that person. In addition, states parties must afford each other assistance in connection with criminal proceedings in respect of any of the offences referred to in article 4. This assistance would include the supply of evidence at their disposal which is necessary for criminal proceedings.

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<sup>228</sup> Art 2(2) of the *Convention against Torture and Cruel and Other Cruel, Inhuman or Degrading Treatment or Punishment*; see also *Chahal v United Kingdom* 108 ILR 385 where the court held that the deportation of the applicant to a state where he would be subjected to torture, would violate the obligation of the UK with regard to torture and other ill-treatment under article 3 of the *European Convention on Human Rights* 1950.

<sup>229</sup> Art 4(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984.

<sup>230</sup> Art 3(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984.

<sup>231</sup> Art 16(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984.

<sup>232</sup> Art 5(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984.

Article 17 makes provision for the establishment of a Committee Against Torture (hereafter CAT) with the objective of observing acts of torture occurring in the territories of states parties to the Convention and to report to the Secretary-General of the United Nations. The CAT came into operation on 1 January 1988.<sup>233</sup>

What follows is an evaluation of the protection of human rights by states parties in the fight against terrorism.

#### *3.8.4 Protection of human rights in the fight against terrorism*

In terms of international law, terrorism is a crime against humanity.<sup>234</sup> It is therefore important that citizens be protected against the threat of international terrorism. While states take appropriate measures to protect their subjects against the harm posed by terrorism, sight should not be lost of the fact that measures taken to protect citizens should be in conformity with human rights law.<sup>235</sup> The arrest and detention of suspected terrorists at Guantanamo Bay by the USA have raised questions as to the respect and protection of human rights accorded accused terrorists under detention.<sup>236</sup> Detainees are tortured and denied the right to a fair trial.

International standards on detention and trial aim to safeguard the basic human rights of criminal offenders notwithstanding the seriousness of the offences they have committed. Therefore, international instruments do provide protection for the human rights of those who have violated the rights and freedoms of others, *inter alia*, the right not to be arbitrarily deprived of one's own life,<sup>237</sup> the right not to be subjected to torture or inhuman and degrading treatment,<sup>238</sup> the right not to be deprived of one's liberty, the right not to be unlawfully detained,<sup>239</sup> and the right to a fair trial.<sup>240</sup> The important question is whether suspected terrorists should enjoy the protection of these rights. It is argued that the arrest of terrorists is akin to that of

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<sup>233</sup> The Committee against Torture accessed at: <http://www.ohchr.org/Documents/publications/factsheet17en.pdf> [date of use 5 March 2014].

<sup>234</sup> Art 7 of the *Rome Statute* 27 of 2002; see also Beck & Arend *Wis Int'l L.J* 166.

<sup>235</sup> Rosenthal and Muller *The Evil of Terrorism* 117.

<sup>236</sup> Marks and Clapham *International Human Rights* 347.

<sup>237</sup> Art 6 of the ICCPR 1966.

<sup>238</sup> Art 7 of the ICCPR 1966.

<sup>239</sup> Arts 9 & 10 of the ICCPR 1966.

<sup>240</sup> Arts 14 & 15 of the ICCPR 1966.

any civilian who commits an offence and thus, nothing justifies the deprivation of the right to liberty of terrorists, except when the deprivation of liberty is on the grounds or in accordance with the procedure established by law.<sup>241</sup>

#### 3.8.4.1 Does the fight against terrorism justify limitations on human rights?

Respect for human rights cannot be compromised in any way on the basis of the fight against terrorism. However violation of human rights may be justified in time of public emergencies that threatens the life of the nation as provided by article 4 of the ICCPR. International instruments on human rights provide a yardstick for the treatment of persons accused of terrorism. However, the ICCPR stipulates that restrictions on human rights can be invoked, provided certain conditions have been met. The rights to which limitations are permitted include: the right to freedom of movement;<sup>242</sup> the right to freedom of expression;<sup>243</sup> the right of freedom of belief;<sup>244</sup> the right to freedom of assembly;<sup>245</sup> and the right to freedom of association.<sup>246</sup> Of particular importance is the requirement that for the limitation to be legitimate, it should be provided for by the law. It is important to note that limitations to the basic right to life, the right not to be subjected to torture, the right to liberty and security of the person, and the right to a fair trial are not allowed.<sup>247</sup>

Article 4 of the ICCPR lists the circumstances under which it is permissible to derogate from the respect of fundamental human rights, for example, in a public emergency situation which threatens the life of the nation. However, the emergency must be officially proclaimed, derogating measures must also be strictly required by the circumstances of the situation, and they may not be inconsistent with the other international obligations of the state imposing them. The derogating measures may

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<sup>241</sup> Art 9(1) of the ICCPR 1966; see also art 4 of the ICCPR which provides as follows "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

<sup>242</sup> Art 12 of the ICCPR 1966.

<sup>243</sup> Art 19 of the ICCPR 1966.

<sup>244</sup> Art 20 of the ICCPR 1966.

<sup>245</sup> Art 21 of the ICCPR 1966.

<sup>246</sup> Art 22 of the ICCPR 1966.

<sup>247</sup> Arts 6, 7 & 8 of the ICCPR 1966.

not be discriminatory to certain persons. It is only when the threat of terrorism is of such proportions and intensity that a state of emergency may be declared. The implication is that not all forms of terrorism warrant the declaration of a state of emergency. Terrorism involving the threat to life may justify the declaration of a state of emergency. The provisions of the ICCPR bind all states irrespective of whether or not they are members of the UN.

#### 3.8.4.2 Prohibition on the use of force in fighting terrorism

Under international law, states may defend themselves against attack.<sup>248</sup> International law recognises the fact that nations should not suffer attack before they can lawfully take action to defend their citizens.<sup>249</sup> In terms of article 1 of the *Treaty for the Renunciation of War* 1928<sup>250</sup> as an instrument of national policy, the parties condemn recourse to war for the resolution of international conflicts. However, this does not mean that the prohibition is absolute, as different reservations by states parties to the Treaty made it clear that self-defence is a legitimate use of force.<sup>251</sup> In terms of the complicity approach, in states that support terrorism, the acts of the non-state terrorist actors can be attributed to the host state from which terrorists operate if the host state is not willing to act against terrorist activities.<sup>252</sup> Therefore, the use of force will be permissible by the aggrieved state in self-defence. However, if the host state does take measures to prevent terrorist operations in its territory, the use of force will not be allowed.<sup>253</sup> In *Nicaragua v US*<sup>254</sup> the court cited the *Declaration on Friendly Relations between States* 1970<sup>255</sup> which provides that:

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<sup>248</sup> Ulfstein accessed at: <http://Ulfstein.net/wp-content/uploads/2012/08/Terrorism-and-use-of-force.pdf> [date of use 10 May 2016]; see also UNGA Res 1368/ 2001.

<sup>249</sup> Beck and Arend 1993 *Winconsin Int'l .L.* J 158.

<sup>250</sup> *Treaty for the Renunciation of War* 1928 accessed at: <http://www.iilj.org/courses/documents/kellog-braind pact-ooopdf> [date of use 25 Apr 2014].

<sup>251</sup> Schmidt 2003 *Mich Int'l .L.* J 520.

<sup>252</sup> Tams 2009 *EJIL* 368; see also Trapp 2009 *EJIL* 1051. See further Saul *Research Handbook* 201.

<sup>253</sup> Trapp 2009 *EJIL* 1053.

<sup>254</sup> *Nicaragua v US* 1986 ICJ 14 at para 188.

<sup>255</sup> *Declaration on Friendly Relations between States* 1970 accessed at: <http://www.unhcr.org/refworld/topic.459d17822.459d17a82.3dda1f104.0.html> [date of use 26 Apr 2014].

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the charter of the United Nations and shall never be employed as a means of settling international issues.

The court further held that the law of the *Charter of the United Nations* concerning the prohibition of the use of force in terms of the *Declaration on Friendly Relations between States* 1970, constitutes an example of a rule of international law which has the character of *jus cogens*. As such, peremptory norms cannot be derogated from even by means of a provision in a treaty. International law further requires that any use of armed force in self-defence should comply with the requirements of necessity, proportionality, and immanence of the attack.<sup>256</sup> The principle of proportionality limits the defensive action to measures necessary to defeat the attack or to pre-empt any future attack. The recent invasion of Afghanistan by the USA and UK was based on an invocation of this principle. The UNSC adopted resolution 1378/2001<sup>257</sup> through which it expressed its support for the air strikes by the USA and the UK on Al-Qaeda as an effort to uproot terrorism. In supporting the action by the USA and the UK, the UNSC stressed that those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of acts of terrorism, will be held accountable.<sup>258</sup> The attack by the two states was regarded as falling within the limits of the *Charter of the United Nations'* resolution on the right to self-defence because the Taliban government had allowed Al-Qaeda to train terrorists and operate from within its territory. The unlawful acts perpetrated by Al-Qaeda could therefore be attributed to the government of Afghanistan, as Afghanistan had refused to take any action against Al-Qaeda.<sup>259</sup> In addition, in *Nicaragua v US*,<sup>260</sup> the court decided that

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<sup>256</sup> Art 51 of the *Charter of the United Nations* provides that: "Nothing in the present charter shall impair the inherent of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way oppose the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security."

<sup>257</sup> UNSC res 1378/2001 accessed at: [www.un.org/docs/scres/2001/sc2001.htm](http://www.un.org/docs/scres/2001/sc2001.htm) [date of use 26 Apr 2014].

<sup>258</sup> Chesterman 2005 *J. Int'l L P* 283.

<sup>259</sup> Dugard *International Law* 505; see also Bantekas and Nash *International Criminal Law* 39; see further Saul *Research Handbook* 202.

not all uses of force amounted to an armed attack justifying the use of force in self-defence. The court held that:

The prohibition of the use of force may apply to sending by a State of armed bands to a territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of armed attacks includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such support may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states.

The use of force by the USA against Afghanistan received the support of many countries based on the argument that self-defence is justified in terms of customary law.<sup>261</sup> There are, however, arguments from certain states that a terrorist attack on a state territory by a non-state actor may be regarded as an armed attack and could justify a response against the state which is providing a safe haven for terrorists. The UNSC also accepts the legality of self-defence by states.<sup>262</sup> The ICJ in its advisory opinion in *Armed Activities in the Territory of Congo*,<sup>263</sup> supported the right to self-defence in terms of article 51 of the *Charter of the United Nations*. The ICJ held that Uganda could not justify its action in Congo as self-defence when it responded to an armed attack which did not emanate from armed bands acting on behalf of the Democratic Republic of Congo. The attack in this case was waged by the Allied Democratic Force including Ugandan forces which were opposed to the government of Uganda.

### **3.9 Chapter summary**

Both the UNGA and the UNSC have, through the adoption of international instruments against international terrorism, taken steps to fight international terrorism. In an effort to fight terrorism, the UNSC has adopted several resolutions such as resolution 1456<sup>264</sup> which obliges states parties to support anti-terrorism

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<sup>260</sup> *Nicaragua v US* 1986 ICJ 14 at para195.

<sup>261</sup> Gray *The Use of Force* 629; see also O'Connell 2002 *ASIL* 1.

<sup>262</sup> Gray *The Use of Force* 630.

<sup>263</sup> *Armed Activities in the Territory of Congo (Democratic Republic of Congo v Uganda)* 2005 ICJ Rep 168 para 280.

<sup>264</sup> UNSC res 1456 of 2003 accessed at:

[http://www.un.org/en/ga/search/viewdoc.asp?symbol=S/RES1456\(2003\)](http://www.un.org/en/ga/search/viewdoc.asp?symbol=S/RES1456(2003)) [date of use 22 Sept



initiatives, and resolution 731<sup>265</sup> through which the UNSC directed Libya to surrender terrorism suspects for prosecution.<sup>266</sup>

The fourteen UN international conventions against terrorism have already, and continue to play an important role in enforcing the prevention and combating of international terrorism. The conventions call upon states to prevent and punish acts of terrorism within their jurisdictions. Most importantly, the *International Convention for the Suppression of the Financing of Terrorism*<sup>267</sup> obliges states to implement measures to prohibit financing terrorist related activities.<sup>268</sup> The rationale behind this Convention, is that without the finance terrorist organisations receive, they will not be able to function. South Africa has incorporated the *Convention for the Suppression of the Financing of Terrorism* by means of the FICA<sup>269</sup> and POCA.<sup>270</sup> Other international conventions which have been incorporated are the *Convention against the Unlawful Seizure of Aircraft*,<sup>271</sup> the *Convention against Offences and Certain Other Acts Committed on Board Aircraft*,<sup>272</sup> and the *Convention for the Suppression of Unlawful Acts Relating to Civil Aviation*.<sup>273</sup> The *Civil Aviation Act*<sup>274</sup> punishes offences committed on board aircraft, for example the hijacking of aircraft in the USA terrorist attacks of 11 September 2001. Other conventions such as the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*,<sup>275</sup> the *Convention against the Taking of Hostages*,<sup>276</sup> the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons*

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<sup>265</sup> UNSC res 731 of 2001 accessed at: <http://daccess-dds-ny.org/doc/RESOLUTION/GEN/NRO/010/70/IMG.pdf> [date of use 18 Jun 2015].

<sup>266</sup> Thackrah *Dictionary* 161.

<sup>267</sup> *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>268</sup> Art 14 of the *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>269</sup> FICA 38 of 2001.

<sup>270</sup> POCA 121 of 1998.

<sup>271</sup> *International Convention against Unlawful Seizure of Aircraft* 1970.

<sup>272</sup> *International Convention against Offences and Certain other Acts Committed on Board Aircraft* 1963.

<sup>273</sup> *International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971.

<sup>274</sup> *Civil Aviation Act* 10 of 1972.

<sup>275</sup> *International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971.

<sup>276</sup> *International Convention against Taking of Hostages* 1979.

including *Diplomatic Agents*,<sup>277</sup> the *Convention for the Suppression of Acts of Nuclear Terrorism*,<sup>278</sup> and others have also been incorporated in South African legislation by means of the POCDATARA.

The *Declaration on Measures to Eliminate International Terrorism*<sup>279</sup> encourages states to extradite or prosecute perpetrators of crimes involving terrorism. There is, however, a serious lack of coordinated international control and enforcement of the conventions to deal with international terrorism.<sup>280</sup> There are also many states that have not yet ratified these international instruments which makes it difficult to deal effectively with international terrorism. All fourteen UN international conventions define terrorism, impose obligations on states to criminalise terrorism and to establish jurisdiction to prosecute terrorism. However, there is no specific UN convention that prevents and combats terrorism with precision. The *Draft Comprehensive Convention on International Terrorism*<sup>281</sup> has not been finalised and is unlikely to be finalised in the foreseeable future because of the difficulty presented by the legal definition of terrorism.<sup>282</sup> It is therefore important that states should agree on a special international convention to combat and prevent terrorism in order effectively to deal with the threat of terrorism. Although the international law has attempted to combat and prevent terrorism by means of the international instruments, an appropriate solution in a form of a specific instrument combating terrorism is yet to materialise. Different states have their own policies and strategies to deal with terrorism in their own jurisdictions. Consequently, there is no uniformity amongst states in the fight against international terrorism. Furthermore, there is no universal international convention that prohibits acts of terrorism. Therefore, a universally inclusive convention such as the *United Nations International Convention Combating and Preventing Terrorism* binding on all states needs to be established to

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<sup>277</sup> *International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* 1973.

<sup>278</sup> *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005.

<sup>279</sup> UNGA res 49/60 of 1994 accessed at: [www.un.org/en/ga/sixth/65/ElimIntTerror.shtml](http://www.un.org/en/ga/sixth/65/ElimIntTerror.shtml) [date of use 13 Aug 2013].

<sup>280</sup> Bassiouni 2002 *Harv. Int'l L.J.*2.

<sup>281</sup> *Draft Comprehensive International Convention on the Prevention of Terrorism* 1994.

<sup>282</sup> "Measures to Eliminate International Terrorism" accessed at: <http://legal.un.org/terrorism/index.html> [date of use 22 May 2014].

deal effectively with the threat of international terrorism, and to create legal certainty on the international level.

Of importance, human rights instruments such as the UDHR and the ICCPR emphasise the protection of human rights while fighting terrorism. In terms of the ICCPR human rights may be suspended when the security of the state is threatened. However, there can be no limitation of rights such as the right to life, the right against torture, and the right to liberty.

The ICC does not include terrorism as an offence within its jurisdiction. However, it appears that the ICC offers an appropriate forum in which crimes of terrorism can be dealt with effectively, despite the differing views of different states on the jurisdiction of the court.

## CHAPTER 4

# REGIONAL LEGAL FRAMEWORKS TO COUNTER INTERNATIONAL TERRORISM

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### ***4.1. Introduction***

In view of the growing threat posed by international terrorism to international peace and security, states are faced with the problem of developing regional specific counter-terrorism measures in order to protect themselves against terrorist acts. In enhancing the development of regional arrangements, article 52(1) of the *UN Charter* provides that nothing in the *Charter* stops the existence of appropriate regional arrangements or agencies for dealing with matters such as international peace and security.

Therefore, in the face of terrorist attacks, states have cooperated to prevent and combat terrorism in their regions. The Organisation of American States (hereafter the OAS) to which the USA is a member, and the European Union to which UK is a member, have adopted regional instruments in response to the threat of international terrorism.

Furthermore, after 1994 South Africa experienced the problem of internal terrorist threats from right-wing organisations such as the Boeremag,<sup>1</sup> and the People Against Gangsterism and Drugs (hereafter PAGAD) which operated mainly in Cape Town.<sup>2</sup> The presence of the members of international terrorist organisation such as Al-Qaeda in South Africa cannot be excluded.<sup>3</sup> The recent attempt by a Capetonian girl to leave South Africa in order to join the Islamic State armed group (hereafter ISIS) is a clear sign of the presence of the members of the international terrorist organisation in South Africa.<sup>4</sup> South Africa is a member of the African Union

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<sup>1</sup> Schonteich and Boshoff accessed at: <http://www.iss.co.za/pubs/monograph/no81/chap4.html> [date used 19 Apr 2012].

<sup>2</sup> Solomon 2012 *SAJMS* 143.

<sup>3</sup> Botha 2009 accessed at: <http://www.iss.org.za/static/templates/tmlhtml/php/node=id=3331&linkid=32> [date of use 19 Jul 2013].

<sup>4</sup> Ebrahim 2015 accessed at:

(hereafter the AU). In order for the AU to fight terrorism on the African continent, it has adopted regional instruments aimed at countering terrorism. This chapter seeks to examine specific regional counter-terrorism arrangements within the OAS, EU and AU organisations. What follows is a detailed discussion of the different regional specific, counter-terrorism arrangements.

#### **4.2. Regional Counter-terrorism legal framework of the Organisation of American States**

In an attempt to prevent and combat terrorist activities and to preserve peace and security in the American region, the OAS has adopted the following instruments: the *Charter of the Organisation of American States* 1948; the *Organisation of American States Convention to Prevent and Punish Acts of Terrorism* 1971; and the *Inter-American Convention against Terrorism*, 2002.

##### *4.2.1 The Charter of Organisation of the American States 1948*

The *Charter of the Organisation of the American States* (hereafter the *OAS Charter*) was adopted on 30 April 1948. The USA is the co-founder of the *OAS Charter*.<sup>5</sup> According to article 2 of the *OAS Charter*, it aims, amongst others, to strengthen peace and security in the American continent; to promote and consolidate representative democracy; to find solutions for political, juridical, and economic problems; and to prevent the proliferation of conventional weapons in the areas of states parties.<sup>6</sup> The OAS focuses mostly on matters relating to the security of states parties against transnational criminal threats such as terrorism and drugs. As a result, the OAS was the first to condemn the 11 September 2001 terrorist attacks on the USA. Consequently, the OAS took a decision to strengthen cooperation against terrorism in the USA. On 21 September 2001 a consultative meeting of Ministers of Foreign Affairs adopted a resolution in terms of which states parties to the *OAS*

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<http://www.iol.co.za/news/crime-courts/cape-girl-stopped-from-joining-is-1.1841189> [date of use 5 May 2015].

<sup>5</sup> Meyer accessed at: <http://fas.org/sgp/crs/row/R42639.pdf> [date of use 30 Jun 2014].

<sup>6</sup> Anon accessed at: <http://www.oas.org/juridico/english/charter.html> [date of use 30 Jun 2014].

*Charter* agreed to pursue, capture, prosecute, and punish perpetrators of terrorist acts.<sup>7</sup>

What follows is a detailed discussion of counter-terrorism instruments adopted by the OAS to prevent and combat the threat of terrorism on the American continent.

#### *4.2.2 The Organisation of American States Convention to Prevent and Punish Acts of Terrorism 1971*

The main objective of the above Convention is to urge states to cooperate in the prevention and punishment of acts of terrorism. The Convention considers the following acts as acts of terrorism: kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty under international law to provide protection, including extortion in connection with these crimes.<sup>8</sup>

In terms of the Convention, terrorism is excluded as an exception to a political offence. As indicated above, the classification of terrorism as a political offence is an obstacle to the extradition of perpetrators of terrorist acts. The Convention further removes the protection provided by political asylum.<sup>9</sup> Articles 3 and 5 of the Convention provide for extradition and jurisdiction over acts of terrorism committed within the jurisdiction of states parties.

#### *4.2.3 The Inter-American Convention against Terrorism 2002*

This Convention recognises the threat that terrorism poses to democratic values, and international peace and security. It is aimed at the prevention, punishment, and elimination of terrorism, and provides for the inclusion of offences contained in specialised international instruments against terrorism.

The Convention deals with measures to prevent and combat the financing of terrorism.<sup>10</sup> In terms of the Convention, states parties are obliged to institute legal and regulatory measures to prevent, combat and eradicate the financing of terrorism

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<sup>7</sup> OAS Res 1/ 2001 Strengthening Hemispheric Cooperation to Prevent, Combat and Eliminate Terrorism.

<sup>8</sup> Art 2 of the *OAS Convention to Prevent and Punish Acts of Terrorism 1971*.

<sup>9</sup> Art 2 of the *OAS Convention to Prevent and Punish Acts of Terrorism 1971*.

<sup>10</sup> Art 4 of the *Inter-American Convention against Terrorism 2002*.

and to promote effective international cooperation which includes a comprehensive domestic regulatory and supervisory regime for banks, financial institutions, and other entities which may be used to finance terrorist activities.<sup>11</sup> It further provides for measures to detect and monitor movements of cash and negotiable instruments across state borders,<sup>12</sup> and addresses measures such as the identification, freezing or seizure of any funds or other assets constituting the proceeds of, used to facilitate, or used or intended to be used to finance the commission of any offences by terrorists.<sup>13</sup> As regards money laundering, states parties to the Convention are obliged to take the steps necessary to ensure that national penal money laundering legislation includes offences established in international conventions. Finally, the Convention obliges states parties to respect the rule of law, human rights and fundamental freedoms in their fight against terrorism.<sup>14</sup>

#### *4.2.4 Instruments aimed at the protection of human rights by the Organisation of American States*

Protection of human rights is important in the fight against terrorism. Therefore, states are obliged to guard against the violation of human rights while fighting terrorism. In an effort to protect human rights, the OAS has deemed it appropriate to adopt human rights instruments to ensure the effective protection of rights in the region. The following are some of the human rights instruments which find application in the USA in the attempt to protect human rights while fighting terrorism.

##### 4.2.4.1 American Declaration of the Rights and Duties of Man 1948

The states parties to the *American Declaration of the Rights and Duties of Man* 1948 (hereafter the Declaration) recognise that the essential rights of a man are not derived from the fact that he is a national of a particular state, but are rather based upon attributes of man's human personality. In terms of the preamble to the Declaration, "all men are born free and equal, in dignity and in rights." Therefore the

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<sup>11</sup> Art 4(1)(b) of the *Inter-American Convention against Terrorism* 2002.

<sup>12</sup> Art 5(1) of the *Inter-American Convention against Terrorism* 2002.

<sup>13</sup> Art 6(1) of the *Inter-American Convention against Terrorism* 2002.

<sup>14</sup> Art 15 of the *Inter-American Convention against Terrorism* 2002.

fulfilment of the duty by each individual is a requirement for the rights of all the people.

Under the Declaration, every human being has the right to life, liberty and security of his or her person.<sup>15</sup> The Declaration further provides that all persons are equal before the law and have rights and duties established by the Declaration, without distinction as to race, sex, language, creed or any other factor.<sup>16</sup> In terms of the Declaration, no person may be deprived of his or her liberty except in cases and according to procedures established by a pre-existing law.<sup>17</sup> Every person who has been deprived of his or her liberty has the right to have the legality of his or her detention determined without delay by a court of law, and the right to be tried without delay or otherwise be released from detention. Every person has the right to humane treatment while in detention.<sup>18</sup>

Article xxvi of the Declaration provides that every accused person is presumed to be innocent until proven guilty. The article further provides that every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with the pre-existing laws and not to receive cruel, infamous or unusual punishment. Therefore, in line with the objectives of the Declaration, the right to life, liberty and security cannot be compromised for reasons of national security. The provisions of article xxvi of the Declaration corresponds to the provisions in the UDHR<sup>19</sup> and the ICCPR.<sup>20</sup> These objectives of the Declaration have been violated by the USA's anti-terrorism legislation such as the *Patriot Act* 2001<sup>21</sup> which provides for detention without trial.

#### 4.2.4.2 American Convention on Human Rights 1978

This Convention was signed on 22 November 1969 and came into force on 18 July 1978. The *American Convention on Human Rights* 1978 (hereafter ACHR) obliges

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<sup>15</sup> Art 1 of the *American Declaration of the Rights and Duties of Man* 1948.

<sup>16</sup> Art II of the *American Declaration of the Rights and Duties of Man* 1948.

<sup>17</sup> Art xv of the *American Declaration of the Rights and Duties of Man* 1948.

<sup>18</sup> Art xv of the *American Declaration of the Rights and Duties of Man* 1948.

<sup>19</sup> Art 3 of the UDHR 1948 protects the right to life, liberty and security of person.

<sup>20</sup> Art 6(1) of the ICCPR 1966 protects the right to life while article 9 (1) protects the right to liberty and security.

<sup>21</sup> *Patriot Act* 2001.



states parties to undertake to respect rights and freedoms, and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, economic status, birth or any other social condition.<sup>22</sup> The Convention protects the right to life, the right to liberty, the right to a fair trial, and other fundamental rights of a person. In accordance with the Convention no one shall be arbitrarily deprived of his or her right to life.<sup>23</sup> The Convention further provides that in countries that have not abolished the death penalty, this penalty may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court in accordance with the law establishing such punishment enacted prior to the commission of the crime.<sup>24</sup> Furthermore, the death penalty shall not be re-established in states that have already abolished it, or shall not be imposed as a punishment for political offences or related common law crimes.<sup>25</sup> As part of the right to life, every person who has been condemned to death has the right to apply for amnesty, pardon, or commutation of a sentence, which may be granted in all cases. The death penalty shall not be imposed while such a petition is pending before the competent authority. Article 5(2) provides for the protection against torture or, inhuman or degrading punishment or treatment. Thus the Convention requires that all persons deprived of their liberty be treated with respect for their inherent dignity.

As regards the right to personal liberty, article 7 of the Convention provides that every person has the right to personal liberty and that no one shall be subject to arbitrary arrest or imprisonment. As the core importance of this right, any person who is detained shall be informed promptly of the reasons of his or her detention and be notified of the charge or charges against him or her. Such a person must promptly be brought before the judge or any other judicial officer authorised by the law, and is entitled to a trial within a reasonable time or to release without prejudice.<sup>26</sup> Anyone who is deprived of his or her liberty is entitled to recourse to a

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<sup>22</sup> Art 1(1) of the ACHR 1978.

<sup>23</sup> Art 4 of the ACHR 1978.

<sup>24</sup> Art 4(2) of the ACHR 1978.

<sup>25</sup> Art 4(3) of the ACHR 1978.

<sup>26</sup> Art 7(5) of the ACHR 1978.

competent court which may decide without delay on the lawfulness of his or her arrest or detention, and order his or her release if the arrest or detention is unlawful.<sup>27</sup>

Article 8 protects the right to a fair trial. The right to a fair trial provides for the following rights: the right to a hearing within a reasonable time by a competent, independent and impartial tribunal;<sup>28</sup> the right of every person accused of an offence to be presumed innocent until his or her guilt has been proven according to law;<sup>29</sup> the right to be notified in detail of the charges against him or her;<sup>30</sup> the right to be afforded adequate time and means for preparation of his or her defence;<sup>31</sup> the right to defend him or herself personally, or to be assisted by a legal representative of his or her own choice, and to communicate freely with his or her legal representative;<sup>32</sup> the inalienable right to be assisted by a legal representative provided by the state, paid or not, as the domestic law provides, if the accused does not defend himself or herself personally or engage own legal representative within the period established by law;<sup>33</sup> the right of the defence to examine witnesses present in court and to secure the appearance, as witnesses, of experts or other persons who may shed light on the facts;<sup>34</sup> and the right not to be compelled to be a witness against him or herself or to plead guilty.<sup>35</sup>

The criminal proceedings are to be public, except in so far as may be necessary to protect the interest of justice. All the human rights protected by the Convention can be suspended during a declared emergency that threatens the independence or security of the state party to the Convention.<sup>36</sup> Although the Convention does permit

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<sup>27</sup> Art 7(6) of the ACHR 1978.

<sup>28</sup> Art 8(1) of the ACHR 1978.

<sup>29</sup> Art 8 (2) of the ACHR 1978.

<sup>30</sup> Art 8 (2)(b) of the ACHR 1978.

<sup>31</sup> Art 8 (2)(c ) of the ACHR 1978.

<sup>32</sup> Art 8 (2)(d) of the ACHR 1978.

<sup>33</sup> Art 8 (2)(e) of the ACHR 1978.

<sup>34</sup> Art 8 (2)(f) of the ACHR 1978.

<sup>35</sup> Art 8 (2)(g) of the ACHR 1978.

<sup>36</sup> Art 27 of the ACHR 1978 provides that in time of war, public danger, or other emergency that threatens the independence or security of a state party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion, or social origin.

suspension of human rights, the right to life, to liberty, and the right against torture is not permitted even at the instances of a threat to state security.<sup>37</sup> In addition to the Convention, a *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*<sup>38</sup> was adopted to ensure the abolition of the death penalty. The abolition of the death penalty ensures effective protection of the right to life because the death penalty has irreversible consequences and excludes the correction of judicial error. States parties to the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, agree that the death penalty will not be a sentencing option in their respective jurisdictions.<sup>39</sup> States parties to the Protocol may not enter reservations to the Protocol.<sup>40</sup> However, the USA is not a party to this Protocol. It is notable that ACHR covers almost all the human rights protections as provided under the UDHR<sup>41</sup> and the ICCPR<sup>42</sup> discussed above.

#### 4.2.4.3 The Inter-American Convention to Prevent and Punish Torture 1985

The *Inter-American Convention to Prevent and Punish Torture* 1985 reaffirms that all acts of torture or any other cruel, inhuman or degrading treatment or punishment constitute an offence against human dignity. In terms of the Convention torture is:

Any act that is intentionally performed whereby physical or mental pain or suffering is inflicted on a person for the purposes of criminal investigations as a means of intimidation, as personal punishment, as a preventative measure, penalty or for any other purpose.

It is within the spirit of the Convention that the existence of circumstances such as a state of war, threat of war, state of siege or emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other

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<sup>37</sup> Art 29 of the ACHR 1978 provides that no provision of the Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognised in this convention or to restrict them to a greater extent than is provided for by the Convention.

<sup>38</sup> *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* 1990 accessed at: <http://www.oas.org/juridico/english/treaties/a-53.html> [date of use 25 Jun 2014].

<sup>39</sup> Art 1 of the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* 1990.

<sup>40</sup> Art 2 of the *Protocol to the American Convention on Human Rights to Abolish Death Penalty 1* 1990.

<sup>41</sup> UDHR 1948

<sup>42</sup> ICCPR 1966.

public emergencies or disasters shall not be invoked or admitted as a justification for the crime of torture.<sup>43</sup>

Therefore, states parties to the Convention are obliged to take effective measures to prevent and punish torture within their jurisdictions.<sup>44</sup> Furthermore, states parties must take measures to ensure that in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis is placed on the prohibition of the use of torture during interrogation, detention or arrest.<sup>45</sup> Where an act of torture is alleged to have been committed within the jurisdiction of state party, states parties must guarantee that their respective authorities will proceed properly and immediately, to investigate the case and initiate, where appropriate, the required criminal process.<sup>46</sup> It is important that states parties undertake to incorporate into their national laws, regulations guaranteeing suitable compensation for victims of torture.<sup>47</sup> States parties to the Convention must further agree to take necessary steps to extradite anyone accused of having committed the crime of torture, or who has been sentenced for the commission of that crime, in accordance with their respective national laws.<sup>48</sup> The *Inter-American Convention to Prevent and Punish Torture* like the UDHR and the ICCPR specifically prohibits torture.<sup>49</sup>

#### 4.2.5 OAS bodies aimed at the protection and enforcement of human rights

What follows is a discussion of bodies established under the ACHR tasked with monitoring the protection of human rights, namely; the *Inter-American Commission on Human Rights* and the *Inter-American Court of Human Rights*.

##### 4.2.5.1 The Inter-American Commission on Human Rights 1985

The USA is a party to the *Inter-American Commission on Human Rights* (hereafter the Commission). The Commission is the principal organ of the OAS.<sup>50</sup> Its principal

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<sup>43</sup> Art 5 of the *Inter-American Convention to Prevent and Punish Torture* 1985.

<sup>44</sup> Art 5 of the *Inter-American Convention to Prevent and Punish Torture* 1985.

<sup>45</sup> Art 7 of the *Inter-American Convention to Prevent and Punish Torture* 1985.

<sup>46</sup> Art 8 of the *Inter-American Convention to Prevent and Punish Torture* 1985.

<sup>47</sup> Art 9 of the *Inter-American Convention to Prevent and Punish Torture* 1985.

<sup>48</sup> Art 11 of the *Inter-American Convention to Prevent and Punish Torture* 1985.

<sup>49</sup> Art 5 of the UDHR prohibits torture; see also art 7 of the ICCPR which also prohibits torture.

<sup>50</sup> Art 1 of *Statute of the Inter-American Commission on Human Rights* 1979.

objective is to observe and protect human rights and to act as a consultative organ of the OAS.<sup>51</sup> As one of the functions of the Commission, it is charged with receiving and taking action on petitions lodged by a person or group of persons alleging violation of human rights that occurred within the jurisdiction of a state party to the OAS.

The establishment of the Commission is relevant to the current human rights regime in the USA in the light of the numerous human rights violations resulting from the threat posed by international terrorism. The Commission acts as a watchdog for the protection of human rights in cooperation with the *Inter-American Human Rights Court* (hereafter *Human Rights Court*). For example, in *Juan Raul Garza v United States*<sup>52</sup> the Commission was of the opinion that to ignore the granting of precautionary measures in a death penalty case, could cause irreparable harm to the condemned party. In *Carlos Augusto Rodrigues Vera et al v USA*,<sup>53</sup> the Commission filed an application with the *Human Rights Court* in connection with the forced disappearances, detention, torture and execution of Carlos Augusto Rodrigues Vera, Cristina Pilar Gaurin Cartes, David Suspes Celis, and others. The *Human Rights Court* ruled that the right to life, liberty and humane treatment of the applicants had been violated. Furthermore, the *Commission* safeguards the rights enshrined in the *American Declaration of the Rights and Duties of Man* signed in 1948. In summary the Commission controls the actions of the government affecting the governed.<sup>54</sup>

#### 4.2.5.2 The Inter-American Human Rights Court

The Inter-American Human Rights Court was established on 22 May 1979 principally to enforce and interpret the provisions of the ACHR 1978.<sup>55</sup> The two main functions of the court are adjudicatory and advisory.<sup>56</sup> The court deals with human rights violation cases brought before it by the state party to the ACHR. The parties to the Convention are required to accept the jurisdiction of the court. States parties to the Convention are required not only to submit voluntarily to the jurisdiction of the court,

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<sup>51</sup> Art 1(1) *Statute of the Inter-American Commission on Human Rights* 1979.

<sup>52</sup> *Juan Raul Garza v United States* no 12.243 Report no 52/2001.

<sup>53</sup> *Carlos Augusto Rodrigues Vera et al v USA* 10.738 IACHR 2012.

<sup>54</sup> Volio 1981 *AM U Int'l .L. Rev* 69.

<sup>55</sup> Beurgenthal 1982 *AJIL* 231

<sup>56</sup> Art 2 of the *Statute of the Inter-American Court of Human Rights* 1980.

but are also expected to ratify the Convention. Therefore in terms of the Convention,<sup>57</sup> in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm or damage, the Inter-American Human Rights Court may adopt provisional measures it deems appropriate in matters under its consideration. Furthermore, in instances where the case has not yet been submitted to the court for consideration, the court can act on the request of the Commission.<sup>58</sup> Of importance is that all the domestic remedies must be exhausted before a case can be submitted to the court.<sup>59</sup> Notable is the fact that the court has a flexible approach as regards the admissibility of evidence. While the aggrieved party has the duty to prove the alleged facts, direct proof is not necessary for the admissibility of evidence. The standard of proof is different from that required by the criminal courts. The case of *Velasquez Rodriquez v Honduras*<sup>60</sup> illustrates the standard of proof of facts in the Inter-American Human Rights Court. In this case, it was argued that when the existence of the systematic practice or policy violating a specific right is shown, the violation in question may be proved by means of circumstantial evidence.

The Inter-American Human Rights Court enjoys advisory jurisdiction with regard to the interpretation of the ACHR and other conventions concerning the protection of human rights in OAS states at the request of any member of the OAS.<sup>61</sup> Although the task of the court is to render an advisory opinion, the court cannot render an advisory opinion in matters concerning international obligations of non-American states. Nevertheless the court has extensive advisory jurisdiction that enables it to safeguard human rights.<sup>62</sup> *Mapiripan v Columbia*<sup>63</sup> is one of the important cases that the court dealt with. In this case, the Inter-American Commission on Human Rights lodged an application with the allegation of the involvement of Columbia in the Mapiripan massacre. It was alleged that Columbia violated a number of human rights as provided for by the ACHR. Human rights such as the right to life,<sup>64</sup> the right to

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<sup>57</sup> Art 63(1) of the ACHR 1978.

<sup>58</sup> Shaw *International Law* 387; see also Shelton 1996 *AM.U.J.Int'l LJ* 343.

<sup>59</sup> Shelton 1996 *AM.U.Int'l & Pol'y* 344.

<sup>60</sup> *Velasquez Rodriquez v Honduras* Inter-Am.Ct.HR Ser C no 4 1988.

<sup>61</sup> Shaw *International Law* 387.

<sup>62</sup> Shelton 1996 *AM.U.J.Int'l & Pol'y* 340.

<sup>63</sup> *Mapiripan v Columbia* 2005 IACHR Ser C 134.

<sup>64</sup> Art 4 of the ACHR 1978.

humane treatment;<sup>65</sup> the right to liberty<sup>66</sup> and the right of children to special protection<sup>67</sup> were violated. The court arrived at the conclusion that Columbia violated the right of children in terms of the ACHR. According to the court, Columbia failed to protect the children of Mapiripan during and after the massacre. The court has further dealt with many cases including the *Habeas Corpus in Emergency Situations* (articles 27(2), 25(1) and 7(6) of the ACHR). In *Advisory Opinion OC 8/87*<sup>68</sup> the court declared that the writ of *habeas corpus* did not qualify as a judicial guarantee that may be suspended for the protection of rights from which no derogation was permitted under article 27 of the Convention. The court has however, been critical of the time delay by the Inter-American Commission on Human rights in processing cases to be lodged for consideration. As a result of these delays, cases submitted to the court for consideration have been dismissed because the submission was beyond the required time limit. In *Cayara v Peru*<sup>69</sup> the court found that the case brought by the commission for consideration was outside the time period provided for by article 51(1) of the ACHR.<sup>70</sup> Although the court was critical of the procedural irregularities, the court has however affirmed the functions of the Inter-American Commission on Human Rights to promote human rights in the region. The Inter-American Human Rights Court is the American counterpart of the European Court of Human Rights and the African Court of Human Rights and Peoples Rights who are also charged with the task of protecting human rights in their areas of jurisdiction.

#### **4.3. Regional counter-terrorism legal framework of the European Union**

In an effort to fight terrorism in its region, the Organisation of the European Union, the Council of Europe, and the Organisation for Security and Cooperation in Europe were established. The EU is a political and economic union consisting of 28 states in the European region. The UK is a signatory party of the Union. Amongst others, the EU is charged with ensuring internal security in the European states parties. In an

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<sup>65</sup> Art 5 of the ACHR 1978.

<sup>66</sup> Art 7 of the ACHR 1978.

<sup>67</sup> Art 19 of the ACHR 1978 provides that "every minor child has the right to protection required by his condition as a minor on the part of his family, society and the state."

<sup>68</sup> *Advisory Opinion OC-8/87* [96 ILR 392] 389.

<sup>69</sup> *Cayara v Peru* 1993 AICHR Ser C 14 1395.

<sup>70</sup> Art 51(1) of the ACHR provides that the time limit of submission of cases for consideration is three months.

endeavour to counter terrorist activities, the EU adopted the *European Union Council Common Position* (2001) which defines a terrorist group as a structured group of persons acting in concert to commit terrorist acts, regardless of its composition or level of development.<sup>71</sup> The Extraordinary European Council meeting of 21 September 2001 identified terrorism as one of the main challenges facing the world and stated that the fight against terrorism was one of a priority objective of the EU.

In addition to the EU's responses to counter-terrorism, a Counter-Terrorism Coordinator has been appointed to deal with a counter-terrorism strategy. The function of the Counter-Terrorism Coordinator is to monitor the implementation of the *EU Counter-Terrorism Strategy* and to ensure that the EU plays an active role in countering terrorism in the EU region. The *European Union Counter-Terrorism Strategy* includes the implementation of the following measures to combat terrorism in the EU region: preparation to manage and minimise the consequences of terrorist attacks by improving capacity to deal with the coordination of responses after attacks and to meet the needs of terrorist attack victims; protection of citizens and infrastructure and the reduction of vulnerability to attacks which includes improved border security and transportation infrastructure;<sup>72</sup> prevention of people from being involved in terrorism by dealing with issues of recruitment in Europe and the world; and pursuing and investigating terrorists within Europe and globally, intervening in terrorist plans, freezing assets of and finance to terrorists, and bringing terrorists to justice.

As one of the institutions of the EU, the Council of Europe is charged with fighting terrorism and protecting human rights in the EU region. As one of its functions, the Council of Europe has developed a set of guidelines on human rights and the fight against terrorism.<sup>73</sup> The main purpose of the guidelines is to reconcile legitimate national security concerns with the protection of fundamental freedoms in line with the EU approach.<sup>74</sup> The guidelines encourage states to take measures to protect

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<sup>71</sup> EU Council Common Position 931/2001.

<sup>72</sup> See <http://register.consilium.eu.int/pdf/en/05/st1449-re04.en05pdf> [date of use 28 March 2013].

<sup>73</sup> See <http://register.consilium.eu.int/pdf/en/05/st1449-re04.en05pdf> [date of use 28 March 2013].

<sup>74</sup> Art I of the *Council of Europe Guidelines* 2005 obliges states to take measures needed to protect fundamental rights of everyone within their jurisdiction against terrorist acts especially the right to life.



human rights and include the following protections: prohibition on the death penalty; provision of surveillance of detainees' communication with legal representatives; regulation of surveillance; and a prohibition on arbitrariness and discrimination. However, measures taken by states parties to combat terrorism must be lawful and if such measures restrict human rights, the restrictions must clearly be defined and proportionate to the objective pursued.<sup>75</sup>

The European Council has also published the *European Commission against Racism and Intolerance: General Policy Recommendation no 8* on combating racism while fighting terrorism. The policy recommendation, amongst others, advises states to review legislation and regulations adopted in connection with the fight against terrorism to ensure that they do not directly or indirectly discriminate against persons or groups of persons on the grounds of colour, race, language, nationality, ethnic origin or religion.<sup>76</sup>

The OSCE is tasked with collective security. The objective of the OSCE is to create a comprehensive framework for peace and stability within the European region.<sup>77</sup> Therefore, states parties of the organisation are committed to democracy based on the rule of law and the guarantee of human rights as the only approach capable of guaranteeing a comprehensive framework for security, peace and stability. In accordance with the *OSCE Action Plan on Combating Terrorism 2001*<sup>78</sup>, no circumstance or cause can justify acts of terrorism. The OSCE provides a framework within which to develop and implement human rights compliant counter-terrorism strategies. Therefore, while states have an obligation to prevent and combat terrorism, the measures employed must not unlawfully infringe human rights and the rule of law.<sup>79</sup>

4.3.1 *Regional counter-terrorism instruments in the European Union*

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<sup>75</sup> Art 2 (1) & (2) of the *Council of Europe Guidelines* 2005.  
<sup>76</sup> ERCI accessed at: [https://www.coe.int/t/dlapil/codexter/sarce/ECRI\\_Recommendation\\_8\\_2004\\_EN.pdf](https://www.coe.int/t/dlapil/codexter/sarce/ECRI_Recommendation_8_2004_EN.pdf) [date of use 31 March 2014].  
<sup>77</sup> Moeckli 2008 *Tex Intl'L.* J 166.  
<sup>78</sup> Anon accessed at: <http://2001-2009.state.gov/coalition/cr/ddr/8833.htm> [date of use 21 Aug 2015].  
<sup>79</sup> OSCE accessed at: <http://www.osce.org/odihr/80473> [date of use 30 Apr 2014]

Because terrorism knows no borders, terrorist attacks in the EU region, and most particularly in the UK, made it clear that the UK was also a target for international terrorist organisations.<sup>80</sup> Therefore, as a measure by which to enhance the fight against terrorism, the EU adopted the counter-terrorism instruments discussed below in order to protect itself against the threat of international terrorism.

#### 4.3.1.1 The European Convention on the Suppression of Terrorism 1977

The UK ratified the *European Convention on the Suppression of Terrorism* on 24 July 1978 and incorporated it into its domestic law on 30 July 1978.<sup>81</sup> The objective of the Convention is to prevent the increase in terrorist-related acts in the UK, and to ensure that the perpetrators of such acts are brought to justice. In addition, the Convention seeks to enforce economic and other measures against countries which offer safe havens for terrorists and to identify and seize funds used to further the interests of terrorist organisations.

The Convention provides that, for the purpose of extradition between contracting states, none of the following offences shall be regarded as a political offence, an offence connected with a political offence, or an offence inspired by political motives:<sup>82</sup>

- (a) an offence within the scope of the *Convention for the Suppression of Unlawful Seizure of Aircraft* (1970);
- (b) an offence within the scope of the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (1971);
- (c) a serious offence involving an attack against life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- (d) an offence involving kidnapping, the taking of hostages, or serious unlawful detention;
- (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if the use endangers persons; and

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<sup>80</sup> Van Buuren accessed at: <http://www.statewatch.org/news/2009/Aug/stcen2009.pdf> [date of use 9 Jun 2014].

<sup>81</sup> Donohue 2000 *Stan JLS* 63.

<sup>82</sup> Art 1(a)-(f) of the *European Convention on the Suppression of Terrorism* 1977.

(f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempt to commit an offence.

The Convention encourages states parties to establish jurisdiction for the prosecution of the offences mentioned in article 6,<sup>83</sup> and further, to cooperate in the extradition of the offenders in their territories and afford mutual legal assistance to each other.<sup>84</sup> In order to enhance the application of the *European Convention on the Suppression of Terrorism*, the *Protocol Amending the European Convention on Suppression of Terrorism*<sup>85</sup> was adopted on 15 May 2003.

The Protocol aims to extend the application of the *European Convention on the Suppression of Terrorism* 1977. The penal provisions of the Convention were amended to include the offences within the scope of the following conventions:

- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents* (1973);
- *International Convention against the Taking of Hostages* (1979);
- *Convention on the Physical Protection of Nuclear Material* (1980); and
- *Protocol to the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation* (1988).

#### 4.3.1.2 The Convention based on Article K.3 of the Treaty on the European Union Relating to Extradition between the Member States of the European Union 1996

The principal objective of the above Convention is to facilitate cooperation and extradition of the nationals of states parties to the *Convention of the European Union on the Suppression of Terrorism* (1997) for terrorism-related acts in order to stand trial in accordance with the criminal laws of the requesting state party.<sup>86</sup> Therefore, this instrument extended the application of the *European Convention on the Suppression of Terrorism* and the *European Convention on Extradition*.

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<sup>83</sup> Art 7 of the *European Convention on the Suppression of Terrorism* 1977.

<sup>84</sup> Art 8 of the *European Convention on the Suppression of Terrorism* 1977.

<sup>85</sup> *Protocol Amending the European Convention on the Suppression of Terrorism* 2003.

<sup>86</sup> Art 1 of the *Convention based on Article K.3 of the Treaty on European Union Relating to Extradition between Member States of the European Union* 1996.

In terms of the Convention, no offence may be regarded by the requested state party as a political offence, as an offence connected with a political offence, or as an offence inspired by political motives.<sup>87</sup> In an attempt to simplify the extradition processes, article 7 of the Convention provides that extradition may not be refused on the ground that the person claimed is not a national of the requested state party within the meaning of article 6 of the *European Convention on Extradition*. However extradition shall not be granted in respect of an offence covered by amnesty in the requested state party, where the state is competent to prosecute that offence under its own criminal laws.

#### 4.3.1.3 The Council of the European Union Framework Decision on Combating Terrorism 2002

As a measure to counter international terrorism in the EU, the *Framework Decision*,<sup>88</sup> obliges each state party to take measures to ensure that acts defined as offences under national laws which, given their nature or context, may seriously damage a country or international organisation, were committed with the aim of:

- (a) intimidating the population;
- (b) compelling a government or international organisation to perform or not to perform any act; or
- (c) seriously destabilising or destroying the fundamental, political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences.<sup>89</sup>

The following acts are regarded as terrorist offences in terms of the Framework Decision: attacks upon a person's life which may cause death;<sup>90</sup> attacks on the physical integrity of a person;<sup>91</sup> kidnapping or taking of hostages;<sup>92</sup> seizure of aircraft, ships or other means of public or goods transportation;<sup>93</sup> manufacture, possession,

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<sup>87</sup> Article 5 (1) of the *Convention based on Article K.3 of the Treaty on European Union Relating to Extradition between the Member States of the European Union* 1996.

<sup>88</sup> Council Framework Decision accessed at: <http://eur-lex.eu/LexYriServ.do?uri=CONSLEG> [date of use 9 Oct 2013].

<sup>89</sup> Art 1 of the *Council Framework Decision* 2002.

<sup>90</sup> Art 1(b) of the *Council Frame Work Decision* 2002.

<sup>91</sup> Art 1(c) of the *Council Framework Decision* 2002.

<sup>92</sup> Art 1(e) of the *Council Framework Decision* 2002

<sup>93</sup> Art 1(f) of the *Council Framework Decision* 2002.

acquisition, transport, supply, or use of weapons, explosives or of nuclear, biological or chemical weapons;<sup>94</sup> causing destruction to a government or public facility, a transport system, information system, a fixed platform located on the continental shelf, public place, or private property to endanger human life or result in a major economic loss;<sup>95</sup> release of dangerous substances or causing fires, floods or explosions which may endanger human life;<sup>96</sup> or interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life.<sup>97</sup>

Furthermore, the Framework Decision provides for offences relating to terrorist groups. In terms of the Framework Decision, a terrorist group is a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences.<sup>98</sup> A structured group, consequently, is not randomly formed for the immediate commission of an offence, does not need to have a formally defined role for its members and need not have continuity of membership or a developed structure.<sup>99</sup> The offences relating to a terrorist group include, directing a terrorist group and participation in the activities of a group, including the supply of information or material resources or funding of the activities of the terrorist group.<sup>100</sup> States parties to the Framework Decision are urged to assert jurisdiction over the prosecution of terrorist-related offences in their territories in order to combat the commission of terrorist offences.<sup>101</sup>

#### 4.3.1.4 The Council of Europe Convention for the Prevention of Terrorism 2005

The *Council of Europe Convention for the Prevention of Terrorism 2005* was adopted on 16 May 2005 and entered into force on 1 December 2009. The objective of the Convention is to enhance the efforts of the parties to the Convention to prevent terrorism.<sup>102</sup> In terms of the Convention, states parties are to take measures

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<sup>94</sup> Art 1(f) of the *Council Framework Decision 2002*.

<sup>95</sup> Art 1 (d) of the *Council Framework Decision 2002*.

<sup>96</sup> Art 1 (g) of the *Council Framework Decision 2002*.

<sup>97</sup> Art 1(h) of the *Council Framework Decision 2002*.

<sup>98</sup> Art 2(1) of the *Council Framework Decision 2002*.

<sup>99</sup> Art 2(1) of the *Council Framework Decision 2002*.

<sup>100</sup> Art 2(2)(a)-(b) of the *Council Framework Decision 2002*.

<sup>101</sup> Art 9 of the *Council Framework Decision 2002*.

<sup>102</sup> Art 2 of the *Council of Europe Convention on the Prevention of Terrorism 2005*.

necessary to improve and develop cooperation among national authorities with the aim of preventing terrorist offences by exchanging information relating to terrorist acts, enhancing training and coordination plans for civil emergencies, and improving physical protection of persons and infrastructure.<sup>103</sup>

#### 4.3.1.5 The Treaty of Lisbon 2009

The *Treaty of Lisbon* entered into force on 1 December 2009 to strengthen matters related to internal security in the fight against terrorism in the EU states parties. The entry into force of the *Treaty of Lisbon* resulted in changes in the security matters of the EU. As a result, the jurisdiction of the European Court of Justice has been extended to cover all matters of freedom, security, and justice. There is already a perception that the Treaty will have a noticeable impact on EU counter-terrorism policies. Consequently, the European Court of Justice has the power to force reluctant EU states parties to implement counter-terrorism measures adopted by the Union. The *Treaty of Lisbon* also clarifies the general objectives of the EU. Article 3 of the Treaty provides that internal security is the fundamental objective of the EU.<sup>104</sup> This does not mean that the EU concentrates on measures of internal protection only, but must also consider external matters of security. The external security matters involve representation of the EU on international counter-terrorism institutions which require exchange of information related to homeland security. In addition, the Treaty lists the tasks of the EU as including joint disarmament operations, functions of combat forces including peace keeping and post conflict stabilization that contribute to the fight against terrorism.<sup>105</sup> Furthermore, in an effort to fight terrorism in the European region, the Treaty provides for the adoption of a solidarity clause in terms of article 222 by states party to the EU.<sup>106</sup> It is one of the future objectives of the *Treaty of Lisbon* to create the office of the European

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<sup>103</sup> Art 3 (a)-(c) of the *Council of Europe Convention on the Prevention of Terrorism* 2005.

<sup>104</sup> Art 3(2) of the *Treaty of Lisbon* 2009 provides that the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border control, asylum, immigration and the prevention and combating of crime.

<sup>105</sup> Arcarazo and Murphy *EU Security* 173.

<sup>106</sup> Art 222 of the *Treaty of Lisbon* 2009 provides that the Union and its member states shall act jointly in a spirit of solidarity if its member state is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by member states.

Public Prosecutor to deal with crimes involving financial interests and transnational crimes. However, the consent of the European Parliament and unanimity amongst states parties, is required for the creation of this office.

Furthermore, the *Treaty of Lisbon* introduced provisions that strengthened the protection of fundamental rights in the EU. For example, the *Charter of the European Union* obliges the EU to accede to the *European Convention on Human Rights* 1950, and grants the European Court of Justice greater powers of judicial review of judicial cooperation in criminal law and acts of the police in preventing and combating terrorist acts.<sup>107</sup> In one of its ground breaking decisions, the European Court of Justice, in *Kadi and Al Barakaat International Foundation v Council and Commission*<sup>108</sup> declared the European Commission Regulation that implements the UNSC resolution 1267 authorising sanctions on Yasin Abdullah Ezzedine Kadi and the Al Bakaraat Foundation invalid. The European Court of Justice held that the European Commission Regulation authorising the implementation of sanctions violates the right of a person to a proper defence, to be heard and to effective review. This finding overturned the decision of the European Court of the first instance in *Kadi v Council and Commission*<sup>109</sup> which dismissed the challenge by Kadi against being listed as a terrorist. The European Court of the first instance had arrived at the finding that the European Court had no jurisdiction to review the lawfulness of the blacklisting decision. The European Court of Justice in *Kadi v Commission*<sup>110</sup> confirmed the decision of the European Court of Justice decision of 2008.

#### 4.3.2 Instruments aimed at the protection of human rights in the EU

In order for the UK to be able to fight international terrorism while at the same time respecting the rule of law and fundamental human rights, as a state party of the EU it ratified the following human rights instruments discussed in detail below.

##### 4.3.2.1 European Convention on Human Rights 1950

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<sup>107</sup> Douglas-Scott 2011 *HRLR* 646.

<sup>108</sup> *Kadi and Al Barakaat International Foundation v Council and Commission* 2008 ECR I 6351.

<sup>109</sup> *Kadi v Council and Commission* 2005 ECR II- 3649.

<sup>110</sup> *Kadi v Commission* 2010 ECR 11-05177.

The *European Convention on Human Rights* came into force in September 1953. The preamble to the *European Convention on Human Rights* provides that states are like-minded and have common heritage of political traditions, ideals, freedoms and the rule of law.<sup>111</sup> The *European Convention on Human Rights*, amongst others, deals with rights such as the right to life;<sup>112</sup> the prohibition of torture and slavery;<sup>113</sup> the right to liberty and security of the person;<sup>114</sup> the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law;<sup>115</sup> and the right to an effective remedy before a national authority if one of the Convention rights or freedoms has been violated.<sup>116</sup>

In terms of the Convention, everyone has the right to liberty and security of his or her person, and no one shall be deprived of his or her liberty except under the following circumstances:<sup>117</sup>

- the lawful detention of a person after conviction by a competent court;
- the lawful detention of a person for non-compliance with the lawful order of a court;
- the lawful arrest or detention of a person effected for the purpose of bringing him or her before a competent court on reasonable suspicion that he or she has committed an offence, or when it is reasonably considered necessary to prevent his or her committing an offence or fleeing; and

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<sup>111</sup> Shaw *International Law* 347.

<sup>112</sup> Art 2 of the *European Convention on Human Rights* 1950.

<sup>113</sup> Arts 3 & 4 of the *European Convention on Human Rights* 1950.

<sup>114</sup> Art 5(1) of the *European Convention on Human Rights* 1950 provides that "everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed the law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with a lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by a lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken a view to deportation or extradition."

<sup>115</sup> Art 6 of the *European Convention on Human Rights* 1950.

<sup>116</sup> Art 13 of the *European Convention on Human Rights* 1950.

<sup>117</sup> Art 5(1)(a)-(c) of *the European Convention on Human Rights* 1950.



- the lawful arrest or detention of a person to prevent his or her unauthorised entry into the country, or of a person against whom action is being taken with a view of deportation.<sup>118</sup>

The Convention further provides that everyone arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, and shall be entitled to trial within a reasonable time, or to release pending trial.<sup>119</sup> However, the Convention does not specify what constitutes a reasonable detention period. In *De Jong, Beljet and Van den Brink v Netherlands*,<sup>120</sup> the European Court of Human Rights concluded that six, seven and eleven day detention periods without judicial intervention, was incompatible with the prompt appearance requirement under article 5(3) of the Convention. Therefore, everyone who is deprived of his liberty by arrest or detention is entitled to initiate proceedings questioning the lawfulness of his detention.<sup>121</sup>

Of importance, the Convention provides for the right to a fair trial. The right to a fair trial was considered in *Rowe and Davies v UK*<sup>122</sup> where the European Court on Human Rights held as follows with regard to right to disclosure of evidence:

It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence.

In terms of the Convention everyone charged with a criminal offence has the following minimum rights:

- to be informed promptly, in a language which he understands, of the nature and cause of the accusation against him or her;<sup>123</sup>
- to have adequate time and facilities for the preparation of his or her defence;<sup>124</sup> for example, the accused has the right to be informed of the

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<sup>118</sup> Art 5(1)(f) of the *European Convention on Human Rights* 1950.

<sup>119</sup> Art 5(3) of the *European Convention on Human Rights* 1950.

<sup>120</sup> *De Jong, Beljet and Van den Brink v Netherlands* 1984 77 ECHR Ser A 3.

<sup>121</sup> Art 5(4) of the *European Convention on Human Rights* 1950.

<sup>122</sup> *Rowe and Davies v UK* 2000 30 EHRR 30 at 60.

<sup>123</sup> Art 3(a) of the *European Convention on Human Rights* 1950.

<sup>124</sup> Art 3(b) of the *European Convention on Human Rights* 1950.

charge to enable the accused person to prepare a defence as dealt with in *GSM v Austria*;<sup>125</sup>

- to defend him or herself in person or through legal assistance of his or her choosing or, if he or she has insufficient means to pay for legal assistance, to be given assistance free when the interest of justice so requires;<sup>126</sup>
- to examine or have witnesses against him examined, and to secure the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;<sup>127</sup> and
- to have a free assistance of an interpreter if he or she cannot understand or speak the language used in court.<sup>128</sup>

Various Protocols have been added to the rights protected under the Convention, for example Protocol no 6 which provides for the abolition of the death penalty.<sup>129</sup> Furthermore, the Convention provides for the derogation of the rights of individuals during a declared state of emergency.<sup>130</sup> However, there are limitations imposed by the Convention on human rights.<sup>131</sup> The purpose of the Convention is to serve as an alert as to large scale violations of human rights to the other European states parties to the *European Convention on Human Rights*.<sup>132</sup> The Convention also aims further to protect the freedoms and the rule of law to which the preamble of the Convention refers. Most important, the *European Convention on Human Rights* 1950 is a regional counterpart of the UDHR 1948 and the ICCPR 1966. The *European*

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<sup>125</sup> *GSM v Austria* 1983 34 DR 119.

<sup>126</sup> Art 3(c) of the *European Convention on Human Rights* 1950

<sup>127</sup> Art 3(d) of the *European Convention on Human Rights* 1950.

<sup>128</sup> Art 3(e) of the *European Convention on Human Rights* 1950.

<sup>129</sup> Shaw *International Law* 348.

<sup>130</sup> Art 15(1) of the *European Convention Human Rights* 1950 provides that in the time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law; no derogation from article 2, except in respect of death resulting from lawful acts of war, or from article 3,4 and 7 shall be made under this provision.

<sup>131</sup> Art 17 of the *European Convention on Human Rights* 1950 provides that nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth by the Convention or at their limitation to a greater extent than is provided for in the Convention.

<sup>132</sup> Harries *et al Law of the European Convention* 2.

*Convention Human Rights* has a common application with the *American Convention on Human Rights* and the *African Charter on Human and Peoples' Rights* 1981.

#### 4.3.2.2 *The European Convention for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment 1984*

The Convention came into operation on 1 February 1989 and aims to enable the supervision of persons deprived of their liberty and to prevent their torture or ill-treatment. As a measure to strengthen the aims of the Convention, the Committee for the Prevention of Torture was established. This Committee is empowered to carry out visits to people in detention who are suspected of terrorism, and to examine their treatment while in detention. The important objective of these visits is to strengthen the protection of detained persons from torture and inhuman or degrading treatment or punishment. States parties to the Convention agreed to permit visits by the Committee to any place within their jurisdictions where it is suspected that persons have been deprived of their liberty by a public authority.<sup>133</sup> The Committee has powers to interview private persons deprived of their liberty and may communicate freely with any person whom it believes can supply the necessary information.<sup>134</sup> In summary, the important objective is to protect individuals from torture, inhuman or degrading treatment or punishment which is also protected by the UDHR<sup>135</sup> and the ICCPR.<sup>136</sup>

#### 4.3.3 *EU bodies aimed at the protection and enforcement of human rights*

The following discussion focuses on the *European Court for Human Rights* which is charged with the duty of protecting and enforcing human rights in EU state parties as enshrined in the *European Convention on Human Rights* 1950.

##### 4.3.3.1 The European Court of Human Rights

The Court was established on 1 November 1959. The UK agreed to be bound by the jurisdiction of the European Court of Human Rights. The Court stresses the fact that

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<sup>133</sup> Art 2 of the *European Convention for the Prevention of Torture, Inhuman and Degrading Treatment* 1984.

<sup>134</sup> Art 8 of the *European Convention for the Prevention of Torture, Inhuman and Degrading Treatment* 1984.

<sup>135</sup> Art 5 of the UDHR 1948.

<sup>136</sup> Art 7 of the ICCPR 1966.

the *European Convention on Human Rights* 1950 is a living instrument that is to be interpreted in the light of the present-day conditions.<sup>137</sup> The Court also noted that the objective and purpose of the *European Convention on Human Rights* as an instrument for the protection of individuals requires that its provisions be interpreted and applied so as to render its safeguards practical and effective.

Through its judgments relating to terrorist activities, the European Court of Human Rights managed to strike a balance between the competing interests of national security and the rights of individuals. Democracy, the rule of law, and human rights are cardinal to the approach and objectives of the Court.<sup>138</sup>

Notwithstanding the fact that the UK has consented to the jurisdiction of the European Court of Human Rights, problems have been encountered by the UK's domestic courts and the European Court of Human Rights. Differences between the two courts are not uncommon. These are demonstrated in the recent decision of *Othman (Abu Qatada) v UK*.<sup>139</sup> In this case, the European Court of Human Rights overruled the decision of the House of Lords. The House of Lords had itself overruled the decision of the Appeal Court. Othman had been arrested and detained under the *Anti-terrorism, Crime and Security Act* 2001. When the 2001 Act was repealed, Othman was released on bail and subjected to control in terms of the *Prevention of Terrorism Act* 2005. Othman had never been prosecuted in terms of the criminal or anti-terrorism laws of the United Kingdom. The Home Secretary then served Othman with a notice of intent to deport him on the ground of national security. Othman appealed. It was argued that the deportation of the applicant to Jordan would put him at risk of ill treatment contrary to the provisions of article 3<sup>140</sup> of the *European Convention on Human Rights* 1950, and a denial of justice contrary to article 6.<sup>141</sup> The European Court of Human Rights agreed with the Appeal Court that the use of evidence obtained by means of torture would amount to a denial of justice. The

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<sup>137</sup> Shaw *International Law* 349.

<sup>138</sup> Bakotic *International Law* 465.

<sup>139</sup> *Othman (Abu Qatada) v UK* 2012 ECHR 56.

<sup>140</sup> Art 3 of the *European Convention on Human Rights* 1950 provides that "no one shall be subjected to torture or inhuman or degrading treatment or punishment."

<sup>141</sup> Art 6 of the *European Convention on Human Rights* 1950 provides that: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law.

court relied on the decision in *A and Others v Secretary of State for the Home Department*<sup>142</sup> where the evidence obtained by means of torture was excluded because it was unreliable, and did not meet the ordinary standards of humanity and decency. However, the United Kingdom Supreme Court differed from the European Court of Human Rights in that the decision of the Supreme Court in *Rabone and Another v Pinnine Care NHS Foundation Trust*<sup>143</sup> went beyond the jurisprudence of the European Court of Human Rights. In this case the Supreme Court extended the obligations that article 2 places on the state and its officials.<sup>144</sup>

In *Brannigan and Mc Bride v United Kingdom*<sup>145</sup> the applicants complained of violations of article 5(3) and (5) of the *European Convention on Human Rights* 1950. In terms of article 5 everyone has the right to liberty and security of the person, and no one shall be deprived of his liberty save in accordance with the procedure prescribed by law. Article 5(3) of the *European Convention on Human Rights* 1950 provides that everyone arrested or detained in accordance with the provisions of paragraph 1(c) shall be promptly brought before a judge or officer authorised by law to exercise judicial power. In terms of article 5(5) everyone who has been a victim of arrest or detention in contravention of the provisions of article 5(5) shall have an enforceable right to compensation. The applicants in the case had been detained for a period of six days which the European Court of Human Rights found to be in contravention of article 5(3) of the *European Convention on Human Rights* 1950.

Where the European Court of Human Rights allowed interference with the protected rights, the court required the state to justify the deviation from the respect and protection of human rights. The Court did not offer the so-called 'blind justice' that did not take account of the difficulties that the states came across in protecting their citizens bearing in mind that the protection of citizens includes protection from

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<sup>142</sup> *A and Others v Secretary of State for the Home Affairs Department* 2005 UKHL 71.

<sup>143</sup> *Rabone and Another v Pinnine Care NHS Foundation Trust* 2012 UKSC 2.

<sup>144</sup> Article 2 of the ECHR 1950 provides that "everyone has a right to life."

<sup>145</sup> *Brannigan and Mc Bride v United Kingdom* 1993 17 EHRR 251; see also *Punzelt v Czech Republic* 2000 ECHR 170 where the European Court of Human Rights found that the periods of pre-trial detention lasting between two and half years were excessive; see further *Weinhoff v Germany* 1968 ECHR 2 para 5 wherein the Court held that a detained person is entitled to have a case given priority and conducted with particular expedition.

terrorist activities. Therefore, the Court in *Klaas and Others v Germany*<sup>146</sup> emphasised that whilst it was aware of the danger of undermining or even destroying democracy in the process of defending it, and affirmed that a state party to the *European Convention on Human Rights* 1950 may not, in the name of the struggle against espionage and terrorism, adopt whatever measures it deems appropriate.

It is, however, the duty of the state to protect the human rights of all within its jurisdiction, including against terrorist attacks. While the European Court of Human Rights did not deny this role, it held that the role should be exercised under the supervision of the Court, which is to rule on its compatibility with the *European Convention for Human Rights* 1950.<sup>147</sup>

#### **4.4. Regional counter-terrorism legal framework of the African Union**

The continent of Africa has long experienced different kinds of terrorism, including state terrorism. Libya is an African state that has been accused of encouraging and sponsoring terrorism.<sup>148</sup> For example, Libya was accused of the Lockerbie Pan-Am flight attack in which an aircraft exploded mid-air and crashed at Lockerbie in Scotland.<sup>149</sup> The second attack was on UTA Flight 772 en route from Paris to Congo in which 170 passengers died.<sup>150</sup> The primary concern of the AU in combating terrorism is that terrorism violates basic human rights, particularly the right to life, freedom from fear, freedom of expression, and the right to security.<sup>151</sup> Therefore, in order to be able to prevent and combat terrorist activities on the African continent, the AU adopted the following instruments: *Convention on the Prevention and Combating of Terrorism* 1999; the *AU Non-aggression and Common Defence Pact* 2001 and the *Protocol to the OAU Convention on the Prevention and Combating of Terrorism* 2004.

What follows is a detailed discussion of the regional instruments adopted by the AU to prevent and combat terrorism on the African continent.

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<sup>146</sup> *Klaas and Others v Germany* 1978 Series A no 28.

<sup>147</sup> Anon accessed at: <http://www.publicwhip.org.uk/division.php> [date of use 29 May 2012].

<sup>148</sup> Blishchenko and Zhdanov *Terrorism* 54.

<sup>149</sup> Saul *Research Handbook* 67.

<sup>150</sup> Thackrah *Dictionary* 161.

<sup>151</sup> Gumedze 2010 *AHRLJ* 139.

#### 4.4.1 *Convention on the Prevention and Combating of Terrorism 1999*

The AU adopted its *Convention on the Prevention and Combating of Terrorism* during 1999 in Algiers. The Convention was adopted after the 1998 terrorist attacks on the USA embassies in Kenya and Tanzania.<sup>152</sup> The Convention acknowledges the scope and seriousness of terrorism and the dangers it poses to the stability and security of states.<sup>153</sup> South Africa ratified the Convention on 7 November 2002.<sup>154</sup>

In terms of the Convention an act of terrorism includes any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, and organising or procurement of any person with intent to commit any act referred to in the Convention. Struggles waged by peoples for their liberation from occupation, aggression and domination by foreign forces are not to be classified as terrorist acts.<sup>155</sup> Furthermore, the Convention prohibits participation in any activities aimed at organising, financing, supporting, committing, or inciting to commit terrorist acts, or providing safe havens for terrorist organisations, including the provision of weapons and stockpiling in their countries, and issuing travelling documents.<sup>156</sup> States parties to the Convention agree to cooperate with each other in order to prevent and combat terrorism, including state sponsored terrorism.

In an effort to encourage states to comply with the objectives of the 1999 Convention, a plan for the creation of an African Centre for the Study and Research on Terrorism was adopted. The Centre will coordinate the analysis of terrorism and terrorism activities in African Union members' territories, and on the African continent, and is tasked with the centralisation, collection and dissemination of studies and analysis on terrorism so as to create awareness amongst states parties and prevent and combat terrorism. The *African Union Convention on Preventing and Combating Terrorism* and the establishment of the African Centre for the Study and Research on Terrorism demonstrate Africa's commitment to dealing with the threat of international terrorism. The African Centre for the Study and Research on

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<sup>152</sup> Ewi and Aning 2006 *ASR* 1.

<sup>153</sup> Goredema 2003 *Security Review* 2.

<sup>154</sup> Sturman accessed at: <http://www.issafrica.org/armnet africa/default/files/sturma-pdf> [date of use 13 March 2014].

<sup>155</sup> Art 3 of the *AU Convention on the Prevention and Combating of Terrorism* 1999.

<sup>156</sup> See [www.Africa-union.org](http://www.Africa-union.org) [date of use 25 Feb 2013].

Terrorism is based in Algiers, Algeria. Between 30 November and 5 December 2008, the Centre hosted a workshop aimed at building African capacity and regional and international cooperation to regulate, monitor, investigate, and prevent the transfer of monies aimed at supporting terrorist organisations and their operations.

#### *4.4.2 The African Union Non-aggression and Common Defence Pact 2001*

On 31 January 2001 in Abuja, Nigeria, the AU adopted the *African Union Non-aggression and Common Defence Pact* which supplements the framework provided by the AU Convention of 1999. In accordance with the *Non-aggression and Common Defence Pact*, the encouragement, support, harbouring, or provision of any assistance in the commission of terrorist acts and other violent organised crimes against a state party, constitutes an act of aggression.<sup>157</sup> States parties are therefore prohibited from using their territory for stationing, transit, withdrawal or incursions by irregular armed groups, mercenaries and terrorist organisations operating in the territory of another state party.<sup>158</sup> States parties are further obliged to extend mutual legal and other assistance in the event of threats of terrorist attacks or other organised international crimes, and to arrest and prosecute any irregular armed groups, mercenaries, or terrorists who pose a threat to any state party.<sup>159</sup>

#### *4.4.3 Protocol to the OAU Convention on the Prevention and Combating of Terrorism 2004*

The above Protocol was adopted on 8 July 2004 with the main purpose of enhancing the effective implementation of the *OAU Convention on Preventing and Combating Terrorism* 1999. As a result of the increasing incidence of terrorist acts worldwide, including on the African continent, the AU deemed it appropriate to adopt the Protocol to combat terrorism in all its forms and manifestations, and the support thereof.<sup>160</sup> Of utmost importance is that regional mechanisms play a complementary role in the effective implementation of the Convention and its Protocol. Therefore, in accordance with the Protocol, regional mechanisms are to be employed amongst

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<sup>157</sup> Art 1(xi) of the *AU Non-aggression and Common Defence Pact* 2001.

<sup>158</sup> Art 5 (c) of the *AU Non-aggression and Common Defence Pact* 2001

<sup>159</sup> Art 6 (a) of the *AU Non-aggression and Common Defence Pact* 2001.

<sup>160</sup> Art 2 of the *Protocol to the OAU Convention on the Prevention and Combating of Terrorism* 2004.



others to establish contact points on terrorism at the regional level;<sup>161</sup> liaise with the Commission of the AU in developing measures for the prevention and combating of terrorism;<sup>162</sup> harmonise and coordinate national measures to prevent and combat terrorism in their respective regions;<sup>163</sup> and to report to the Commission on measures taken at regional level to prevent and combat terrorism.<sup>164</sup> In its effort to fight terrorism, South Africa ratified the Protocol on 25 March 2007.

#### 4.4.4 *Instruments aimed at the protection of human rights in the AU*

The AU has adopted instruments to prevent and combat terrorist acts on the African continent. Therefore in order for the AU to conform to international protection of human rights policies, the OAU adopted regional human rights instruments to protect human rights while fighting terrorism in its region such as the *African Charter on Human and Peoples' Rights* 1981.

##### 4.4.4.1 The African Charter on Human and Peoples' Rights 1981

The *African Charter on Human and Peoples' Rights* (hereafter the *African Charter*) was adopted in Nairobi on 27 June 1981 and entered into force on 21 October 1986. The aim of the *African Charter* is to promote and protect human and peoples' rights. The *African Charter* specifically provides that every human being shall be entitled to respect for the life and integrity of his person, and that no one may be deprived of the right.<sup>165</sup> Article 5 of the *African Charter* stresses the right to respect and dignity of a human being, and the recognition of his legal status. The *African Charter* prohibits all forms of exploitation and degradation of man, in particular slavery, slave trade, torture, and cruel, inhumane or degrading punishment and treatment.<sup>166</sup> These prohibitions conform to the spirit of the UDHR<sup>167</sup> and the ICCPR.<sup>168</sup>

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<sup>161</sup> Art 6(a) of the *Protocol to the OAU Convention on the Prevention and Combating of Terrorism* 2004.

<sup>162</sup> Art 6(b) of the *Protocol to the OAU Convention on the Prevention and Combating of Terrorism* 2004.

<sup>163</sup> Art 6(d) of the *Protocol to the OAU Convention on the Prevention and Combating of Terrorism* 2004.

<sup>164</sup> Art 6(g) of the *Protocol to the OAU Convention on the Prevention and Combating of Terrorism* 2004.

<sup>165</sup> Art 4 of the *African Charter* 1981.

<sup>166</sup> Art 5 of the *African Charter* 1981.

<sup>167</sup> Art 5 of the UDHR 1948 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Furthermore, in an effort to protect human and peoples' rights, the *Charter* provides that every individual shall have the right to liberty and security of his or her person. Consequently, no one may be deprived of his or her freedom save for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained.<sup>169</sup> The *African Charter* further provides for fair trial protections such as the right to be presumed innocent until proven guilty by a competent court or tribunal;<sup>170</sup> the right to legal representation;<sup>171</sup> and the right to be tried within a reasonable time by an impartial court or tribunal.<sup>172</sup> Although countering terrorism poses a difficult challenge to the protection of human rights, the *African Charter* encourages states parties to respect the human rights it embodies. In promoting the protection of human and peoples' rights, article 30 of the *African Charter* establishes the African Commission on Human and Peoples Rights to ensure protection of human rights on the African continent. While the aim of the *African Charter* is to promote the protection of human and peoples' right, it imposes duties on the individual so as not to compromise the security of the state of which he or she is a national.<sup>173</sup> The *African Charter* is a regional counterpart to the UDHR and the ICCPR. It further has an application similar to that of the ACHR and the *European Convention on Human Rights*. It is, however, regrettable that the *African Charter* makes no provision for the derogation of rights during declared emergencies.

#### 4.4.5 AU bodies aimed at the protection and enforcement of human rights

The following discussion focuses on the AU bodies charged with protecting and enforcing human rights on the African Continent, namely the Peace and Security Council of the African Union, the African Commission on Human and Peoples' Rights, the African Court on Human Rights and Peoples' Rights, and the African Court of Justice and Human Rights.

##### 4.4.5.1 The Peace and Security Council of the African Union

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<sup>168</sup> Art 7 of the ICCPR 1966 prohibits torture or cruel or degrading treatment or punishment.

<sup>169</sup> Art 6 of the *African Charter* 1981.

<sup>170</sup> Art 7(b) of the *African Charter* 1981.

<sup>171</sup> Art 7(c) of the *African Charter* 1981.

<sup>172</sup> Art 7(d) of the *African Charter* 1981.

<sup>173</sup> Art 29(3) of the *African Charter* 1981.

The Peace and Security Council was established as an organ of the AU on 9 July 2002 and is charged with the duty of enforcing the decisions of the AU.<sup>174</sup> The most important task of the Peace and Security Council is to promote peace, security and stability on the African continent in order to guarantee the protection and preservation of life and property.<sup>175</sup> In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>176</sup> the African Commission on Human and Peoples' Rights (hereafter the ACHPR) emphasised the provisions of article 4 of the *African Charter* that are to the effect that the human person is inviolable, and every human being is entitled to the respect for his or her life and the integrity of his or her person. Therefore, no one may be arbitrarily deprived of this right. The Peace and Security Council is further tasked to ensure the execution of the *AU Convention on Preventing and Combating Terrorism* 1999 and to coordinate continental and regional efforts against terrorism.<sup>177</sup> One of the main achievements of the Peace and Security Council since its establishment, is that it has increased cooperation with the UNSC and the EU Political and Security Committee in addressing conflict and crisis situations on the African continent.

#### 4.4.5.2 The African Commission on Human and Peoples' Rights

The ACHPR was established in 1987 with the main purpose of monitoring the application of the *African Charter on Human and Peoples' Rights* by states parties. Broadly speaking, in terms of article 45 of the *African Charter*, the ACHPR is charged the promoting of human and peoples' rights, and in particular, to collect documents, undertake studies and research on African problems in the field of human and peoples' rights, to organise seminars, conferences, to disseminate information, and

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<sup>174</sup> Organisation of African Unity (OAU)/African Union (AU) accessed at: [www.Africa-union.org](http://www.Africa-union.org) [date of use 25 Feb 2013].

<sup>175</sup> Gamedze 2010 *AHRLJ* 139.

<sup>176</sup> *International Pen and Others on behalf of Saro-Wiwa v Nigeria* 2000 *AHRLR* 212 (ACHPR 1998); see also *Commission National des Droits de l' Homme et des Libertes v Chad* 2000 *AHRLR* 66 (ACHPR 1995) where in it was stressed that governments have a duty to protect their citizens, not only by means of appropriate legislation and effective enforcements, but also by protecting them from damaging acts that may be perpetrated by private parties. See further *Velasquez Rodriguez v Honduras* 19 July 1988 Ser C. where the Inter-American Court on Human rights held in relation to the protection of human rights that when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be a clear violation of its obligations to protect human rights of its citizens.

<sup>177</sup> Toth accessed at: [http://www.publikon.com/application/essay496\\_1pdf](http://www.publikon.com/application/essay496_1pdf) [date of use 7 March 2014].

to encourage national and local institutions dedicated to promoting human and peoples' rights. It must further make recommendations to governments on human rights related issues.<sup>178</sup> The ACHPR is further vested with powers to receive and adjudicate individual allegations of human rights violations by states parties in terms of the *African Charter*.<sup>179</sup>

The ACHPR is further concerned with human rights related violations that occur in the process of countering terrorism. In December 2005, the ACHPR adopted a resolution on the protection of human rights and the rule of law in the fight against terrorism. Through its jurisprudence, the ACHPR has continuously urged states parties to comply with their human rights obligations under the *African Charter* and other international human rights instruments. In *Constitutional Rights Project and Another v Nigeria*,<sup>180</sup> the suspension of the right to *habeas corpus* of detainees in Nigeria was held to constitute a violation of the *African Charter*. The ACHPR further undertook to ensure that all special procedures and mechanisms of the ACHPR, within the framework of their mandates, have regard to the protection of human rights and fundamental freedoms in the context of measures aimed at preventing and combating terrorism, and coordinate their efforts, as appropriate, in order to promote a coherent approach to fighting terrorism.

Despite its broad human rights mandate, there are views that the ACHPR has been inadequate and ineffective in ensuring the protection of human rights on the African continent.<sup>181</sup> The reason for the inadequacy and ineffectiveness of the Commission is largely attributed to the fact that it could only report human rights violations and make recommendations to the Assembly of Heads of State and Government.<sup>182</sup>

#### 4.4.5.3 The African Court on Human Rights and Peoples' Rights

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<sup>178</sup> Heyns and Killander *Compendium* 30-31; see also Murray 2001 *AHRLJ* 1.

<sup>179</sup> Art 55 and 56 of the *African Charter*; see also Mujuzi 2012 *AHRLJ* 89.

<sup>180</sup> *Constitutional Rights Project and Another v Nigeria* 2000 *AHRLR* 235 (ACHPR 1999). See also *Huri Laws v Nigeria* 2000 *AHRLR* 273 where the violation of rights as provided for by Article 5 were alleged, in that the detainee was detained in a sordid and dirty cell under inhuman and degrading conditions. Article 5 of the *African Charter* provides that every individual shall have the right to the respect of dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

<sup>181</sup> Viljoen *International Human Rights* 428.

<sup>182</sup> Hopkins 2002 *AHRLJ* 234.

On 26 December 2003, fifteen African states (including South Africa) ratified the *Additional Protocol for the Establishment of the African Court on Human Rights and Peoples Rights*. The court was established to enhance the efficiency of the ACHPR. The *Protocol on the African Court* clearly provides that the establishment of the court is aimed at complementing and reinforcing the functions of the ACHPR.<sup>183</sup> However, whilst executing its duties, the African Court on Human Rights and Peoples' Rights should guard against conflict between itself and the ACHPR. The court came into operation on 25 January 2004. The jurisdiction of the court covers cases and disputes submitted to it concerning the interpretation and application of the *African Charter*, from civil and political rights, social, cultural, and economic rights. In terms of article 3(1) of the *Protocol on the African Court*, the jurisdiction of the court extends to all cases and disputes submitted to it concerning the interpretation and application of the *African Charter* and any other human rights instruments ratified by the states.<sup>184</sup> It is the duty of the court to ensure respect for the *African Charter*. This implies that the court should ensure that measures adopted by states conform to international human rights obligations. The *Convention of the Organisation of African Unity on Prevention and Combating of Terrorism* stipulates that none of its provisions may be interpreted in a manner that derogates from the principles of international law, particularly the principles of international humanitarian law and the *African Charter*.<sup>185</sup> The success of the court depends on the willingness of states to be subjected to the jurisdiction of the court.

#### 4.4.5.4 Establishment of the African Court of Justice and Human Rights

The relationship between the AU and the ICC is currently strained,<sup>186</sup> largely as a result of the warrant issued for the arrest of the President of Sudan, Omar Al-Bashir, who stands accused of crimes against humanity.<sup>187</sup> Calls by the AU to the UNSC for the deferment of the arrest warrant in terms of article 16 of the *Rome Statute*<sup>188</sup> that

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<sup>183</sup> Elsheikh 2002 *AHRLJ* 252; see also Viljoen *International Human Rights* 437.

<sup>184</sup> Eno 2002 *AHRLJ* 226.

<sup>185</sup> Art 22(1) of the *OAU Convention on the Prevention and combating of Terrorism*.

<sup>186</sup> Du Plessis accessed at: <http://www.issafrica.org/uploads/paper235-Africacourt.pdf> [date of use 12 Jun 2014].

<sup>187</sup> Tladi 2009 *SAYIL* 57; see also Dugard *International Law* 564.

<sup>188</sup> Art 16 of the *Rome Statute of the International Criminal Court* 1998 empowers the Security Council to defer investigations and prosecutions.

fell on deaf ears, fuelled hostility between the AU and the ICC. The fear was that the arrest and prosecution of Al-Bashir by the ICC would disrupt the peace process in Sudan.<sup>189</sup> Furthermore, the ICC was seen as a western institution that would not best serve the interests of the African states. Consequently, member states to the AU deemed it appropriate to reject the jurisdiction of the ICC and to merge the existing African Court on Human and Peoples Rights with the African Court of Justice of the African Union, and to establish the African Court of Justice and Human Rights under the *Protocol on the Statute of the African Court of Justice and Human Rights*.<sup>190</sup> The AU envisages that the African Court of Justice and Human Rights should take over the jurisdiction of the ICC. Therefore, the new court will have jurisdiction over international crimes such as war crimes, genocide, crimes against humanity, as well as transnational crimes such as terrorism.<sup>191</sup> The important objective of the African Court of Justice and Human Rights is to preserve peace and security on the African continent. The problem facing the AU decision to establish the African Court of Justice and Human Rights is that the idea comes after the African states had agreed to become parties to the *Rome Statute*<sup>192</sup> establishing the ICC. Furthermore, the opponents of the new court fear that it will shield leaders who perpetrate crimes against humanity despite reassurances against impunity.<sup>193</sup> The new court also does not enjoy retrospective jurisdiction to deal with cases that occurred before its establishment. This means that the cases committed during the reign of the ICC, will not be dealt with.<sup>194</sup> It is worth noting that the AU adopted a non-interference policy as regards the internal policies of member states. Notwithstanding the fact that the AU has adopted a non-interference policy, the Constitutive Act<sup>195</sup> empowers the AU to intervene in the affairs of a state party pursuant to a decision of the Assembly in respect of grave circumstances such as

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<sup>189</sup> Dugard *International Law* 565.

<sup>190</sup> *Protocol on the Statute of the African Court of Justice and Human Rights* 2008.

<sup>191</sup> Du Plessis accessed at: <http://www.issafrica.org/uploads/paper235-Africacourt.pdf> [date of use 12 Jun 2014].

<sup>192</sup> *Rome Statute of the International Court* 1998.

<sup>193</sup> ASF accessed at: <http://www.asf.be/wp-content/uploads/2012/08/ASF-AG-Africa-and-the-icc.pdf> [date of use 9 Jun 2014].

<sup>194</sup> See Du Plessis accessed at: <http://www.issafrica.org/uploads/paper235-Africacourt.pdf> [date of use 12 Jun 2014].

<sup>195</sup> AU Constitutive Act 2002.

war crimes, genocide and crimes against humanity.<sup>196</sup> The non-interference policy has resulted in the AU not addressing gross human rights violations, such as those that occurred during the Zimbabwe election process, and the African genocide attacks.<sup>197</sup> The lack of intervention by the AU in these attacks led to the collapse of the rule of law which is a challenge facing the AU. It thus remains to be seen whether the establishment of the African Court of Justice and Human Rights will preserve the peace sought by the African states.

#### **4.5. Chapter summary**

In an attempt to prevent and combat the threat of terrorism in its region, the OAS has adopted the *Organisation of the American States Convention to Prevent and Punish Acts of Terrorism*. Important to note is article 2 which removes the protection offered for political asylum and encourages the extradition of terrorists. This means that no one will be granted asylum if he or she is suspected of involvement in terrorist activities, thereby eliminating safe havens for terrorists. In fighting terrorism, the USA has on many occasions been accused of violating human rights such as the right to liberty by means of detention without trial at Guantanamo Bay. Therefore, in an effort to protect human rights while fighting terrorism, the USA adopted conventions such as, the *American Declaration of the Rights and Duties of Man*,<sup>198</sup> the ACHR,<sup>199</sup> the *Inter-American Convention to Prevent and Punish Torture*,<sup>200</sup> and the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*.<sup>201</sup> The Inter-American Court of Human Rights was established as a watchdog for the protection of human rights.

The EU, of which the UK is a member, has adopted various regional measures such as the *European Convention on the Suppression of Terrorism*<sup>202</sup> and its *Amending Protocol*<sup>203</sup> to enhance the prevention of terrorist threats. In order to be able to protect human rights while fighting terrorism, the EU member states adopted the

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<sup>196</sup> Art 4(h) of the AU Constitutive Act 2002.

<sup>197</sup> Biegon and Killander 2009 *AHRLJ* 309.

<sup>198</sup> *American Declaration of the Rights and Duties of Man* 1948.

<sup>199</sup> ACHR 1978.

<sup>200</sup> *Inter- American Convention to Prevent and Punish Torture* 1985.

<sup>201</sup> *Protocol to the American Convention on Human Rights to Abolish Death Penalty* 1990.

<sup>202</sup> *European Convention on the Suppression of Terrorism* 1997.

<sup>203</sup> *Protocol Amending the European Convention on the Suppression of Terrorism* 2003.

*European Convention on Human Rights* 1950 and the *European Convention for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment* 1984. The *European Convention on Human Rights* 1950 provides for the limitation of rights during periods of emergency. A regional watchdog such as the European Court of Human Rights has been established to monitor and enforce protection of human rights in the EU region. The *Treaty of Lisbon*<sup>204</sup> has also added value to EU security strategies, more particularly on cooperation to combat terrorism.

South Africa is a member of the AU. The AU adopted the *African Union Convention on Preventing and Combating Terrorism*<sup>205</sup> as a measure aimed at fighting terrorism on the African continent. Regional institutions such as the Peace and Security Council of the African Union have also been established with the sole purpose of monitoring peace and security in the African region. However, it is worth noting that given the hostility between the AU and the ICC, the establishment of the new court is a matter of a serious concern for the African continent. Although the court enjoys jurisdiction over the crimes over which the ICC has jurisdiction, it does not have retrospective jurisdiction.<sup>206</sup> This lack of retrospective jurisdiction will deal a fatal blow to efforts to preserve peace and security on the continent. The same applies to the policy on non-interference in internal matters of AU member states.

Of particular importance is that while the human rights instruments in the OAS, the EU, and the AU provide the necessary protection for human rights, the *European Convention on Human Rights* and the ACHR allow for the limitation of rights during an emergency period. It is, however, regrettable that the *African Charter on Human and Peoples' Rights* does not have a limitation clause.<sup>207</sup> The human rights limitations as provided by the *European Convention on Human Rights* and the ACHR are in conformity with the limitation permitted under the UDHR and ICCPR.<sup>208</sup> The

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<sup>204</sup> *Treaty of Lisbon* 2009.

<sup>205</sup> *African Union Convention on Preventing and Combating Terrorism* 1999.

<sup>206</sup> Du Plessis accessed at: <http://www.issafrica.org/uploads/paper235-Africacourt.pdf> [date of use 12 Jun 2014].

<sup>207</sup> Sermet 2007 *AHRLJ* 143.

<sup>208</sup> Art 30 of the UDHR 1948 provides that "nothing in the Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein" and Art 5 (1) of the ICCPR 1966 provides that "nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the



limitation prohibits any suspension of the rights to life and liberty, or suspension of the prohibition on torture or degrading or inhumane treatment or punishment including during a declared emergency. It is, therefore, argued that although states are allowed to protect themselves against the threat of terrorism, measures used to counter terrorism should not violate the civil liberties of their citizens. Importantly, human rights, such as the right to life, liberty and the right against torture, cannot be suspended even in the face of the scourge of terrorism.

It is notable that, unlike the OAS and EU, the AU does not have sufficient counter-terrorism instruments to protect the African continent against the threat of terrorism. The AU has adopted the *OAU Convention on Preventing and Combating Terrorism* 1999 and the *Protocol to the OAU Convention on the Prevention and Combating of Terrorism* of 2004. Therefore, in addition to the lessons learned from the international legal framework, the AU can learn lessons from the legal frameworks of the OAS and the EU, and adopt additional instruments to prevent and combat terrorism in the region.

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destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the Convention;(2) There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Convention pursuant to law, convention, regulations or custom on the pretext that the present Convention does not recognise such rights or that it recognises them to a lesser extent.”

## CHAPTER 5

### THE AMERICAN LEGAL FRAMEWORK COUNTERING TERRORISM

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#### **5.1. Introduction**

The USA has been at the forefront in the fight against the threat of international terrorism. The USA uses both legal and military responses to fight the threat of terrorism. However, difficult political, legal and constitutional questions are still being asked in the American courts concerning the strategies employed to fight terrorism, particularly as the USA has many different definitions of what constitutes terrorism.<sup>1</sup> Each of the different definitions of terrorism focuses on a different aspect.<sup>2</sup>

The USA's use of military force to attack Afghanistan and Iraq as a measure to combat terrorism has also been criticised by the international community as inappropriate.<sup>3</sup> Furthermore, the detention and ill-treatment of suspected terrorists at the Guantanamo Bay detention centre, has raised concerns amongst human rights organisations on the basis of gross violations of the human rights of detainees.<sup>4</sup>

Divided into three parts, this chapter analyses the counter-terrorism legal framework in the USA. Part 1 deals with counter-terrorism legislation before 2001, Part 2 addresses counter-terrorism legislation since 2001, while Part 3 deals with the protection of human rights in the USA. It is argued that certain aspects of the counter-terrorism legislation enacted before and after the 11 September 2001 terrorist attacks, violates the rights of those suspected of involvement in terrorist acts.

#### **5.2. Counter terrorism legislation before 2001**

Attacks by terrorist organisations on the USA date from the 19<sup>th</sup> century. The 20<sup>th</sup> century was characterised by Muslim terrorist organisations which carried out several terrorist attacks on the USA. On 26 February 1993 the World Trade Centre in the USA suffered an attack by Al-Qaeda. Six people lost their lives, over 1000 were

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<sup>1</sup> Fichtelberg *Crime Without Borders* 180.

<sup>2</sup> Fichtelberg *Crime Without Borders* 180.

<sup>3</sup> Webber 2012 *J. Nat'l L Security L & Pol'y* 176.

<sup>4</sup> Waxman 2009 *J. Nat'l L Security L & Pol'y* 1.

injured and buildings were extensively damaged. Al-Qaeda accepted responsibility for the attacks.<sup>5</sup> On 19 April 1995 Oklahoma City, saw 168 people killed and extensive infrastructural damage when a car bomb exploded at a federal building.<sup>6</sup> Thereafter, the USA suffered Al-Qaeda's devastating terrorist attacks on 11 September 2001. As a result of these attacks, the USA was compelled to step up its security measures in order to prevent and combat terrorism on its territory.

In response to the 2001 terrorist attack, the UNSC adopted a resolution referencing the inherent right to self-defence.<sup>7</sup> The UNSC adopted this resolution because, according to the USA, a terrorist attack on its citizens was viewed as an attack on the USA as a sovereign state. In terms of the resolution, a terrorist attack is tantamount to an armed attack which justifies recourse to armed forces.<sup>8</sup> The numerous terrorist attacks suffered by the USA has resulted in its anti-terrorism legislation becoming ever more complex and diverse.<sup>9</sup> Even before the 2001 terrorist attacks on the country, the USA had legislation to combat terrorism in place, but the increase in attacks by international terrorist organisations, compelled further measures. The legislation was followed by attempts to define terrorism. In terms of the *United States Federal Code*, terrorism is defined as the unlawful use of force and violence against persons or property to intimidate or coerce government, the civilian population, or a segment thereof, in furtherance of political or social objectives. The following pre-2001 USA counter-terrorism legislation will be considered more closely: the *Diplomatic Security and Anti-Terrorism Act 1986*; the *Anti-Terrorism and Effective Death Penalty Act 1996*; and the *Prevention of Terrorism Act 1996*.

### 5.2.1 *Diplomatic Security and Anti-Terrorism Act 1986*

The main purpose of the *Diplomatic Security and Anti-Terrorism Act 1986* was to provide for the office of the Bureau of Diplomatic Security within the Department of State, to make provision for the Diplomatic Security Service, and to maximise

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<sup>5</sup> Brothers accessed at: <http://www.physics911.net/nuclearfalseflag> [date of use 15 May 2015].

<sup>6</sup> Anon accessed at: <http://www.Factmonster.com.ipka/A0001454:html> [date of use 28 Jun 2012].

<sup>7</sup> UNSC res 1368/2001 accessed at: <http://access-adds-ny.un.org/doc/UNDOC/GEN/NO1/533/82.pdf> [date of use 18 Jun 2015].

<sup>8</sup> UNSC res 1368/2001 accessed at: <http://access-adds-ny.un.org/doc/UNDOC/GEN/NO1/533/82.pdf> [date of use 18 Jun 2015].

<sup>9</sup> Bantekas and Nash *International Criminal Law* 21.

coordination by the Department of State with Federal, State and Local agencies, as well as the agencies of foreign governments to enhance security programmes.<sup>10</sup> The Act also provides for the promotion of strengthened security measures and for the accountability of USA government personnel for security related issues.<sup>11</sup>

Important matters like the protection of USA diplomatic missions abroad against terrorist attacks, and actions to combat international nuclear terrorism are provided for by the Act.<sup>12</sup> The Act further allows for the establishment of the counter-terrorism protection fund to reimburse domestic and foreign persons, agencies or governments for the protection of judges or other persons who provide assistance or information relating to terrorist incidents outside the territorial jurisdiction of the USA.<sup>13</sup> Finally, the legislation provides for multilateral cooperation to combat international terrorism.<sup>14</sup>

### *5.2.2 Anti-Terrorism and Effective Death Penalty Act 1996*

The *Anti-Terrorism and Effective Death Penalty Act* 1996 was enacted in the wake of the terrorist bombing tragedy in Oklahoma City.<sup>15</sup> The aim of the legislation was to prevent and punish acts of terrorism in the USA with greater emphasis being placed on international terrorism. The Act soon became one of the principal laws used to prosecute terrorist acts in the USA. It allowed the state to secure conviction without establishing that an individual was involved in acts of terrorism, had conspired to engage in acts of terrorism, or had aided in the commission of acts of terrorism.<sup>16</sup> Title II of the Act makes provision for the institution of civil claims against foreign governments that support terrorism which has caused injuries to the victims of terrorist activity. Title III authorises the regulation of fundraising by foreign organisations associated with terrorist activities to isolate countries which support terrorists and bolster counter-terrorism measures against those countries that oppose the USA.

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<sup>10</sup> S 102 (2)(b)(2)&(3) of the *Diplomatic Security and Anti-Terrorism Act* 1986.

<sup>11</sup> S 102 (2)(b)(4) of the *Diplomatic Security and Anti-Terrorism Act* 1986.

<sup>12</sup> S 409 & 601 of the *Diplomatic Security and Anti-Terrorism Act* 1986.

<sup>13</sup> S 501 of the *Diplomatic Security and Anti-Terrorism Act* 1986.

<sup>14</sup> S 701 of the *Diplomatic Security and Anti-Terrorism Act* 1986.

<sup>15</sup> Beall 1998 *ILJ* 694.

<sup>16</sup> Cole 2009 *Cal.L.Rev* 723.

Section 2332 of the Act prescribes criminal offences where a USA national is killed, or an attempt or conspiracy to kill a USA national, is carried out outside of the jurisdiction of the USA. This section further provides for cases where persons outside of the USA engage in physical violence with intent to cause bodily injury to a USA national. However, no prosecutions in terms of the Act are to be undertaken without the certification of the Attorney-General that, in his judgment, the offence was intended to coerce, intimidate, or retaliate against the government or civilian population. A sentence of death is provided for in the case of murder, and life imprisonment in the case of conspiracy to murder. Allowance is also made for imprisonment and fines in respect of other related offences.<sup>17</sup> Furthermore, the Act limits the time allowed for late applications for stay of execution for those sentenced to death by providing for an automatic stay of execution.<sup>18</sup> The execution process is carried out only once all post-conviction proceedings, such as appeal, have been exhausted.<sup>19</sup> The automatic stay of execution expires if the convicted person does not file a *habeas* application within the time limit provided by the Act.<sup>20</sup>

In addition, section 2332 prohibits the use of weapons of mass destruction and chemical weapons. The use of this kind of weapon against a USA national who is outside of the country, or any person within the USA, or any property of the USA whether situated within or outside of the USA, will justify a sentence of life imprisonment. If death occurs as a result of the unlawful act of the offender, the offender will be sentenced to death.<sup>21</sup>

It is also an offence for USA nationals, including juristic persons, to engage in a financial transaction with the government of a country which supports international terrorism.<sup>22</sup> The Act further prohibits the provision of material support to foreign terrorist organisations and obliges financial institutions to have knowledge of the possession of, or control over funds in which foreign terrorist organisations have an

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<sup>17</sup> South African Law Commission accessed at: [www.justice.gov.za/salrc/dpapers/dp92.pdf](http://www.justice.gov.za/salrc/dpapers/dp92.pdf) [date of use 14 March 2013]

<sup>18</sup> S 2262(a) of the *Anti-Terrorism and Effective Death Penalty Act 1996*.

<sup>19</sup> Kochan 1997 *J.Urb & Cont .L* 412.

<sup>20</sup> S 2262(b)(1) of the *Anti-Terrorism and Effective death Penalty Act 1996*.

<sup>21</sup> S 2332(a) & (c) of the *Anti-terrorism and Effective Death Penalty Act 1996*.

<sup>22</sup> S 2332(d) of the *Anti-terrorism and Effective Death Penalty Act 1996*.

interest, to freeze the funds, and to make the necessary report of the availability of the funds.<sup>23</sup>

The Act further addresses immigration related issues and establishes mechanisms to prevent alien terrorists from entering and remaining in the USA , to remove any suspected alien terrorists from the country, to tighten asylum provisions which allow terrorists to enter the USA, and to expedite the deportation of criminal aliens.<sup>24</sup>

Title V of the *Anti-Terrorism and Effective Death Penalty Act* 1996 addresses the restrictions on the possession and use of materials capable of producing catastrophic damage in the hands of the terrorists. In terms of section 3071 of the Act, an act of terrorism is defined as an activity that involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the USA or of any State, or that would be a criminal violation if committed within the jurisdiction of the USA or any State and appears intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by assassination or kidnapping. The Act provides a wide definition of terrorism in an attempt to cover all acts that fall within the scope of the offence of terrorism. Opponents of the *Anti-Terrorism and Effective Death Penalty Act* argue that the legislation represents a serious assault on the Constitution of the USA. The Act added, it is claimed, has compounded the problem of a capital punishment system that is far from perfect.<sup>25</sup> Foreign countries opposed to the death penalty would not be willing to co-operate with the USA's efforts to arrest terrorists in those countries' territories as the persons arrested would face death if convicted.<sup>26</sup> The death penalty violates the right to life as protected by the provisions of the ACHR 1978,<sup>27</sup> and the UDHR 1948.<sup>28</sup>

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<sup>23</sup> S 2339B of the *Anti-terrorism and Effective death Penalty Act* 1996; See also Beall 1998 *ILJ* 699.

<sup>24</sup> Beall 1998 *ILJ* 705; see also *Kwong Hai Chew v Colding* 344 US 596 1953 at 597-98 where the Supreme Court that although Congress may prescribe conditions for a lawful resident alien's expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.

<sup>25</sup> Griset & Maham *Terrorism* 283.

<sup>26</sup> Griset & Mahan *Terrorism* 283.

<sup>27</sup> Art 4(1) of the ACHR 1978 provides that every person has the right to have his life respected and protected by law from the moment of conception. No one shall be arbitrarily be deprived of his life.

<sup>28</sup> Art 3 of the UDHR 1948 provides that everyone has the right to life, liberty and security of a person.

### 5.2.3 *Prevention of Terrorism Act 1996*

The *Prevention of Terrorism Act 1996* was enacted to prevent the perpetration of terrorist activities in the USA. The Act, amongst others, provides for the following important matters: the prohibition of terrorist fundraising;<sup>29</sup> the prohibition of assistance to countries that aid terrorist states;<sup>30</sup> the prohibition of assistance to countries that provide military equipment to terrorist states;<sup>31</sup> anti-terrorism assistance;<sup>32</sup> the exclusion of terrorists from the USA;<sup>33</sup> and a denial of visa applications for suspected terrorists.<sup>34</sup>

### 5.3. **Counter-terrorism legislation after 2001**

The pre-2001 counter-terrorism legislation in place in the USA, appeared to be ineffective in dealing with the threat of international terrorism. The 11 September 2001 terrorist attacks necessitated the extension of legislation to counter terrorism. In this regard terrorist attacks resulted in the United States adopting a plethora of legislation to supplement to the pre-2001 counter-terrorism legislation, so as protect the country against the threat posed by international terrorism. The following legislation which will be discussed was enacted in order to counter terrorism in the USA: the *Homeland Security Act 2000*; the *Uniting and Strengthening of America by Providing Appropriate Tools Required to Intercept (and) Obstruct Terrorism Act 2001* (hereafter the *Patriot Act 2001*); the *Aviation and Transportation Security Act 2001* the *Enhanced Border Security and Visa Entry Reform Act 2002*; the *Anti-Terrorism and Port-Security Act 2003*; and the *Intelligence Reform and Terrorism Prevention Act 2004*.

#### 5.3.1 *Uniting and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001(the Patriot Act)*

The *Patriot Act 2001* was adopted in response to the 11 September 2001 terrorist attacks on the USA. The main aim of the Act was to enhance the domestic security

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<sup>29</sup> S 303 of the *Prevention of Terrorism Act 1996*.

<sup>30</sup> S 325 of the *Prevention of Terrorism Act 1996*.

<sup>31</sup> S 326 of the *Prevention of Terrorism Act 1996*.

<sup>32</sup> S 328 of the *Prevention of Terrorism Act 1996*.

<sup>33</sup> S 411 of the *Prevention of Terrorism Act 1996*.

<sup>34</sup> S 412 of the *Prevention of Terrorism Act 1996*.

of the USA against terrorism and further to identify and punish those who committed or assisted in the commission of terrorist attacks against the USA.<sup>35</sup> Of great concern is that the Act does not define what terrorism is, but simply defines who is to be deemed a terrorist and which organisations are deemed to be terrorist organisations.<sup>36</sup> Title I of the Act authorises the establishment of a fund to counter terrorist activities. It authorises, at the request of the Attorney-General, assistance by the military in instances where weapons of mass destruction are involved.

Title II of the *Patriot Act* 2001 enhances surveillance procedures to covers all aspects of surveillance of suspected terrorists, including those suspected of engaging in computer fraud or abuse, and agents of a foreign power who engage in clandestine activities. Title III deals with money laundering to prevent terrorism and is titled *International Money Laundering Abatement and Financial Anti-Terrorism Act* 2001. The Act was intended to facilitate the prevention, detention and prosecution of those involved in international money laundering and the financing of terrorism. The *International Money Laundering Abatement and Financial Anti-Terrorism Act* first deals with the enhancing of bank rules against money laundering on an international fora. Therefore, in terms of the Act, banks and other financial institutions are required to report all suspicious activities and to disclose the bank records of those under investigation for financial crimes related to terrorism.<sup>37</sup> Secondly, the Act is intended to improve communication between law enforcement agencies and expand record-keeping and reporting requirements. The third subtitle deals with currency smuggling and counterfeiting, and increases the maximum penalty for counterfeiting foreign currency. Title III of the *Patriot Act* 2001 also amends portions of the *Money Laundering Control Act* 1986, and the *Bank Secrecy Act* 1970. Title IV amends the *Immigration and Nationality Act* of 1952. It gives greater law enforcement and investigative powers to the USA Attorney-General and to the Immigration and Nationalisation Service.

Title V of the *Patriot Act* 2001 is known as the *Removing of Obstacles to Investigation of Terrorism* and permits the USA Attorney-General to pay rewards for

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<sup>35</sup> Vendaschi 2009 *Cal.L.Rev* 9.

<sup>36</sup> Ss 411- 412 of the *Patriot Act* 2001.

<sup>37</sup> S 351 of the *Patriot Act* 2001.



media advertisements assisting the Department of Justice to combat and prevent terrorist acts. The Secret Service's jurisdiction is extended to investigate computer fraud, access device frauds, false identification documents or devices, or any fraudulent activities against USA financial institutions. Title IX addresses improved intelligence and amends the *National Security Act* 1947. International terrorist acts are made to fall within the scope of foreign intelligence and under the *National Security Act* 1947.

The *USA Patriot and Terrorism Prevention Reauthorization Act* of 2005 was passed by Congress in July 2005. The bill re-authorised provisions of the *USA Patriot Act* 2001 and the *Intelligence Reform and Terrorism Prevention Act* 2004. The *Patriot Act* 2001 introduced new provisions relating to the death penalty for terrorists, enhanced security at seaports, introduced new measures to combat terrorism, and conferred greater powers on the secret service.

While the *Patriot Act* 2001 was seen as a measure suited to the prevention and combating of terrorism in the USA, the Act violated the fundamental human rights of those suspected of being involved in terrorist acts against the USA.<sup>38</sup> For instance, the President of the USA is authorised to seize the property and funds of foreign nationals suspected of involvement in plotting an attack against the USA.<sup>39</sup> The provisions of section 106 of the Act are discriminatory in that only non-citizens of the USA are singled out when it comes to the seizure of property. In addition, the *Patriot Act* authorises the seizure of property on suspicion, and not on the basis of proof that a person is involved in terrorist activities against the USA.

Section 412 of the *Patriot Act* 2001 provides for the mandatory detention of suspected terrorists, and further authorises the USA Attorney-General to detain aliens indefinitely so long as he has reasonable grounds to believe that an alien is a terrorist. The detention may be continued if the Attorney-General continues to believe that an alien poses a threat to national security.<sup>40</sup> The detention may be

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<sup>38</sup> Galloway 2002 *Wash & Lee .L .Rev* 927.

<sup>39</sup> S 106 of the *Patriot Act* 2001.

<sup>40</sup> Zelman 2002 *J.Transnat'l L&Pol'y* 423-424; see also Cole 2009 *Cal.L.Rev* 702; Webber 2010 *Touro Int'l .L .Rev* 163; Waxman 2009 *J.Nat'l Security L&Pol'y* 21 and *Ludecke v Watkins* 335 US 160 (1948) where the US Supreme Court upheld the presidential directive for the detention and

confirmed by a court of law as a punishment or sentence, and is therefore a violation of the person's right not to be arbitrarily deprived of his or her liberty.<sup>41</sup> Furthermore, the constitutional right to privacy is continuously eroded by the electronic surveillance on communications without justification. In *United States v Jones*<sup>42</sup> the USA Court of Appeals for the District of Columbia Circuit reversed the conviction of the accused on the ground that the use of a global positioning system device without an authorised warrant violated the provisions of the Fourth Amendment of the USA Constitution.<sup>43</sup> Recently, there has been an outcry over the interception of phone calls and internet communications by the USA National Security Agency in the USA. The surveillance activities by the National Security Agency are according to Human Rights Watch, a violation of privacy safeguards.<sup>44</sup> The recent introduction of the *Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act (Freedom Act)*<sup>45</sup> brought about an important change to the protection of the right of privacy of American citizens. The *Freedom Act* limits the powers which the USA intelligence agency such as NSA had in terms of the *Patriot Act*.<sup>46</sup> The *Freedom Act* ensures that phone records obtained by the intelligence agencies are essential to the investigation of terrorist activities.<sup>47</sup> Therefore, in a nutshell the *Freedom Act* affords protection of the individual's right of privacy.

### 5.3.2 Aviation and Transportation Security Act 2001

The *Aviation and Transportation Security Act* was signed into law by President Bush on 19 November 2001. The Act established the Transportation Security Administration whose main responsibility is to protect domestic transportation and

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removal of alien enemies who were deemed to be dangerous to the public peace and safety from the United States.

<sup>41</sup> Art 3 of the UDHR 1948; see also art 9 of the ICCPR 1966.

<sup>42</sup> *United States v Jones* 565 US 2012; see also *Riley v California* 134 S Ct 2473 2014 where the Supreme Court held that the search and seizure of the digital contents of a cellular phone of the accused without a warrant was unconstitutional.

<sup>43</sup> The Fourth Amendment of the USA Constitution protects the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

<sup>44</sup> Anon accessed at: <http://www.eff.org/nsa-spying> [date of use 14 Nov 2013]; see also art 17 of the ICCPR 1966 which protects the right to privacy.

<sup>45</sup> *Freedom Act* 2015.

<sup>46</sup> Section 215 of the *Patriot Act* 2001.

<sup>47</sup> Byers accessed at: <http://www.politico.com/story/2015/05usa-freedom-act-vs-usa-patriot-act-118469.html> [date of use 17 Aug 2015].

includes body screening at all airports as a measure of combating terrorism. The Act further empowers the Under-Secretary of the Transportation Security Administration to place Federal Air Marshals on passenger flights including long haul flights where there is a possible security risk.<sup>48</sup> The Act further provides for screening of baggage at all airports in the USA. All airline workers are, in accordance with the provisions of the Act, subjected to a background checks.<sup>49</sup> Only USA citizens may be employed as airline workers.<sup>50</sup> As a measure to enhance security on American airlines, pilots are allowed to carry firearms while in flight.<sup>51</sup> The baggage screening violates the right of the individual to privacy provided by the USA Constitution,<sup>52</sup> but is justified based on the ground of state security.

### *5.3.3 Enhanced Border Security and Visa Entry Reform Act 2002*

The *Enhanced Border Security and Visa Entry Reform Act 2002* requires the Secretary of State to implement enhanced security measures for the review of visa applications to counter and prevent terrorists from gaining entry into the USA. The Act further provides additional tools and resources for government information about potential terrorists to be shared amongst law enforcement agencies.<sup>53</sup> In terms of the Act, the Secretary of State must establish a Terrorist Lookout Committee. The duty of this Committee is to identify known and potential terrorists, and to collect information on those individuals and bring it to the attention of consular officers who will ensure that the names are entered into the appropriate lookout databases.<sup>54</sup> Section 306 of the Act provides for a restriction on the issuing of non-immigrant visas to aliens who are nationals of countries that are state sponsors of international terrorism unless it has been determined by the Secretary of State that the specific person does not pose a safety or security threat to the USA.

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<sup>48</sup> S 105 of the *Aviation and Transportation Security Act 2001*.

<sup>49</sup> S 138 of the *Aviation and Transportation Security Act 2001*.

<sup>50</sup> S 106 of the *Aviation and Transportation Security Act 2001*.

<sup>51</sup> S 128 of the *Aviation and Transportation Security Act 2001*; see also Zelman 2001 *J. Transnat'l & Pol'y* 4.

<sup>52</sup> The Fourth Amendment of the USA Constitution provides the right of the people to be secure in their persons, houses, papers and protects against unreasonable searches and seizures; see also art 17 of the ICCPR 1966.

<sup>53</sup> Anon accessed at: <http://immigrationforum.org/images/uploadsBordersecurityAct.pdf> [date of use 26 Apr 2013].

<sup>54</sup> S 304 of the *Enhanced Border Security and Visa Entry Reform Act 2002*.

#### 5.3.4 *Homeland Security Act 2002*

The aim of the *Homeland Security Act 2002* is to prevent terrorist attacks in the USA, reduce the vulnerability of the USA to terrorism to minimise damage, and assist in the recovery from terrorist attacks that occur in the USA.<sup>55</sup> In terms of the *Homeland Security Act 2002* the term 'terrorism' means any activity that involves an act that is dangerous to human life or potentially destructive of critical infrastructure or key resources and is in violation of the criminal laws of the USA or of any State or other subdivision of the USA, and appears to be intended to intimidate or coerce a civilian population to influence the policy of the government by intimidation, or coercion, or to affect the conduct of the government by mass destruction, assassination, or kidnapping.<sup>56</sup>

In terms of section 101(1)(G) of the Act the Department of Homeland Security is authorised to monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and to contribute to the efforts of interdicting illegal drug trafficking. The Act further aims at preventing the entry of terrorist and instruments of terrorism into the USA<sup>57</sup> and to respond to the threat of nuclear terrorism and regulate cyber security.<sup>58</sup> In *Florida v Royer*<sup>59</sup> the Supreme Court had to deal with the violation of the fourth amendment of the USA constitutional rights. Two narcotics detectives stopped Royer in the airport and asked to speak to him. At their request Royer produced his airline ticket and drivers' licence. The detectives noticed a discrepancy between the two documents and asked to search Royer's luggage. Marijuana was found in the luggage and he was arrested and convicted of possession of marijuana. In the opinion of the Court the first encounter with Royer resulted in an unlawful arrest when the detectives moved Royer to a small room while retaining his airline ticket, licence and the luggage. Royer's consent to the search was given after the arrest which was illegal. As one of its important objectives, the *Homeland Security Act 2002* provides for the control of entry of aliens into the USA. In terms of the Act a denial of the granting a visa to

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<sup>55</sup> S 101(b) of the *Homeland Security Act 2002*.

<sup>56</sup> S 2(15) of the *Homeland Security Act 2002*.

<sup>57</sup> S 402(1) of the *Homeland Security Act 2002*.

<sup>58</sup> S 504 of the *Homeland Security Act 2002*.

<sup>59</sup> *Florida v Royer* 460 US 491 1983.

enter the USA, is to be entered into an electronic data system. Consequently no alien may enter the USA without a visa issued in accordance with the *Homeland Security Act*.<sup>60</sup>

### 5.3.5 *Anti-Terrorism and Port Security Act 2003*

The purpose of the *Anti-Terrorism and Port Security Act 2003* is to prevent and respond to terrorism and crimes at or in transit ports in the USA. The *Anti-Terrorism and Port Security Act 2003* makes it unlawful to destroy or interfere with vessels or maritime facilities, and to plant devices in the USA waters that could destroy a ship or cargo or interfere with safe navigation or maritime commerce.<sup>61</sup> The Act criminalises the use of any dangerous weapon or explosive in an attempt to kill someone on board a passenger vessel and knowingly to discharge or release oil, hazardous substance, a noxious liquid substance, or any other substance into USA navigable waters or the adjoining shoreline with intent to endanger human life or welfare.<sup>62</sup> Therefore, in terms of the Act it is unlawful for any person wilfully to set fire to, to damage, to destroy, or to wreck a vessel. The Act further prohibits the placing of a destructive device or substance in the proximity of a vessel or port with the aim of interfering with the use of the vessel or port. If convicted, the accused may be fined in accordance with the provisions of Title I of the Act or to a life imprisonment term, or if death results because of the commission of the offence, the accused may be sentenced to death.<sup>63</sup> The Act further revises piracy laws and increases penalties for piracy related offences.<sup>64</sup> The legislation imposes an obligation on the port captains to secure and protect all sensitive information, including maps, blueprints, and information on the internet.<sup>65</sup>

### 5.3.6 *Intelligence Reform and Terrorism Prevention Act 2004*

The 11 September 2001 terrorist attacks on the USA changed the nature of the USA intelligence services. As a result of the attacks, the USA was under immense

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<sup>60</sup> S 429(2) of the *Homeland Security Act 2002*.

<sup>61</sup> S 101 of the *Anti-Terrorism and Port Security Act 2003*.

<sup>62</sup> S 104 of the *Anti-Terrorism and Port Security Act 2003*.

<sup>63</sup> S 106 of the *Anti-Terrorism and Port Security Act 2003*.

<sup>64</sup> S 103 of the *Anti-Terrorism and Port Security Act 2003*.

<sup>65</sup> S 233 of the *Anti-Terrorism and Port Security Act 2003*.

pressure to improve its intelligence legislation.<sup>66</sup> The *Intelligence Reform and Terrorism Prevention Act* 2004 is designed to improve the collection and dissemination of intelligence and the coordination of counter-terrorism activity, while protecting sources and methods and respecting privacy and civil liberties.<sup>67</sup> The Act deals with the following matters: reform of the intelligence community; improvements in the intelligence of the Federal Bureau of Investigation; the revamping and standardisation of security clearance procedures; measures to enhance transportation security; improvements in border protection; immigration and visa procedures; new tools for terrorism prosecutors; and the establishment of integrating mechanisms as regards information and intelligence sharing, infrastructure protection and analysis; and civil rights and civil liberties.

Title VI of the Act specifically provides for the prevention of terrorism. Sub-title A of Title VI makes provision for individual terrorist agents of foreign powers, and authorises the issuing of warrants under the *Foreign Intelligence Surveillance Act*<sup>68</sup> for individuals involved in international terrorism.<sup>69</sup> Furthermore, the Act criminalises the provision of material support to terrorists.<sup>70</sup> Therefore, in terms of the Act it is a crime knowingly to receive military type training from a designated foreign terrorist organisation. For the purposes of prosecution of the offence, a person must have knowledge that the terrorist group has been so designated or that it engages in terrorist activities. In *United States v Lindh*<sup>71</sup> the Federal Court rejected the defendant's defence that he had been improperly charged with providing personnel for training to Al-Qaeda when he underwent training with the Taliban.

Sub-title H establishes criminal penalties for hoaxes relating to terrorism, death or disappearance of a member of armed services during wartime. Criminalisation of hoaxes came after the 2001 anthrax mailings to the media and members of Congress in the USA.<sup>72</sup> Thereafter, the law enforcement agencies were faced with an

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<sup>66</sup> Givens 2012 *JSS* 65.

<sup>67</sup> Best 2010 *Congressional Research Service Report* 3.

<sup>68</sup> *Foreign Intelligence Surveillance Act* 1978.

<sup>69</sup> S 6001 of the *Intelligence Reform and Terrorism Prevention Act* 2004

<sup>70</sup> Subtitle G of Title VI of the *Intelligence Reform and Terrorism Prevention Act* 2004.

<sup>71</sup> *United States v Lindh* 212 F Supp 2d 541 2002.

<sup>72</sup> Kaser 2005 *USA Attorneys Bulletin* 23.

increasing number of hoax cases. For example in *United States v Allali*,<sup>73</sup> the accused falsely provided the FBI with the names of people he claimed to be members of the Al-Qaeda. The accused further falsely informed the FBI that he travelled with four Al-Qaeda members in 1998 and learned of their plot to destroy government facilities in 2005. The accused fabricated this information to avoid deportation from the USA. Consequently, measures to deter and punish hoaxes were implemented. Where a serious injury is suffered as a result of the commission of the offence, the offender may be sentenced to twenty years imprisonment. If death results from the commission of the offence, life imprisonment may be imposed. The Act further covers the federal jurisdiction over crimes involving weapons of mass destruction, and establishes chemical weapons as weapons of mass destruction.<sup>74</sup> For a person who participates in or provides material support to the nuclear weapons or weapons of mass destruction program of a foreign terrorist organisation such as Al-Qaeda, an imprisonment term of twenty years may be imposed. Possession or manufacturing, an attempt to possess or conspiracy to possess, a radiological weapon is punishable with life imprisonment.<sup>75</sup> Sub-title K of the Act provides for the pre-trial detention of those suspected of being involved in the commission of terrorist acts. The pre-trial detention of suspected terrorists violates the right of the individual against arbitrary arrest and detention as provided by the ICCPR and the UDHR.<sup>76</sup>

#### **5.4. Counter-terrorism legislation and the protection of human rights in the USA**

Human rights in the USA are protected by USA Constitution adopted in 1791. The USA Constitution 1791 recognises a number of inalienable human rights including freedom from cruel and unusual punishment, and the right to a fair trial by a jury. However, the International and Domestic Human Rights and Civil Rights Organisation consider the USA as a country that violates fundamental human rights more often than other countries.<sup>77</sup>

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<sup>73</sup> *United States V Allali* No IP o5-23-CR -01 M/F (S.D Ind.Feb, 16 2005).

<sup>74</sup> S 6802 of the *Intelligence Reform and Terrorism Prevention Act* 2004.

<sup>75</sup> S 6803 of the *Intelligence Reform and Terrorism Act* 2004.

<sup>76</sup> Art 9 of the ICCPR 1966; see also art 3 of the UDHR 1948.

<sup>77</sup> Amnesty International accessed at: <http://www.amnesty.org/en/region/usa> [date of use 20 Dec 2012].

Be that as it may, the USA has been leading the way in the fight against terrorism. For instance, military attacks have been launched against states like Afghanistan and Iraq to combat terrorism. Afghanistan and Iraq are known for harbouring and allowing training by terrorist organisations like the Al-Qaeda and the Taliban in their territories. In 1993 missile attacks were launched by the USA against Iraq. According to the USA, these attacks were undertaken to deter further violence against the people of USA. President Clinton submitted that the missile strikes by the USA would combat terrorism, deter aggression, and protect the people of USA.<sup>78</sup> The missile attacks on Iraq raised many questions, such as: are terrorist acts illegal under international law; if so, on what grounds; and under what circumstances may a victim state lawfully respond with armed force to an incident of terrorism?<sup>79</sup> Another example of attacks by the USA is the use of combat drones to destroy Al-Qaeda operations in Afghanistan in 2010.<sup>80</sup>

Fighting terrorism has not been without problems for the USA. Many fundamental human rights have been violated through the methods and strategies used to combat and prevent terrorism. The USA is also known to have refused to be subjected to the jurisdiction of the ICC.<sup>81</sup> The USA rejected the *Rome Statute* after its submissions regarding viable definitions of crimes, protection of national security information that might be required by the court, and the jurisdiction of the UNSC to stop court proceedings in special cases, had not been met. In addition, the USA has encouraged nations around the world to sign bilateral immunity agreements that prohibit the surrender of USA subjects to the ICC.<sup>82</sup> The rejection of the ICC by the USA was viewed by the Human Rights Watch Organisation as an undemocratic move, more particularly because the Court deals with crimes against humanity.<sup>83</sup> Therefore, the policy of undermining the jurisdiction of the ICC by the USA was

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<sup>78</sup> Beck and Arend 1994 *Wisconsin Int'l L. J* 153.

<sup>79</sup> Beck and Arend 1994 *Wisconsin Int'l L.J* 153.

<sup>80</sup> Roth 2003 accessed at: <http://nybooks.com/articles/arcives/2013/what-rules-should-govern-us-drone-attacks> [date of use 13 May 2014].

<sup>81</sup> Saul *Research Handbook* 398.

<sup>82</sup> Amnesty International accessed at: <http://www.amnesty.org/en/international-justice/issues/international-criminalcourt/us>. [date of use 18 Nov 2013].

<sup>83</sup> Human Rights Watch accessed at: <http://www.hrw.org/campaigns/icc/us.htm> [date of use 20 Dec 2012].



regarded as a strategy intended to protect the country against prosecution for the violation of fundamental human rights before the court.<sup>84</sup>

Furthermore, the type of legislation enacted to counter-terrorism has also had the effect of violating the fundamental human rights of the suspected terrorists, as will be indicated in greater detail in the discussion below.

#### 5.4.1 *The right to life*

The first death sentence in USA was imposed in 1608. Since then people sentenced to death have been hanged, electrocuted, gassed or lethally injected.<sup>85</sup>

Notwithstanding international calls for the abolition of the death penalty, this form of punishment still applies in the USA. Although the death penalty was suspended in 1976, this proved transitory. The USA Supreme Court opted for the constitutional regulation of the death penalty rather than a complete abolition, and this decision helped to legitimise and stabilise the practice of the death penalty.<sup>86</sup> The ACHR provides that in no case shall the death penalty be imposed for political offences or listed common-law offences.<sup>87</sup> The opponents of the death penalty regard it as inhumane and irreversible.<sup>88</sup> Furthermore, innocent people may be sentenced to death.<sup>89</sup> The Human Rights Committee found that the imposition of the death penalty violated the provisions of article 9 of the ACHR.<sup>90</sup>

In *Ropper v Simmons*<sup>91</sup> the USA Supreme Court set aside the sentence of death imposed on the accused on the ground that at the time of his conviction, the accused was seventeen years of age. The Court held that the execution of a juvenile

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<sup>84</sup> "America v the Rest" accessed at: <https://www.globalpolicy.org/component/content/article/164/28433.htm> [date of use 21 Jul 2014].

<sup>85</sup> Harrison and Tamony 2010 *Internet Journal of Criminology* 2.

<sup>86</sup> Steiker accessed at: <http://www.international-ui-com/pdf/steiker.pdf> [date of use 7 Jun 2012].

<sup>87</sup> Art 4(4) of the ACHR 1978.

<sup>88</sup> See *Furman v Georgia* 408 US 238 1972 where the USA Supreme Court at 240 held that the death sentence constitutes a cruel and unusual punishment and in violation of the Eighth and Fourteenth Amendments of the USA Constitution.

<sup>89</sup> Peffly and Hurwitz 2007 *AJPS* 997.

<sup>90</sup> Art 9 of the ACHR 1978 provides that "no one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom."

<sup>91</sup> *Ropper v Simmons* 543 US 551 2005.

who was under eighteen years of age when he committed the crime, was in violation of the Eighth and Fourteenth Amendments of the USA Constitution.

Whilst the USA practised the death penalty, the *Inter-American Commission of Human Rights*<sup>92</sup> found that the imposition of the death penalty in the USA violated states' obligation under the Inter-American human rights law incorporated in the *Charter of the Organisation of American States*.<sup>93</sup> The Commission recommended that states should ratify the *Protocol to the American Convention* to abolish the death penalty; to refrain from any measure that would extend the application of the death penalty; to reintroduce the death penalty; to adopt measures to ensure that domestic legal standards conform to the review measures applicable in death penalty cases and to further comply with decisions of the Inter-American Commission on Human Rights and the court in relation to decisions of individual death penalty.<sup>94</sup> This aspect was enunciated in *Domingues v United States*<sup>95</sup> where the Inter-American Commission on Human Rights concluded that the USA has acted contrary to the international norm of *jus cogens* by imposing the death penalty on a juvenile for the offence committed when he was sixteen years of age.

Although article 1 of the ACHR provides for the right to life and its protection, the Convention does not guarantee this right. A similar approach has been adopted by the ICCPR.<sup>96</sup> Article 1 provides that every human being has the inherent right to life and this right shall be protected by law. The provision goes further to provide that no one shall be deprived of his or her life arbitrarily. The two conventions do not preclude the application of the death penalty but rather subject the imposition of the death penalty to certain limitations. The limitations are applicable to state parties which have not abolished the death penalty. First, the imposition of the death penalty is to be done subject to the creation of procedural requirements whose compliance must be strictly observed and reviewed. The application of the death penalty must only be for the most serious common-law crimes, such as murder,

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<sup>92</sup> Art 106 of the *Charter of the Organisation of American States* 1967 provides that the primary function of the Commission of Human Rights is to observe and protect human rights.

<sup>93</sup> *Charter of the Organisation of American States* 1967.

<sup>94</sup> IACHR accessed at: <http://www.oas.org/en/iachr/media-center/PRelease/2012/100.asp> [date of use 10 Oct 2013].

<sup>95</sup> *Domingues v United States* IACHR Report 62/02 2002.

<sup>96</sup> Art 1 of the ICCPR 1966.

which are not related to political crimes. In the last instance, in imposing the death sentence, factors involving the person that could mitigate the imposition of the death penalty should be considered.<sup>97</sup> Article 4 of the ACHR also permits the application of the death penalty by states that have not abolished the death penalty subject to certain restrictions and prohibitions. The restrictions are as follows:

- a) Every person has the right to have his or her life respected. The right shall be protected by law and in general from the moment of conception and no one shall arbitrarily be deprived of his or her life.
- b) In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
- c) The death penalty shall not be re-established in states that have abolished it.
- d) In no case shall capital punishment be imposed for political offences or related common crimes.
- e) Capital punishment shall not be imposed upon persons who, when the crime was committed, were under eighteen years of age or over 70 years of age, nor shall it be applied to pregnant women.
- f) Every person condemned to a death penalty shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such petition is pending decision by the competent authority. In *Fermin Ramirez v Guatemala*<sup>98</sup> it was held that the state failed to comply with the obligations imposed on states in article 4(6) by denying a measure of grace presented by Mr Ramirez who was sentenced to death.

The purpose of article 4 is to reduce the number death sentences imposed and promote the gradual disappearance of the death penalty.<sup>99</sup>

#### 5.4.2 *The right to liberty and security*

Torture is prohibited under international law.<sup>100</sup> The USA Constitution does not expressly prohibit torture as a means of punishment or obtaining information. However, torture in the USA is prohibited in terms of the Eighth Amendment<sup>101</sup> of the USA Constitution which protects the right to be free of cruel or unusual punishment. The right to be free from cruel or unusual treatment was considered in

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<sup>97</sup> Art 4 of the ACHR 1978.

<sup>98</sup> *Fermin Ramirez v Guatemala* 2005 IACHR Ser C 126.

<sup>99</sup> Tittlemore 2004 *WM&MaryBill Rts.J.* 460.

<sup>100</sup> Rouillard 2005 *AM U Int'l .L.Rev* 12.

<sup>101</sup> The Eighth Amendment of the USA Constitution 1791.

*Baze v Rees*.<sup>102</sup> The accused in the case were convicted of murder and sentenced to death by lethal injection. They then filed an appeal that the use of lethal injection violates the Eighth Amendment of the USA Constitution which prohibits cruel and unusual punishments. However, the USA Supreme Court held that the use of lethal injection was safe from unnecessary infliction of pain, torture or lingering death.

Despite the many conventions prohibiting torture, the USA is known for its disregard of the right against torture. The torture and ill-treatment which involved waterboarding of detainees at the Guantanamo Bay Centre, are some of the incidents which attracted world attention. One other such incident of torture is of Abu Ghraib an Iraqi prisoner who was held hooded and naked by USA military personnel.<sup>103</sup> In pursuance of the policy of interrogation at the Guantanamo Bay Centre, the Department of Justice's Office of Legal Counsel created a new interrogation strategy which justified the use of torture in fighting terrorism.<sup>104</sup> This strategy was criticised as it encouraged the use of torture which violated the right not to be tortured or treated or punished in an inhuman and degrading manner prohibited by the ICCPR.<sup>105</sup>

Furthermore, as another measure to combat terrorist attacks on the USA, the Department of Justice sought legislation that could permit it to detain non-citizens who were regarded as terrorists, indefinitely without charge and without judicial review. The USA *Patriot Act* 2001 permitted the Department of Justice to detain or keep suspected terrorists in detention for a period of seven days without charge. The Attorney-General was then to charge the suspects with the commission of a crime, initiate immigration procedures for deportation, or release the suspect as a measure of preventing and combating terrorism within the borders of the USA.

As another measure to fight terrorism in the USA, detention camps were established in Guantanamo Bay Centre in Cuba. The detainees in Guantanamo Bay Centre were

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<sup>102</sup> *Baze v Rees* 553 US 35 2008; see also *Kennedy v Louisiana* 55 US 407 2008 where the USA Supreme Court held that the Eighth Amendment of the USA Constitution does not permit a state to punish a crime of rape of minor with death penalty.

<sup>103</sup> Wilson 2012 *Santa Clara. J. Int'l L* 41. See also Anon accessed at: <http://www.hrw.org/news/2003/03/11/lega-prohibition-against-torture> [date of use 2 Sept 2014].

<sup>104</sup> Goldman 2012 accessed at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent> [date of use 2 Sept 2014].

<sup>105</sup> Art 7 of the ICCPR 1966.

suspected terrorists and consequently not entitled to the prisoner of war status. The prisoners at Guantanamo Bay Centre had been captured during air strikes in Afghanistan and Iraq and detained without trial. As a result of the Guantanamo Bay Centre detainees, the USA was now faced with the problem of what to do with the large number of detainees. The number of prisoners kept on increasing. The important question was whether the detainees had the right to challenge their detention. The legality of indefinite detention was addressed in *Hamdi v Rumsfeld*.<sup>106</sup> In this case the decision of the lower to dismiss the Hamdi's *habeas corpus* petition was reversed. The Circuit Court held that the executive alone does not have the power to designate people as enemy combatants and to detain them without due process in terms of the Fifth Amendment of the US Constitution.<sup>107</sup> The Court further held that Hamdi had a right to bring his case before an independent court. As a result of the detentions, the USA has been criticised for having a large prison population without trial and with numerous abuses.<sup>108</sup> The detentions without trial in Guantanamo Bay Centre violate the right to liberty of the detainees provided by the UDHR,<sup>109</sup> the ICCPR,<sup>110</sup> and the ACHR 1978.<sup>111</sup>

#### 5.4.3 Eavesdropping

As one of the measures employed to respond to the terrorist attacks of 11 September 2001, the USA enacted Title II of the *Patriot Act* 2001 which amended legislation such as the *Foreign Intelligence Surveillance Act*<sup>112</sup> and the *Electronic*

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<sup>106</sup> *Hamdi v Rumsfeld* 542 US 507 2004; see also *Al Bihani v Obama* 590 F. 3d 866 (DC Cir 2010) where it was held that the *Military Commissions Act* 2006 lists person who materially supported hostilities against the USA as being subject to trial by the Military Commission. The court went to state that "any person subject to a military commissions trial is subject to detention and that category of persons includes those who are part of the forces associated with Al-Qaeda or Taliban or those who supports those forces;" see further *Awad v Obama* 608 F. 3d 1 (DC Cir 2010) and *Gherebi v Obama* 609 F Supp 2 d 43 (D.D.C. 2009) which supports the decision in *Al Bihani v Obama*.

<sup>107</sup> Fifth Amendment of the US Constitution 1791 provides that no person shall be deprived of life, liberty or property without due process of the law.

<sup>108</sup> Tuhus-Dubrow 2008 accessed at: <http://www.thenation.com/doc/20040105tuhusdubrow> [date of use 2 Jul 2012].

<sup>109</sup> Art 3 of the UDHR 1948 provides that everyone has the right to life, liberty and security.

<sup>110</sup> Art 9(1) of the ICCPR 1966 provides that everyone has the right to liberty and security of person and no one shall be subjected to arbitrary arrest or detention.

<sup>111</sup> Art 7(3) of the ACHR 1978 provides that no one shall be subject to arbitrary arrest or imprisonment.

<sup>112</sup> *Foreign Intelligence Surveillance Act* 1978.

*Communications Privacy Act*.<sup>113</sup> The purpose of Title II was to increase the federal law enforcement agencies' powers to gather criminal information of terrorist acts by terrorist organisations through the interception of electronic communications. Under section 201 of the *Patriot Act 2001*, the judge is empowered to make an order authorising or approving the interception of wire or oral communications by the FBI in its investigations. For example, in *Dalia v United States*<sup>114</sup> the Supreme Court confirmed the validity of the installation of electronic equipment by the FBI for the purposes of intercepting communications. The Act further covers communication interceptions relating to terrorism, such as providing material support to terrorists, financial aid to terrorists or terrorist organisations, and the use of weapons of mass destruction. However, the Title II amendment to the *Patriot Act 2001* is not uncontroversial. The amendment permits the order for communication interception to be granted without hearing the application of the person whose communications are to be intercepted, thereby invading his or her right to privacy. Furthermore, the order does not allow disclosure of the reasons why it has been granted which implies that the validity of the order cannot be challenged. The amendment has gagging orders prohibiting the disclosure of the FBI investigations.<sup>115</sup>

Additionally, the Title II amendment provides protection from liability for the invasion of privacy to anyone who complies with the court order in good faith and produces tangible goods as required. As a form of protection of civil liberties of the citizens of the USA, any person who has his or her rights violated due to unlawful interception, may institute civil action for damages against the offending party, including the USA government.<sup>116</sup> In *Berger v New York*<sup>117</sup> the Supreme Court held that the New York electronic surveillance statute was invalid as it amounted to intrusion into constitutionally protected areas. An action against the USA government can be instituted within a period of two years after the applicant has discovered the

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<sup>113</sup> *Electronic Communications Privacy Act 1986*.

<sup>114</sup> *Dalia v United States* 441 US 238 1979; see also *Goldman v United States* 316 US 129 1942 where the Supreme Court held that the use of a dicta phone device on adjoining party wall to listen to the conversations by federal agents was not unlawful and therefore not intrusion of the right to privacy.

<sup>115</sup> S 215 of the *Patriot Act 2001*.

<sup>116</sup> S 223 of Title II of the *Patriot Act 2001*.

<sup>117</sup> *Berger v New York* 388 US 41 (1967); see also *Wong Sun v United States* 371 US 1963 where the Circuit Court granted protection against eavesdropping.

violation of his or her right to privacy.<sup>118</sup> In protecting investigations into terrorist acts, the court may order stay of proceedings if it is established that the process of the claim will jeopardise the investigation or prosecution of the case.

The ACHR<sup>119</sup> also provides protection to the right of privacy of individuals.<sup>120</sup> However, this right to privacy may be violated on the basis of state security and by the just demands of the general welfare and advancement of democracy.<sup>121</sup> For example, interception of communications for purposes of national security by the National Security Agency in the USA was exposed by the information leaking of Edward Snowden. Snowden leaked classified information that was gathered by the National Security Agency.<sup>122</sup> The interception of communications by the National Security Agency was justified because it was for the purposes of protection of national security. Concerns about the USA's new surveillance Bill and the speed with which the Bill was passed without public debate, have been raised. The fear is that the Bill will increase the law enforcement agencies' powers of intrusion in private communications.<sup>123</sup>

#### 5.4.4 *The right to a fair trial*

The right to a fair trial includes the following rights: the right to be informed promptly and in detail of the charge; the right to be presumed innocent until proven guilty; the right to be tried without delay; the right to be tried in public unless it can be shown that on a specified grounds closed proceedings are necessary; the right against self-incrimination; and the right to appeal or review by a higher court.<sup>124</sup>

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<sup>118</sup> Galloway 2002 *Wash & Lee .L. Rev* 973.

<sup>119</sup> ACHR 1978.

<sup>120</sup> Art II of the ACHR 1978 provides that: (1) everyone has the right to have his honour respected and his dignity recognised; (2) no one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence or of unlawful attacks on his honour or reputation; and (3) everyone has the right to protection of the law against such interference or attacks.

<sup>121</sup> Art 17(xxvIII) of the ICCPR 1966.

<sup>122</sup> Breslow 2014 accessed at:

<http://www.pbs.org/wgbh/frontline/article/how-edward-snowden-leaked-thousand-of-nsa-documents> [date of use 28 Aug 2014].

<sup>123</sup> Shane accessed at: <http://moritzlaw.osu.edu/students/groups/is/files/2013/11/shane.pdf> [date of use 28 Aug 2014].

<sup>124</sup> Marks and Clapham *International Human Rights* 155.

The accepted standards regarding the right to a fair trial are enshrined in both the UDHR<sup>125</sup> and the ICCPR.<sup>126</sup> Article xxvi of the *American Declaration of the Rights and Duties of Man*<sup>127</sup> provides that an accused person is presumed to be innocent until proven guilty. The Declaration further provides that every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive a cruel, infamous or unusual punishment. The ACHR also provides for the right to a fair trial.<sup>128</sup> This notwithstanding, the USA government has all along been reluctant to ratify the *Rome Statute establishing the International Criminal Court* because of the absence of fair trial procedures in the USA.

This calls for a detailed discussion of the right to fair trial guarantees in the USA.

#### 5.4.4.1 The right to be afforded adequate time and facilities to prepare a defence

This right is protected by the Sixth Amendment to the USA Constitution and article 14 of the ICCPR.<sup>129</sup> In terms of the Sixth Amendment, an accused person has a right to be informed of the nature and the cause of accusation. It is therefore important that the indictment must state the offence charged with reasonable certainty to enable him or her to prepare a defence. Therefore, the indictment will be defective if it does not allege all the elements of the offence and will not enable the accused to prepare a sufficient defence. Furthermore, it is an important requirement that the indictment be formulated in clear and simple language which can be readily understood.

According to the *Military Commissions Act* a detainee should be made aware of the charges against him or her as soon as possible.<sup>130</sup> However, the policies at Guantanamo Bay Centre contradicted this rule in that detainees were detained for

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<sup>125</sup> Art 10 & 11 of the UDHR 1948.

<sup>126</sup> Art 14 of the ICCPR 1966.

<sup>127</sup> *American Declaration of the Rights and Duties of Man* 1948.

<sup>128</sup> Art 8 of the ACHR 1978 provides that every person has the right to a hearing with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature.

<sup>129</sup> Art 14(3)(b) of the ICCPR 1966 protects the right of the individual to have adequate time and facilities for the preparation of his defence and to communicate with a counsel of his choice.

<sup>130</sup> Rule 308 of the *Military Commissions Act* 2006.



extended periods without any charges being preferred against them.<sup>131</sup> There are no time frames provided in the *Military Commissions Act* within which an accused person must be charged, in contrast to the rule that the accused must be made aware of the charges against him as soon as is practicable.

The treatment of classified information for the purposes of national security is an issue of concern in relation to fair trial rights.<sup>132</sup> In terms of *Military Commissions Act* rules of evidence, the right to classified information for the purposes of trial is excluded.<sup>133</sup> The application for the submission of such classified information could also be made by the state on an *ex parte* basis, in writing, and even in the absence of the accused person and defence counsel.<sup>134</sup> National security can be invoked for the authorisation of the closure of the session in order to protect disclosure of information which, in the opinion of the state, could be expected to harm national security. Death sentences can be imposed by a two-thirds vote of the presiding military officers instead of the unanimous verdict generally required for the imposition of the death penalty.<sup>135</sup>

#### 5.4.4.2 The right to a public trial before an ordinary court

The right to a public trial before an ordinary court is cardinal to a right to a fair trial and is protected by the Sixth Amendment to the USA Constitution. Public trial protects the accused from the abuse of the justice system. Furthermore, an open trial enables the public to see justice done. The right is not violated if the presence of television cameras is denied during the trial proceedings in court,<sup>136</sup> but there must be a justification for closed proceedings. However, when it came to terrorist acts committed by the detainees at Guantanamo Bay Centre, the USA established the so-called 'Military Commissions' in terms of the *Military Commissions Act* 2006. The purpose of the *Military Commissions Act* was to try unlawful enemy combatants.<sup>137</sup> In accordance with the Act, an unlawful enemy combatant is defined

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<sup>131</sup> Cole *Cal.L.Rev* 745.

<sup>132</sup> Rule 701(F) of the *Military Commissions Act* 2006.

<sup>133</sup> Anon accessed at: <http://nshr.org.sa.Siteimages/BookList/file/83.pdf> [date of use 25 May 2013].

<sup>134</sup> Rule 505(b)(3) of the *Military Commissions Act* 2006.

<sup>135</sup> Griset and Mahan *Terrorism* 286.

<sup>136</sup> *Estes v Texas* 381 US 532 1965 at 538.

<sup>137</sup> Brown *Research Handbook* 29; see also Webber *J.Nat.L. Security & Pol'y* 178.

as a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the USA, or a person who, before, on or after the date of the enactment of the Act in 2006, has been detained as an unlawful enemy combatant by the Combatant Status Review Tribunal.

The *Military Commissions Act* 2006 was enacted as a response to the USA Supreme Court ruling in *Hamden v Ramsfeld*.<sup>138</sup> It was decided in this case that the President's initial attempt at prosecuting the detainees before the military commissions was not authorised by the congressional legislation or the President's war powers. Thereafter, the Secretary for Defence published a manual for the proceedings to be conducted in military commissions. The manual set out guidelines for trials of unlawful enemy combatants at Guantanamo Bay Centre. As a result of the instructions in the manual, prosecutors had to bring those who were detained to court.

#### 5.4.4.3 The right to have trial begin and be concluded without unreasonable delay

The right to have a trial begin and conclude without unreasonable delay is guaranteed by the Sixth Amendment to the USA Constitution<sup>139</sup> and the *Speedy Trial Act*.<sup>140</sup> The *Speedy Trial Act* regulates the time within which the criminal trial is to commence and ensures that prosecution of a criminal case is not unreasonably delayed.<sup>141</sup> This issue was dealt with in *Zedner v United States*<sup>142</sup> where the Supreme Court was tasked to consider whether the accused's right to speedy trial had been violated. The Supreme Court concluded that the commencement of the case against the accused person after a period of seven years violated the accused's right to a speedy trial. Furthermore the Act does allow delays such as the complexity of the case which requires long adjournment for the investigations to be completed, unavailability of the accused, and the involvement of the accused in other trial proceedings.<sup>143</sup> The *Military Commissions Act* does not protect this right.<sup>144</sup> The suspected terrorist detainees at the Guantanamo Bay Centre who were brought

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<sup>138</sup> *Hamden v Ramsfeld* 126 US 2749 (2006).

<sup>139</sup> Gehr 1948 *J Crim L & Criminology* 193.

<sup>140</sup> *Speedy Trial Act* 1974.

<sup>141</sup> S 3161 of the *Speedy Trial Act* 1974; see also article 14(3)(c) of the ICCPR 1966.

<sup>142</sup> *Zedner v United States* 126 S Ct 1976 2006.

<sup>143</sup> S 3161(h) of the *Speedy Trial Act* 1974.

<sup>144</sup> Rule 707 of the *Military Commissions Act* 2006.

before the courts, had already spent long periods in detention and were ill-treated in violation of their fundamental human rights.<sup>145</sup> There are no time frames set for the commencement or finalisation of trials before the military commissions, for example detainees could be held in custody for almost a period of five years without any trial initiated as was the position in *United States v Khadr*.<sup>146</sup> The defendant, a young seventeen year old male, was arrested for the commission of terrorist acts and detained for a period of five years at Guantanamo Bay Centre where he was subjected to lengthy interrogations.

#### 5.4.4.4 The right to be assisted by a legal representative

The right to legal representation is fundamental to the right to a fair trial. This right to legal representation is provided by the USA Constitution.<sup>147</sup> The importance of the right to legal representation was dealt in *Gideon v Wainwright*<sup>148</sup> where it was held that a legal representative must be appointed to needy defendants in felony cases. Therefore, as one of the important requirements of the right, the right to legal representation must be effective.<sup>149</sup> In *Perkins v Hall*,<sup>150</sup> the Georgia Supreme Court concluded that defendant's Sixth Amendment right had been violated as the jury sentenced him to death because his legal representative did not investigate his brain injury that occurred before the commission of the offence with which he was charged. With regard to terrorism-related cases, the *Military Commissions Act 2006* further provides for a right to be represented by a legal representative at trial proceedings. This right is, however, only applicable during the main trial proceedings, and does not extend to the pre-trial questioning and investigations.<sup>151</sup> The right to a legal counsel could also be tempered by the restriction under the national security privilege. This aspect was dealt with in the decision in *Padilla v*

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<sup>145</sup> Fichtelberg *Crime Without Borders* 194.

<sup>146</sup> *United States v Khadr* 717 F Supp 2d 1215 CMCR 2007.

<sup>147</sup> Sixth Amendment of the USA Constitution 1791; see also art 14(3)(d) of the ICCPR 1966 that provides for the right to legal representation.

<sup>148</sup> *Gideon v Wainwright* 372 US 1963 at 385.

<sup>149</sup> Koenig 2013 *Fordham Urb. L. J* 177.

<sup>150</sup> *Perkins v Hall* 708 SE 2d 335 Ga 2011 at 344; see also *Walker v State* 88 So 3d Fla 2012 at 138-139 where the court found that the legal representative was ineffective for not investigating the defendant's history of substance abuse. The court held that the evidence was mitigating because of the defendant's daily use of drugs since the age of eleven years.

<sup>151</sup> Rule 910(c) of the *Military Commissions Act 2006*.

*Bush*<sup>152</sup> where the court found that even though Padilla had a constitutional right to consult a lawyer for the purposes of applying for a writ of *habeas corpus*, the exercise of the right would jeopardise intelligence gathering by the state. This view was also emphasised by White House Counsel, Alberto Gonzales, during his address to the American Bar Association meeting where he argued that citizens who betray their country, do not deserve legal counsel.<sup>153</sup> Instead, the right to a legal counsel must give way to the national security needs of the country to gather intelligence from captured enemy combatants.<sup>154</sup> The restriction of the right to legal representation is in contravention of the provisions of the ICCPR<sup>155</sup> and the ACHR.<sup>156</sup>

#### 5.4.4.5 The right of the accused to confront the evidence and witnesses

The Sixth Amendment of the USA Constitution protects the right of the accused to confront evidence and cross-examine witnesses to test the credibility of the evidence presented against him or her.<sup>157</sup> In *Pointer v Texas*<sup>158</sup> the court held that the right of the accused to confront witnesses called to testify against him is a fundamental right. In this case the prosecution presented evidence in a form of a transcript of the testimony of a witness at a preliminary hearing where the accused was also present. However, because the witness was not called to testify, the accused could not confront and cross-examine the witness. The court therefore held that the accused

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<sup>152</sup> *Padilla v Bush* 233 F Supp 2nd 564 (SDNY 2002); see also *Johnson v Eisentranger* 339 US 763 (1950) where the Supreme Court held that enemy aliens held beyond sovereign territory of the USA had no constitutional right to claim *habeas corpus* relief. See further *Boumediene v Bush* 533 US 723 2008 where the court held that procedures in terms of the *Military Commissions Act* 2006 were not adequate or sufficiently effective to substitute *habeas corpus*.

<sup>153</sup> Chevigny 2004 *IJHR* 143.

<sup>154</sup> Abel 2010 *SAJHR* 227.

<sup>155</sup> Art 14(d) of the ICCPR 1966 provides that everyone charged with a criminal offence has the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have a legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

<sup>156</sup> Art 8(2)(d) of the ACHR 1978 provides that everyone charged with a criminal offence has the right to defend himself personally or to be assisted by legal counsel of his choosing, and to communicate freely and privately with his counsel; and (e) the inalienable right to be assisted by counsel provided by the state, paid or not as domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law. See also the Sixth Amendment of the USA Constitution 1791.

<sup>157</sup> See also article 14(3)(e) of the ICCPR 1966.

<sup>158</sup> *Pointer v Texas* 380 US 400 1965 at 403; see further *Barber v Page* 390 US 719 1965 where the court held that the right to confrontation includes the opportunity to cross-examine and for the jury to be able to observe the demeanour of the witness. The court held further that the right to confrontation must therefore not be lightly dispensed.

had been denied an opportunity to cross-examine the witness in terms of the Sixth Amendment to the USA Constitution. The aim of the right is to ensure that the accused in criminal proceedings effectively rebuts evidence presented against him or her. The right to confront and cross-examine witnesses limits the admission of irrelevant evidence that may prejudice the accused, such as hearsay evidence which may lead to his or her conviction. Although the presence of the accused is not a must, it is important that he or she be present at the trial proceedings so that he or she can effectively advise his or her legal representative. In *United States v Gregorio*<sup>159</sup> the court held that the right to the presence of the accused at criminal proceedings guarantees the accused the opportunity to assist and instruct his or her legal representative accordingly. The right of the accused to be present during trial proceedings is protected by the Fourteenth Amendment to the USA Constitution. However, the right to be present at trial proceedings is not absolute, the accused can waive this right or by means of persistent misconduct which renders trial proceedings impossible. In *Snyder v Massachussets*<sup>160</sup> the court held that the absence of the accused from the viewing of the scene of crime, violated the right of the accused to be present during trial proceedings. Only the accused's legal representative was present during the visit to the scene of the crime and could not get instructions from the accused as to the correctness of the identification of the scene.

#### 5.4.4.6 The right to be presumed innocent until proven guilty according to law

This right is protected by the provisions of article 14(2) of the ICCPR 1966. The maxim 'every man is presumed innocent until declared guilty' of the *French Declaration of the Rights of Man and Citizen*<sup>161</sup> was introduced into American jurisprudence by the Supreme Court in *Coffin v United States*.<sup>162</sup> It is in this case that the Supreme Court held that the presumption of innocence is the undoubted law which is the foundation of the administration of USA criminal law. The presumption of innocence was further considered in *Estelle v Williams*<sup>163</sup> where the Supreme

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<sup>159</sup> *United States v Gregorio* 497 F 2d 1253 4<sup>th</sup> Circuit 1974.

<sup>160</sup> *Snyder v Massachussets* 291 US 97 1934.

<sup>161</sup> *French Declaration of the Rights of Man and Citizen* 1789.

<sup>162</sup> *Coffin v United States* 156 US 432 1895.

<sup>163</sup> *Estelle v Williams* 425 US 501 1976 at 503.

Court held that this presumption of innocence is the basic component of a fair trial under the USA criminal justice. The ICCPR provides for this right.<sup>164</sup>

Although the USA Constitution does not expressly provide for the right to be presumed innocent, the Fifth Amendment does protect this right.<sup>165</sup> In the case of *Kentucky v Whorton*,<sup>166</sup> in stressing the importance of the presumption of innocence as a criminal norm in the USA, the court stated as follows:

No principle is more firmly established in our system of criminal justice than the presumption of innocence that is accorded to the defendant in every criminal trial.

The *Military Commissions Act* 2006 acknowledges that an accused person must be presumed innocent until his guilt has been established beyond a reasonable doubt by competent legal evidence.<sup>167</sup> The presumption of innocence kicks in as soon as the individual is suspected of the commission of the offence and persists until the end of the trial and the pronouncement of a verdict.<sup>168</sup> Therefore, a high standard of proof is required to ensure that there are no unjust convictions by giving substance to the presumption of innocence.<sup>169</sup> As a measure to safeguard this right, it is the duty of the trial judge to inform and instruct the members of the jury about the presumption of innocence in deciding the fate of the accused.<sup>170</sup> In addition, the verdict should only be based on the evidence presented in court and not on the impression or opinion of the jurors.<sup>171</sup>

#### 5.4.4.7 The right to have evidence obtained in an unfair manner excluded

The right to have unfairly obtained evidence excluded from the criminal proceedings is protected by the Fourth Amendment to the USA Constitution. In terms of the Fourth Amendment, evidence obtained in violation of the USA Constitution is to be

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<sup>164</sup> Art 14(2) of the ICCPR 1966 provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law; see also art 8(2) of the ACHR 1978; see further the Fifth Amendment of the USA Constitution 1791.

<sup>165</sup> Gray 2012 *U Tas .L.Rev* 140.

<sup>166</sup> *Kentucky v Whorton* 441 US 786 1979 at 790; see also *Estelle v Williams* 425 US 501 1976 at 503 where the court held that the presumption of innocence is the basic component of a fair trial in the American system of criminal justice.

<sup>167</sup> Rule 290(e)(5) of the *Military Commissions Act* 2006.

<sup>168</sup> Laudan accessed at: <http://pgil.pk/wp-content/uploads/2014/04/The-presumption-of-innocence> [date of use 13 Aug 2014].

<sup>169</sup> *Lego v Twomey* 404 US 477 1972 at 486.

<sup>170</sup> *US v Fernandez* 496 F 2d 1294 5<sup>th</sup> Cir 1974.

<sup>171</sup> *Irvin v Dowd* 366 US 717 1960 at 723.

held inadmissible in criminal trial proceedings.<sup>172</sup> However, with the development of the doctrine of the good faith exception to the exclusionary rule, evidence obtained in good faith has been held to be admissible, despite the fact that it violated the rights protected by the Fourth Amendment. The good faith exception to the exclusionary rule was addressed by the Supreme Court in *United States v Leon*<sup>173</sup> where evidence obtained through search and seizure based on an invalid search warrant was held admissible. The police had obtained the evidence in good faith because they believed the search warrant was valid.

As regards trial proceedings in the military courts, there is no provision in the Military Commissions Manual relating to the admissibility of evidence. Evidence was in the main acquired by means of torture or ill treatment, which implies that the evidence before the military commissions was obtained in an unlawful manner and should render the trial unfair.<sup>174</sup> Self-incriminating evidence, involuntary statements, or evidence obtained by means of coercion or torture is admissible in terms of the *Military Commissions Act 2006* and the new *Military Commissions Act 2009* amending the 2006 Act. The new *Military Commissions Act 2009* also fails to provide for the exclusion of evidence obtained unlawfully, such as evidence obtained outside of the USA without a warrant.<sup>175</sup> Hearsay evidence is also admissible in the military commission courts.<sup>176</sup> The admission of evidence obtained in an unlawful manner violates the right not to be compelled to be a witness against oneself.<sup>177</sup>

#### 5.4.4.8 The right against self-incrimination

This right is protected by the Fifth Amendment to the USA Constitution and international law instruments such as the ICCPR.<sup>178</sup> In protecting this right, the Fifth Amendment provides that no one may be compelled to be a witness against him or herself. In emphasising the right against self-incrimination, the Supreme Court held

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<sup>172</sup> Kauf 2010 *American University Criminal Law Brief* 24.

<sup>173</sup> *United States v Leon* 468 US 897 1984; see also *Herring v United States* 555 US 135 2009 where the court found that the good faith exception to the exclusionary rule was applicable when the police erred in keeping correct records in the warrant database.

<sup>174</sup> Mark and Clapham *International Human Rights* 156.

<sup>175</sup> S 949a (b)(3)(A) of the *Military Commissions Act 2009*.

<sup>176</sup> S 949a (b)(3)(D) of the *Military Commissions Act 2009*.

<sup>177</sup> Art 14(2)(g) of the ICCPR 1966; Art 8(2)(g) of the ACHR 1978; see also the Sixth Amendment of the USA Constitution 1791.

<sup>178</sup> Art 14(3)(g) of the ICCPR 1966.

in *Griffin v California*<sup>179</sup> that the prosecution cannot be asked to draw an inference of guilt based on the fact that the accused refuses to testify in his or her defence. Therefore, the most important objective of the privilege against self-incrimination is to protect an innocent person against unfair conviction. However in terms of the *Military Commissions Act*<sup>180</sup> self-incriminating evidence is admissible in military commission trials.

#### 5.4.4.9 The right to appeal or review by a higher court

As early as 1894, the USA Supreme Court decided in *McKane v Durston*<sup>181</sup> that the accused in criminal proceedings does not have an absolute right to appeal. However, in dealing with the right to appeal, the court held in *Mathews v Eldridge*<sup>182</sup> that procedural due process requires the recognition of the absolute right to appeal. The Fourth Amendment to the USA Constitution provides for the due process of the law which protects the rights of the accused in criminal proceedings against violation without compliance with fair trial procedures.<sup>183</sup> Therefore, the due process right to appeal is based on the fact that the first hearing before a trial court does not have sufficient procedural safeguards. As a result, the second hearing in the form of an appeal, satisfies the due process requirement.<sup>184</sup> Noteworthy is the fact that in criminal matters, the risk of conviction of the innocent justifies the guaranteed right to appeal.<sup>185</sup>

The ICCPR 1966 indeed, does provide for right of a person convicted of a crime to have his conviction and sentence reviewed by a higher court.<sup>186</sup> The ACHR also provides for appeal to a higher court.<sup>187</sup> This right includes the right to demand compensation for miscarriages of justice.<sup>188</sup> The military commissions lacked

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<sup>179</sup> *Griffin v California* 380 US 609 1965.

<sup>180</sup> *Military Commissions Act* 2009

<sup>181</sup> *McKane v Durston* 153 US 684 1894 at 687.

<sup>182</sup> *Mathews v Eldridge* 424 US 319 1976 at 335.

<sup>183</sup> Lobsenz 1985 *University of Puget Sound Law Review* 380.

<sup>184</sup> Lobsenz 1985 *University of Puget Sound Law Review* 382.

<sup>185</sup> Lobsenz 1985 *University of Puget Sound Law Review* 383.

<sup>186</sup> Art 14(5) of the ICCPR 1966.

<sup>187</sup> Art 8(2)(h) of the ACHR 1978.

<sup>188</sup> Art 14(6) of the ICCPR 1966 provides that if it is discovered that there has been miscarriage of justice and a person has suffered punishment as a result of conviction, such person shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.



adequate procedures for the right to appeal, including adequate *habeas corpus* procedures. Furthermore, the rules under the *Military Commissions Act* do not provide for review or appeal against conviction for insufficiency of evidence. A similar problem was addressed in *Lewis v Attorney General of Jamaica*.<sup>189</sup> In this case, the Judicial Committee of the Privy Council was called upon to address the implementation of capital punishment. The majority of the judges concluded that the prerogative of mercy exercised in Jamaica by the Privy Council, must operate under a fair and proper procedure. According to the Privy Council, the requirements of fair and proper procedures in processes governing clemency are, amongst others, that the condemned person be given sufficient notice of the date on which the competent authorities would consider his or her case; be afforded a chance to make representations; and be furnished with documents that the authorities will use in considering the entitlement to mercy in his or her favour.

### **5.5. Chapter summary**

The aim of this chapter was to analyse the counter-terrorism legal framework in the USA. The USA's counter-terrorism legislation, such as the *Patriot Act 2001*, the *Enhanced Border Security Act 2002*, the *Homeland Security Act 2002*, and the *Anti-Terrorism and Port Security Act 2002* have strengthened the country's fight against the threat of terrorism. Noteworthy is the fact that counter-terrorism closes the gaps in the ability to investigate terrorist acts and enables the USA to meet challenges of new terrorist threats. The *Patriot Act* allows the indefinite detention of aliens suspected of involvement in terrorist activities, while the *Enhanced Border Security and Visa Entry Reform Act* restrict the issuing of visas to immigrants from terrorist-sponsor countries. The *Homeland Security Act* denies terrorist suspects entry into the USA. These pieces of legislation complement each other in preventing and combating the threat of terrorism in the USA. Noteworthy is the fact that human rights such as the right to privacy are often violated by means of interception of communication by the American National Security Agency. The right against torture is also often violated, for example the torture of terrorist suspects practised at Guantanamo Bay military detention centre. The violation of human rights may be

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<sup>189</sup> *Lewis v Attorney General of Jamaica* 2000 3 WLR 1785.

justified provided the limitation of the right is necessary, proportional and not inconsistent with the state's obligation under international law.<sup>190</sup> The USA's counter-terrorism legislation conforms to the American regional instruments, such as the *American Declaration of the Rights and Duties of Man* 1948 and ACHR 1978. Furthermore, the legislation conforms to international instruments protecting human rights such as the ICCPR 1966 and the UDHR 1948. However when it comes to prosecution of terrorist crimes, the legislation violates the right to a fair trial of the suspected terrorism suspects. For example, the *Military Commissions Act* 2006 provides for limitations on a right to a fair trial such as secret trials of the suspected terrorist which infringe the right to a public hearing.<sup>191</sup> Furthermore, counter-terrorism legislation such as the *Patriot Act* 2001 and the *Military Commissions Act* 2006 violates the Fifth and the Sixth Amendments to the USA Constitution.<sup>192</sup> Of importance is that the USA Constitution does not contain a suspension of rights and liberties clause during periods of national emergency, such as the serious terrorist attacks of 11 September 2001.<sup>193</sup>

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<sup>190</sup> Marks S & Clapham A *International Human Rights* 342.

<sup>191</sup> Art 14(6) of the ICCPR 1966, Art 10 of the ACHR; see also Thomas 2003 *Fordham Int'l .L .J* 1203.

<sup>192</sup> The Fifth Amendment of the USA Constitution provides for the due process of the law while the Sixth Amendment of the USA Constitution provides for the right to speedy, public and fair trials and the right to confront accusers to a criminal defence.

<sup>193</sup> Sottioux *Terrorism and the Limitation* 62.

## CHAPTER 6

# THE UNITED KINGDOM'S LEGAL FRAMEWORK FOR COUNTERING TERRORISM

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### **6.1. Introduction**

The UK, like other liberal states, has not been able to prevent the influx of terrorist organisations within its borders. The country has fallen victim to violent attacks by international terrorist organisations such as Al-Qaeda.<sup>1</sup> On 7 July 2005 the City of London experienced a series of attacks. On 24 December 2006 it was reported that the Channel Tunnel was targeted by a group of Islamic militants aiming to cause maximum damage during the holiday season.<sup>2</sup> In addition to terrorist attacks by international terrorist organisations like Al-Qaeda, the UK also experienced terrorist attacks by the Irish Republican Army (hereafter the IRA).<sup>3</sup> The objective of the IRA was to realise the right to self-determination from the United Kingdom.<sup>4</sup> The IRA guerrillas attacked British troops, police officers, prison-guards and para-military organisations. The major attacks waged by the IRA on the British government included the 1984 bombing of the Brighton hotel in which the ruling party was holding its annual meeting, the 1990 mortar attack on the British Prime Minister's residence, and the 1993 bombing in London's financial district.<sup>5</sup>

In response to the growing threat of international terrorism in its territory, the UK government introduced counter-terrorism legislation.<sup>6</sup> Noteworthy is that, as a result of its long experience in dealing with threats of terrorism posed by the IRA, the UK

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<sup>1</sup> Landman 2007 *Cal.w Int'l L* .J76.

<sup>2</sup> Raman accessed at: <http://www.ict.org.il/Articles/tabid66/currentpage/11/Default.aspx>. [date of use 11 Jun 2012].

<sup>3</sup> Gurr and Cole *The new Face* 16.

<sup>4</sup> Webber 2012 *J Nat Security L & Pol'y* 171.

<sup>5</sup> Anon 2007 accessed at: <http://www.reuters.com/artice/us-britain-bomb-timeline-idUSL298947012000701> [date used 5 Apr 2016].

<sup>6</sup> Breau *et al* accessed at: <http://www/britishcouncil.org/china-society-publications-911.pdf> [date of use 22 Feb 2013].

has a highly developed and complex network of anti-terrorism legislation when compared to other countries.<sup>7</sup>

This chapter deals with the legal framework of counter-terrorism legislation in the UK. As under the preceding chapter, this is addressed in three parts. Part 1 analyses counter-terrorism legislation before 2001; Part 2 the effectiveness of counter-terrorism legislation post-2001; and Part 3 contains a critical analysis of human rights in the UK. It is argued that the counter-terrorism legislation which has been enacted violates the fundamental human rights of individuals in the UK.

The following is a detailed discussion of the counter-terrorism legislation adopted in the UK in response to the threat of international terrorism within its borders.

## **6.2. Counter-terrorism legislation before 2001**

The following legislation, which was implemented before 11 September 2001 to prevent and combat international terrorism in the UK will be discussed in detail: the *Prevention of Violence Act 1939*; the *Prevention of Terrorism (Temporary Provisions) Act 1989*; *Criminal Justice (Terrorism and Conspiracy) Act 1998*; and the *Terrorism Act 2000*. The legislation is evidence of the fact that the threat of terrorism is not new in the UK and that steps to fight terrorist activities were in place long before 2001.

### *6.2.1 The Prevention of Violence Act 1939*

The *Prevention of Violence Act 1939* was enacted as emergency legislation in response to the IRA's campaign of violence against the UK.<sup>8</sup> The Act was to apply for a period of two years only.<sup>9</sup> It applied to persons suspected of involvement in acts of violence designed to influence public opinion or government policy with respect to Irish affairs. In terms of the Act, even where there was no adequate evidence to convict suspects of criminal acts, the Home Secretary was authorised to order persons of whose complicity he was reasonably satisfied, to be registered and a report be made to the police. Where the suspects were non-residents of the UK, the

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<sup>7</sup> Donohue *Civil Liberties* 1.

<sup>8</sup> Bishop 1978 *Yale Law School Legal Scholarship Repository* 145. See also Roche 1989 *Fordham Int'l L. J* 344.

<sup>9</sup> S 5(2) *Prevention of Violence Act 1939*.

Home Secretary was empowered to order their expulsion or exclusion from the UK.<sup>10</sup> Furthermore, the police were empowered to arrest and detain persons suspected of committing acts of violence for a period of seven days.<sup>11</sup> The Act was, however, repealed in 1973 and replaced by the *Prevention of Terrorism (Temporary Provisions) Act*.<sup>12</sup> The latter was further developed by the *Prevention of Terrorism (Temporary Provisions) Act* 1974, in response to the troubles in Northern Ireland. The *Prevention of Violence Act* was replaced by the *Prevention of Terrorism (Temporary Provisions) Act* 1989, which was in turn replaced by the *Permanent Terrorism Act* of 2000<sup>13</sup> which will be discussed below.

### 6.2.2 *The Prevention of Terrorism (Temporary Provisions) Act 1989*

The *Prevention of Terrorism (Temporary Provisions) Act* 1989 was a comprehensive anti-terrorism piece of legislation which was intended to combat acts of terrorism specifically involving the affairs of the UK and Northern Ireland. The Act defined terrorism as the use of violence for the purposes of putting the public or any section of the public in fear.<sup>14</sup>

In terms of the Act, it was an offence to belong to a prohibited organisation such as the IRA, to arrange meetings to support such organisations, and to wear, carry or display items of dress or other articles so as to arouse reasonable doubt of support for the organisation.<sup>15</sup> The Act prohibited financial assistance for terrorism, possession of articles for suspected terrorist purposes, and the unlawful collection of information which could be useful to terrorists planning or carrying out acts of terrorism.<sup>16</sup>

In *Murray v UK*,<sup>17</sup> the applicant was arrested on suspicion of involvement in the collection of money to purchase arms for the IRA, a prohibited organisation. The

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<sup>10</sup> Bishop 1978 *Yale Law School Legal Scholarship Repository* 146.

<sup>11</sup> Bishop 1978 *Yale Law School Legal Scholarship Repository* 145-146.

<sup>12</sup> *Prevention of Terrorism (Temporary Provisions) Act* 1974.

<sup>13</sup> Anon accessed at: <http://epress.anu.edu.au/war-terror/mobile-devices/ch15s02.html> [date of use 5 Apr 2013].

<sup>14</sup> S 20(1) of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>15</sup> Ss 1-3 of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>16</sup> S 9 of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>17</sup> *Murray v UK* 1988 2 All ER 521.

withholding of information was an offence in terms of the Act.<sup>18</sup> Furthermore, the Home Secretary had powers to issue an order prohibiting a person involved in the commission, preparation, or instigation of acts of terrorism from being in or entering Britain, Northern Ireland or the UK.<sup>19</sup>

In terms of the Act a statement by a police officer of the rank of Superintendent to the effect that the accused was a member of a specified proscribed organisation was admissible as evidence.<sup>20</sup> The Act further provided for inferences to be drawn from the failure of the accused to disclose a material fact which he could reasonably be expected to disclose.<sup>21</sup> However, the accused could not be convicted of the offence of terrorism based solely on inferences or the statement of a police officer.

The Act further empowered senior police officers to authorise the stop and search of vehicles, persons and pedestrians in order to combat and prevent terrorist acts. Special powers of arrest and detention were provided for in the Act. Therefore, a police officer of the rank of Constable had the power, in terms of the Act, to arrest without a warrant a person whom he reasonably suspected of committing acts of terrorism or being a member of the IRA.<sup>22</sup> A person suspected of committing terrorist acts could be detained for a period of 48 hours. The period of detention could be extended by the Home Secretary to a period of not more than seven days.<sup>23</sup> Finally, the Act empowered the courts to order the forfeiture of property belonging to any person convicted of being a member of a proscribed organisation.<sup>24</sup> The property to be forfeited had to be owned or controlled by the convicted person, or have been used to further the interests of a specified proscribed organisation.

The detention of those suspected of committing terrorist acts without a warrant violated the right to liberty as provided for by article 5 of the *European Convention on Human Rights* 1950. The arrest of members of the IRA in Northern Ireland further violated the right to freedom of peaceful assembly and to freedom of

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<sup>18</sup> Ss 9-11 of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>19</sup> S 16 of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>20</sup> S 2 of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>21</sup> S 12 of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>22</sup> S 14(1) of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>23</sup> Ss 12(4)-(5) of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>24</sup> S 13 of the *Prevention of Terrorism (Temporary Provisions) Act* 1989.

association under article 11 of the *European Convention on Human Rights*.<sup>25</sup> Article 8(2) of the Convention provides that there shall be no interference by a public authority in the exercise of the right save in accordance with the law, and where necessary for the protection of national security, public safety and the economic well-being of the country. However in *McVeigh, O' Niel and Evans v UK*<sup>26</sup> the courts held differently. The applicants were arrested when they arrived in Liverpool from Ireland for involvement in terrorist activities in terms of the *Prevention of Terrorism (Temporary Provisions) Act*.<sup>27</sup> They were searched, questioned, photographed and their fingerprints were taken. The applicants were detained for 45 hours without being charged with the commission of any offence. The applicants alleged that their right to liberty in terms of article 5 of the *European Convention on Human Rights* 1950 had been violated. Based on the background of the terrorist activities taking place in Northern Ireland, it was held that the applicants' right to liberty had not been violated. Detention may also be justified with the view to deportation, as held in *Zamir v UK*.<sup>28</sup>

### 6.2.3 *Criminal Justice (Terrorism and Conspiracy) Act 1998*

The purpose of this legislation was to amend the *Prevention of Terrorism Act*<sup>29</sup> by inserting provisions relating to procedure, forfeiture, and conspiracy. In terms of the *Criminal Justice (Terrorism and Conspiracy) Act* 1998, where a person was charged with being a member of a prohibited organisation, a statement or opinion from a police officer of or above the rank of Superintendent that the person was a member of a prohibited organisation was admissible as evidence.<sup>30</sup> The Act further empowered the courts to order forfeiture of property belonging to persons who had been convicted of offences relating to a prohibited organisation when they were members of specified organisations.<sup>31</sup> The property to be forfeited had, however, to

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<sup>25</sup> Art 11 of the *European Convention on Human Rights* 1950 provides that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

<sup>26</sup> *McVeigh, O' Niel and Evans v UK* 1981 25 DR 15 paras 223-226; see also *Fox, Campbell and Hurlley v UK* 13 EHRR 157 Ser A 182.

<sup>27</sup> *Prevention of Terrorism (Temporary Provisions) Act* 1976.

<sup>28</sup> *Zamir v UK* 1983 40 DR 42.

<sup>29</sup> *Prevention of Terrorism (Temporary Provisions) Act* 1989.

<sup>30</sup> S 2(3)(a) of the *Criminal Justice (Terrorism and Conspiracy) Act* 1998.

<sup>31</sup> S 4(1)(b) of the *Criminal Justice (Terrorism and Conspiracy) Act* 1998.

be in the possession of, or under the control of the convicted person, and had to have been used in relation with or in furtherance of the activities of the specified organisation.<sup>32</sup> The provisions of section 2 of the *Criminal Justice (Terrorism and Conspiracy) Act 1998* violated the rights to freedom of peaceful assembly and to freedom of association provided for by article 11 of the *European Convention on Human Rights 1950*. The forfeiture of property violated the right to property in terms of the *European Convention on Human Rights 1950* of those convicted of contravening the provisions of the *Criminal Justice (Terrorism and Conspiracy) Act 1998*.<sup>33</sup>

#### 6.2.4 *Terrorism Act 2000*

The *Terrorism Act 2000* repealed the *Prevention of Terrorism (Temporary Provisions) Act 1989* and the *Northern Ireland (Emergency Provisions) Act 1996*. The *Prevention of Terrorism (Temporary Provisions) Act 1989* provided the police with powers that led to abuse, such as arrest and detention without trial, and resulted in numerous court challenges to the provisions of the legislation.

In terms of the *Terrorism Act 2000*, terrorism means the use or threat of action which falls within subsection (2) of the Act; the use or threat is designed to influence the government or an international organisation, or to intimidate the public or a section of the public; and the use or threat is made for the purpose of advancing a political, religious or ideological cause.<sup>34</sup> An act falls within the ambit of subsection (2) if it involves serious violence against a person, serious damage to property, and endangers the life of a person other than the perpetrator.<sup>35</sup> The Act further includes an act which poses a serious risk to the health or safety of the public or a section of

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<sup>32</sup> S 4(3)(a) & (b) of *Criminal Justice (Terrorism and Conspiracy) Act 1998*.

<sup>33</sup> Art 1 of *Protocol of the European Convention on Human Rights 1950* provides that every natural person or legal person is entitled to the peaceful enjoyment of his possession and no one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law. (2) The provisions of article 1 shall not in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

<sup>34</sup> S 1(a)-(c) of the *Terrorism Act 2000*.

<sup>35</sup> S 1(2) (a)-(c) of the *Terrorism Act 2000*.



the public, or is designed seriously to interfere with or seriously to disrupt an electronic system.<sup>36</sup>

The *Terrorism Act 2000* provides the police with increased powers of arrest and detention of suspected terrorists for a period of up to 48 hours.<sup>37</sup> The period of 48 hours could be extended up to a period of seven days. The *Terrorism Act 2000* further empowered the police and the Home Secretary to define an area in the country and the time at which the stop and search of vehicles or persons could be conducted and articles which could be used in connection with or in committing acts of terrorism, could be seized.<sup>38</sup> However, in January 2010, the stop and search powers granted to the police in terms of section 44 were ruled unlawful by the European Court of Human Rights.<sup>39</sup> Section 44 empowered a police officer of a rank of constable to detain lawful protesters or other persons in the vicinity of demonstrations. These powers could be exercised only for the purpose of searching for articles which could be used to further the commission of terrorist acts.<sup>40</sup> The Act further provided that articles reasonably suspected for use in the commission of terrorist acts could be seized.<sup>41</sup> In *R v Malik*,<sup>42</sup> the police arrested Malik in October 2006 after searching her home and finding records likely to be used for terrorist acts in her possession. She was charged with offences in terms of sections 57<sup>43</sup> and 58<sup>44</sup> of the *Terrorism Act 2000*. Malik was, however, acquitted.

The Act also criminalised failure to stop when directed to do so by the police in uniform.<sup>45</sup> Schedule 7 of the *Terrorism Act 2000* further empowered a constable to

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<sup>36</sup> S 1(2) (d)-(e) of the *Terrorism Act 2000*.

<sup>37</sup> S 41 of the *Terrorism Act 2000*.

<sup>38</sup> S 45 of the *Terrorism Act 2000*.

<sup>39</sup> *Gillian and Quinton v UK* 2010 ECHR 28; see also Anon accessed at: <http://news.bbc.co.uk/1/hi/uk845378.stm> [date of use 8 Jun 2012].

<sup>40</sup> S 45(1)(a) of the *Terrorism Act 2000*.

<sup>41</sup> S 45(3) of the *Terrorist Act 2000*.

<sup>42</sup> *R v Malik* 2008 All ER D 201; see also *R v Omar Khyam* 2008 EWCA Crim 1612 where the accused was found in possession of ammonium nitrate fertilizer with the aim to make a bomb in furtherance of terrorist acts.

<sup>43</sup> S 57 of the *Terrorism Act 2000* criminalises possession of material for the purpose of the commission of terrorist acts.

<sup>44</sup> S 58 of the *Terrorism Act 2000* criminalises (a) the collection or making of record of information of a kind likely to be used in committing or preparation of acts of terrorism, and (b) possession of a document or record containing information of terrorism.

<sup>45</sup> S 47 of the *Terrorism Act 2000*.

question a person to determine whether he or she was a terrorist.<sup>46</sup> In *RV Gillian v Metropolitan Police Authority*<sup>47</sup> it was confirmed that the authorisation in terms of section 45 of the *Terrorism Act 2000* could validly be issued in respect of the whole police district in response to the general threat of terrorist activities where the threat could arise in respect of terrorist targets within the district. According to the critics, the Act gave the police extended powers to stop and search vehicles and remove articles suspected of use in terrorist acts.<sup>48</sup> The aim of the Act was to deter or prevent protests.<sup>49</sup>

Sections 24 to 30 of the *Terrorism Act 2000* provide for the seizure of terrorist funds so long as the authorised officer reasonably believed that the money was intended for use in furthering terrorist purposes, or was part of the resources of a terrorist organisation or the proceeds of terrorist activities. In an effort to prevent the commission of acts of terrorism by British subjects, the *Terrorism Act 2000* further provided that a person commits an act of terrorism if he incites acts of terrorism wholly or partially outside of the UK.<sup>50</sup> However, as a measure to protect human rights while fighting terrorism, *Code A of the Codes of Practice accompanying the Police and Criminal Evidence Act 1984*, provides that any intrusion on the liberty of the person stopped or searched must be brief. Although the stop and search by the police interfered with the right of privacy of individuals as provided by the *European Convention on Human Rights*,<sup>51</sup> the Convention<sup>52</sup> does justify an interference with the right.

### **6.3. Counter-terrorism legislation after 2001**

After the attack on the USA on 11 September 2001, the UK, as a USA ally, was under pressure to enhance its own counter-terrorist legislation. The reason for the new legal developments was that the UK was suffering terrorist attacks from the same

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<sup>46</sup> Walker 2008 *Melbourne U.L. Rev* 278.

<sup>47</sup> *R v Gillian v Metropolitan Police Authority* 2006 2 WLR 537.

<sup>48</sup> Gale 2006 *Working Paper Series* 6.

<sup>49</sup> Anon accessed at: <http://www.liberty-human-rights.org.uk/issues/6-free-speech/index.shtml> [date ouse 20 Jun 2012].

<sup>50</sup> S 59 of the *Terrorism Act 2000*.

<sup>51</sup> *European Convention on Human Rights* 1950.

<sup>52</sup> Art 8(1) of the *European Convention on Human Rights* 1950 provides that everyone has the right to respect for his private and family life, his home and his correspondence.

terrorist organisation, Al-Qaeda. Furthermore, the UK was experiencing an increase in terrorist attacks which demanded the development and improvement of counter-terrorism legislation in order to defend the country against the growing threat of international terrorism.

The following legislation is discussed to evaluate the developments aimed at strengthening legislation in the fight against the threat of international terrorism in the UK after September 2001: the *Anti-Terrorism Crime and Security Act 2001*; the *Crime (International Co-operation) Act 2003*; the *Prevention of Terrorism Act 2005*; the *Terrorism Act 2006*; and the *Counter-Terrorism Act 2008*.

### 6.3.1 *Anti-Terrorism Crime and Security Act 2001*

The *Anti-Terrorism Crime and Security Act 2001* was enacted as the UK's response to the 11 September 2001 terrorist attacks in the USA.<sup>53</sup> The purpose of this Act was to ensure that the government had adequate powers to deal effectively with the threat of terrorism in the UK. The Act dealt with a wide range of matters such as the seizure of terrorist funds and assets, the regulation, disclosure and retention of information relating to terrorist acts in the UK,<sup>54</sup> offences relating to racial and religious hatred, offences relating to weapons of mass destruction, security of nuclear and aviation institutions, new police powers,<sup>55</sup> executive law making powers in respect of European security cooperation, and detention of suspected international terrorists.

Section 50 of the Act criminalised the aiding, counselling, procuring or incitement of a person who is not a UK citizen to perform terrorism-related acts outside of the UK. The disclosure of information relating to nuclear security was prohibited. The disclosure of the information must have occurred either with the intention of prejudicing the security of the state. The purpose of this restriction was to enhance security to prevent the nuclear industry from being accessed for terrorism-related purposes.<sup>56</sup>

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<sup>53</sup> Murphy *Blackstone's Criminal Practice* 598.

<sup>54</sup> Ss17-20 of the *Anti-Terrorism Crime and Security Act 2001*.

<sup>55</sup> Ss 89-95 of the *Anti-Terrorism Crime and Security Act 2001*.

<sup>56</sup> S 79 (1)(a)(b) of the *Anti-Terrorism Crime and Security Act 2001*.

The Act further empowered the Home Secretary to certify a non-UK national as a suspected international terrorist or if he believed that the presence of the person in the UK was a threat to national security. In case of such certification, the Home Secretary had the power to order the removal of such a person from the UK or if the removal was prevented to detain the suspected terrorist indefinitely without charge.<sup>57</sup> These provisions violate the fundamental rights of suspected terrorists in the UK such as the rights to freedom and liberty, and the right to privacy.

Whilst the *Anti-Terrorism Crime and Security Act 2001* played a vital role in fighting international terrorism in the UK, it was not without controversy. Part XI of the Act provided for the retention of communication data for terrorism-related investigations.<sup>58</sup> The opponents of the legislation were of the view that this encouraged mass and widespread snooping of electronic communications of British citizens under the pretext of preventing and combating terrorism.<sup>59</sup> Furthermore, the provisions of section 23 of the Act are discriminatory as they allowed the detention of non-UK nationals in violation of the UK *Human Rights Act*.<sup>60</sup>

### 6.3.2 *Crime (International Co-operation) Act 2003*

The *Crime (International Co-operation) Act 2003* makes provision for furthering co-operation with other countries in respect of criminal proceedings and investigations, and the extension of jurisdiction to deal with terrorist acts or threats outside of the UK. Section 7 of the Act allows for requests for assistance in obtaining evidence outside of the UK. Accordingly, where there is a reasonable ground for suspecting that an offence has been committed, the UK judicial authority may request assistance in obtaining evidence.<sup>61</sup> In terms of the Act prisoners held for terrorist offences may be transferred to assist in investigations outside of the UK.<sup>62</sup> These terrorist offences may be committed by a UK national or resident while in or outside the UK.<sup>63</sup> The Act further provides for property related to terrorist activities to be

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<sup>57</sup> Ss 21-23 of the *Anti-Terrorism Crime and Security Act 2001*; see also Webber 2010 *Touro Int'l .L. Rev* 149 – 150.

<sup>58</sup> Walker and Akdeniz 2003 *NILQ* 162.

<sup>59</sup> Walker and Akdeniz 2003 *NILQ* 162.

<sup>60</sup> S 4 of the *Human Rights Act 1998*.

<sup>61</sup> S 7(1)(b) of the *Crime (International Co-operation) Act 2003*.

<sup>62</sup> S 47 of the *Crime (International Co-operation) Act 2003*.

<sup>63</sup> S 63(1) of the *Crime (International-Co-operation) Act 2003*.

frozen and declared forfeited to the state. In terms of section 11A this applies to such property both within and outside of the EU.

### 6.3.3 *Prevention of Terrorism Act 2005*

The *Prevention of Terrorism Act 2005* came into operation on 11 March 2005 and aimed to provide for the making of control orders against individuals involved in terrorism-related activities so as to prevent their further involvement in such activities. In terms of the Act a control order is an order against an individual which imposes obligations on him or her relating to the protection of members of the public from risk of terrorist acts.<sup>64</sup> The control order includes electronic tagging, travel restrictions, curfew for up to sixteen hours per day, limits on interpersonal communications, and regular home visits and searches.<sup>65</sup> However, the Home Secretary may not issue control orders which are incompatible with the individual's right to liberty under article 5 of the *European Convention on Human Rights*.<sup>66</sup> In terms of the provisions of section 2 of the *Prevention of Terrorism Act 2005*, the Secretary of State may, for example, issue a control order against an individual if he or she has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activities, and considers the order necessary to protect members of the public against acts of terrorism.<sup>67</sup> A police officer of the rank of constable may arrest and detain an individual if the Secretary of State has applied to court for a derogation order against such an individual.<sup>68</sup> The arrest and detention of the person is to ensure his or her availability to be served with a notice of the order if issued.<sup>69</sup> In terms of the Act, the derogation-control order only ceases to have effect at the end of a period of six months.<sup>70</sup>

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<sup>64</sup> S 1 of the *Prevention of Terrorism Act 2005*; see also Anderson *Control Orders* 4.

<sup>65</sup> Anon accessed at: <http://ukhumanrightsblog.com/2011/01/06/control-orders> [date of use 31 Jul 2014].

<sup>66</sup> S 1(1)(a) of the *Prevention of Terrorism Act 1989*.

<sup>67</sup> S 2 (1)(a) & (b) of the *Prevention of Terrorism Act 1989*; see also Webber 2012 *J.Nat'l Security & Pol'y* 172.

<sup>68</sup> S 5 (1)(a) of the *Prevention of Terrorism Act 2005*.

<sup>69</sup> S 5 (1)(b) of the *Prevention of Terrorism Act 2005*.

<sup>70</sup> S 4 (8) of the *Prevention of Terrorism Act 2005*.

The *Prevention of Terrorism Act* 2005 further made provision for matters, including appeals and other proceedings, relating to orders and for connected purposes.<sup>71</sup> The Act was intended as a measure to prevent the perpetration of terrorist activities in the UK. Although there has been criticism about the control orders, the criticism did not relate to the way in which they were imposed, but was concentrated rather on their validity as they could be made without the prior sanction of a court. However, orders issued must be referred to court to confirm their validity.<sup>72</sup> Where the matter is brought before the court for review, a special advocate is appointed and is allowed access to the material and reasons justifying the need for security or serving as the basis for suspicion of a risk, to which the public is not allowed access.<sup>73</sup> The detainee and his lawyer are not allowed to see the material used in reaching the decision.<sup>74</sup> While the detainee is not a client of the special advocate, the special advocate acts in the best interests of the detainee. The use of special advocates in the Special Immigration Appeals Commission (hereafter the SIAC) protects the civil liberties of those affected by control orders. In *Secretary of State for the Home Department v MB (FC)*,<sup>75</sup> the House of Lords was called upon to review the case of a person subject to a control order. The controlee claimed that the control order had been made without the disclosure of the material and without any specific allegation of terrorism-related material. Furthermore, the order was not made in an open court which violated the provisions of article 6 of the *European Convention on Human Rights* which guarantees the right to a fair trial. The court held that the control orders could be set aside if the court could arrive at a conclusion that the detainee had not been afforded a fair trial.

In order to ensure that the control order system is not abused or does not violate human rights, the *Prevention of Terrorism Act* 2005 requires the Home Secretary to prepare a report on the use of control orders for every three months. The Home

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<sup>71</sup> S 10 of the *Prevention of Terrorism Act* 2005.

<sup>72</sup> Ss 2 & 3 of the *Prevention of Terrorism Act* 2005.

<sup>73</sup> Saul *Research Handbook* 415.

<sup>74</sup> Webber 2010 *Touro Int'l .L.Rev* 154.

<sup>75</sup> *Secretary of State for the Home Department v MB (FC)* 2007 UKHL 46.

Secretary is further required to appoint a person whose duty it is to review the law governing control orders.<sup>76</sup>

The *Prevention of Terrorism Act 2005* violated the right to liberty of those suspected of involvement in terrorism-related activities in that they were not prosecuted but rather subjected to control orders. The control orders imposed restrictions on the individual's freedom of movement, such as curfews and tagging which were used to monitor the movements of the suspected terrorist.<sup>77</sup> The restrictions did not result from a fair trial, as they were imposed by the Home Secretary and not by a court after hearing the case. The control orders in terms of the *Prevention of Terrorism Act 2005* have now been abolished and replaced by restrictions imposed in terms of the *Terrorism Prevention and Investigation Measures Act*.<sup>78</sup>

#### 6.3.4 *Terrorism Act 2006*

The *Terrorism Act 2006* was drafted after the 7 July 2005 London bombings and was considered a necessary response to the threat of terrorism in the UK.<sup>79</sup> This Act makes provision for and deals with offences relating to acts carried out, or capable of being carried out, for purposes connected with terrorism;<sup>80</sup> for the amendment of enactments relating to terrorism and it amends the *Intelligence Services Act 1994* and the *Regulation of Investigatory Powers Act 2000*. Part one of the *Terrorism Act 2006* creates a number of new criminal offences that were intended to help the police to deal with terrorism in the UK.

Section 1 of the *Terrorism Act 2006* criminalises the publication of statements that may be understood by some or all members of the public to whom they are published, as a direct or indirect encouragement or other inducement to commit, prepare or instigate acts of terrorism. As regards the dissemination of terrorist publications, the *Terrorism Act 2006* prohibits the dissemination of any publication which is likely to be understood as directly or indirectly encouraging terrorism, or

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<sup>76</sup> S 14 of the *Prevention of Terrorism Act 2005*.

<sup>77</sup> S 1(A) of the *Prevention of Terrorism Act 2005*.

<sup>78</sup> S 2 of the *Terrorism Prevention and Investigation Measures Act 2011*.

<sup>79</sup> Cobain accessed at: <http://www.theguardian.com/uk/2010/jul/07london-bombings-anti-terrorism> [date of use 4 Apr 2016].

<sup>80</sup> Chapter 11 of the *Terrorism Act 2006*.

which includes information which is likely to be understood as being useful in the commission or preparation of an act of terrorism.<sup>81</sup>

Section 5 of the Act prohibits anyone from engaging in any conduct in preparation for an intended act of terrorism. Terrorist training<sup>82</sup> or being at a place where terrorist training is taking place, whether in the UK or abroad, is prohibited. In terms of the Act the transgressor is expected to know, or ought reasonably to have believed that training is underway.<sup>83</sup> The making and possession of devices or materials used to manufacture bombs, and making threats to demand that they be given radioactive materials, is prohibited under the Act.<sup>84</sup> Trespassing on nuclear sites is an offence.<sup>85</sup>

The Act also provides for a 90-day detention period for persons suspected of involvement in terrorist acts. The government argued that this was to enable forensic testing and questioning of the suspected terrorist because the questioning and testing could not be completed within the existing period of two weeks. The opponents of this Act criticised the 90-day detention period arguing that everyone has the right to liberty unless charged with a crime. Many argued that the denial of such a fundamental right cannot be justified regardless of the threat posed by terrorism. The provisions of section 1 of the *Terrorism Act 2006* violate the right to freedom of expression provided by article 10 of the *European Convention on Human Rights 1950*.<sup>86</sup> However the right to freedom of expression can be limited as long as the limitation is for a lawful purpose, necessary and proportionate in terms of article 15 of the *European Convention on Human rights 1950*.<sup>87</sup> Furthermore, the *European Convention on Human Rights 1950* emphasises that the restrictions permitted under

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<sup>81</sup> S 2 of *Terrorism Act 2006*. See also Murphy *Blackstone's Criminal Practice* 564-565.

<sup>82</sup> S 6 of *Terrorism Act 2006*.

<sup>83</sup> S 8 of *Terrorism Act 2006*.

<sup>84</sup> S 11 of the *Terrorism Act 2006*.

<sup>85</sup> S 12 of the *Terrorism Act 2006*.

<sup>86</sup> Art 10(1) of the *European Convention on Human Rights 1950* provides that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

<sup>87</sup> Art 15 of the *European Convention on Human Rights 1950* permits the state to unilaterally derogate from some of its obligations in exceptional circumstances such as the period of state of emergency.



this Convention, to the rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.<sup>88</sup>

### 6.3.5 *Counter-Terrorism Act 2008*

The *Counter-Terrorism Act 2008* came into operation in November 2008 and the purpose is to confer further powers to gather and share information for the purpose of counter-terrorism.<sup>89</sup> Furthermore, the Act makes provision for the detention and gathering of terrorist suspects and prosecution and punishment of terrorist offences. The Act prohibits terrorist financing and money laundering.<sup>90</sup> In terms of the Act, a judge of the Crown Court may authorise the questioning of a person about an offence after that person has been charged with, or been officially informed that he or she may be prosecuted for the commission of the offence, or after the person has been sent for trial for the offence, if the offence is an act relating to terrorism, or it appears to the judge that the offence has a terrorist connection.<sup>91</sup> The Act further provides that the judge must specify the period during which questioning is authorised, and may even impose such conditions as appear to be necessary in the interest of justice, including conditions as to the place where questioning is to be carried out.<sup>92</sup> The duration of the period of questioning must not exceed 48 hours.<sup>93</sup> However, the judge may not authorise the questioning of a person unless he is satisfied that the further questioning is necessary in the interests of justice.<sup>94</sup> The questioning referred to in section 22 of the *Counter-Terrorism Act 2008* may be video recorded with sound.<sup>95</sup> Therefore, for the purpose of correct procedure of video recording of the questioning, the Secretary of State must issue a code of practice to be complied with.<sup>96</sup> Furthermore, the *Counter-Terrorism Act 2008* provides for the jurisdiction to prosecute terrorist offences in the UK.<sup>97</sup>

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<sup>88</sup> Art 18 of the *European Convention on Human Rights* 1950.

<sup>89</sup> S1 of the *Counter-Terrorism Act 2008*.

<sup>90</sup> S 62 of the *Counter-Terrorism Act 2008*.

<sup>91</sup> S 22(2)(a)-(b) of the *Counter-Terrorism Act 2008*.

<sup>92</sup> S 22(3) (a)-(b) of *Counter-Terrorism Act 2008*.

<sup>93</sup> S 22(4)(a) of the *Counter-Terrorism Act 2008*.

<sup>94</sup> S 6(a) of the *Counter-Terrorism Act 2008*.

<sup>95</sup> S25 (1) of the *Counter-Terrorism Act 2008*.

<sup>96</sup> S 25(3) of the *Counter-Terrorism Act 2008*.

<sup>97</sup> S 28 of the *Counter-Terrorism Act 2008*.

The *Counter-Terrorism Act* 2008 provided for a 42-day terrorist detention without charge. This provision was a repetition of the 90-day terrorist detention provided for in the *Terrorism Act* 2006. The provision was ultimately abandoned on 13 October 2008.<sup>98</sup> The reason for abandoning the provision was that in allowing arbitrary detention for 42 days, it violated the suspect's right to liberty as had been the case under the *Terrorism Act* 2000. Detention for a period of 42 days for the purposes of question violates the right to liberty of the detainee provided by the *Human Rights Act* 1998, the *European Convention on Human Rights*, and the ICCPR.<sup>99</sup>

#### **6.4. Counter-terrorism legislation and human rights in the United Kingdom**

The UK does not have a written constitution. It is vital that the constitution be documented, because without a documented constitution, the parameters of the constitution become vague.<sup>100</sup> The vague constitutional rules lead to an ambiguity as to the limits of state powers with regard to fundamental rights. The lack of a written constitutional text containing a bill of rights in the UK has contributed to the often ineffective protection of human rights. As a result of the lack of a written constitution, the UK system of government is termed parliamentary sovereignty.<sup>101</sup> Parliamentary sovereignty implies that, as the supreme law-making authority, parliament has the power to make and unmake any law and that no court has the right to set aside parliamentary legislation.<sup>102</sup> Legislation enacted cannot be subjected to judicial review.<sup>103</sup>

Like other democratic states, for example the USA, the UK has problems as regards the protection of human rights while fighting terrorism on its territory. Legislation aimed at preventing and combating terrorism violated human rights of many

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<sup>98</sup> Anon accessed at: <http://www.publicwhip.org.uk/division.php?date=2002-10-13&numbers=1&house=lords> [date of use 29 May 2012].

<sup>99</sup> S 5 of the *Human Rights Act* 1998 provides the arrested person with a right not to be deprived of liberty or be detained arbitrarily; art 5 (1) of the *European Convention on Human Rights* 1950 provides everyone has the right to liberty and security of person; see also art 9(1) of the ICCPR 1996 provides that everyone has the right to liberty and security of person and no one shall be subjected to arbitrary arrest or detention.

<sup>100</sup> Vick 2002 *Tex Int'l .L .J* 336.

<sup>101</sup> Vick 2002 *Tex Int'l .L .J* 335.

<sup>102</sup> Vick 2002 *Tex Int'l .L .J* 335.

<sup>103</sup> Elliot 2010 *EJLS* 1.

suspected terrorists in the UK.<sup>104</sup> Legislation such as the *Terrorism Act* 2000 which provided for detention without trial for up to seven days violated the right to liberty of the suspected terrorists.<sup>105</sup> The fight against terrorism and the development of international human rights standards in the UK are not in conformity with the human rights instruments to which the UK is a party. In order for the UK to conform to the international human rights standards, the *Human Rights Act* 1998 which came into force on 2 October 2000 was enacted. The Act was promulgated in the realisation that in the UK it takes an average of five years to bring an action before the European Court of Human Rights, and that this can happen only after all domestic remedies have been exhausted. The *Human Rights Act* 1998 draws inspiration from the UDHR in the protection of fundamental human rights.<sup>106</sup>

Before the introduction of the *Human Rights Act* 1998, the legal system in the UK provided a limited power by which the consistency of counter-terrorism measures with human rights standards could be challenged. Through the enactment of counter-terrorism laws in the UK, many fundamental human rights like the right to life, the right to liberty, the right to a fair trial, and the protection against torture were breached.<sup>107</sup> For example, as a measure to combat terrorism, the UK violates the right of nationality of the suspected terrorists. In terms of the *Immigration Bill*,<sup>108</sup> the Home Secretary will be able to render a person stateless by depriving him of nationality if citizenship has been gained by naturalisation. However, the Home Secretary must first be satisfied that it is in the interest of the security of state to deprive a person of citizenship.<sup>109</sup> The purpose of the *Human Rights Act* 1998 was to give further effect to rights and freedoms guaranteed under the *European Convention on Human Rights* 1950.

The Act places a duty on all courts and tribunals in the United Kingdom to interpret legislation as far as possible in a manner compatible with the rights laid down in the

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<sup>104</sup> Lumina 2007 *AHRLJ* 35.

<sup>105</sup> S 41 of the *Terrorism Act* 2000.

<sup>106</sup> UDHR 1948.

<sup>107</sup> Arden 2007 *SALJ* 57.

<sup>108</sup> Clause 60 of the Immigration Bill 2014 which amends s 40 of the *British Nationality Act* 1981.

<sup>109</sup> Robinson accessed at: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml> [date of use 5 Dec 2014].

*European Convention on Human Rights*.<sup>110</sup> The *Human Rights Act* 1998 provides that judicial proceedings to enforce the right provided by the *European Convention on Human Rights* may be brought by individuals whose rights in terms of the *Convention* have been threatened or violated by a public authority.<sup>111</sup> Noteworthy is that the *Human Rights Act* 1998 applies to all public bodies in the UK, including local authorities and other bodies exercising public functions. However, the Act does not apply to parliament when acting in its legislative capacity. Consequently, the *Human Rights Act* 1998 prohibits the courts from striking down Acts of parliament, although they may review them.<sup>112</sup> This means that parliament can still pass any domestic legislation it wishes. The draw-back is that the *Human Rights Act* 1998 does not have a special legal status and can be repealed like any other Act of parliament. Furthermore, the *Human Rights Act* can be repealed by a simple majority vote in the House of Commons.<sup>113</sup> The lack of superior legal status for the *Human Rights Act* 1998 makes the Act weaker than any other legislation because it cannot override the pre-existing Acts which are inconsistent with it.<sup>114</sup> However, in introducing legislation, the Minister of state concerned is required to declare that the legislation respects fundamental human rights.<sup>115</sup>

The *Human Rights Act* 1998 has been criticised as providing inadequate protection for human rights on the basis of the government's ability to derogate from the *European Convention on Human Rights* 1950 in terms of article 15, particularly in relation to legislation governing terrorism.<sup>116</sup> This aspect was confirmed in the case of *R (Prolife Alliance) v BBC*<sup>117</sup> which was decided with reference to common law rather than statutory rights. Labour Party politicians also criticised the *Human Rights Act* 1998 on the basis of the willingness of the judiciary to invoke declarations of

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<sup>110</sup> S 3(1) of the *Human Rights Act* 1998 provides as follows "so far as it is possible to do so primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights;" see also Arden 2007 *SALJ* 58.

<sup>111</sup> S 7 of the *Human Rights Act* 1998; see also Dine, Gobert *et al Cases & Materials* 31.

<sup>112</sup> Klug 2007 *LSE Working Papers* 8.

<sup>113</sup> Vick 2002 *Tex Int'l .L. J* 330.

<sup>114</sup> S 19(1) of the *Human Rights Act* 1998 provides that parliament can refuse to amend or repeal an Act found to be incompatible with the rights provided by the *European Convention on Human Rights* 1950.

<sup>115</sup> Klug 2007 *LSE Working Papers* 9.

<sup>116</sup> Gearty 2005 *Journal of Law Society* 22.

<sup>117</sup> *R (Prolife Alliance) v UK* 2002 EWCA CIV 297.

incompatibility against terrorism legislation. It is argued that the *Human Rights Act* hampers the fight against global terrorism as the state was expected to respect the human rights of the suspected terrorist and avoid violations thereof.<sup>118</sup>

## **6.5. Protection of human rights in the United Kingdom**

The following are some of the human rights protections provided in the UK.

### *6.5.1 The right to life*

Article 2 of the *European Convention on Human Rights* 1950 provides that everyone's right to life shall be protected by law, and no one shall be deprived of his life unless in the execution of a sentence of a court following his or her conviction of a crime for which the penalty is provided by law.<sup>119</sup> The right to life cannot be derogated from.<sup>120</sup> Therefore, the state has the responsibility to protect life.<sup>121</sup> However, the state is not required to make every taking of a life unlawful. For example, killing can be justified on the grounds of self-defence or capital punishment applied by the state. In terms of the *European Convention on Human Rights* 1950, states have the duty to take reasonable steps to prevent the taking of life.<sup>122</sup> In *Kaya v Turkey*<sup>123</sup> the applicant claimed that his brother had been wrongfully killed by the authorities. The Turkish government claimed that the deceased was a rebel who had been killed during a military operation. The European Court on Human Rights held that the protection of the right to life would be ineffective in the absence of a procedure for reviewing the lawfulness of the use of lethal force by state authorities. Furthermore, the protection of the right to life was illustrated in the case of *Soering v UK*<sup>124</sup> where it was held that the extradition of an accused person to a country where the death penalty may be imposed, was a violation of a right to life. The same

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<sup>118</sup> Reid 2007 accessed at: <http://www.guardian.co.uk/frontpage/story/0,,2087867,00html>. [date of use 29 May 2012].

<sup>119</sup> Art 2(1) of the *European Convention on Human Rights* 1950; see also art 2(1) of the *Human Rights Act* 1998.

<sup>120</sup> Oraa *Human Rights* 96.

<sup>121</sup> Slynn 2004 *Fordham Int'l .L.* J 486; see also Harries *et al Law of the European Convention* 30.

<sup>122</sup> Art 2 of the *European Convention on Human Rights* 1950.

<sup>123</sup> *Kaya v Turkey* 1998 28 EHRR 1.

<sup>124</sup> *Soering v UK* 1989 11 EHRR 439; see also *McCann and others v United Kingdom* 1995 324 EurCtHR A where the court determined that the effective protection of the right to life has a procedural component and it entails a requirement that the taking of life by state officials should be investigated.

right was dealt with in *McCann v UK*<sup>125</sup> where the European Court for Human Rights held that the excessive use of force by security forces was a violation of the right to life. Protocol 6<sup>126</sup> to the *European Convention on Human Rights*<sup>127</sup> abolishes the death penalty.<sup>128</sup> On 20 May 1998 the British Parliament adopted the provisions of the *European Convention on Human Rights* which outlawed the death penalty except during the times of war or imminent threat of war.<sup>129</sup> On 27 January 1999 the United Kingdom Home Secretary signed Protocol 6 to the *European Convention on Human Rights* which abolished the death penalty.<sup>130</sup> The right to life is also protected by the *Human Rights Act 1998*.<sup>131</sup> Of particular importance is that no limitation is allowed on this right, including during periods of declared emergency in terms of the provisions of the *European Convention on Human Rights*.<sup>132</sup>

### 6.5.2 *The right to liberty and security*

This right prohibits torture or inhuman or degrading treatment or punishment.<sup>133</sup> During the 1980s the British government put measures in place to combat the activities of the IRA in Northern Ireland and Great Britain. The measures caused government to violate the civil liberties of individuals, but mainly those of the Catholic nationalist minority many of whom were detained without trial. However, in *Ireland v UK*<sup>134</sup> the European Court for Human Rights ruled that techniques used

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<sup>125</sup> *Mc Cann v UK* ECHR Series A 324 1995; see also *Osman v United Kingdom* 2000 29 Eur HR Rep 245 where it was held that the state has the obligation of safeguarding lives of those in its jurisdiction; see further *Regina (Amin) v Secretary of State for the Home Department* IAC 653(HL 2004) where the court held that article 2 of the *European Convention on Human Rights* 1950 includes a duty to take steps to prevent life being taken and therefore there is an obligation on the state to investigate circumstances surrounding the death of a prisoner in custody.

<sup>126</sup> *Protocol 6: Abolishment of Death Penalty* 1983.

<sup>127</sup> *European Convention on Human Rights* 1950.

<sup>128</sup> Art 1 of Protocol 6 provides that the death penalty shall be abolished. No one shall be condemned to death penalty or executed.

<sup>129</sup> Anon accessed at: [http://www.stephen-stratford.co.uk/capital\\_hist.htm](http://www.stephen-stratford.co.uk/capital_hist.htm) [date of use 19 Nov 2013].

<sup>130</sup> Anon accessed at: [http://www.stephen-stratford.co.uk/capital\\_hist.htm](http://www.stephen-stratford.co.uk/capital_hist.htm) [date of use 19 Nov 2013].

<sup>131</sup> S 2(1) of the *Human Rights Act* 1998 provides that: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided."

<sup>132</sup> S 14 of the *Human Rights Act* 1998 provides for limitation on human rights in exception to the right to life. See also art 15 of the *European Convention on Human Rights* 1950; see further art 3 of the UDHR 1948 and art 4 of the ICCPR 1966.

<sup>133</sup> Art 3 of *European Convention on Human Rights* 1950.

<sup>134</sup> *Ireland v UK* 1978 ECHR 18.

such as sleep deprivation, hooding, stress postures, subjection to white noise, and deprivation of food and drink constituted cruel and inhuman treatment, but fell short of torture. The rationale behind the prohibition of the use of torture or cruel, inhuman and degrading treatment is that it is abhorrent and immoral. Notwithstanding the fact that the techniques of torture such as hooding, stress positioning and others, were prohibited, it was clear from the decision in *R (Al-Skeini) v Secretary of State for Defence*<sup>135</sup> that, taken with assault by British soldiers, the prohibited technique had contributed to the death of the deceased. The prohibition of torture was dealt with in *Vilvarajah v UK*<sup>136</sup> where the decision to send a fugitive to a country where it had been established that there was a serious risk of inhuman or degrading treatment, was challenged. A statement obtained by means of torture cannot be used in criminal trials despite the fact that it is difficult to obtain statements from suspected terrorists. The *European Union Torture Guidelines*<sup>137</sup> also oblige countries to ensure that statements obtained through torture and ill-treatment should not be invoked as evidence as such evidence violates the provisions of the *European Convention on Human Rights*.<sup>138</sup>

Torture violates article 3 of the *European Convention on Human Rights* 1950 which in conformity with article 5 of the UDHR 1948 and article 7 of the ICCPR 1966, prohibits torture and inhuman or degrading treatment or punishment. All EU member states that are party to the *UN Convention against Torture* have also ratified the *European Convention on Human Rights* 1950 which prohibits torture or ill-treatment. The right is also protected by the *Human Rights Act* 1998 and there is no ground of

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<sup>135</sup> *R (Al-Skeini) v Secretary of State for Defence* 2007 UKHL 26.

<sup>136</sup> *Vilvarajah v UK* 1991 14 EHHR 248; see also *Bugdaycay v Secretary of State for the Home Department* 1987 1 AII ER 940 at 952 where the court held as follows: "The most fundamental of all human rights is the individual's right to life and, an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny;" see also *Tyrer v UK* 26 Eur Ct HR (Ser A) 1978 in which the Human rights Court held that birching violates the provisions of article of the *European Convention on Human Rights* 1950 which prohibits inhuman or degrading treatment or punishment.

<sup>137</sup> Anon accessed at: <http://www.consilium.europa.eu/uedocs/cmsupload/TortureGuidelines.pdf> [date of use 29 May 2012].

<sup>138</sup> Art 6 of the *European Convention on Human Rights* 1950 protects the right to a fair trial.

justification for violation of the right against torture and inhuman or degrading treatment or punishment.<sup>139</sup>

The *European Convention on Human Rights*<sup>140</sup> further provides that everyone has the right to liberty and security of his person and no one shall be deprived of his liberty except under the following circumstances:

- the lawful detention of a person after conviction by a competent court;<sup>141</sup>
- the lawful arrest or detention of a person for non-compliance with the lawful order of a court;<sup>142</sup>
- the lawful arrest or detention of a person effected for the purpose of bringing him or her before a competent court on reasonable suspicion that he or she has committed an offence, or when it is reasonably considered necessary to prevent his or her from committing an offence or fleeing;<sup>143</sup> and
- the lawful arrest or detention of a person to prevent his or her unauthorised entry into the country, or of a person against whom action is being taken with a view of deportation.<sup>144</sup>

The Convention further provides that everyone arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, and shall be entitled to trial within a reasonable time or to release pending trial.<sup>145</sup>

The *European Convention on Human Rights* does not specify what constitutes a reasonable detention period.<sup>146</sup> In *De Jong, Beljet and Van den Brink v Netherlands*<sup>147</sup> the court arrived at a conclusion that six, seven and eleven-day detention periods

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<sup>139</sup> S 3 of the *Human Rights Act* 1998.

<sup>140</sup> *European Convention on Human Rights* 1950.

<sup>141</sup> Art 5(1)(a) of the *European Convention on Human Rights* 1950.

<sup>142</sup> Art 5(1)(b) of the *European Convention on Human Rights* 1950.

<sup>143</sup> Art 5(1)(c) of the *European Convention on Human Rights* 1950; see also *Fox, Campbell and Hartley v UK* 1990 ECHR 18 where the applicants were arrested as suspected terrorists but later released without charge. The Court held that the rights of the applicants in terms of art 5 of the *European Convention on Human Rights* 1950 were violated as there was no sufficient evidence to establish reasonable suspicion for their arrest.

<sup>144</sup> Art 5(1)(f) of the *European Convention on Human Rights* 1950.

<sup>145</sup> Art 5(1)(3) of the *European Convention on Human Rights* 1950.

<sup>146</sup> Roche 1989 *Fordham Int'l L J* 334.

<sup>147</sup> *De Jong, Beljet and Van Den Brink v Netherlands* 1984, 77 ECHR (Ser A) 3; See also *Brogan and Others v UK* 1988 ECHR Ser A 145 where the European Court of Human Rights concluded that the extrajudicial powers of arrest and detention provided by section 14(5) of the *Prevention of*



without judicial intervention were incompatible with the prompt appearance requirement of article 5(3) of the Convention. Everyone who is deprived of his or her liberty by arrest or detention is entitled to initiate proceedings by which the lawfulness of the detention shall be decided by a court and his or her release ordered if the detention is found to be unlawful.<sup>148</sup>

### 6.5.3 Eavesdropping

Long before September 2001 terrorist attacks on the USA, the interception of communications had been an important weapon in the hands of the authorities to prevent serious crimes such as terrorism and organised crime. The UK had interception of communication legislation in place such as the *Interception of Communications Act*<sup>149</sup> (hereafter the IOCA), to prevent or detect serious crimes. However, rapid advances in telecommunications technology meant that terrorist acts and other organised criminal behaviour became more complex and more difficult to detect and prevent. Terrorist organisations have the opportunity of easy networking in planning their attacks. Private telecommunications networks have also added to the problem of terrorist networking in the UK.<sup>150</sup>

In response to the terrorist attacks planned through the use of telecommunications technology in the UK, the UK had to improve its interception of communications legislation to meet the demands of the new and sophisticated manner in which terrorist acts are planned. The *Regulation of Investigatory Powers Act 2000*<sup>151</sup> (hereafter the RIPA) was enacted to increase the scope and enhance the application of the *Interception of Communications Act 1985*. In terms of the RIPA, it is a punishable<sup>152</sup> and wrongful act<sup>153</sup> to intercept communications without lawful grounds. It is, therefore, essential that authorisation be secured for the lawful interception of communications. Only the Secretary of State may authorise a warrant

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*Terrorism (Temporary Provisions) Act 1989* were incompatible with the provisions of section 5(3) of the *European Convention on Human Rights 1950* which provide for the prompt appearance of the accused person in court after arrest.

<sup>148</sup> Art 5(4) of the *European Convention on Human Rights 1950*.

<sup>149</sup> *Interception of Communications Act 1985*.

<sup>150</sup> Anon accessed at: <http://www.webarchive-national.archives.gov.uk/./cons-1999-interception-comm528> [date of use 7 Jul 2014].

<sup>151</sup> RIPA 2000.

<sup>152</sup> S 5(1) of the RIPA 2000.

<sup>153</sup> S 51(2) of the RIPA 2000.

for the interception of communications at the request of an authorised official. The authorised official includes: the Chief of the Intelligence and Security Services; the Director-General of the National Criminal Intelligence Service; the Commissioner of Customs; the Commissioner of Police of the Metropolis; the Chief of Defence Intelligence; the Chief Constable of the Royal Constabulary of Ulster; and the Chief Constable of any police force.<sup>154</sup> Furthermore, the Secretary of State can authorise the warrant for interception of communication only when he or she is satisfied that the necessary grounds for the authorisation of the warrant exist, such as the protection of national security.<sup>155</sup> Other grounds for authorisation of a warrant for interception of communication include the detection of serious crime committed by means of violence,<sup>156</sup> or which involves substantial financial gain, or by a group of people.<sup>157</sup> The RIPA provides that if the party whose communication is to be intercepted consents, there may be authorisation without a warrant for interception of communications.<sup>158</sup>

In protecting individuals whose communications are intercepted, the RIPA prohibits the disclosure of communications in criminal trial proceedings; questioning or evidence relating to the intercepted communication is therefore prohibited. The accused cannot also benefit from the exculpatory intercepted evidence, because the use of such evidence will reveal the existence of the interception warrant.<sup>159</sup> The RIPA allows for the disclosure of the contents of the interception only to the prosecutor, although such evidence cannot be used in trial proceedings.<sup>160</sup> The non-disclosure of the contents of the interception violates the accused's right to a fair trial.<sup>161</sup> However, in *Morgans v DPP*,<sup>162</sup> the court held that the necessity of a fair trial

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<sup>154</sup> S 6 of the RIPA 2000.

<sup>155</sup> S 5(3) of the RIPA 2000.

<sup>156</sup> S 81(2) of the RIPA 2000.

<sup>157</sup> S 81 (3) of the RIPA 2000.

<sup>158</sup> S 53(1) of the RIPA 2000.

<sup>159</sup> S 17 of the RIPA 2000.

<sup>160</sup> S 18 of the RIPA 2000.

<sup>161</sup> Art 6 of the *European Convention on Human Rights* 1950 requires that neither of the parties in a criminal trial should be placed at the disadvantage in relation to another; see also s 18(2)(a) of the RIPA that provides that the prosecution has a duty to ensure fairness of the prosecutions despite denying the defence access to the intercepted material.

<sup>162</sup> *Morgans v DPP* 2001 AC 315 at 338.

provides a strong indication that it had not been the intention of parliament that evidence obtained in unlawful interceptions should be admissible.

In view of the above, the RIPA can be criticised because it preserves reliance in intercepted communication as an intelligence method in fighting crime and not as evidential material.<sup>163</sup> The interception of communications is a serious violation of the right to privacy under the *European Convention on Human Rights*.<sup>164</sup> Therefore, in compliance with the Convention, there shall be no interference by a public authority with the exercise of the right to privacy except where the interference is in accordance with law and is necessary in a democratic society. Furthermore, interference in the right of privacy by a public authority will be justified if it is for the protection of national security, public safety, or the economic wellbeing of the country, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others.<sup>165</sup> As a measure for protecting the rights of individuals, the *European Convention on Human Rights* provides for everyone whose rights and freedoms have been violated to have an effective remedy before a national authority.<sup>166</sup> However, in order to comply with the obligations imposed by the *European Convention on Human Rights* 1950 it is important that authorisation be obtained. In addition to the Convention requirement, failure to obtain authorisation in terms of the RIPA, will render the act of surveillance unlawful in terms of the *Human Rights Act*.<sup>167</sup> However, limitation of this right is allowed during a declared emergency when the life and security of the nation are in danger, in terms of the *European Convention on Human Rights* and the *Human Rights Act*.<sup>168</sup> Although a limitation of this right is justifiable, the limitation must be temporary, and must not involve discrimination based on race, colour, sex, language, religion, or social origin.

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<sup>163</sup> Oxford Pro bono Publico accessed at: <http://www2.law.ox.ac.uk/./OPBP%20intercept%20evidenc%20Report.pdf> [date of use 7 Jul 2014].

<sup>164</sup> Art 8 of the *European Convention on Human Rights* Provides 1950 that everyone has the right to respect for his private and family life, his home and his correspondence; see also section 8 of the *Human Rights Act* 1998 which also provide for the respect of a right to privacy.

<sup>165</sup> Art 8(2) of the *European Convention on Human Rights* 1950.

<sup>166</sup> S 80 of the RIPA 2000.

<sup>167</sup> S 8 of the *Human Rights Act* 1998.

<sup>168</sup> See article 15 of the *European Convention on Human Rights* 1950 and section 1 of the *Human Rights Act* 1998; see also article 4 of the ICCPR 1966.

Furthermore, the limitation of the right must be required strictly to control the situation, such as during terrorist attack.<sup>169</sup>

#### 6.5.4 *The right to a fair trial*

Public justice is a fundamental principle of common law and a means of ensuring public confidence in a legal system. Consequently, public justice safeguards the rule of law.<sup>170</sup> Therefore judgment must be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where a public hearing would prejudice the interests of justice. The introduction of secret terrorism trials in terms of the *Justice and Security Act*<sup>171</sup> is a blow to the right to a public trial by an independent tribunal. However, the first secret trial in Britain was blocked by the Appeal Court.<sup>172</sup> Furthermore, everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.<sup>173</sup>

In terms of the provisions of section 6 of the *Human Rights Act* 1998 everyone charged with a criminal offence has the following minimum rights:

- the right to a fair hearing;
- the right to a public hearing;
- the right to hearing before an independent hearing and impartial tribunal; and
- the right to a hearing within a reasonable time.

Section 6 of the *Human Rights Act* 1998 provides for additional rights to a fair trial such as the right to be afforded adequate time and facilities to prepare a defence, the right to legal representation, the right to be presumed innocent until proven

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<sup>169</sup> Art 4(1) of the ICCPR 1966.

<sup>170</sup> Anon accessed at: [www.telegraph.co.uk/news/uk/new-terrorism](http://www.telegraph.co.uk/news/uk/new-terrorism) [date of use 4 Aug 2014].

<sup>171</sup> The *Justice and Security Act* 2013 was passed to provide for closed material procedures in civil proceedings and cases involving national security.

<sup>172</sup> Anon accessed at: <http://rt.com/uk/165568-uk-block-secret-trials> [date of use 4 Aug 2014].

<sup>173</sup> Art 2 of the *European Convention on Human Rights* 1950.

guilty by law, the right to have evidence obtained unlawfully excluded, and the right against self-incrimination.

#### 6.5.4.1 The right to be afforded adequate time and facilities to prepare a defence

This right is protected by article 14(3) (b) of the ICCPR 1966 and article 6 (3) (b) of the ECHR 1950. As appears from the above discussion, part of the right to a fair trial is that the accused be afforded adequate time and facilities to prepare a defence. A right of disclosure of evidence for preparation of a defence is included under the right to adequate time and facilities to prepare a defence. The prosecution is, therefore, obliged to disclose to the defence copies of statements of the evidence it intends to present during trial proceedings.<sup>174</sup> In terms of the *Criminal Procedure and Investigations Act 1996*<sup>175</sup> the prosecutor is under a continuing duty of disclosure. Therefore, at any time before the accused can be convicted or discharged, if the prosecutor is of the opinion that there is material the presentation of which may assist the accused in his or her defence, such material must be disclosed to the accused. This aspect was dealt with in *R v Ward*<sup>176</sup> where the conviction against the accused was set aside because the prosecution had failed to disclose material scientific evidence which had bearing on the case. In *Mc Nally v Chief Constable of the Greater Manchester Police*<sup>177</sup> it was held that a person who intends bringing a claim for damages against the police was entitled to know whether one of the key witnesses was an informant in the criminal case. The requirement of disclosure is based on the fact that there must be equality of arms between the prosecution and the defence. However, the right to disclosure of evidence was violated in terrorism-related cases where control orders were imposed. Only the special advocate was allowed to see the secret evidence used by the Secretary of State in recommending the imposition of the control order. In *Tariq v The Home Office*,<sup>178</sup> the UK Supreme Court concluded that the right to a fair trial does not require disclosure of evidential

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<sup>174</sup> S 3 of the *Criminal Procedure and Investigations Act 1996*; see also Howard *Phipson on Evidence* 177.

<sup>175</sup> S 7 of the *Criminal Procedure and Investigations Act 1996*.

<sup>176</sup> *R v Ward* 1993 1 WLR 619.

<sup>177</sup> *Mc Nally v Chief Constable of the Greater Manchester Police* 2002 EWCA Civ 14; see also *R v H* 2004 UKHL 3 where the court held that fairness requires that any material which is held by the prosecution which has the effect of weakening the prosecution case or strengthening the defence should be disclosed to the defence.

<sup>178</sup> *Tariq v The Home Office* 2011 UKSC 35.

material to the defence where such disclosure would be detrimental to the security of the UK.

#### 6.5.4.2 The right to a public trial before an ordinary court

The right to a public hearing before an ordinary court is based on the international law principle of open justice. Furthermore, in terms of the *Magistrates Courts Act*,<sup>179</sup> criminal proceedings must be held in an open court as emphasized in *R v East Kerrier Justices, ex p Mindy*.<sup>180</sup> The importance of holding the proceedings in public, is that proceedings in private prevent justice from being seen to be done as held by Lord Diplock in *Attorney-General v Leveller Magazine Ltd*.<sup>181</sup>

In terms of section 6 of the *Human Rights Act* 1998, everyone charged with a criminal offence is entitled to a public hearing. The purpose of this right is to protect accused persons against secret trials where there is no public scrutiny.<sup>182</sup> Therefore the practice of secret courts in order to protect national security in terrorism-related trials negates the requirements of a fair trial.<sup>183</sup> However, the right to a public hearing may be restricted in the interest of public order or national security which may require the exclusion of the public or media. Therefore, the holding of criminal proceedings in private must be justified to the extent that serves the interests of justice as in terrorist-related cases.<sup>184</sup> Furthermore, as held in *R v Taylor*,<sup>185</sup> the court can sit in private where the police officer works under cover.

The right to a fair trial further entitles the accused to the right of access to an independent tribunal.<sup>186</sup> Therefore, on the issue of impartiality, it must first be assessed whether there is evidence of actual bias, and whether there are circumstances giving rise to the risk of bias. In summary, the right to a fair trial includes compliance with the principle of equality of arms as stressed in *Neumeister*

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<sup>179</sup> S 121(4) of the *Magistrates' Courts Act* 1980.

<sup>180</sup> *R v East Kerrier Justices, ex p Mindy* 1952 2 QB 719.

<sup>181</sup> *Attorney-General v Leveller Magazine Ltd* 1979 AC 440 HL at 450.

<sup>182</sup> Harries *et al* *Law of the European Convention* 218.

<sup>183</sup> *Saul Research Handbook* 426.

<sup>184</sup> *Attorney-General v Leveller Magazine Ltd* 1979 AC 440 HL; see also s 8(4) of the *Official Secrets Act* 1920 that provides for the court to can hold proceedings in private.

<sup>185</sup> *R v Taylor* 1995 Crim LR 253 CA.

<sup>186</sup> Art 6(1) of the *European Convention on Human Rights* 1950 provides that in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing by an independent and impartial tribunal of law.

*v Austria*<sup>187</sup> where it was emphasised that equality of arms is an inherent element of a fair trial.

#### 6.5.4.3 The right to have trial begin and concluded without unreasonable delay

Article 14(3) (c) of the ICCPR 1966 protects the right to have the trial begin and conclude without delay. The accused is further entitled to a right to a trial within a reasonable period as guaranteed by section 6 of the *Human Rights Act*<sup>188</sup> which provides that the state is required to take reasonable steps to begin and finalise trial within a short a period as possible. However, the reasonableness of the length of the trial depends on the nature of the case.<sup>189</sup> The most important factors to consider in the reasonableness of the length of the trial are the complexity of the case, the conduct of the defendant, and that of the judicial and administrative authorities. Factors such as the nature and number of the charges, the number of defendants, the number of witnesses, the volume of evidence, expert evidence, and other legal issues may add to the length of the trial. The state is responsible for unjustified delays caused by the judicial and administrative authorities as was held in *Orchid v UK*.<sup>190</sup>

In *Ledonne No1 v Italy*,<sup>191</sup> the applicant had twice sought adjournment and twice challenged the validity of the summons issued against him, as the prosecution could not provide the reason for two delays for a total period of over two years and ten months. The court held that the delay was in breach of article 6(1) of the European Convention on Human Rights 1950. In *Bock v FRG*,<sup>192</sup> the court arrived at the conclusion that the state will not be held responsible for the delays caused by the

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<sup>187</sup> *Neumeister v Austria* A8 (1968); *Kaufman v Belgium* 1093 42 CD 145 1972 where the principle of equality of arms was expressed in respect of both criminal and non-criminal cases as meaning that everyone who is a party to proceedings shall have a reasonable opportunity of presenting his case to the court under the conditions which do not place him at substantial disadvantage against his opponent.

<sup>188</sup> *Human Rights Act* 1998.

<sup>189</sup> *Koning v FRG* A 27 1978 para 99.

<sup>190</sup> *Orchid v UK* 34 DR 5 1982.

<sup>191</sup> *Ledonne No 1 v Italy* 1999 ECHR 2; see also In *Mills v HM Advocate* 2004 1 AC 441 where the Privy Council held that the setting aside of the conviction was possible but, was an exceptional remedy for the delay of finalisation of trial proceedings within a reasonable time; see also *B v Austria* A 175 1990 where the court found that there was a breach of the provisions of article 6(1) of the *European Convention on Human Rights* 1950 because it took the Appeal Court judge a period of two years nine months to write the judgement after hearing an appeal by the convicted person.

<sup>192</sup> *Bock v FRG* A 150 1989 para 41.

defendant or his legal representative without justification. This aspect was further dealt with in *Buchholtz v FRG*<sup>193</sup> where the Court held that the state will not be held liable for the delays that result from backlog of cases that was not reasonably foreseeable, provided efforts to remedy the situation are made. In this case the state was not held liable for the delay because steps were taken to increase the number of the judges to deal with the backlog of cases.

#### 6.5.4.4 The right to be assisted by a legal representative

This right is protected by article 14(3) (d) of the ICCPR 1966 and article 6(3) (c) of the *European Convention on Human Rights* 1950. In terms of the *Police and Criminal Evidence Act* 1984, a defendant facing a criminal charge has the right to be informed of his right to legal representation.<sup>194</sup> This fact was stressed in *Cadder v Her Majesty's Advocate*<sup>195</sup> where the UK Supreme Court held that the police cannot question a suspect in custody in the absence of a legal representative. In this case the police had interrogated the suspects for a period of up to six hours in the absence of a legal representative. Matters relevant to the interests of justice are: (i) the complexity of the case; (ii) the ability of the accused to understand and present relevant arguments without assistance; and (iii) the severity of the possible penalty. Where the violation of the right to liberty is at stake, the interest of justice require that the application for legal aid assistance be granted and the refusal thereof should be kept under review. Allocating a legal representative for the accused person in criminal proceedings is inadequate if the allocated lawyer is unable to provide effective legal representation. Thus, in *Artico v Italy*<sup>196</sup> the nominated lawyer for the applicant refused to represent him on appeal. The European Court for Human Rights came to the conclusion that article 6(3) (c) of the *European Convention on Human Rights* 1950 speaks of assistance and not nomination. Therefore, the mere nomination of a legal representative does not ensure effective assistance.

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<sup>193</sup> *Buchholtz v FRG* A 4 1981 para 51.

<sup>194</sup> S 58(1) of the *Police and Criminal Evidence Act* 1984 provides that a person arrested and held in custody in a police station or other premises shall be entitled if he so requests, to a legal advice or to consult a solicitor at any private time.

<sup>195</sup> *Cadder v Her Majesty's Advocate* 2010 UKSC 43.

<sup>196</sup> *Artico v Italy* 1981 3 EHRR 1.



The right to a fair trial does not only require that the right to legal representation should be afforded during trial proceedings. The suspect must be informed of the offence he or she is suspected of and of his or her right to legal representation. Therefore, a police officer who interviews a person suspected of committing a crime must inform the suspected person of his or her entitlement to free legal advice immediately before the commencement of the interview.<sup>197</sup> In the case of *John Murray v United Kingdom*,<sup>198</sup> the accused averred that he had been denied access to a legal representative at a critical stage of the criminal proceedings. He was interviewed on twelve occasions without a legal representative being present. The European Court of Human Rights held that article 6 of the *European Convention on Human Rights* 1950 requires that the accused be allowed to benefit from the assistance of a lawyer at the initial stages of police interrogation. Therefore, it became clear that the accused person in the case had been deprived of his right to a fair trial.

#### 6.5.4.5 The right of the accused to be present in court and to confront witnesses

The accused has the right to be present during trial proceedings and to cross-examine witnesses called by the prosecution to testify against him or her.<sup>199</sup> The presence of the accused enables the accused to comment on the evidence presented against him or her.<sup>200</sup> In *Kunnath v State*<sup>201</sup> the court, in emphasising the presence of the accused during trial proceedings, held that the accused must not only be present but, if necessary, must have the proceedings interpreted to him or her so that he or she can comprehend the case presented against him or her. However, the accused may waive the right to be present in court by deliberately being absent without reason by absconding. The court can then continue with trial proceedings in the absence of the accused.<sup>202</sup> This aspect was dealt with by court in *R v Jones*<sup>203</sup>

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<sup>197</sup> *R v Kirk* 2000 1 WLR 567.

<sup>198</sup> *John Murray v United Kingdom* 1996 22 EHRR 29.

<sup>199</sup> Art 14(3)(e) of the ICCPR 1966; see also art 6 (3)(d) of the *European Convention on Human Rights* 1950.

<sup>200</sup> Murphy *Blackstones Criminal Practice* 130.

<sup>201</sup> *Kunnath v State* 1993 1 WLR 1315; see also *Stanford v UK* 1994 Ser A no 282 at 26 where the court held that the accused must not only be present during the trial proceedings but he must also be able to participate effectively in the proceedings.

<sup>202</sup> Howard MN, Bagshaw R *et al Phipson on Evidence* 216.

<sup>203</sup> *R v Jones no 2* 1972 2 All ER 731.

where it was held that the trial judge had correctly exercised his discretion after the accused was absent without reason from the trial proceedings.

#### 6.5.4.6 The right to be presumed innocent until proven guilty according to law

The right to remain silent and to be presumed innocent until proven guilty according to law is one of the cornerstones of the right to a fair trial. This is protected by article 14(2) of the ICCPR 1966, article 6(2) of the *European Convention on Human Rights* 1950, and article 6 of the *Human Rights Act* 1998. The right to be presumed innocent was further confirmed in the English decision of *Sheldrake v Director of Public Prosecutions*<sup>204</sup> where Lord Bingham held that presumption of innocence is one of the important elements of a fair criminal trial. The right to be presumed innocent requires that everyone charged with a criminal charge must have a fair trial. It is therefore the duty of the prosecution to prove the guilt of the accused by means of evidence. As a rule, the presumption of innocence relieves the accused of the duty to prove his innocence. In *Barbera, Messa and Jabardo v Spain*<sup>205</sup> the European Court of Human Rights held that the presumption of innocence requires when carrying out their duties, the members of the court should not start with the preconceived idea that the accused has committed the offence charged, instead the burden of proof is on the prosecution. In similar circumstances, in *Welch v UK*<sup>206</sup> it was held that the implementation of security arrangement at a trial cannot be considered to be unfair, although the Commission indicated that handcuffing of an accused is undesirable if it gives the jury an impression which is against a presumption of innocence.

#### 6.5.4.7 The right to have evidence obtained in an unfair manner excluded

Although it is important for an accused person to answer questions, if answers to questions posed incriminate the accused in a criminal trial, such evidence is

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<sup>204</sup> *Sheldrake v Director of Public Prosecutions* 2004 UKHL 43.

<sup>205</sup> *Barbera, Messa and Jabardo v Spain* 1989 11 EHRR 360 at 77.

<sup>206</sup> *Welch v UK* 1995 20 EHRR 247; see also *Geerings v The Netherlands* 2007 ECHR 191 where the European Court of Human Rights stressed the fact that the presumption of innocence as guaranteed by article 6(2) of the *European Convention on Human Rights* 1950, will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence indicates an opinion that he is guilty before he has been proven guilty.

inadmissible as it invalidates the fairness of the trial.<sup>207</sup> In *R v P*<sup>208</sup> the Supreme Court held that the defendant was not entitled to have unlawfully obtained evidence excluded because it had been so obtained. However in the decision of *A v Secretary of the State for the Home Department (No 2)*<sup>209</sup> the court held differently. The Law Lords rejected judicial reliance on evidence obtained by means of torture.

In *Ludi v Switzerland*<sup>210</sup> evidence was excluded because it had been obtained by means of oppression. The defendant must challenge the admission of the unlawfully obtained evidence so that the impact of such evidence on the fairness of the trial may be determined. This aspect was illustrated in *Khan v United Kingdom*<sup>211</sup> where it was acknowledged that evidence had been obtained unlawfully in breach of the *European Convention on Human Rights* 1950. In this case the police had obtained evidence by installing a listening device on the applicant's private property without his knowledge or consent. The UK domestic court admitted the evidence without considering its unfairness. The European Court of Human Rights held that the evidence obtained breached the provisions of article 8 of the *European Convention on Human Rights*.<sup>212</sup>

#### 6.5.4.8 The right against self-incrimination

In 1988 a proposal was made to introduce measures to abolish the right to silence in criminal proceedings. The reason for the abolition was that the right to silence was being abused by hardened terrorists to frustrate the police and prosecuting

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<sup>207</sup> S 2(8) of the *Criminal Justice Act* 1987 provides that evidence obtained in an unfair manner must be disregarded.

<sup>208</sup> *R v P* 2002 1 AC 146.

<sup>209</sup> *A v Secretary of the State for the Home Department No 2* 2005 UKHL 71.

<sup>210</sup> *Ludi v Switzerland* 1992 EHRR 173; In *A v Secretary of State for the Home Department* 2005 2 AC 68 and *A v Secretary of the State for the Home Department (No 2)* 2005 3 WLR 1249 Lord Bingham held as follows: "The principles of the common law standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to the ordinary standard of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice."

<sup>211</sup> *Khan v United Kingdom* 2000 ECHR 194.

<sup>212</sup> Art 8 of the *European Convention on Human Rights* 1950 provides that (1) everyone has the right to respect for his private and family life, his home and his correspondence; and, (2) there shall be no interference by the public authority with the exercise of the right except in accordance with the law and is necessary in a democratic society in the interests of national security, public or economic well-being of the country.

authorities.<sup>213</sup> The right to silence was completely removed as a measure of combating terrorism in the UK, in November 1998 by the House of Commons.<sup>214</sup> The right to remain silent is one of the important safeguards against wrongful conviction and oppressive questioning, and by denying suspects this rights the UK is violating an important right to a fair trial. Other important elements to a fair trial such as the protection against self-incrimination were also not practised in the UK. In *Brown v Stott*<sup>215</sup> the Privy Council decided that the privilege against self-incrimination was not offended by a provision making it a criminal offence to refuse to identify the driver of a motor vehicle involved in a traffic violation. However, in *R v Lyons*<sup>216</sup> the European Court of Human Rights held differently in that the conviction of the defendant by the jury admitting answers incriminating the defendant, violated the defendant's right to fair trial.

#### 6.5.4.9 The right to appeal or review by a higher court

This right is protected by the provisions of article 14(5) of the ICCPR. Furthermore, in terms of the *Criminal Appeal Act*,<sup>217</sup> the accused may appeal against conviction on indictment and against sentence passed following on conviction. In the UK appeals are heard by the Criminal Division of the Court of Appeal. An appeal in terms of section 1 of the *Criminal Appeal Act* lies only with the leave of the Court of Appeal or if the judge in the trial court grants a certificate that the case is appropriate for appeal.<sup>218</sup> The certificate may be granted by the trial judge at his own initiative or at the request of the legal representative when the case is finalised. However, in granting the certificate, the judge must be satisfied that there is indeed a good ground to appeal and that there is a substantial chance for the appeal to succeed. The aspect of grounds of appeal was dealt in *R v Inskip*<sup>219</sup> where the Court of Appeal held that there must be exceptional grounds for the certificate to be granted. The fact that the trial judge had difficulty in exercising his discretion to decide whether or not to refer the case to the jury, was not a sufficient ground of appeal.

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<sup>213</sup> Foley *Human Rights* 109.

<sup>214</sup> Foley *Human Rights* 109.

<sup>215</sup> *Brown v Stott* 2 WLR 817 2001.

<sup>216</sup> *R v Lyons* 2002 4 All ER 1028 HL.

<sup>217</sup> S 1 of the *Criminal Appeal Act* 1968.

<sup>218</sup> S 1(2)(a)-(b) of the *Criminal Appeal Act* 1968.

<sup>219</sup> *R v Inskip* 2005 EWCA Crim 3372.

## 6.6. Chapter summary

The purpose of Chapter Six was to analyse the counter-terrorism legal framework in the UK. The UK has, in accordance with its laws such as the *Anti-Terrorism Crime and Security Act 2001*, the *Prevention of Terrorism Act 2005*, and others, an obligation to prevent and protect civilians against terrorist attacks. However, while fighting terrorism, the UK also has an obligation to uphold and respect human rights and the rule of law, instead of eroding them.<sup>220</sup> The UK counter-terrorism legislation continues to violate the human rights of the persons suspected of committing terrorism-related offences or being members of organisations proscribed in the UK. Detention without trial of those suspected of committing terrorist acts has been common in violation of the right to liberty as provided by the *Human Rights Act 1998* and the *European Convention on Human Rights*.<sup>221</sup> Control orders such as curfews, have been imposed on suspected terrorists. The right to privacy has been violated by sporadic stop and search orders issued in the name of fighting terrorism. Therefore, even though the UK has attempted through its legislation to defend itself against the threat of international terrorism, the measures employed do not conform to the required human rights standards as provided for by the different regional human rights and international conventions. For instance, article 15 of the *European Convention on Human Rights 1950* permits the state unilaterally to derogate from some of its obligations under certain exceptional circumstances.<sup>222</sup> The use of communication interception methods in terms of the *Regulation of Investigatory Powers Act 2000* to investigate acts of terrorism, violated the right of privacy of individuals. However, violation of human rights may be justified as long as the limitation of the rights is in accordance with the law and it is for a lawful purpose.<sup>223</sup> Furthermore, the limitation must be necessary and proportionate.<sup>224</sup> Nevertheless, despite the human rights violations that occurred while countering terrorism, the UK does have adequate legislation to counter terrorism. The introduction of the *Human*

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<sup>220</sup> Amnesty International accessed at: <http://www.amnesty.org/en/news-and-updates/report/uk-violates-rights-terror-suspect> [date of use 1 Aug 2014].

<sup>221</sup> Art 5 of the *European Convention on Human Rights 1950* provides for the right to liberty and security of a person.

<sup>222</sup> Loof accessed at: <http://openaccess.leidenuniv.nl/pdf>. [date of use 26 March 2013]; see also OSCE accessed at: <http://www.osce.org/odihr/33772>. [date of use 30 Apr 2013].

<sup>223</sup> Liberty accessed at: [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk) [date of use 19 Aug 2015].

<sup>224</sup> Liberty accessed at: [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk) [date of use 19 Aug 2015].

*Rights Act* 1998 has added to the continuing development of the adequate human rights system to guarantee protection of human rights while countering terrorism. Against the backdrop of the above discussion, it is evident that there are relevant lessons South Africa can learn from the UK in enhancing its counter-terrorism legislation.

## CHAPTER 7

# SOUTH AFRICA'S LEGAL FRAMEWORK FOR COUNTERING INTERNATIONAL TERRORISM

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### **7.1. Introduction**

Terrorism is a threat to the international community including the Republic of South Africa. Even before South Africa became a democratic state in 1994, the country was under threat from terrorism. South Africa had long suffered attacks by national liberation movements fighting for the right to self-determination. With the transition to democracy and the coming into effect of the *Constitution of the Republic of South Africa, 1996*, (hereafter the Constitution), South Africa continued to suffer attacks from right wing organisations whose aims were to ensure that South Africa reverted to the former apartheid state. International terrorist organisations are rumoured to be operating within the borders of South Africa. Before the Constitution came into effect, South Africa had enacted legislation to combat and prevent terrorism in its territory. The legislation in question did not comply with the requirements of relevant international human rights instruments. After becoming a democratic state, South Africa had to implement laws which could effectively fight terrorism while at the same time complying with its human rights obligations.

This chapter seeks to investigate the effectiveness of the relevant counter-terrorism measures that South Africa adopted before and after the new democratic dispensation. The chapter is divided into five parts. Part one examines the international position of South Africa before 1994. Part two evaluates the presence of terrorist organisations in South Africa which gives rise to the need for counter-terrorism measures. Part three analyses the pre-democratic South African counter-terrorism legislation, for example the *Urban Areas Act*,<sup>1</sup> the *Public Safety Act*,<sup>2</sup> the *Explosives Act*,<sup>3</sup> the *Riotous Assemblies Act*,<sup>4</sup> the *Affected Organisations Act*,<sup>5</sup> the

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<sup>1</sup> *Urban Areas Act* 25 of 1945.

<sup>2</sup> *Public Safety Act* 3 of 1953.

<sup>3</sup> *Explosives Act* 26 of 1956.

<sup>4</sup> *Riotous Assemblies Act* 83 of 1963.

<sup>5</sup> *Affected Organisations Act* 31 of 1974.

*Internal Security Act*,<sup>6</sup> the *Intimidation Act*,<sup>7</sup> the *Non- Proliferation of Weapons of Mass Destruction Act*,<sup>8</sup> and the *Regulation of Gatherings Act*.<sup>9</sup> It is argued that the pre-democratic era counter-terrorism legislation, while combating terrorism, violated many human rights. Part four evaluates the effects of the pre- 1994 counter-terrorism legislation on human rights, while Part five addresses the post-democratic era counter-terrorism legislation such as the POCDATARA,<sup>10</sup> the FICA,<sup>11</sup> and the POCA.<sup>12</sup> Part six evaluates the protection of human rights while combatting terrorism in South Africa in terms of the Constitution.

In an effort to fight international terrorism, the South African government approved a new policy against terrorism. In this new policy, terrorism is defined as an incident of violence, or threat thereof, against a person, a group of persons, or property not necessarily related to the aim of the incident, to coerce the government or civil population to act or not to act according to certain principles.<sup>13</sup> The definition of terrorism in South Africa will help the country to adopt relevant legislation to combat and prevent terrorist activities within her borders. The focus will be on whether the South African counter-terrorism legislation is adequate to prevent and combat terrorism.

## **7.2. The international position of the Republic of South Africa before 1994**

South Africa became an independent sovereign state in 1961 although it was regarded as a subject of international law since 1931.<sup>14</sup> As a sovereign state, South Africa was a member of the UN. However, because of its apartheid policies, South Africa was suspended from the UNGA in 1974.<sup>15</sup> South Africa was then disqualified from participating and becoming a party to treaties against international terrorism.

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<sup>6</sup> *Internal Security Act* 74 of 1982.

<sup>7</sup> *Intimidation Act* 72 of 1992.

<sup>8</sup> *Non Proliferation of Weapons of Mass Destruction Act* 87 of 1993.

<sup>9</sup> *Regulation of Gatherings Act* 205 of 1993.

<sup>10</sup> POCDATARA 33 of 2004.

<sup>11</sup> FICA 38 of 2001.

<sup>12</sup> POCA 121 of 1998.

<sup>13</sup> Masuku accessed at: <http://www.humanrightinitiative.org.publications/nl> [date of use 20 Feb 2013].

<sup>14</sup> Dugard *International Law* 17.

<sup>15</sup> Dugard *International Law* 475.



Furthermore, South Africa could not participate in drafting and adopting international human rights treaties.<sup>16</sup> It was only after the coming into power of the democratic government in 1994, that South Africa was once again accepted as a member of the UNGA. The Republic of South Africa was accepted as a non-permanent member of the UNSC for the first time for a period of two years in 2007-2008 and for a second term in 2011-2012.<sup>17</sup> South Africa also assumed membership of the African Union that is actively involved in the fight against international terrorism.

The Constitution permits the application of international law in South African courts. Section 39 provides that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law and may consider foreign law.<sup>18</sup> Section 231 of the Constitution permits South Africa to negotiate and enter into international agreements.<sup>19</sup> Furthermore, international customary law finds application in South Africa unless inconsistent with the Constitution or an Act of Parliament.<sup>20</sup> This is the reason why the Constitution specifically provides that when interpreting any legislation, the court must prefer any reasonable interpretation consistent with international law.<sup>21</sup>

### ***7.3. The presence of terrorist organisations in the Republic of South Africa***

Before the 1994 democratic elections, South Africa had a domestic terrorist problem perpetrated by liberation movements, most notably the African National Congress (hereafter ANC). South Africa faced no threat from international terrorist organisations. After the democratic elections of 1994, terrorist organisations which have their origins in South Africa, like the Boeremag, came into existence and posed internal terrorism threat to South Africa. The Boeremag is a right wing organisation

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<sup>16</sup> Olivier 2003 *TSAR* 293.

<sup>17</sup> Bowland accessed at: <http://www.saiia.org.za/policy-briefings/foreign-policy-positioning-through-multilateralism> [date of use 15 Nov 2013].

<sup>18</sup> S 39(1)(a)-(c) of the Constitution.

<sup>19</sup> S 231(4) of the Constitution provides that "any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

<sup>20</sup> S 232 of the Constitution.

<sup>21</sup> S 233 of the Constitution.

which aims to overthrow the South African ANC-led government.<sup>22</sup> The Boeremag accuses the ANC of having taken power in South Africa by illegal means. The opponents of the Boeremag and the government of South Africa recognise the Boeremag as a terrorist organisation.<sup>23</sup> The most important aim of the Boeremag is to establish an independent state.<sup>24</sup> The Boeremag, like other terrorist organisations, uses terror and violence to achieve its aims. For instance, on 30 October 2002 they set-off eight bombs on the main commuter railway lines from Soweto which led to extensive damage to property.<sup>25</sup>

After 1994, the country started to experience threats from international terrorist organisations within her borders. The presence of international terrorist organisations in South Africa is influenced by weak border controls. Members of international terrorist organisations like Al-Qaeda are suspected of entering and leaving the country undetected. In 2005, fraudulent South African identity documents were discovered in the UK. Members of international terrorist organisations use fraudulent identity documents and passports to gain entry into countries like the USA, the UK and others not to mention SA. The example of a recent incident is that of the 'white widow' Samantha Lewthwaite, a British national who used fraudulent SA passport document to enter South Africa.<sup>26</sup>

During the 2010 World Soccer Cup competition hosted by South Africa, there were rumours of the presence of Al-Qaeda in the country, whose intention was to disrupt World Cup events.<sup>27</sup> A terrorist attack was planned to occur on 12 June 2010 at the soccer stadium where the match between the English and American teams was to be played. The attack by Al- Qaeda however, did not take place.<sup>28</sup> Recently a young girl

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<sup>22</sup> Schonteich and Boshoff accessed at: <http://www.iss.co.za/pubs/monographs/no81/chap4.html> [date of use 2 March 2012].

<sup>23</sup> Rosand and Ipe *ASR* 44.

<sup>24</sup> Schonteich 2003 *Monograph* 2.

<sup>25</sup> Schonteich and Boshoff *Monograph* 5.

<sup>26</sup> Hlongwane and Wicks 2013 accessed at: <http://www.iol.co.za/news/politics/white-widow-paid-for-sa-passport-1.1584186> [date of use 7 May 2015].

<sup>27</sup> Rosand and Ipe *ASR* 44.

<sup>28</sup> Anon April 2010 accessed at: [ict@idc.aci/www.ict.org.il35](http://ict@idc.aci/www.ict.org.il35) [date of use 2 March 2012].

from Cape Town was recruited to join the ISIS. The girl was prevented from leaving South Africa at airport.<sup>29</sup>

#### **7.4. Legislation enacted before 1994 to counteract terrorism**

Before 1994, South Africa operated under a system euphemistically termed "separate development" but commonly known as apartheid.<sup>30</sup> During this period, liberation movements like the ANC, the Pan Africanist Congress (hereafter the PAC), the South African Communist Party (hereafter the SACP), the United Democratic Front (hereafter the UDF), and others, were regarded by the apartheid government as terrorist organisations and were banned from operating in South Africa.<sup>31</sup> These organisations were opposed to the *status quo* which the majority of black South Africans rejected as oppressive and a violation of their right to self-determination. Apart from the whole scale violation of the most fundamental rights of all black South Africans, the fundamental rights of the members of the various liberation movements were infringed in various ways, for instance, they were detained and subjected to ill-treatment by security forces in an attempt to elicit information.<sup>32</sup>

The following pieces of legislation were enacted as counter-terrorism measures to suppress the existence of liberation movements in South Africa which had been classified as terrorist organisations by the apartheid government: the *Urban Areas Act*,<sup>33</sup> the *Public Safety Act*;<sup>34</sup> the *Riotous Assemblies Act*,<sup>35</sup> the *Explosives Act*,<sup>36</sup> the *Terrorism Act*;<sup>37</sup> the *Affected Organisations Act*,<sup>38</sup> the *Internal Security Act*,<sup>39</sup> the *Intimidation Act*,<sup>40</sup> the *Regulation of Gatherings Act*,<sup>41</sup> and the *Non-Proliferation of Weapons of Mass Destruction Act*.<sup>42</sup>

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<sup>29</sup> Ebrahim 2015 accessed at: <http://www.iol.co.za/news/crime-courts/cape-girl-stopped-from-joining-is-1.1841189> [date of use 5 May 2015].

<sup>30</sup> Devenish 2005 *TSAR* 564.

<sup>31</sup> Heyns *A Jurisprudential Analysis* 368; see also McKinley accessed at: <http://up.ac.za/sitefiles/file/46/1322/Dale%20McKinleyp118-134.pdf> [date of use 20 Apr 2014].

<sup>32</sup> Swart and Fowkes 2009 *SALJ* 780; see also *Rossouw v Sachs* 1960 3 SA 353 (T).

<sup>33</sup> *Urban Areas Act* 25 of 1945.

<sup>34</sup> *Public Safety Act* 3 of 1953.

<sup>35</sup> *Riotous Assemblies Act* 17 of 1956.

<sup>36</sup> *Explosives Act* 26 of 1956.

<sup>37</sup> *Terrorism Act* 83 of 1967.

<sup>38</sup> *Affected Organisations Act* 31 of 1974.

<sup>39</sup> *Internal Security Act* 74 of 1982.

<sup>40</sup> *Intimidation Act* 72 of 1992.

The discussion that follows will show how the Acts dealt with the threat of terrorism in South Africa before the adoption of the Constitution. It will be indicated that this legislation clearly violated international human rights norms.

#### *7.4.1 Urban Areas Act 25 of 1945*

The *Urban Areas Act* regulated the presence and movement of individuals in municipal areas. In terms of this Act, if the presence of an individual was detrimental to the maintenance of peace in an area, the local authority (municipality) could declare him or her undesirable, and have such a person evicted from the area. As a measure of preventing activities detrimental to peace and security, people who were suspected of involvement in terrorist activities were evicted or banned from being in certain municipal areas. The eviction and banning of suspects violated the rights of people to enter, remain and reside anywhere in the country.<sup>43</sup> In *S v Govender*,<sup>44</sup> the ejection of Indians from a white-designated area was held to have seriously affected the lives of the persons concerned. The court further held that ejection orders should be made only after a full inquiry has been held and it had been established that alternative accommodation was available. The *Urban Areas Act* violated the provisions of article 12(1) of the ICCPR which provides for the right of freedom of movement and residence.<sup>45</sup> The *Urban Areas Act* was ultimately repealed by the *Abolition of Racially Based Land Measures Act*.<sup>46</sup>

#### *7.4.2 Public Safety Act 3 of 1953*

The *Public Safety Act* empowered the government to declare a state of emergency. After proclaiming the state of emergency, the State President could in terms of the Act, make regulations deemed necessary for the restoration of law and order in the country.<sup>47</sup> Furthermore, the Act increased police powers by giving police extended powers to arrest and detain during a period of declared state of emergency.<sup>48</sup> The

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<sup>41</sup> *Regulation of Gatherings Act* 205 of 1993.

<sup>42</sup> *Non-Proliferation of Weapons of Mass Destruction* 87 of 1993.

<sup>43</sup> Art 12(1) of the ICCPR 1966 provides that everyone lawfully within the territory of a state shall, within the territory have the right to liberty of movement and freedom to choose his residence.

<sup>44</sup> *S v Govender* 1986 3 SA 969 (T) at 971 paras F-G.

<sup>45</sup> Art 12(1) of the ICCPR 1966; see also art 13(1) of the UDHR 1948.

<sup>46</sup> *Abolition of Racially Based Land Measures Act* 108 of 1991.

<sup>47</sup> S 5(A)(1) of the *Public Safety Act* 3 of 1953; see also Plasket 1986 *SAJHR* 144.

<sup>48</sup> Haysom and Morgan *Emergency* 5.

purpose of the Act, in the broader sense, was to promote the banning of anti-government organisations, prohibit public incitement to take part in strikes which according to the government were illegal, engage in boycott actions, demonstrations, or gatherings, or to take part in any act of civil disobedience.<sup>49</sup> Amongst others, the Act imposed restrictions on the press in reporting matters related to political unrest.<sup>50</sup> For example in *Catholic Bishops Publishing Co v State President and Another*,<sup>51</sup> the appellant, the *New Nation* newspaper, was served with a notice for contravening media regulations provided in section 3 of the *Public Safety Act*, for publishing statements which according to the Minister of Home Affairs were subversive. In reply to the notice, representations were submitted and a request was made to interview the Minister. The request for an interview was refused on the ground that there was procedure for hearing a party by way of written representations, and that no face to face interview with the Minister was therefore necessary.

In terms of the Act, the presence of media crews at places of political unrest, rioting, or the photographing and reporting on security actions by the police in unrest situations, was prohibited.<sup>52</sup> In order to enforce the Act, any member of the security forces was empowered to arrest any person whose detention, in the opinion of the member, was necessary for the maintenance of public order or the safety of the public. The detention could be for 30 days and it could be extended until the proclaimed state of emergency was uplifted. The detainees could be held without any reasons being furnished.<sup>53</sup> In *Katofa v Administrator of South West Africa*,<sup>54</sup> the detainee was detained in terms of a proclamation which permitted detention where

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<sup>49</sup> Marcus accessed at: <http://www.disa.ukzn.ac.za/webpages/DC/remay87.4.pdf> [date of use 25 Oct 2012].

<sup>50</sup> Hayson and Plasket *Developments* 2-3; see also *United Democratic Front v State President* 1987 3 SA 296 (N) and *United Democratic Front v State President* 1987 3 SA 343 (N) where the Natal Provincial Division of the Supreme Court found that the restrictions on reporting political unrest matters were invalid.

<sup>51</sup> *Catholic Bishops Publishing Co v State President and Another* 1990 1 SA 849 (A); see also *State President and Others v Release Mandela Campaign and Others* 1988 4 SA 903 (A) at 904 para F-G where subversive statements were found to be present in publications made available to the public. It was held that the provisions of the notice issued to the Release Mandela Campaign were not drastic and unreasonable that no right thinking person could have enacted them and therefore could not be declared invalid.

<sup>52</sup> S 3 of the *Public Safety Act* 3 of 1953; see also Didcott 1988 *SAJHR* 358.

<sup>53</sup> S 5(7) of the *Public Safety Act* 3 of 1953.

<sup>54</sup> *Katofa v Administrator of South West Africa* 1987 1 SA 695 (A).

the administrator was of the opinion that the person detained posed a violent threat to public order. The period of detention was fourteen days which could be extended by the Minister of Law and Order. The detainees had no right to visits from anyone, and no one was entitled to any information about those detained.<sup>55</sup> However, on appeal the court decided that the Administrator-General had not discharged the onus of proving that the detainee was a person intended by section 2 of the Act<sup>56</sup> in that he had not provided sufficient information to show that he was satisfied that the detainee was the person intended by section 2 of the Act. According to the court, in issuing a warrant for the arrest for the appellant, the Administrator-General should have foreseen that, without furnishing reasons or a reasonable explanation for not doing so, he would have not discharged the onus resting on him.

An important feature of emergency regulations was the attempt to exclude the legal process and legal supervision, particularly in the case of the exercise of powers by the police. Regulations contained what was termed the 'ouster clause' aimed at excluding court intervention in the exercise of emergency powers, orders and the conduct of the security forces.<sup>57</sup> As a result, security forces escaped liability in the exercise of their powers which violates accepted legal standards.<sup>58</sup> In *Minister of Law and Order v Dempsey*,<sup>59</sup> the Court found that the subjective view of the arresting officer regarding the necessity of the arrest, could not be questioned. Furthermore, in *Ngqumba v Staatspresident, Damons No v Staatspresident, Jooste v Staatspresident*<sup>60</sup> the Appellate Division held that the release of detainees during a state of emergency could only be ordered by the Minister. This decision excluded any intervention by the courts to question the legality of the detentions.

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<sup>55</sup> Levin 1986 *SAJHR* 177.

<sup>56</sup> S 2 of Proc R101 of 1985 SWA makes provision for the person to be detained if the Administrator-General is satisfied that circumstances that warrant detention exist.

<sup>57</sup> Mureinik 1989 *SAJHR* 70; see also Didcott 1988 *SAJHR* 359.

<sup>58</sup> Foster and Luyt 1986 *SAJHR* 297.

<sup>59</sup> *Minister of Law and Order v Dempsey* 1988 3 SA 19 A.

<sup>60</sup> *Ngqumba v Staatpresident, Damons NO v Staatspresident, Jooste v Staatspresident* 1988 4 SA 224 at 229 paras E-F.

In *Nkwinti v Commissioner of Police*<sup>61</sup> the Court accepted that the right to a hearing did not exist at the time when a person was detained as the purpose of the regulations would be frustrated if the legality of the detention could be questioned.

However, in *Tsenoli v State President*<sup>62</sup> the Court intervened and struck down the power of detention conferred by the 1986 emergency regulations. Furthermore, the emergency regulations attempted to grant the security forces indemnity from the consequences of their unlawful actions such as torturing detainees under the emergency provisions.<sup>63</sup>

The Act also violated the human rights of those detained in that the detainees were not furnished with reasons for their detention and thus denied their right to liberty in terms of the ICCPR.<sup>64</sup> Detention without trial was common, which clearly indicates the radical effect of the Act. For example, from 21 July 1985 to 2 June 1986 during a declared state of emergency, some 2 262 people were detained.<sup>65</sup> The Act also had retrospective application. The Act seriously violated the rights of individuals during the period of a state of emergency which necessitated interference by the courts. To this effect, Basson correctly points out that whenever judges have a choice, they should actively protect the rights and freedoms of individuals who seek redress.<sup>66</sup> Therefore, during a state of emergency, and in the face of draconian security legislation, courts should favour the individual and protect fundamental rights.<sup>67</sup> The *Public Safety Act* was repealed by the *State of Emergency Act* 86 of 1995.

The *State of Emergency Act* 1995, laid down the circumstances necessary for the declaration of a state of emergency and empowered the State President to make regulations in pursuance of any such declaration. The Act specifically states that the declaration of a state of emergency is subject to the provisions of section 37 of the

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<sup>61</sup> *Nkwinti v Commissioner of Police* 1986 2 SA 421 (E) at 438 paras C-E; see also *Sisulu v State President and Others* 1988 4 SA 731 (T) at 737 para B where the court held that the Minister of Law and Order was entitled to disregard any representation made for the release of the detainee.

<sup>62</sup> *Tsenoli v State President* 1986 4 SA 1150 (A); see also *Minister of Law and Order and Another v Swart* 1989 1 SA 295 (A) where the court held that the detention of the detainee without being informed of the reason of the arrest was unlawful.

<sup>63</sup> Haysom and Morgan *Emergency* 5; see also Haysom and Plasket *Development* 2-3.

<sup>64</sup> Art 9 of the ICCPR 1966 provides for liberty and security of a person.

<sup>65</sup> Leon 1986 *SAJHR* 248.

<sup>66</sup> Basson 1987 *SAJHR* 29.

<sup>67</sup> Basson 1987 *SAJHR* 29.

Constitution.<sup>68</sup> Therefore, in the democratic era, the declaration of a state of emergency is regulated by the provisions of the Constitution.<sup>69</sup> In terms of the Constitution, a state of emergency may only be declared in terms of an Act of parliament.<sup>70</sup> Furthermore, a state of emergency can only be declared when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency.<sup>71</sup> The declaration must be necessary to restore peace and order.<sup>72</sup> Of utmost importance, in contrast to the *Public Safety Act*, the Constitution specifically provides for the supervision of the application of a state of emergency by the courts.<sup>73</sup> Therefore, the Constitution monitors the application of any legislation during a state of emergency and this is clearly indicated by the provisions of section 37(5) of the Constitution<sup>74</sup> which regulate the actions of state organs during a declared state of emergency, whereas the *Public Safety Act* provided police with extended powers of arrest and detention which could not be questioned.

#### 7.4.3 *Riotous Assemblies Act 17 of 1956*

The Act prohibited gatherings in an open public place if the State President was of the opinion that the gathering might endanger public peace or life.<sup>75</sup> The State President could, for a specified period by means of proclamation in the *Government Gazette*, prohibit the transportation of explosives from one place in South Africa to another. The prohibition could include storage, removal, possession, or use of the

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<sup>68</sup> S1 of the *State of Emergency Act* 64 of 1997.

<sup>69</sup> S 37 of the Constitution.

<sup>70</sup> S 37(1) of the Constitution.

<sup>71</sup> S 37(1)(a) of the Constitution.

<sup>72</sup> S 37(2) of the Constitution.

<sup>73</sup> S 37(3) of the Constitution provides that any competent court may decide on the validity of (a) a declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; or (c) any legislation enacted, or other action taken, in consequence of a state of emergency.

<sup>74</sup> S 37(5) of the Constitution provides that no Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise (a) indemnifying the state, or any person, in respect of any unlawful act.

<sup>75</sup> S 2 of the *Riotous Assemblies Act* 17 of 1956 prohibited gatherings which were regarded as illegal; see also *S v Turrell and Others* 1973 1 SA 248 (C) at 263 para C where the court on appeal reversed the order of the magistrate court that prohibited a meeting in terms section 2 (1) of the *Riotous Assemblies Act* 17 of 1956 on the grounds that the order did not identify the meeting with certainty; see further *S v Budlender and Another* 1973 1 SA 264 at 271 paras F-G where the court on appeal dealt with a bail condition to the effect that appellant should not attend gatherings while the case was pending. The court held that the appellant cannot be prohibited from attending gatherings unless it be shown that he was attending gatherings with the objective of persisting in unlawful conduct or even encouraging other people to act unlawfully.



explosives within a particular area by persons of specified occupations, and could limit or vary the conditions of any licences or permits issued under the *Explosives Act*.<sup>76</sup> Acts or conducts which constituted incitement to public violence were prohibited in terms of the Act.<sup>77</sup> Furthermore, the Act provided that a person who conspired or procured the commission of any offence, whether at common law or in terms of statute or statutory regulation, would be guilty of an offence.<sup>78</sup> The Act did not specify what offences could be committed. As a result, the Act was vague and unfair. As a form of punishment for those convicted in terms of the *Riotous Assemblies Act*, a person could be banned from remaining in a particular area.<sup>79</sup> Such a ban will nowadays constitute a contravention of section 21(3) of the Constitution which provides that every citizen has the right to enter, to remain, and to reside anywhere in Republic. However this right could be limited in terms of the law of general application as provided by the Constitution.<sup>80</sup> The limitation could be applicable, for example, during the declared period of state of emergency.<sup>81</sup>

The Act further empowered the government to ban any newspaper or documentary information that could cause hostilities between black and white people. The Act violated the fundamental human right of freedom of speech<sup>82</sup> and also suppressed

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<sup>76</sup> S 16(1) of the *Riotous Assemblies Act* 17 of 1956.

<sup>77</sup> S 17 of the *Riotous Assemblies Act* 17 of 1956 provides that "a person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed."

<sup>78</sup> S 18(2)(a) of the *Riotous Assemblies Act* 17 of 1956.

<sup>79</sup> Heyns A *Jurisprudential Analysis* 368.

<sup>80</sup> S 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature of the right; the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>81</sup> S 37 of the Constitution.

<sup>82</sup> S 16(1) of the Constitution provides everyone has the right to freedom of expression which includes (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.

freedom of assembly<sup>83</sup> guaranteed under the UDHR.<sup>84</sup> The right to freedom of assembly is nowadays protected by section 17 of the Constitution which provides that everyone has the right, peacefully and unarmed, to assemble, demonstrate, picket, and present petitions.

The *Riotous Assemblies Act* introduced the statutory crime of intimidation. The Act has now been replaced by the *Intimidation Act*<sup>85</sup> and *Internal Security Act*<sup>86</sup> which provide for detention of persons participating in unlawful protests. Section 46 of the *Internal Security Act* empowered the magistrate in the area in which a meeting by a political organisation was to be held, to prohibit the meeting or to stipulate the terms under which the meetings or gathering could be held.<sup>87</sup>

#### 7.4.4 *Explosives Act 26 of 1956*

The *Explosives Act*<sup>88</sup> regulated the manufacture, storage, transportation, importation, export, and use of explosives. In terms of the Act, explosives means: (a) gunpowder, nitro-glycerine, dynamite, guncotton, blasting powders, fulminate of mercury or of other metals, coloured fires, and every other substance, whether similar to those mentioned in the Act or not, which is used or manufactured with a view to producing a practical effect by explosion or a pyrotechnic effect; (b) any fuse,

<sup>83</sup> Art 19 (2) of the ICCPR 1966.

<sup>84</sup> Art 19 & 20 of the UDHR 1948.

<sup>85</sup> *Intimidation Act* 72 of 1992.

<sup>86</sup> *Internal Security Act* 74 of 1982.

<sup>87</sup> S 46 of the *Internal Security Act* 74 of 1982 provides that: "(1) Whenever a magistrate has reason to apprehend that the public peace would be seriously endangered (a) By any gathering in his district: or (b) by a particular gathering or any gathering of a particular nature, class or kind at a particular place or in a particular area or wheresoever in his district, he may (i) prohibit for a period not exceeding forty-eight hours every gathering in his district or that particular gathering or any gathering of a particular nature, class or kind at a particular place or in a particular area or everywhere in his district except in such cases as he may expressly authorise in the prohibition in question or at any time thereafter; or (ii) direct that, that particular gathering or any other gathering with the same purpose shall be held only in accordance with such conditions as he may determine in the direction in question, including, in case of any gathering which takes the form of a procession, and without derogating from the generality of the preceding provisions of this paragraph, conditions (aa) prescribing the route to be taken by the procession concerned; (bb) prohibiting the procession or any person forming part thereof from entering any place specified in the direction; (cc) requiring the persons forming the procession to travel in vehicles, as the case may be." See also *United Democratic Front v Acting Chief Magistrate Johannesburg* 1987 1 SA 413 (W) at 421 where the court held that the words 'has reason to apprehend' in section 46(1) provide for the exercise of an objective, rather than a subjective, discretion. The decision of the magistrate must be objectively determined on the facts. In other words there must be some reasonable foundation for the belief, on the basis of the facts placed before the magistrate that a breach of the peace is likely to occur.

<sup>88</sup> *Explosives Act* 26 of 1956.

rocket, detonator, cartridge, and every adaptation or preparation of an explosive; and (c) any other substance which the State President may from time to time by proclamation in the *Gazette* declare to be an explosive.<sup>89</sup> The Act made it an offence to send or carry in any ship, except in accordance with prescribed regulations, explosives as cargo or dangerous goods. Dangerous goods were defined as goods which by their nature, quantity, or make would endanger the health of persons or endanger a ship.<sup>90</sup>

Terrorist organisations require arms and weapons of mass destruction to further their campaign of violence, and the regulation of explosives was a strategy employed by the government to prevent and combat terrorism within the Republic of South Africa. The Act also contains provisions relating to bomb-hoaxes. Consequently, in terms of the Act it is an offence for any person who in any manner threatens or falsely alleges, knowing it to be false, that any other person intends to cause an explosion whereby life or property is or may be endangered, or in order to intimidate any person.<sup>91</sup> The Act further criminalises the communication of false information, knowing it to be false, regarding any false explosion or any attempt or alleged attempt to do so.<sup>92</sup> For purposes of the provisions of section 27 of the Act, explosion includes fire caused by an explosive.<sup>93</sup> This Act has been repealed by the *Explosives Act* 15 of 2003 which, in accordance with its preamble, aims to provide for the control of explosives and matters connected thereto. This Act defines an explosive differently from the 1956 Act. In terms of the new Act, explosive means: (a) a substance, or mixture of substances, in a solid or liquid state, which is capable of producing an explosion; (b) a pyrotechnic substance in a solid or liquid state, or a mixture of such substances, designed to produce an effect by heat, light, sound, gas or smoke, or a combination of these, as a result of non-detonative self-sustaining exothermic chemical reaction, including pyrotechnic substances which do not evolve gases; (c) any article or device containing one or more substances contemplated in paragraph (a); (d) any explosive; or (e) any other substance or article which the

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<sup>89</sup> S 1(a)(b) and (c) of the *Explosives Act* 26 of 1956.

<sup>90</sup> S 235 of the *Explosives Act* 26 of 1956.

<sup>91</sup> S 27(1A) (b) of the *Explosives Act* 26 of 1956.

<sup>92</sup> S 27(1A)(a) of the *Explosives Act* 26 of 1956.

<sup>93</sup> S 27(3) *Explosives Act* 26 of 1956.

Minister may from time to time by notice in the *Gazette* declare to be an explosive.<sup>94</sup> In terms of section 1 of the Act an authorised explosive is an explosive listed in the regulations as an authorised explosive, while an unauthorised explosive means an explosive other than an authorised explosive.

#### 7.4.5 *Terrorism Act 83 of 1967*

This Act provided for various conducts that could endanger the maintenance of law and order, as acts of terrorism. Section 2 of *Terrorism Act*<sup>95</sup> provided a very broad definition of terrorism in an attempt to cover all criminal offences falling within the ambit of terrorism. According to the decision by Rumpff CJ in *S v Mange*,<sup>96</sup> the term “terrorism” was used to describe violent attacks on, *inter alia*, innocent persons, more often than not, committed by people from the Republic who had undergone military training in foreign countries. The judge went further to state that trained terrorists seek to kill innocent people in order to overthrow the state. The Act further provided for persons suspected of involvement in acts of terrorism to be detained for an indefinite period without trial on the authority of a senior police officer holding the rank of Commissioner.<sup>97</sup> Section 6(5) of *Terrorism Act* specifically provided that no court of law shall pronounce upon the validity of any action taken under this section, or order the release of any detainee.<sup>98</sup> Section 2(1)(a) made the recruitment and training of members of a banned organisation an offence. In *S v Makape and*

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<sup>94</sup> S 1 of *Explosives Act* 15 of 2003.

<sup>95</sup> In terms of s 2 the *Terrorist Act* 83 of 1967 a terrorist means “any person who (a) with intent to endanger the maintenance of law and order in the Republic or any portion thereof, in the Republic or elsewhere commits any act or attempts to commit or conspires with any other person to aid or procure the commission of or to commit or incites, instigates, commands, aids, advises, encourages or procures any other person to commit any act; or (b) in the Republic or elsewhere undergoes, or attempt, consents or takes steps to undergo, incites, instigates, commands, aids, advises, encourages or procures any other person to undergo any training which could be of use to any person intending to endanger the maintenance of law and order, and who fails to prove beyond a reasonable doubt that he did not undergo or attempt, consent or take any steps to undergo, or incite, instigate, command, aid, advise, encourage or procure such other person to undergo such training for the purpose of using it or causing it to be used to commit any act likely to have any of the results referred to in subsection (2) in the Republic or any portion thereof; or (c) possess any explosives, ammunition, fire-arm or weapon and who fails to prove beyond a reasonable doubt that he did not intend using such explosives, ammunition, fire-arm or weapon to commit any act likely to have any of the results referred to in subsection (2) in the Republic or any portion thereof.”

<sup>96</sup> *S v Mange* 1980 4 SA 613 (A).

<sup>97</sup> S 6 of *Terrorism Act* 83 of 1967.

<sup>98</sup> Basson 1987 *SAJHR* 29.

*Another*,<sup>99</sup> the appellants were convicted of participating in terrorist activities as they had been recruited and had received military training as members of the ANC. At the time of their arrest, the appellants were found in possession of arms and ammunition. There was no requirement requiring the release of information about people who had been arrested. As a result, people tended to disappear while in detention.

The practice of not releasing information and the disappearance of detainees resulted in detention without trial and unlawful deprivation of liberty. Unfortunately, in its report the *Rabie Commission*<sup>100</sup> recommended the exclusion of judicial supervision.<sup>101</sup> The basis of the report by the Commission was that the provisions of section 6 of the Act provided for ministerial control rather than control by the judiciary.<sup>102</sup> The Act was intended to criminalise acts regarded as terrorist activities and which were unlawful in nature. Furthermore, as a measure to combat terrorism, the *Terrorism Act* provided for presumptions applicable where the prosecution proved that the accused person committed or conspired to commit an act as alleged in section 2(1)(a), which included participation in terrorist activities.<sup>103</sup> The death

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<sup>99</sup> *S v Makape and Another* 1989 2 SA 753 T; see also *S v Mpheta* 1985 3 SA 702 AD wherein the appellant was also convicted of participating in terrorist activities in contravention of the provisions of the *Terrorism Act*. In *S v Bacela* 1988 2 SA 665 (E) the accused was arrested and convicted for attempting to leave South Africa to join the ANC. The accused admitted that the intention of joining the ANC was to bring about the downfall of the government by use of violence.

<sup>100</sup> The *Rabie Commission* was a judicial commission of investigation into the pre 1994 security legislation that was led by the judge of the Appellate Division, Judge Rabie. The report of the commission was delivered in 1982. See Anderson accessed at: [www.isrci.org/papers/2008/Anderson.pdf](http://www.isrci.org/papers/2008/Anderson.pdf) [date of use 5 Nov 2013].

<sup>101</sup> Dugard 1982 *Report on the Rabie Report* 41.

<sup>102</sup> Dugard 1982 *Report on the Rabie Report* 41.

<sup>103</sup> Section 2(1)(a) of the *Terrorism Act* provides that "any person who with intent to endanger the maintenance of law and order in the Republic or elsewhere commits any act or attempt to commit or conspires with any other person to aid or to procure the commission of or to commit or incites, instigates or procures any other person to commit any act shall be guilty of the offence of participation in terrorist activities;" see also *S v Moumbaris* 1974 1 SA 681 (T) where the accused were charged with conspiracy to commit acts of terrorism in terms of s 2(1)(a) and (b) of *Terrorism Act*. The court held that it is necessary to prove that the conspirators came together and agreed in terms to have common design and to pursue it by common means so to carry it into execution. If they pursue their acts, the same object, often by the same means, some performing one part of an act and others another part of the same act so as to complete it with the view to the attainment of the object which they are pursuing, the conclusion may be justified that they have been engaged in a conspiracy to effect that object; see further *S v Copper and Others* 1976 2 SA 875 (T) and *S v Hosey* 1974 1 667 (A) where the court dealt with the issue of participation in the commission of terrorist activities in contravention of the provisions of s 2 of the *Terrorism Act* 83 of 1967.

penalty applied as a sentence for the commission of terrorist activities. The death penalty was confirmed by the Appeal Court in *S v Lubisi and Others*<sup>104</sup> where the three appellants were convicted of high treason. The court held that the death sentence had been properly imposed for killing innocent person for political purposes.

The *Terrorism Act* destroyed the rule of law in South Africa in that it empowered the government to suppress resistance to the implementation of laws which were inconsistent with international human rights law.<sup>105</sup> The report of the *Rabie Commission* further accepted the indefinite detention of detainees for the purpose of interrogation relating to terrorist activities. The recommendation of the Commission dealt a fatal blow to the right of liberty for those detained in terms of section 6 of the Act.<sup>106</sup> The well-known fatal application of the provisions of section 6 of *Terrorism Act*, is the death of Steven Biko in detention.<sup>107</sup> The application of the *Terrorism Act* was repealed by the *Internal Security Act*.<sup>108</sup>

#### 7.4.6 *Affected Organisations Act 31 of 1974*

The aim of this piece of legislation was to restrict the activities of liberation movements such as the ANC, PAC, UDF, and others in the Republic of South Africa. In terms of this Act, the State President could, if satisfied that an organisation engaged in politics with the aid of an organisation or a person abroad, without notice to the organisation concerned, declare it an affected organisation.<sup>109</sup> For example, in *State President of South Africa and Others v United Democratic Front and Others*,<sup>110</sup> the UDF was confirmed to be an affected organisation. The Act further provided for

<sup>104</sup> *S v Lubisi and Others* 1982 3 SA 113 (A); see also *S v Tsotsobe and Others* 1983 1 SA 856 (A) where the Appeal Court confirmed the death sentence for high treason committed by an accused who was alleged to have received training by the ANC .

<sup>105</sup> Arden 2007 *SALJ* 60.

<sup>106</sup> Dugard 1982 *Report on the Rabie Report* 40.

<sup>107</sup> Dugard 1982 *Report on the Rabie Report* 18.

<sup>108</sup> *Internal Security Act* 74 of 1982.

<sup>109</sup> S 2(1) of the *Affected Organisations Act* 31 of 1974.

<sup>110</sup> *State President of South Africa and Others v United Democratic Front and Others* 1989 4 All SA 14 (A); see also *S v Mkhwanazi* 1987 4 SA 171 (T) where the appellant was convicted in the court for contravening provisions of s 56(1) read with s 13(1)(a) of the *Internal Security Act* 74 of 1982 in that he had won a T shirt during the funeral process on which there was a picture of a clenched fist with the words 'viva ANC' indicating that he associated himself with an unlawful organisation. On appeal the conviction was set aside on the grounds that it was not proven beyond a reasonable doubt that by wearing the T shirt the appellant identified himself with the ANC.

the full investigation by an authorised officer to whom powers of seizure, search and interrogation had been granted, into the affairs of the organisation under suspicion. An organisation could be declared an affected organisation, if a person could raise foreign funds or receive foreign money on behalf of the organisation. The Act infringed the right of freedom of association of members of the allegedly affected organisations. This right was protected by the UDHR<sup>111</sup> and the ICCPR.<sup>112</sup> After 1994 this right was enshrined in the Constitution.<sup>113</sup> The application of the Act has been repealed by the *Internal Security Act 74 of 1982*.

#### 7.4.7 *Internal Security Act 74 of 1982*

The *Internal Security Act* was enacted to counter a broad spectrum of acts such as bombings, and damage or destruction of property forming part of public infrastructure. The legislation was further enacted to comply with the requirements of the *Terrorist Bombings Convention*.<sup>114</sup> The Act provided for the following matters: investigations of organisations, publications and individuals with the aim of ascertaining whether they endanger the security of the state or spread communism; declaring organisations and publications unlawful; the prohibition of gatherings; detention without trial of persons suspected of endangering the safety of the state or having information concerning terrorist activities; and interrogation by the police in relation to terrorist activities.<sup>115</sup>

The Act further created the following offences: terrorism, subversion, sabotage, offences relating to unlawful gatherings, offences relating to unlawful organisations or publications, advocating or defending the objects of communism, and offences relating to restrictions placed on certain persons.

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<sup>111</sup> Art 20(1) of the UDHR 1948 provides that everyone has the right to freedom of peaceful assembly and association.

<sup>112</sup> Art 22 of the ICCPR 1966 provides that everyone shall have the right to freedom of association with others including the right to form and join trade unions for the protection of his rights.

<sup>113</sup> S 18 of the Constitution provides that everyone has the right to freedom of association.

<sup>114</sup> The *International Convention for the Suppression of Terrorist Bombings* 1997 criminalises the unlawful and intentional delivery, placing, discharging or detonation of explosives or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility.

<sup>115</sup> S 54 of the *Internal Security Act 74 of 1982*.

In terms of the *Internal Security Act*,<sup>116</sup> a person was guilty of the offence of terrorism if he or she, *inter alia*, committed or threatened to commit an act of violence, or incited, advised or encouraged any other person to commit an act of violence with the intent to:

Overthrow or endanger the state authority in South Africa;<sup>117</sup> achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the country;<sup>118</sup> and induce the government to do or abstain from doing any act or adopt or abandon any particular standpoint.<sup>119</sup>

Section 54(3) of the *Internal Security Act* specifically dealt with the offences of sabotage and provided that:

Any person who with intent to:

- (a) endanger the safety, health or interests of the public at any place in the Republic;
- (b) destroy, pollute or contaminate any water supply in the Republic which is intended for public use;
- (c) interrupt, impede or endanger at any place in the Republic the manufacture, storage, generation, distribution, rendering of supply of fuel, petroleum products, energy, light, power or water or sanitary, medical, health, education, police, fire fighting, ambulance, postal or telecommunication services or radio or television transmitting, broadcasting or receiving services or any other public service;
- (d) endanger damage, destroy, render useless or unserviceable or put out of action at any place in the Republic any installation for the rendering or supply of any service referred to in paragraph(c), any prohibited place or any public building;
- (e) cripple, prejudice or interrupt at any place in the Republic any industry or undertaking or industries generally or the production, supply or distribution of commodities or foodstuffs; or
- (f) impede or endanger at any place in the Republic the free movement of any traffic on land, at sea or in the air, in the Republic or elsewhere
  - (i) commits any act;
  - (ii) attempts to commit such act;
  - (iii) conspires with any other person to commit such act or bring about the commission thereof or to aid the commission or the bringing about of the commission thereof; or
  - (iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit such act, shall be guilty of the offence of sabotage and liable on conviction to imprisonment for a period not exceeding twenty years.

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<sup>116</sup> S 54(1) of the *Internal Security Act* 74 of 1982.

<sup>117</sup> S 54 (1)(a) of the *Internal Security Act* 74 of 1982.

<sup>118</sup> S 54(1)(b) of the *Internal Security Act* 74 of 1982.

<sup>119</sup> S 54(1)(c) of the *Internal Security Act* 74 of 1982.



The definition of sabotage as laid out by section 54(3) of the *Internal Security Act* was adequate to cover many acts including destruction of property which forms part of the infrastructure of the public, bombings, and other acts committed by the so-called terrorist organisations.

Detention without trial was one of the central elements in the repressive tools of the state.<sup>120</sup> The detention of those alleged to be involved in terrorist activities included torture of the detainees despite claims to the contrary.<sup>121</sup> The *Internal Security Act* empowered the Minister of Justice to order the arrest and detention of any person if the Minister was satisfied that such a person engages in activities which endanger or are calculated to endanger the security of the state.<sup>122</sup> Such persons so arrested, were not held as criminals, suspects, or witnesses but on the grounds that their activities, even if they were lawful, were aimed at endangering the security of the state. The Act further provided for short-term preventative detention by a police officer of the rank of Warrant Officer for a period of 48 hours which could be extended by a senior police officer of the rank of Lieutenant-Colonel for a period of 180 days.<sup>123</sup> The police officers could further use the powers of detention if they were of the opinion that the detention could contribute to the termination or prevention of public violence and the combating of acts of terrorism at any place in the Republic of South Africa.<sup>124</sup> In *Nkondo v Minister of Law and Order*<sup>125</sup> the court analysed the provisions of section 28(3)(b) of the *Internal Security Act* which provided for the Minister to furnish reasons in writing why he had ordered detention in terms of the provisions of the section. Notwithstanding the requirements of section 28, the Minister provided only the statutory provisions under which he had ordered the detention. The court held that the mere reiteration by the Minister that the person engages in activities prohibited by section 28 of the Act, showed that it intended that the person to whom a notice is served should have an opportunity to

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<sup>120</sup> S 29 of the *Internal Security Act* 74 of 1982; see also Foster and Luyt 1986 *SAJHR* 300.

<sup>121</sup> Louw 2000 *SACJ* 84.

<sup>122</sup> S 10(1)(a) *bis* of the *Internal Security Act* 74 of 1982.

<sup>123</sup> S 50 of the *Internal Security Act* 74 of 1982.

<sup>124</sup> Paizes and Skeen 1986 *ASSAL* 420.

<sup>125</sup> *Nkondo v Minister of Law and Order* 1986 2 SA 756 (A); see also *Omar v Minister of Law and Order* 1987 3 SA 859 (A) where the Appellate Division held that there was no obligation on the minister to furnish reasons for detention under the emergency regulations.

challenge its legality of his detention. Consequently, the court held that the notices issued by the Minister were invalid.

*Minister of Law and Order v Hurley*<sup>126</sup> involved a challenge to the provisions of section 29 of the *Internal Security Act*. Section 29(1) permitted detention without trial if an officer of or above the rank of Lieutenant-Colonel had a reason to believe that the person had committed or intended to commit an offence in contravention of the Act. Of importance, section 29(6) of the *Internal Security Act* contained what is termed an 'ouster clause' which provided that no court of law had jurisdiction to pronounce upon the validity of any action taken in terms of the provision of the section.<sup>127</sup> Therefore, the court did not have the power to release any person detained in terms of the provisions of section 29 of the *Internal Security Act*. A result of the 'ouster clause' was a serious attack on the rule of law and the liberties of those suspected of being involved in terrorist activities.<sup>128</sup> In *Ganyile v Minister of Justice*<sup>129</sup> the court held that the Supreme Court is the protector of the rights of the individual citizen, and will protect him or her against unlawful action by the executive in all its branches, just as the UK Supreme Court protects British nationals even from the Crown. The *dicta* in *Ganyile* illustrate the role of the Court when faced with the ouster clause. However, in *Morarjee v Minister of Law and Order*,<sup>130</sup> the application was for the release of the detainee on the ground that the detention in terms of section 29(9) of the Act was unlawful as the Minister had not afforded him an opportunity to make representations challenging his extended detention. The court held that the *audi alteram partem* rule did not apply to the procedure for extending the period of 30 days' detention. The same sentiments were echoed by the court in *N and Another NO v Minister of Law and Order and Another*<sup>131</sup> where the court dealt

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<sup>126</sup> *Minister of Law and Order v Hurley* 1986 3 SA 549 (A) at 589 paras E-I; see also *Minister of Law and Order and Others v Hurley and Another* 1985 4 SA 709 (D) where Judge Leon courageously intervened in the operation of S 29 of the *Internal Security Act* 74 of 1982 and questioned the lawfulness of the detention without trial in terms of the provisions of the section. The court held that the provisions of S 29 violates the rule of law because it precludes judicial intervention on behalf of the detainees as the section specifically provides that no court of law shall have jurisdiction to pronounce on the validity of any action taken in terms of the section order to release the detained person.

<sup>127</sup> Van den Wyngaert 1986 *SAJHR* 279.

<sup>128</sup> Budlender 1988 *SAJHR* 144.

<sup>129</sup> *Ganyile v Minister of Justice* 1962 1 SA 647 (E) at 725 paras H-J.

<sup>130</sup> *Morajee v Minister of law and Order* 1986 3 SA 823 (D ) at 839 paras B-D.

<sup>131</sup> *N and Another NO v Minister of Law and Order and Another* 1986 3 SA 921 (C).

with an application for an order declaring the detention in terms of section 50 (2)(b) of the *Internal Security Act*<sup>132</sup> unlawful. As a result of the ouster clause, the court in *State President v United Democratic Front*<sup>133</sup> in interpreting the media emergency regulations, renounced its inherent jurisdiction to proclaim on the validity of proclamations and regulations even in cases where such subordinate legislation was vague and without certainty. The court further held that the State President was empowered to issue proclamations and regulations that were in contradiction of existing legislation. Furthermore, confirming the decision of the court in *United Democratic Front* case, the court held as follows in *Sachs v Minister of Justice, Diamond v Minister of Justice*:<sup>134</sup>

Once we are satisfied on the construction of the Act, which it gives to the Minister an unfettered discretion, it is no function of a court of law to curtail its scope in the least degree; indeed it would be quite improper to do so. The above observation is, perhaps, so trite that it needs no statement, yet in cases before the courts when the exercise of a statutory discretion is unchallenged, arguments are sometimes advanced which seem to ignore the plain principle that parliament may take any encroachment it chooses upon the life, liberty or property of any individual subject to sway; and that it is function of the courts of law to enforce its will. In this division, at all events, no decision affirms the right of a court to interfere with the honest exercise of a duly conferred discretion.<sup>135</sup>

Detention of state witnesses until the proceedings had been finalised or for a period of six months if no proceedings were initiated, was also provided for by the Act.<sup>136</sup> In terms of the Act, a person could be restricted from attending gatherings or from being at certain places or areas or even be restricted from communicating with

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<sup>132</sup> Section 50(2)(b) of the *Internal Security Act* 74 of 1982 provided as follows: "Whenever a magistrate is of the opinion, on the ground of information submitted to him upon oath by a police officer, that the further detention of any person arrested in terms of subsection 1 is justified on the ground of a consideration contemplated in paragraph (a) or (b) as the case may be, of that subsection, he may on the application of the said police officer issue a warrant for the further detention of such person."

<sup>133</sup> *State v President v United Democratic Front* 1988 4 SA 830 (A); see also *Minister of Law and Order v Dempsey* 1988 3 SA 19 (A) where the court was of the opinion that the arresting official's subjective view as to the final decision regarding an administrative decision against individual rests with the executive and not the judiciary. See further Dyzenhaus *Truth, Reconciliation* 44.

<sup>134</sup> *Sachs v Minister of Justice, Diamond v Minister of Justice* 1934 AD 11.

<sup>135</sup> *Sachs v Minister of Justice, Diamond v Minister of Justice* 1934 AD 11 at pars 36-37. see also *South African Defence and Aid Fund and Another v Minister of Justice* 1967 1 SA 31 (C) at 35 paras A-B where the court held as follows, "it is trite that it is not the function of the court to enquire into the correctness of the opinion."

<sup>136</sup> S 31 of the *Internal Security Act* 74 of 1982.

certain persons.<sup>137</sup> In *Gumede and Others v Minister of Law and Order*<sup>138</sup> a full bench of the Natal Provincial Division held as follows with regard to the *Internal Security Act*:

The Act, like the enactment in *Sachs v Minister of Justice*, vests the Minister with a discretion of a wide and drastic kind which in its exercise, as was stated in that case, must necessarily make serious inroad upon the ordinary liberty of the subject. Its object clearly is to stop and prevent at the earliest possible stage any activity likely to endanger the security of the state or maintenance of law and order.

From the above extract, it appears that because there was no Bill of Rights to protect the fundamental rights of the citizen before 1994, the provisions of the *Internal Security Act* made serious inroads into many of the fundamental rights of individuals. For instance, the provisions of sections 10 and 29 of the Act violated the right to liberty of those arrested as provided for by article 9 of the ICCPR.<sup>139</sup> Furthermore, the right to legal representation of those arrested was violated. Those detained under the Act were denied access to legal representatives.<sup>140</sup> The *Internal Security Act* 74 of 1982 was amended by the *Internal Security and Intimidation Amendment Act* 138 of 1999. The purpose of the amendment was to delete or substitute certain definitions such as communism, the Minister, public violence, unlawful organisation, and others. The Act further sought to regulate the declaration of organisations as unlawful; to extend the time limit for the institution of proceedings in terms of the Act; to make different provision in relation to the detention of certain persons for interrogation; and to increase the maximum fine for certain offences. The *Internal Security Act* has been repealed in its entirety by the POCDATARA.<sup>141</sup>

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<sup>137</sup> Budlender 1988 *SAJHR* 144.

<sup>138</sup> *Gumede and Others v Minister of Law and Order* 1985 2 SA 529 (N) at 534 paras E-F.

<sup>139</sup> Art 9(1) of the ICCPR 1966 provides that everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law; see also Article 9 of the UDHR 1948 which provides that no one shall be subjected to arbitrary arrest, detention or exile.

<sup>140</sup> Levin 1986 *SAJHR* 177.

<sup>141</sup> POCDATARA 33 of 2004.

#### 7.4.8 *Intimidation Act 72 of 1992*

The *Intimidation Act*<sup>142</sup> provides that it is an offence for any person, without lawful reason and with intent, to compel or induce any person or persons of a particular nature, class or kind, or persons in general, to do or abstain from doing any act or abandon a particular *status quo* or decision, if in the process that person:

Assaults, injures or causes damage to any person, or (i) in any manner threatens to kill, assault, injure or cause damage to any person, (ii) or persons of a particular nature, class or kind'; (b) acts or conducts himself in such a manner or utters or publishes such words which have the effect of a person receiving such utterances or publication fears for his own safety or the safety of his property or the security of his livelihood or the safety of any person or the safety of the property of any person or the security of livelihood of any person.

The Act further declared it an offence for any person to intentionally and by means of violence, incitement, and instigation raise fear in or demoralise the general public or a particular section of the population or inhabitants of a particular area in the Republic, in order to induce them to do or abstain from doing any act in the Republic or elsewhere.<sup>143</sup> Sections 1 and 1A of the *Intimidation Act* were used as an effective tool to combat terrorism. The *Intimidation Act* is still in force but has been amended by the provisions of the *Intimidation Amendment Act*<sup>144</sup> and *Criminal Law Second Amendment Act*.<sup>145</sup>

#### 7.4.9 *Non- Proliferation of Weapons of Mass Destruction Act 87 of 1993*

This Act was passed in 1993 before the Republic of South Africa became a democratic state and remains in force post-1994. The purpose of the *Non-Proliferation of Weapons of Mass Destruction Act*<sup>146</sup> is to provide control over weapons of mass destruction and for the establishment of a council to control and manage matters relating to the proliferation of such weapons in the Republic of South Africa. The control and regulation of arms and weapons of mass destruction is

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<sup>142</sup> S 1 of the *Intimidation Act 72 of 1982*.

<sup>143</sup> S 1A of the *Intimidation Act 72 of 1982*.

<sup>144</sup> *Internal Security and Intimidation Amendment Act 138 of 1991*.

<sup>145</sup> *Criminal Law Second Amendment Act 126 of 1992*.

<sup>146</sup> *Non- Proliferation of Weapons of Mass Destruction Act 87 of 1993*, provided control of weapons of mass destruction including denying terrorist organizations access to arms in preventing and combating acts of terrorism.

a measure adopted by the government to deny terrorist organisations and any person against its policies access to arms. The fear was that access to arms would enable terrorist organisations to intensify their resistance against the government and to further commit violent acts such as injuring, killing, and destruction of property.

In terms of the Act, a weapon of mass destruction is any weapon designed to kill, harm or infect people, animals or plants through the effects of nuclear explosion or the toxic properties of a chemical-warfare agent or the infectious or toxic properties of biological-warfare agent, and includes a delivery system exclusively designed, adapted or intended to deliver such weapons.<sup>147</sup> In terms of the Act the Minister of the Department of Trade and Industry may, by notice in the *Government Gazette*, prohibit the import, export, re-export or transit of weapons of mass destruction.<sup>148</sup> For example, the donation of helicopters by South Africa to Zimbabwe was stopped because they could be used as a repressive tool by the Zimbabwe defence force of the Zanu-PF government.<sup>149</sup> The Act has been amended by the *Non-Proliferation of Weapons of Mass Destruction Amendment Act 59 of 1996*, the *Nuclear Energy Act 46 of 1999*, and the *POCDATARA 33 of 2004*.

#### *7.4.10 Regulation of Gatherings Act 205 of 1993*

The object of this Act was to prohibit any political gatherings by banned movements such as the ANC, PAC, SACP and UDF who would wear uniforms similar to those of the South African National Defence Force (hereafter SANDF) and sing struggle songs.<sup>150</sup> In terms of the Act,<sup>151</sup> gathering means:

Any assembly, concourse or procession of more than fifteen persons in or on any public road as defined in the *Road Traffic Act 29 of 1989*, or any other public place or premises at which the principles, policy, actions or failure to act of any government, political party or political organisation, whether or not that party or

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<sup>147</sup> S 1 of the *Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993*.

<sup>148</sup> S 13(2)(a) of the *Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993*.

<sup>149</sup> See Anon accessed at: <http://www.da.org.za/newsroom.htm?action=view-news-item&id=12207> [date of use 5 Jun 2014].

<sup>150</sup> S 5(8) of the *Regulation of Gatherings Act 205 of 1993*; see also Mathews 1985 *SAJHR* 200.

<sup>151</sup> S 1 of the *Regulation of Gatherings Act 205 of 1993*; see also *S v Twala* 1979 3 SA 864 (T) where a gathering was defined as "the congregation or the coming together of a number of people with intent to defy, subvert or assail the authority of the state."

organisation is registered in terms of any applicable law, are discussed, attacked, criticized or propagated.

Therefore, in order to be able to hold a meeting, the convener was required to give the police notice of the meeting.<sup>152</sup> Furthermore, those attending a meeting had to comply with orders from the police on how the meeting should be conducted.<sup>153</sup> In terms of this Act, no participant or any other person at a gathering or demonstration was permitted, through the use of placards, speech or song, to incite hatred of other people on account of differences of race, sex, religion, or language.<sup>154</sup> Participants were not permitted to perform any act or utter any words calculated or likely to encourage violence against any person or group of persons.<sup>155</sup>

A police officer of the rank of Warrant Officer was empowered to order persons attending a gathering to disperse if he or she was of the opinion that such gathering was a threat to peace and security.<sup>156</sup> A police officer above the rank of a Warrant Officer was empowered in terms of the Act to order members under his or her command to take steps, including the use of firearms and other weapons, to disperse a meeting to prevent destruction of property, injury and killing of persons.<sup>157</sup> The measures taken by the police to control public gatherings often resulted in the abuse of power where people were subjected to torture in violation of their fundamental human rights.<sup>158</sup> The provisions of the Act further violated the right to freedom of expression<sup>159</sup> and the right to assembly, demonstration, picket and petition<sup>160</sup> as provided for by the ICCPR.

### **7.5. Counter-terrorism legislation enacted since 1994**

In 1994, a new democratic legal order came into existence. Democratic South Africa emerged as a fertile ground for international terrorist organisations. The sea and

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<sup>152</sup> S 1 of the *Regulation of Gatherings Act* 205 of 1993; see also Abrams 1988 *SAJHR* 179.

<sup>153</sup> S 7 of the *Regulation of Gatherings Act* 205 of 1993.

<sup>154</sup> S 5(5) of the *Regulation of Gatherings Act* 205 of 1993.

<sup>155</sup> S 5(6) of the *Regulation of Gatherings Act* 205 of 1993.

<sup>156</sup> S 8 of the *Regulation of Gatherings Act*; see also Milton & Cowling *South African Criminal Law* Ch B3 3.

<sup>157</sup> S 9(2)(d) of the *Regulation of Gatherings Act* 205 of 1993.

<sup>158</sup> Human Rights Commission 2012 accessed at:

<http://www.sahrc.org.za/home/21/files/Report-comm-SA-police-service20301012.pdf> [date of use 13 May 2016].

<sup>159</sup> Art 19 of the ICCPR 1966; see also Art 19 of the UDHR 1948.

<sup>160</sup> Art 19 of the ICCPR 1966; see also Art 19 of the UDHR 1948.

airports of South Africa enabled members of international terrorist organisations to enter and leave the country undetected. The poor immigration and border control system added to the problem. South Africa is currently regarded as a safe haven for terrorists.<sup>161</sup>

As a result of the influx into South Africa of international terrorist organisations such as Al-Qaeda, the government adopted a new approach to the fight against terrorism.<sup>162</sup> The adoption of a new approach was aimed at enabling South Africa to comply with her obligations in terms of the Constitution which guarantees, *inter alia*, the right to life, the right not to be subjected to torture, and the right to privacy while preventing and combating international terrorism. The democratic government committed itself to uphold the rule of law in its fight against terrorism, and not to resort to any form of general discriminatory repression in defending and upholding the freedom and security of its citizens. The South African government further acknowledged its international obligations by becoming a party to international conventions aimed at the fight against terrorism. This new anti-terrorism approach was based on the fundamental principle that terrorism should be countered without sacrificing or violating the civil liberties of citizens.

As a result of the prevalence of terrorism in South Africa, the government had to come up with new strategy through which terrorism could be prevented and combated. New legislation had to be promulgated to counter terrorist acts. The following statutes aimed at countering terrorism were enacted and will be discussed in detail below: the *Protection of Constitutional Democracy against Terrorist-Related Activities Act*<sup>163</sup> (hereafter POCDATARA); the *Prevention of Organised Crime Act*<sup>164</sup> (hereafter POCA); and the *Financial Intelligence Centre Act*<sup>165</sup> (hereafter FICA).

#### 7.5.1 *Prevention of Organised Crime Act 121 of 1998 (POCA)*

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<sup>161</sup> Botha 2009 accessed at: <http://www.iss.org.za/static/templates/tml-html/.php/node=id=3331&link=id=32> [date of use 14 Dec 2013].

<sup>162</sup> See Anon accessed at: <http://goliath.ecnext.com/coms2/gi-0199-6809542/Terrorism-public-policy-and-democracy> [date of use 18 Jul 2012].

<sup>163</sup> POCDATARA 33 of 2004.

<sup>164</sup> POCA 121 of 1998.

<sup>165</sup> FICA 38 of 2001.



Terrorist organisations require funds to further their objectives. As a result, terrorist organisations often associate with organised crime syndicates in the commission of offences in order to acquire funds.<sup>166</sup> Al-Qaeda is believed to have benefited from the illicit sale of blood diamonds in South Africa to finance its operations.<sup>167</sup> The objective of the POCA<sup>168</sup> is to prohibit the relationship between these syndicates, and prevent the commission of terrorist activities by taking the proceeds of crime from these organisations.<sup>169</sup> In terms of the POCA, the proceeds of crime include any property or any service, advantage, benefit or reward which is derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of the Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing proceeds of unlawful activity or so derived.<sup>170</sup> Unlawful activity is explained as any conduct which constitutes a crime or which contravenes any law whether the conduct occurred before or after the commencement of the Act, and whether the conduct occurred in the Republic or elsewhere.<sup>171</sup>

Chapter 6 of the POCA provides for the forfeiture of goods, where the goods in question are used or are the instrument to be used for the commission of the offence. In *Prophet v National Director of Public Prosecutions*,<sup>172</sup> the Supreme Court of Appeal held that it was beyond doubt that the house in which drugs were manufactured had been organised, furnished, and adapted or equipped to enable or facilitate the applicant's illegal activities. The house was therefore declared to be the instrument of the crime and was forfeited to the state. Further, in *National Director*

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<sup>166</sup> Bantekas and Nash *International Criminal Law* 44.

<sup>167</sup> Anon accessed at: <http://www.jamestown.org/single/?no> [date of use 20 Apr 2013].

<sup>168</sup> *Prevention of Organised Crime Act* 121 of 1998.

<sup>169</sup> S 4 of the POCA 121 of 1998.

<sup>170</sup> S 1 of the POCA 121 of 1998.

<sup>171</sup> S 1 of the POCA 121 of 1998.

<sup>172</sup> *Prophet v National Director of Public Prosecutions* 2006 1 All SA 212 (SCA); see also *National Director of Public Prosecutions v Seevnarayan* 2004 2 All SA 491 (SCA) where the court was critical of the fact that the court *a quo* limited the definition of an instrumentality to a means by which a crime was committed. The court held that the words concerned in the commission of the offence must be interpreted so that the link between the crime committed and the property is reasonably direct and that the employment of the property must be functional to the commission of the offence. In other words, the property must play a direct role in the commission of the offence.

of *Public Prosecutions v Mohunram and Others*,<sup>173</sup> it was held that, although the purpose of civil forfeiture under chapter 6 of the POCA is to remove the incentive to commit crime and further to deter persons from committing, such forfeiture must be proportionate. Therefore, the forfeiture of premises used for gambling offences on the grounds of instrumentality of the offence was according to the Court disproportionate as Mohunram had pleaded guilty to the offence, paid fine and had his gambling machines confiscated.

The POCA further makes provision for the prohibition of money laundering and imposes an obligation to report certain suspicious transactions concerning proceeds of crime.<sup>174</sup> Section 5 of the Act provides that anyone who assists another person to benefit from the proceeds of unlawful activities commits an offence. In terms of section 6, the acquisition, possession, or use of proceeds of unlawful activities is an offence. This aspect was emphasised in *National Director of Public Prosecutions v Starplex 47 CC and Others: Ex parte National Director of Public Prosecutions v Mamadau and Another*.<sup>175</sup> In this case it was held that in terms of section 38 of the POCA,<sup>176</sup> the standard of proof requires the applicant to do no more than to establish reasonable grounds to believe that the property concerned is an instrumentality of an offence or the proceeds of unlawful activity. Instrumentality of an offence is defined as:

Meaning any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of the POCA, whether committed within the Republic or elsewhere.

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<sup>173</sup> *National Director of Public Prosecutions v Mohunram and Others* 2006 1 SACR 554 (SCA) at 559 paras A-E; see also *Phillips and Another v NDPP* 2003 6 SA 447 (SCA) where the same position was also held. In *National Director of Public Prosecutions v Parker* 2006 3 SA 198 (SCA) the court held that the NDPP had established that the property was not merely an incidental venue from which drugs were obtainable, but was in fact a drug shop. The property was a well-known drug haven and therefore instrumental on the basis of the repeated use as a venue for the purposes of concluding drug deals.

<sup>174</sup> S 4 of the POCA.

<sup>175</sup> *National Director of Public Prosecutions v Starplex 47 CC and Others: In Exparte National Director of Public Prosecutions v Mamadau and Another* 2009 1 SACR 68 (C) at 85 paras G-H; see also *Singh v National Director of Public Prosecutions* 2007 2 SACR 326 (SCA) at 334 para A where the court arrived at the finding that instrumentality of the offence narrowly interpreted means a property which use plays a real substantial part of actual commission of the offence.

<sup>176</sup> S 38(2) of the POCA 121 of 1998 provides that on the application by the National Director of Public Prosecutions, the High Court shall make an order (1) if there are reasonable grounds to believe that the property concerned is (a) an instrumentality of an offence (b) is the proceeds of unlawful activities.

Proceeds of unlawful activities are defined as:

Meaning, any property or any service advantage, benefit or reward which is derived, received or retained, directly or indirectly in the Republic or elsewhere, at any time before or after the commencement of the POCA, in connection with or as result of any unlawful activity carried on by any person and includes any property representing property so derived.

Involvement in gang related activities for the purposes of making profit is prohibited.<sup>177</sup>

The POCA also provides for civil forfeiture of property that has been used in the commission of an offence. The aspect of forfeiture was elucidated in *National Director of Public Prosecutions v Cole and Others*<sup>178</sup> where the court held that even though forfeiture is harsh, it plays an important role in the prevention and punishment of offences. This aspect was further dealt with in *Mazibuko v The National Director of Public Prosecutions*<sup>179</sup> where the property used in the commission of the offence was forfeited to the state. The confiscation provisions of the POCA are not only concerned with the recovery of what has been illegally obtained, but extend to the benefits obtained as a result of what has been obtained unlawfully. Thus, the confiscation order in terms of the POCA does not aim only at reparation, but also at prevention and deterrence.<sup>180</sup> The importance of the POCA is to deny terrorist organisations funding which enables them to perpetrate terrorist acts. The rationale behind the forfeiture of the proceeds of crime is that terrorist organisations associate with organised crime syndicates to earn money obtained in an unlawful manner. The Act is therefore aimed at denying terrorist organisations the benefit of unlawful proceeds that could be used to further the commission of violent acts.

South Africa is a country plagued by escalating organised crime and the POCA makes it easier for the state to deprive criminals of the proceeds of criminal activity. However, whilst the POCA is an effective tool to deter crimes such as money laundering that may end up benefiting terrorist organisations, the practice of

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<sup>177</sup> S 9 of the POCA.

<sup>178</sup> *National Director of Public Prosecutions v Cole and Others* 2004 3 All SA 745.

<sup>179</sup> *Mazibuko v The National Director of Public Prosecutions* 2009 2 SACR 368 (SCA) at 619-920 paras J-A; see also also *Zuma v National Director of Public Prosecutions* 2008 12 BLCR 1197 (CC).

<sup>180</sup> Jordaan 2002 SACJ 55.

forfeiture of proceeds of crime is not without controversy.<sup>181</sup> The opponents of the POCA legislation are of the view that the Act violates the rights of those who possess the property subject to forfeiture in terms of section 25(1) of the Constitution.<sup>182</sup>

#### 7.5.2 *Financial Intelligence Centre Act 38 of 2001 (FICA)*

The aim of this Act is to support the POCDATARA in preventing the financing of terrorist organisations. The objective is to establish a Financial Intelligence Centre and Money Laundering Advisory Council in order to combat money laundering activities and financing of terrorist related activities, and further to impose duties on institutions and other persons who might be used for money laundering purposes and financing terrorist activities. The objective of the FICA is also to amend the POCA<sup>183</sup> and the *Promotion of Access to Information Act*.<sup>184</sup> The *Prevention of Organised Crime Act* prohibits benefitting from proceeds of unlawful activities by forfeiture of the suspected assets. The *Promotion of Access to Information Act* gives effect to the constitutional right of access to information held by the state, and any information held by another person such as a financial institution, that is required for the protection of any rights.

Any organisation requires finances to function properly and achieve its objectives. Therefore, the prohibition of the financing of terrorist organisations is another important method of combating and preventing terrorism. The FICA provides for the reporting of all suspicious and unusual transactions to the Financial Intelligence Centre.<sup>185</sup> Section 28A of the FICA specifically place a duty on financial institutions like banks to report property believed to be linked to a terrorist activity.<sup>186</sup> Section 28A (1) provides that an accountable institution which has in its possession or under

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<sup>181</sup> Gupta 2002 *Harvard Civil Rights-Civil Liberties Law Review* 160.

<sup>182</sup> S 25(1) of the Constitution provides that no one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property. See also Article 17(1) of the UDHR which provides that everyone has a right to own property alone as well as in association with others. Article 17(2) of the UDHR further provides that no one shall be arbitrarily deprived of his property. See further Powell 2005 *SACJ* 152.

<sup>183</sup> POCA 121 of 1998.

<sup>184</sup> *Promotion of Access of Information Act* 2 of 2000.

<sup>185</sup> S 29 of the FICA 38 of 2001.

<sup>186</sup> De Koker *South African Money Laundering* 22; see also Financial Intelligence Centre which objective is to define and outline in detail steps to be followed in the manual submission of a Terrorist Property Report in terms of section 28A accessed at: <http://www.fic.gov.za> [date of use 22 Feb 2014].

its control property owned or controlled by or on behalf of, or at the direction of: (a) any entity which has committed or attempted to commit or facilitated the commission of a specified offence as defined in the POCDATARA; or, (b) a specific entity identified in a notice issued by the President under section 25 of the POCDATARA, must within a prescribed period report that fact and the prescribed particulars to the Financial Intelligence Centre. The Financial Intelligence Centre has the power to intervene and direct a responsible institution not to proceed with a transaction suspected of involving money laundering or the proceeds of crime.<sup>187</sup> Section 29 obliges any person who carries, manages, or is in charge of a business and who knows or ought to have known or suspects that the business has received or is about to receive proceeds of unlawful activities, to report such suspicion or knowledge to the Financial intelligence Centre within the period prescribed.<sup>188</sup>

In *Price and Another v S*<sup>189</sup> the appellants were charged with two counts of fraud involving two cheques stolen and deposited in the trust account of the attorneys' firm. The first appellant, the attorney, knew that the cheques were stolen and had them cleared and paid into the trust account. It was confirmed by the Supreme Court of Appeal that the attorney deposited cheques in the trust account with the full knowledge that they were stolen. The cheques were the proceeds of unlawful activities, and the appellant, as an attorney, was regarded as a person accountable for the trust account in terms of section 29 of the FICA. Therefore, the appellant was obliged to report the unlawful transaction of the deposit of the stolen cheques into his trust account, which he failed to do. However the court held differently in *National Director of Public Prosecutions v Seevnarayan*<sup>190</sup> where an action for civil forfeiture of money alleged to have been earned by means of tax fraud, was deposited into an account with a false name. The court arrived at the conclusion that the subject matter of concealment is not the proceeds of that concealment. In terms

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<sup>187</sup> S 34 of the FICA 38 of 2001.

<sup>188</sup> S 29(1) of the FICA 38 of 2001; see also Burchell *Principles of Criminal Law* 996.

<sup>189</sup> *Price and Another v S* 2003 4 All SA 26 (SCA); see also the English decision of *R v Griffiths* 2006 All ER (D) 1 where a lawyer was convicted for failing to disclose a suspicious real estate transaction where he was supposed to have known that the subject property was associated with the proceeds of crime because it was grossly undervalued; see further *Government of the Republic of South Africa v van Huesteyns Attorneys* 1999 2 All 29 (T) where the court concluded that the funds deposited in the trust account of an attorney was used for money laundering activities.

<sup>190</sup> *National Director of Public Prosecutions v Seevnarayan* 2004 2 SACR 208 (SCA) at 239 paras A-B.

of section 35 of the FICA, the accountable institution may apply for the monitoring of a money transaction by a specified person if there are reasonable grounds to suspect that the transaction involved the transfer of proceeds of unlawful activities or property relating to the financing of terrorist activities. The objective of the provision is to stop the transfer and freeze the proceeds if it is found that the transaction is aimed at financing terrorist activities.

The FICA further provides that upon conviction under the Act, the offender is liable to imprisonment for a period of five to fifteen years or a fine of between R1 000 000 (one million rand) and R10 000 000 (ten million rand) depending on the nature of the crime.<sup>191</sup> The heavy penalties provided by the FICA are an attempt to prevent the financing of terrorist organisations in the Republic of South Africa.

The FICA complies with the objective of the *Convention on the Suppression of the Financing of Terrorism*<sup>192</sup> in that it guards against the commission of offences such as money laundering that may enable terrorist organisations to acquire funds. The financing of terrorist organisations will in turn enable these organisations to continue with their mission of perpetrating threats of violence globally. Whilst the aim of the FICA is to identify proceeds of unlawful activities and combat money laundering, the legislation appears to violate the fundamental rights of those accused of possessing and acquiring proceeds of unlawful activities. The monitoring and interception of transaction communications involving the transfer of funds infringes the right to privacy in terms of the Constitution.<sup>193</sup> In *S v Nkabinde*<sup>194</sup> the court held that the monitoring and interception of communications between the accused person and the legal representative was a violation of the right to privacy.

### *7.5.3 Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004*

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<sup>191</sup> *S v Nkabinde* 1998 8 BCLR 996(N); see also *Protea Technology v Wainer* 1997 9 BCLR 1225 (W) where the court also held that the use of transcripts of telephone calls recorded by means of surveillance device violated the right to privacy.

<sup>192</sup> *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>193</sup> S 14 of the Constitution provides that everyone has the right to privacy, which includes the right not to have (a) their person or home searched; (b) their property searched; their possessions seized; or (d) the privacy of their communications infringed.

<sup>194</sup> *S v Nkabinde* 1998 8 BCLR 996 (N); see also *Protea Technology v Wainer* 1997 9 BCLR 1225 (W) where the court also held that the use of transcripts of telephone calls recorded by means of surveillance device violated the right to privacy.

The *Protection of Constitutional Democracy against Terrorist and Related Activities Act*<sup>195</sup> (hereafter the POCDATARA) was enacted to ensure that South Africa complies with its international obligations emanating from international instruments such as the UNSC resolution 1373 (2001). The purpose of the Act was to provide for: the offence of terrorism and other offences associated or connected with terrorist acts;<sup>196</sup> the convention offences; and to provide for mechanisms to comply with UNSC resolutions which are binding on state parties in relation to terrorist activities.<sup>197</sup> In accordance with the Act, the offence of terrorism is committed if a person engages in a terrorist activity.<sup>198</sup> Terrorist activity consists of three elements: the act; intent; and motivation of the perpetrator.<sup>199</sup> The act of terrorism may be committed inside or outside of the borders of South Africa. It involves the systematic, repeated or arbitrary use of violence, the systematic, repeated or arbitrary release of toxic substances into the environment endangering the life or violating the physical integrity or physical freedom or, causing serious bodily injury to or the death of any person, the destruction of or substantial damage to any property, serious interference with essential services, major economic loss, or the creation of a serious public emergency or insurrection.

The Act further provides for an offence associated or connected with terrorist activities.<sup>200</sup> Various acts that would result in a person committing an act of terrorism are listed, for instance, providing or offering to provide any weapon to any other person for use by or for the benefit of the entity.<sup>201</sup> Provision, receiving or participation in training or instruction or recruiting an entity to receive training or instruction, is prohibited in terms of the legislation. Furthermore, offences associated or connected with financing are specified.<sup>202</sup> The provision complies with the

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<sup>195</sup> POCDATARA 33 of 2004.

<sup>196</sup> S 2 of the POCDATARA 33 of 2004.

<sup>197</sup> Chapter 2 Part 2 of the POCDATARA 33 of 2004 provides the following convention offences: offences associated or connected with financing of specified offences, offences relating to explosive or other lethal devices, offences relating to hijacking, destroying or endangering safety of fixed platform, offences relating to hostage taking, offences relating to causing harm to internationally protected persons, offences relating to hijacking of an aircraft and offences relating to hijacking of a ship or endangering safety of maritime navigation.

<sup>198</sup> S 2 of the POCDATARA 33 of 2004.

<sup>199</sup> S 1(1) of the POCDATARA 33 of 2004.

<sup>200</sup> S 3 of the POCDATARA 33 of 2004.

<sup>201</sup> S 3(2)(a) of the POCDATARA 33 of 2004.

<sup>202</sup> S 4 of the POCDATARA 33 of 2004.

prohibition on the financing of terrorist activities as outlined in the *Convention for the Suppression of the Financing of Terrorism*.<sup>203</sup>

The Act further provides for the following offences:

- harbouring or concealing any person who is connected with a crime of terrorism,<sup>204</sup>
- threatening, attempting to conspire, or inducing another person to commit an offence.<sup>205</sup>

According to the Act, a duty to report the presence of a person suspected of intending to commit or having committed an offence is imposed on anybody who is aware or suspects that an offence of terrorism is to be or has been committed.<sup>206</sup>

While the POCDATARA is effective legislation to counter terrorism domestically, it does raise some serious problems.<sup>207</sup> The definition of a 'terrorist act' lacks clarity and overlaps with a large number of common-law offences like murder, attempted murder, malicious damage to property, kidnapping, and arson.<sup>208</sup> There is a likelihood that a person who commits one of the mentioned offences will be committing a terrorist act without intending to do so. The definition of a terrorist act further does not correspond to the basic principle of criminal law that requires that crimes should be formulated clearly.<sup>209</sup> Because of the vagueness of the legislation, the possibility exists that an offender of violent crimes charged in terms of the POCDATARA, may risk being sentenced to a severe punishment like life imprisonment.<sup>210</sup> The interpretation of the Act is a problem because it condones the use of force against tyranny, oppression, and imperialism, for instance violent acts by protestors or freedom fighters.<sup>211</sup> Protestors or freedom fighters may be arrested and detained for fighting for a legitimate cause. Furthermore, the Act excludes from the ambit of the definition of terrorist activity and from the offence of terrorism, any act committed during a struggle waged by people fighting for self-determination,

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<sup>203</sup> *International Convention for the Suppression of the Financing of Terrorism* 1999.

<sup>204</sup> S 11 of the POCDATARA 33 of 2004.

<sup>205</sup> S 14 of the POCDATARA 33 of 2004.

<sup>206</sup> S 12 of the POCDATARA 33 of 2004.

<sup>207</sup> Cachalia 2010 *SAJHR* 516.

<sup>208</sup> Steyn 2001 *SACJ* 179.

<sup>209</sup> Snyman *Criminal law* 43; see also Burchell *South African Criminal Law* 28.

<sup>210</sup> S 18(1)(a)(1) of the POCDATARA 33 of 2004.

<sup>211</sup> Cachalia 2010 *SAJHR* 519.



including any action during the armed struggle in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism.

It is important to note that in order to comply with human rights obligations, the Act does not allow preventative or investigative detention as was provided for by its predecessors, namely the *Internal Security Act* 74 of 1982 and the *Anti-Terrorism Bill*.<sup>212</sup> The reason for not permitting preventative or investigative detention is because such detention amounts to what is well-known as detention without trial and is inconsistent with the provisions of section 12 of the Bill of Rights. Section 12(1)(a) provides that everyone has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause. By permitting detention without trial, the *Draft Anti-Terrorism Bill*<sup>213</sup> was reintroducing the provisions of section 29 of the outlawed *Internal Security Act*<sup>214</sup> which was used to crush any resistance against the policies of the government during the apartheid era. The provisions of clause 16 of the *Draft Anti-Terrorism Bill* providing for detention without trial did not conform to the new policy adopted by the South African government in fighting terrorism, which is to respect the rule of law and protection of fundamental human rights in the prevention and combating of terrorism. The *Draft Anti-Terrorism Bill* was withdrawn because of strong criticism it elicited.

The POCDATARA is a piece of democratic-era legislation which is aimed at protecting the citizens of South Africa against the threat posed by international terrorism. The Act is further expected to protect the fundamental human rights of the inhabitants of the country while fighting international terrorism. However, there are provisions in the Act which violate the rights of the individuals it aims to protect. For example, section 19 of the POCDATARA provides for the forfeiture of property that is reasonably believed to have been used for the commission of terrorist acts. The provisions of section 19 permit the violation of the right not to be arbitrarily deprived of property except by law of general application as provided for by section 25(1) of

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<sup>212</sup> Powell 2005 *SACJ* 151.

<sup>213</sup> *Draft Anti-Terrorism Bill* of 2000.

<sup>214</sup> *Internal Security Act* 74 of 1982.

the Constitution. Section 23 of the POCDATARA provides for a freezing order prohibiting a person from dealing with the property which is believed to be owned or controlled on behalf or at the direction of any entity which has committed or attempted to commit a specified offence, in this instance a terrorist act. Once again, the freezing order denies an individual access to the use or enjoyment of the fruits of his or her property. The application for the freezing order by the National Director of Public Prosecutions is done *ex parte* to a judge in chambers. The *ex parte* application excludes the *audi alteram partem* rule which means the party against whose property the freezing order is brought, is not offered a chance to state his or her case.<sup>215</sup> The stop and search of vehicles and persons in terms of section 24 of the POCDATARA violates the right to privacy of the person as protected by the provisions of section 14 of the Constitution.

Lastly, the POCDATARA attempts to criminalise all conduct that may result in an act of terrorism or which is related to terrorism. Nevertheless, the offences relating to hoaxes in terms of legislation are formulated vaguely and do not accord with the principle of legality.<sup>216</sup> The principle of legality requires that before an accused person may be found guilty and sentenced for an offence, the conduct with which he or she is charged should: (a) have been recognised by the law as a crime; (b) in clear terms; (c) before the conduct took place; and (d) without the court having to stretch the meaning of the words and concepts in the definition to bring the specific conduct within the compass of the definition.<sup>217</sup> Of utmost importance is that the offence must be created in clear terms and the court must not have to stretch the meaning of the terms used to accord with the definition of the offence. Therefore, the POCDATARA does not set out the hoax offence clearly within the meaning of the offence of terrorism. For example, a hoax may be made without the intention of committing an act of terrorism.<sup>218</sup>

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<sup>215</sup> Redpath 2000 *ASR* 1.

<sup>216</sup> S 13(1)(a) provides that any person who, with the intention of inducing in a person anywhere in the world a false belief that a substance, thing or device is, or contains, or is to be, a noxious substance or thing or an explosive or other lethal device (i) places that substance, thing or device in any place; or (ii) sends a thing or device from one place to another, by post, rail or any other means whatsoever is guilty of an offence.

<sup>217</sup> Snyman *Criminal Law* 39.

<sup>218</sup> Cachalia 2010 *SAJHR* 524.

#### 7.5.4 *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006*

The *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006* (hereafter the PMA) repeals the *Regulation of Foreign Military Assistance Act*.<sup>219</sup> The main objective of the PMA is to prohibit mercenary activities and the provision of assistance of a military nature in a country of armed conflict. Prohibition of mercenary activities by the PMA conforms to the prohibition laid down by the *OAU Convention for the Elimination of Mercenarism in Africa*.<sup>220</sup> In accordance with the *OAU Convention for the Elimination of Mercenarism* a mercenary is defined as:

A person who is specially recruited locally or abroad in order to fight in an armed conflict; and does in fact have a direct part in the hostilities; is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict a material compensation; is neither a national of a party to the conflict nor resident of territory controlled by a party to the conflict; is not a member of the armed forces of a party to the conflict and is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.<sup>221</sup>

Therefore, in addition to the prohibitions laid down by the *Convention*, the PMA regulates the enlistment of South African citizens or permanent residents in other armed forces as a measure of combating and preventing terrorism. In terms of the PMA an armed conflict includes any situation in a regulated country as proclaimed in terms of section 6; the armed forces of any state; armed groups; armed forces of any occupying power; and dissident or rebel armed forces or any other armed group.<sup>222</sup> Assistance in terms of the PMA includes any form of military or military-related assistance, service or activity; any form of assistance or service to a party to an armed conflict by means of training; provision of personnel, financial, logistical, intelligence, operational support, medical or para medical assistance.<sup>223</sup>

It is worth noting that the PMA was enacted in reaction to the increasing participation of private security companies in armed conflicts outside of South

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<sup>219</sup> *Regulation of Foreign Military Assistance Act 15 of 1998.*

<sup>220</sup> *OAU Convention for the Elimination of Mercenarism in Africa 1977.*

<sup>221</sup> Art 1(a) – (f) of the *OAU Convention for the Elimination of Mercenarism in Africa 1977.*

<sup>222</sup> S 1(a) (i) – (iv) of the PMA 27 of 2006.

<sup>223</sup> S 1(b) (i) – (iv) of the PMA 27 of 2006.

Africa.<sup>224</sup> South Africans in mercenary and private security companies are known to have been involved in armed conflict in African countries such as Sierra Leone and Angola.<sup>225</sup> Of importance is that the PMA has been phrased in the spirit of the Constitution which advocates living in peace and harmony, and as a result precludes South Africans from participating in any armed conflict, nationally or internationally, except as provided for by the Constitution or national legislation.<sup>226</sup> In terms of the PMA, no person may, within the Republic or elsewhere, participate in an armed conflict as combatants for private gain<sup>227</sup> or recruit, use, train, support or finance a combatant for private gain in armed conflict.<sup>228</sup> Furthermore, the PMA prohibits participation in an armed conflict or *coup d'état*, uprising, or rebellion against any government or even overthrowing a government.<sup>229</sup> In *Kauda and Others v President of the RSA and Others*,<sup>230</sup> the applicants were arrested and detained in Zimbabwe after their plane landed to collect armaments in transit to overthrow the Equatorial Guinea government. The applicants lodged an application in the Constitutional Court contending that their rights to a fair trial, dignity, life and freedom were infringed and that if they were to be extradited to Equatorial Guinea their rights will continue to be infringed. The Court held that the Bill of Rights does not have general application outside the borders of South Africa. Consequently the application by the applicants that the Bill of Rights<sup>231</sup> obliges the state to protect and promote the rights of the South Africans in foreign countries was dismissed.

While the PMA prohibits South Africans or permanent residents to enlist in any foreign military forces, section 7 of the Act provides for exemption of those who are

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<sup>224</sup> Gumedze 2012 accessed at: <http://www.issafrica.org/iss-today/addressing-mercenaries-and-pmscs-in-the-south-afr> [date of use 11 Dec 2014].

<sup>225</sup> Jacobs 2013 accessed at: <http://iisonline.net/south-africas-view-counter-mercenary-law> [date of use 11 Dec 2014].

<sup>226</sup> S 198(b) of the Constitution.

<sup>227</sup> S 2 (1)(a) of the PMA 27 of 2006.

<sup>228</sup> S 2(1)(b) of the PMA 27 of 2006.

<sup>229</sup> S 2(2)(c) – (d) of the PMA 27 of 2006.

<sup>230</sup> *Kauda and Others v President of the RSA and Others* 2005 4 SA 235 CC.

<sup>231</sup> S 7(2) of the Constitution.

granted the necessary authorisation.<sup>232</sup> Therefore, participation in an armed conflict outside of South Africa is a punishable offence.<sup>233</sup>

### **7.6. Protection of human rights by the pre-1994 legislation**

The pre-1994 counter-terrorism legislation in South Africa violated the human rights of those suspected of involvement in terrorist activities while the post-1994 legislation conforms to human rights norms. The following discussion analyses how the pre-1994 affected the human rights of terrorist suspects. Furthermore, the discussion of post-1994 legislation put more emphasis on the protection of human rights while fighting terrorism.

### **7.7. The violation of human rights by pre-1994 counter-terrorism legislation**

There is no doubt that the South African counter-terrorism legislation of the pre-1994 dispensation violated the human rights of many people. The promulgation and enforcement of counter-terrorism legislation led to repression which was not welcomed by the so-called liberation movements in South Africa. Increased repression led to protests by members of liberation movements. The protests by the liberation movements led to the passing of the *Public Safety Act*<sup>234</sup> which paved the way for the declaration of a state of emergency to prevent protests and stay-a-ways that were frequently used to voice the dissatisfaction of the oppressed. In terms of this legislation, a state of emergency could be proclaimed for a period of 30 days.

What follows is a discussion of relevant of human rights violations by the pre-1994 counter-terrorism legislation.

#### **7.7.1 Detention without trial**

Detention was the most important weapon used to prevent and combat terrorism in South Africa. The *Public Safety Act*,<sup>235</sup> which empowered the declaration of the state of emergency, authorised indefinite detention without trial of any person suspected

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<sup>232</sup> S 7 of the PMA 27 of 2006 provides that any person who applies for authorisation must submit to the application for authorisation to the committee.

<sup>233</sup> S 10 of the PMA 27 of 2006.

<sup>234</sup> *Public Safety Act* 3 of 1953.

<sup>235</sup> *Public Safety Act* 3 of 1953.

of being involved in terrorist activities.<sup>236</sup> Security legislation such as the *Internal Security Act*<sup>237</sup> and the *Terrorism Act*<sup>238</sup> also authorised detention without trial. Potential witnesses in terrorism-related cases were also detained for a period of six months if no proceedings were initiated.<sup>239</sup> Furthermore, section 30 of the *Internal Security Act* allowed the Attorney-General to issue an order that certain persons should not be released on bail. The Attorney-General issued the order only when he or she deemed it necessary for the security of the state or maintenance of law and order.<sup>240</sup> The arrest and detention without trial of suspected terrorists was in violation of detainees' rights to freedom and security of the person in terms of the ICCPR.<sup>241</sup> Furthermore the right to fair hearing in terms of the UDHR was violated.<sup>242</sup>

### 7.7.2 Interrogation of detainees

In terms of the *Internal Security Act*<sup>243</sup> detainees suspected of having committed offences related to national security could be interrogated until the Commissioner of Police was of the opinion that the questions had been answered satisfactorily.<sup>244</sup> The answering of questions was compulsory. Compulsory interrogation was encouraged by the rule that where a party remains silent when accused of an offence, if innocent, he will be deemed to have admitted the truth of the accusation.<sup>245</sup> Therefore, compulsory interrogation was in violation of the right to remain silent. Most importantly, the protection of the right to remain silent guarantees the right

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<sup>236</sup> Burchell 1987 *SAJHR* 377.

<sup>237</sup> *Internal Security Act* 74 of 1982 authorised indefinite preventative detention.

<sup>238</sup> S 6 of *Terrorism Act* 83 of 1967 allowed anyone suspected of being involved in terrorist activities to be detained for an indefinite period without trial on the authority of the Senior Police officer.

<sup>239</sup> S 31 of the *Internal Security Act* 74 of 1982: see also van den Wyngaert 1986 *SAJHR* 284.

<sup>240</sup> Marcus 1985 *SAJHR* 236.

<sup>241</sup> Art 9 of the ICCPR 1966.

<sup>242</sup> Art 10 of the UDHR 1948 provides that: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

<sup>243</sup> S 29 of the *Internal Security Act* 74 of 1982; see also Burchell 1987 *SAJHR* 377; see further Baxter accessed at: <http://www.disa.ukzn.ac.za/webpages/Dc/renov85.4pdf> [date of use 30 Apr 2014].

<sup>244</sup> Hiemstra *Introduction* 74; see also *Farasani v Minister of Justice and Others* 1987 2 SA 321 (V) at 330 para B where the court in confirming detention held that the arresting officer had the reason to believe that the detainees had information relating to terrorists which they were withheld from the police and that they did not answer questions put to them satisfactorily.

<sup>245</sup> Scoble *The Law of Evidence* 152. See also s 35(3)(h) of the Constitution.

against self-incrimination.<sup>246</sup> However, the court in *S v Weinberg*<sup>247</sup> held that interrogation under compulsion was irregular.

### 7.7.3 Trial Proceedings

The right to a fair trial is protected by the provisions of section 35(3) of the Constitution in current democratic South Africa. Trial proceedings of the so-called terrorists during the period before 1994 were characterised by violations of the right to a fair trial. For example, where an accused person was charged with terrorist offences under the *Internal Security Act* 74 of 1982,<sup>248</sup> the exclusion of the public from the trial proceedings was a must.<sup>249</sup> Evidence was heard behind closed doors.<sup>250</sup> The exclusion of the public from the trial proceedings contravened articles 10 of the UDHR and 14 of the ICCPR.<sup>251</sup>

### 7.7.4 Torture

Counter-terrorism legislation such as the *Public Safety Act* 3 of 1953 and the *Internal Security Act* 74 of 1982 provided for detention of those suspected of involvement in terrorist activities. The detainees were subjected to interrogation which was accompanied mostly by different forms of torture such as assault, denial of sleep, electric shocks, lengthy interrogation, and standing for long periods.<sup>252</sup> The objective

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<sup>246</sup> Theophilopoulos 2003 *Stell LR* 161.

<sup>247</sup> *S v Weinberg* 1966 4 SA 660 (A) at 667; see also *S v Lwane* 1996 2 SA 433 (A) where the court convicted the accused based on self-incriminating evidence which was tendered without a warning as a witness in a preparatory examination. The Appeal Court at 444 para C held as follows, "according to the high judicial tradition of this country, it is not in the interest of the society that an accused should be convicted unless he has had a fair trial in accordance with the accepted tenets of adjudication."

<sup>248</sup> S 54 of *Internal Security Act* 74 of 1982.

<sup>249</sup> S 65 of the *Internal Security Act* 74 of 1982 provides for the exclusion of the public from trial proceedings.

<sup>250</sup> Hiemstra *Introduction* 64.

<sup>251</sup> Art 10 of the UDHR 1948 provides that: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations and of any criminal charge against him. See also article 14 of the ICCPR 1966 which provides that: all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

<sup>252</sup> Dugard *Report on the Rabie Report* 28-31; see also Swart and Fowkes 2009 *SALJ* 780.

of torture was to force the detainees to confess and divulge information about terrorist activities, and even to incriminate themselves.<sup>253</sup>

As a result of torture, some of those who were detained died in custody, most notably Steve Biko in 1977.<sup>254</sup> There were also suspicions of the killings of civil rights attorney Griffith Mxenge who was murdered in 1982, and the Cradock Four, Matthew Goniwe, Sparrow Mhonto, Sicelo Mhlawulo, and Fort Calata, who were murdered in 1985. The death of the medical practitioner and community leader Fabian Ribero and his wife in 1986, was a killing suspected to have been committed by the security police in order to prevent the resistance by members of the liberation movements.<sup>255</sup>

The torture of detainees was in contravention of the provisions of the ICCPR.<sup>256</sup> Nowadays, torture would violate the provisions of section 12 of the Constitution which protects the right to be free from all forms of violence, from either private or public sources.

#### *7.7.5 Restrictions on the media*

The *Public Safety Act* allowed for the imposition of restrictions on the press and on the reporting of protest-related matters. The restrictions on the press prohibited the presence of the mass media at places where there was unrest and the photographing of security control by police, which often included brutal attacks on the protesters.<sup>257</sup> Furthermore, the taking of photographs or the making of a drawing of any unrest or security action which would include the damaging or destruction of property and the injuring or killing of persons without the permission of the commissioned officer of the security police, was prohibited. The Commissioner of Police was further empowered to prohibit the publication, importation or

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<sup>253</sup> Swart and Fowkes 2009 *SALJ* 786.

<sup>254</sup> Muntingh accessed at: <http://www.safli.org/za/journals/LDD/2008/3.pdf> [date of use 1 Nov 2012].

<sup>255</sup> Van der Vyver 1988 *SAJHR* 72.

<sup>256</sup> Art 7 of the ICCPR 1966 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment; see also art 5 of the UDHR 1948 which also provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment; see also Keightley 1995 *SAJHR* 379; see further S 12 of the Constitution which provides for the freedom and security of the person. Section 12 (1) provides for the freedom to be free from all forms of violence; (d) not to be tortured in any way and (e) not to be treated or punished in a cruel, inhuman or degrading way.

<sup>257</sup> Van der Vyver 1988 *SAJHR* 72; see also Cameron, Marcus and Smit 1989 *ASSAL* 565.



production of any material related to subversive statements or imported, published or produced without the approval of the Commissioner of Police.<sup>258</sup> According to Heyns,<sup>259</sup> a subversive statement is a statement which contains anything which is calculated or likely to have the effect of inciting the public or any person or category of persons to take part in any acts of civil disobedience. Material produced or imported for the purpose of publication could be seized by the police. The Minister of Home Affairs and the Commissioner of Police were vested with the powers of seizure including the seizure of a film, television programme, or sound recording if it was deemed to relate to subversive statements.<sup>260</sup> However, the powers of seizure of the Commissioner were successfully challenged in *Natal Newspapers (Pty) Ltd and Others v State President of the Republic of South Africa*.<sup>261</sup> In this case, the court found that the delegation to the Commissioner of Police of the power to make orders with regard to any matter in addition to matters specified by the State President, including powers conferred on members of the security police to seize publications, were *ultra vires* on the ground of vagueness, and further that the delegation was not authorised. The restriction on media violated the right to freedom of opinion and expression in terms of the UDHR.<sup>262</sup>

### 7.7.6 Banning of individuals and organisations related to terrorism

The banning of liberation movements or organisations such as the ANC, the PAC, and the UDF was one of the measures invoked to suppress terrorism in South Africa.<sup>263</sup> The banning of these organisations was to silence protesters.<sup>264</sup> The SACP

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<sup>258</sup> Cameron, Marcus and Smit 1989 *ASSAL* 563; see also *Ndabeni v Minister of Law and Order and Another* 1984 3 SA 500 (D) where the court was called upon to address the question whether the police officer who seized the publications had reasonable grounds to believe that the magazine promoted the aims of an unlawful organisation. The court at 513 held that the mere publication of a magazine which advocated, advised, defended or encouraged the achievement of the objects of the organisation was not distinctive of an unlawful organisation. The court ordered that the seized magazine be returned to the owner, the applicant.

<sup>259</sup> Heyns *A Jurisprudential Analysis* 372.

<sup>260</sup> Cameron, Marcus and Smit 1989 *ASSAL* 564.

<sup>261</sup> *Natal Newspapers (Pty) Ltd and Others v State President of the Republic of South Africa and Others* 1986 4 SA 1109 (N) at 1129 para E; see also *Metal and Allied Workers Union and Another v State President of the Republic of South Africa and Others* 1986 4 SA 358 (D) where the Durban Coastal Local Division struck down some parts of the definition of subversive statements mentioned in media emergency regulations on the grounds that they were vague.

<sup>262</sup> Art 19 of the UDHR 1948 and 19 of the ICCPR 1966.

<sup>263</sup> Ss 4 & 13 of the *Internal Security Act* 74 of 1982.

<sup>264</sup> Heyns *A Jurisprudential Analysis* 369.

was the first organisation to be declared unlawful in terms of the *Internal Security Act*,<sup>265</sup> while the ANC and PAC were declared unlawful in terms of the *Unlawful Organisations Act*.<sup>266</sup> The activities of the organisations suspected of terrorism could also be restricted under the *Affected Organisations Act*.<sup>267</sup> Meetings by the members of these organisations declared unlawful were also prohibited.<sup>268</sup>

The *Internal Security Act* 74 of 1982 vested the Minister of Justice with the discretion to restrict the personal freedom of individuals in respect of membership of organisations, their presence at certain places, and their attendance of gatherings.<sup>269</sup> The legislation violated the right to freedom of association, assembly, demonstration, picket and petition, as well as peaceful and unarmed protest.<sup>270</sup> The right to freedom of association is nowadays protected by section 18 of the Constitution.

#### 7.7.7 *Interference with academic policies*

The counter-terrorism legislation also had unfair repercussions for academic institutions such as universities. The banning of study material and state interference in admission policies of students into academic institutions are some of the actions adopted by the government in order to prevent terrorist-related acts in terms of security legislation.<sup>271</sup> The Director-General of Education and Training was empowered to prohibit the presentation of any course or syllabus which, according to the Director-General, was a threat to the maintenance of peace and security. The Director-General could further prohibit the wearing, possession or displaying in schools or hostel premises of T-shirts or clothing or stickers in support of terrorist organisations such as the ANC and PAC.<sup>272</sup> The interference with academic policies

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<sup>265</sup> *Internal Security Act* 44 of 1950, s 2(1) of the *Internal Security Act* 44 of 1950 provides for the declaration of an organisation as an unlawful organisation.

<sup>266</sup> *Unlawful Organisation Act* 34 of 1960.

<sup>267</sup> *Affected Organisations Act* 31 of 1974.

<sup>268</sup> Heyns *A Jurisprudential Analysis* 370.

<sup>269</sup> Ss 18-22 of the *Internal Security Act* 74 of 1982; see also Anderson accessed at: [www.isrcl.org/papers/2008/Anderson.pdf](http://www.isrcl.org/papers/2008/Anderson.pdf) [date of use 5 Nov 2013].

<sup>270</sup> Art 21 of the ICCPR 1966.

<sup>271</sup> S 56 (1) of the *Internal Security Act* 74 of 1982 prohibits the production, printing, publication and dissemination of any speech, utterance, writing or statement of certain banned persons; see also Van Der Vyver 1988 *SAJHR* 73.

<sup>272</sup> Cameron *et al* 1989 *ASSAL* 567.

violated the right to education as guaranteed by the ICCPR.<sup>273</sup> Apart from the ICCPR, the right to education is nowadays protected by section 29 of the Constitution.

### **7.8. Protection of human rights by post-1994 legislation**

It goes without saying that terrorist activities violate human rights and for this reason the 1993 World Conference on Human Rights condemned terrorism.<sup>274</sup> On 17 of December 1999, the UNGA observed that:

Considering that terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and undermine pluralistic civil society, the general Assembly recognises that terrorist acts are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity of and security of states and having adverse consequences for the economic and social developments of states.<sup>275</sup>

The UNGA appreciates the fact that it is not only possible, but absolutely necessary, to fight terrorism while respecting human rights, the rule of law, and where applicable, international human rights law. South Africa as a democratic state is obliged by its Constitution to respect human rights and uphold the rule of law.<sup>276</sup>

The preamble to the Constitution provides that the people of South Africa recognise the injustices of the past, honour those who suffered for justice and freedom, respect those who have worked to build and develop the country, and believe that South Africa belongs to all who live in it, united in their diversity.<sup>277</sup> The Constitution is the supreme law of the land. The preamble is complemented by the supremacy clause which provides that the Constitution is the supreme law of the Republic, that

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<sup>273</sup> Art 18(4) of the ICCPR 1966 provides that States Parties to the Covenant undertake to have respect for the liberty of parents and when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their convictions; see also Art 26(1) of the UDHR 1948 which provides for the right to education for everyone. Art 26 (2) provides that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

<sup>274</sup> United Nations Conference Doc 157/23.

<sup>275</sup> UNGA res 54/164 of 1999 accessed at: [www.un.org/documents/ga/docs/56/a56190.pdf](http://www.un.org/documents/ga/docs/56/a56190.pdf) [date of use 14 Jan 2015].

<sup>276</sup> S 7 of the Constitution.

<sup>277</sup> Bekink *Principles* 155.

law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.<sup>278</sup>

The Constitution goes further to provide that the Bill of Rights is the cornerstone of democracy in South Africa.<sup>279</sup> It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. Therefore, the state must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>280</sup> Section 7 of the Constitution clearly outlines the obligations of the democratic government of South Africa which are, *inter alia*, to respect, protect and promote the rights in the Bill of Rights. In order for the government to fulfil its obligations, it requires a peaceful and safe environment. South Africa therefore needs to enact counter-terrorist legislation to prevent and combat terrorist activities in its area of jurisdiction. Subsection 7(1) of the Constitution is complemented by section 12(1) which provides that everyone has the right to freedom and security.<sup>281</sup> The Constitution further provides that the right to freedom and security of the person includes the right to be free from all forms of violence from either public or private sources.<sup>282</sup> In *Zealand v Minister of Justice and Constitutional Development and Another*<sup>283</sup> the Constitutional Court held that imprisonment of a person in maximum security custody that deprived him of his liberty arbitrarily without just cause, was unlawful and infringed his right to liberty in terms of section 12 of the Constitution. Even though the Constitution is not specifically aimed at countering terrorism, it does oblige the government to implement measures that protect the security and freedom of its citizens.

The preamble of the Constitution attempts to address the sensitivities of the abuse of anti-terrorism laws during the apartheid era by stressing the fact that national and international terrorism threaten constitutional democracy.<sup>284</sup> It goes further to suggest that armed struggles, in accordance with international law and in order to

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<sup>278</sup> S 2 of the Constitution; see also Bekink *Principles* 63.

<sup>279</sup> S 7(1) of the Constitution.

<sup>280</sup> S 7(2) of the Constitution.

<sup>281</sup> S 12(1) of the Constitution.

<sup>282</sup> S 12(1)(c) of the Constitution.

<sup>283</sup> *Zealand v Minister of Constitutional Development and Another* 2008 4 SA 458 (CC); see also Penfold and Du Plessis 2008 *ASSAL* 86-87.

<sup>284</sup> Roach 2005 *SACJ* 131.

pursue the legitimate rights to national liberation, self-determination, and independence from colonialism, are not to be classified as terrorist acts.<sup>285</sup> This view makes it clear that the purpose of the Constitution is to protect the constitutional democracy.

What follows is a discussion of the protection of human rights as enshrined in the Constitution. It is argued that while fighting terrorism, South Africa must respect and protect human rights. While terrorism threatens the security of the state, it is the duty of the state to protect the human rights of its citizens. However, the measures adopted to protect the rights of the citizen, often violate the rights of those suspected of involvement in terrorist activities. It consequently becomes important that while the state is allowed to protect its citizens, it must do so without violating of the human rights of the suspected terrorists as provided by the UDHR 1948 and the ICCPR 1966.

What follows is a discussion on the protection of a selected few of the human rights in South Africa. It is important that there be a balance between protection of human rights and the fight against terrorism.

### *7.8.1 The right to life*

The ICCPR<sup>286</sup> provides that every human being has an inherent right to life and this right is protected by law. Therefore no one should be arbitrarily deprived of his life.<sup>287</sup> The UDHR also enshrines the right to life.<sup>288</sup>

Whilst the right to life was protected internationally, the same cannot be said of South Africa prior to 1994. Capital punishment was applicable for certain serious offences, including high treason and terrorism,<sup>289</sup> in terms of repealed provisions of the *Criminal Procedure Act*.<sup>290</sup> Section 277(1) of the *Criminal Procedure Act* the

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<sup>285</sup> Roach 2005 *SACJ* 132.

<sup>286</sup> ICCPR 1966.

<sup>287</sup> Art 6(1) of the ICCPR 1966.

<sup>288</sup> UDHR 1948.

<sup>289</sup> Dugard 1989 *Harv. Hum. Rts. J* 101.

<sup>290</sup> S 277 of the *Criminal Procedure Act* 51 of 1977 provided for the death penalty for those convicted of serious crimes such as murder, high treason and other terrorism related offences; see also Hiemstra *Introduction* 90; see further *S v Masina* 1990 (4) SA 709 (A) where the court held that the sentencing court had to find death to be the only appropriate sentence to be imposed, with due regard to the presence and absence of mitigating or aggravating factors.

penalty for murder was death unless the court found extenuating circumstances.<sup>291</sup> By 1988, 101 death sentences had been passed for convictions of unrest or terrorism-related offences.<sup>292</sup> However, due to the unfairness of the death sentence Lawyers for Human Rights, and the Society for the Abolition of the Death Penalty in South Africa, opposed the imposition of the death penalty as a sentence.<sup>293</sup> The Constitution now makes the right to life a non-negotiable right or a right from which no derogation is allowed.<sup>294</sup> The Constitution provides that the state must respect, protect, promote and fulfil the rights enshrined in the Bill of Rights and this implies that the Constitution places an obligation on the state to protect its citizens against acts or conduct that threaten life.<sup>295</sup> Capital punishment was outlawed by the Constitutional Court in the leading judgment of *Makwanyane*.<sup>296</sup> The death sentence has been invalidated as it is inconsistent with the fundamental right to dignity, the right to life, and the right not to be subjected to inhuman punishment despite the strong public opinion in favour of its retention.<sup>297</sup>

The disparity in the imposition of the death sentence by different judges before 1994 added to the problem of the unfairness of the sentences.<sup>298</sup> It appeared that there were judges who were in favour of the death penalty and thus frequently imposed the sentence on those convicted, while judges not in favour of the death penalty did not impose the death sentence. In the case of *S v Makwanyane*,<sup>299</sup> Mohamed J held that the right to life included the right of every person not to be deliberately killed by the state as a method of punishment. In protection of the right to life, the Constitutional Court in *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and*

<sup>291</sup> Goldfarb 1990 *SAJHR* 266.

<sup>292</sup> Murray and Sloth-Nielsen 1988 *SAJHR* 393.

<sup>293</sup> Ellmann 1990 *SAJHR* 243.

<sup>294</sup> S 11 of the Constitution; see also art 4 of the *African Charter on Human and Peoples Rights* 1981 which provides that: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

<sup>295</sup> S 7(2) of the Constitution.

<sup>296</sup> *S v Makwanyane* 1995 3 SA 391 (CC); see also *Catholic Commission v Attorney-General Zimbabwe* 1993 4 SA 239 (ZSC) where the court emphasised the unacceptable danger of the death sentence in that different judges would pass different sentences on the same facts or that the procedures preceding execution and or any method of execution amount to cruel and inhuman punishment.

<sup>297</sup> Currie and De Waal *The Bill of Rights* 282.

<sup>298</sup> Murray, Sloth-Nielsen & Tredoux 1989 *SAJHR* 161.

<sup>299</sup> *S v Makwanyane* 1995 3 SA 391 (CC) at para 269; see also Maduna 1996 *SAJHR* 197.

*Another Intervening*)<sup>300</sup> held that it was against the provisions of the Bill of Rights to deport or extradite a person to a country where there was a possibility of that person being executed. The case involved the violation of the right to dignity in terms of section 10 of the Constitution. The appellant, Mohamed, was deported to the USA to stand trial before the Federal Court on terrorism relating to offences for which he, if convicted, could be sentenced to death. The Court held that in order to comply with the protection of rights enshrined in the Bill of Rights, the South African government was bound to secure an undertaking from the country to which a person was delivered that the death penalty would not be imposed.

Article 1 of Protocol 6 to the *European Convention on Human Rights* 1950 provides that the death penalty shall be abolished and no one shall be condemned to such penalty or executed. Imprisonment for life is presently the applicable sentence instead of the death penalty.<sup>301</sup> It appears from the discussion above that the South Africa complies with this provision.

#### 7.8.2 *The right to liberty and security*

Torture or a cruel, inhuman or degrading punishment is prohibited in customary international law<sup>302</sup> by means of conventions such as the ICCPR<sup>303</sup> and the UDHR.<sup>304</sup> For example, the ICCPR provides that no one shall be subject to cruel, inhuman or degrading treatment or punishment.<sup>305</sup> The right against torture is also protected by the UDHR which also provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment.<sup>306</sup> Furthermore, the right against torture is protected by the *African Charter on Human and Peoples Rights*.<sup>307</sup>

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<sup>300</sup> *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of Death Penalty in South Africa and Another Intervening)* 2001 3 SA 893 (CC); see also *Judge v Canada* 1994 1-2 IHHR 161 where it was held that Canada had violated the right to life by deporting a person to the USA where he was sentenced to death, without first obtaining assurance from the USA that the death penalty would not be imposed.

<sup>301</sup> Burchell *Principles of Criminal Law* 119.

<sup>302</sup> Keightley 1995 *SAJHR* 379.

<sup>303</sup> ICCPR 1966.

<sup>304</sup> UDHR 1948.

<sup>305</sup> Art 7 of the ICCPR 1966.

<sup>306</sup> Art 5 of the UDHR 1948.

<sup>307</sup> Art 5 of the *African Charter on Human and Peoples Rights* 1981 provides that every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

In compliance with the above instruments, section 12(1) of the Constitution provides that everyone has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause,<sup>308</sup> not to be detained without trial,<sup>309</sup> to be free from all forms of violence from either public or private sources,<sup>310</sup> not to be tortured in any way,<sup>311</sup> and not to be treated or punished in a cruel, inhuman or degrading way.<sup>312</sup> The Republic of South Africa further ratified the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*<sup>313</sup> 1984 which criminalised the act of torture.<sup>314</sup> For the purposes of the Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession. Furthermore, torture includes punishing a person for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>315</sup> In terms of the Convention, states parties are obliged to put in place measures to prevent and combat torture, cruel inhuman and degrading treatment or punishment.<sup>316</sup> Article 16 of the Convention also obliges states parties to put measures in place to prevent other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.

Before 1994, arbitrary detention and torture of suspected terrorists by the security forces in an attempt to combat terrorist activities was common. Infliction of corporal

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<sup>308</sup> S 12(1)(a) of the Constitution.

<sup>309</sup> S 12(1)(b) of the Constitution.

<sup>310</sup> S 12(1)(c) of the Constitution.

<sup>311</sup> S 12(1)(d) of the Constitution.

<sup>312</sup> S 12(1)(e) of the Constitution.

<sup>313</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* 1984.

<sup>314</sup> Balule *et al* 2008 SAJHR 123. See also Mubangizi 2001 SACJ 321.

<sup>315</sup> Art 1(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984.

<sup>316</sup> Art 10 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984.



punishment was one of the types of punishment applied in terms of the *Criminal Procedure Act*.<sup>317</sup> The problem of corporal punishment was first dealt with in *S v Williams*<sup>318</sup> where corporal punishment was found to be in violation of the right not to be treated or punished in a cruel, inhuman or degrading manner. In the same case, Langa J expressed the following sentiments:

The Constitution ensures that the sentencing of offenders must conform to standards of decency recognised throughout the civilised world. Thus it sets a norm; measures that assail the dignity and self-esteem of an individual will need to be justified; there is no place for brutal and dehumanising treatment and punishment.

However infringement of the right to security and liberty may be justifiable in terms of sections 36 of the Constitution.<sup>319</sup>

### 7.8.3 Eavesdropping

Communication has always been important in facilitating organised crime syndicates and terrorist organisations to network. In order for the law enforcement agencies such as the South African Police Services, to be able to combat the activities of these organisations it is important to intercept their communications. In South Africa, the interception of communication is regulated by the *Regulation of Interception of Communications and Provision of Communication-Related Information Act*<sup>320</sup> (hereafter the RICA). In terms of the RICA to intercept means the aural or other acquisition of the contents of any communication through the use of any means including an interception device, so as to make some or all of the contents of a communication available to a person other than a sender or recipient or intended recipient of that communication, and includes the: (a) monitoring of any such communication by

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<sup>317</sup> S 293 of the *Criminal Procedure Act* 51 of 1977.

<sup>318</sup> *S v Williams* 1995 3 SA 632 (CC) at 654 paras G-H; see also *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) at 785 paras C-H where the Constitutional Court was faced with the task of deciding on the legality of corporal punishment. The court held that the ban on corporal punishment as laid down in s 10 of the *South African Schools Act* 84 of 1996 applies to all schools in South Africa.

<sup>319</sup> S 36 of the Constitution provides that (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors' including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and the extent of the limitation; (d) relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

<sup>320</sup> RICA 70 of 2002

means of a monitoring device; (b) viewing, examination or inspection of the contents of any indirect communication; and (c) diversion of any indirect communication from its intended destination to any other destination.<sup>321</sup> The RICA prohibits any person from intentionally intercepting or attempting to intercept or authorise or procure any other person to intercept or attempt to intercept at any place in the Republic any communication in the course of its occurrence or transmission.<sup>322</sup> However, interception may be authorised by a designated judge if he is satisfied that a serious offence will be committed.<sup>323</sup> Furthermore, interception may be authorised for the purposes of gathering of information of an actual threat to a public health, national security or compelling national economic interests of the Republic.<sup>324</sup> Authorisation for the interception of communication relating to organised crime or any offence relating to terrorism or gathering of any information relating to organised crime and terrorism is provided by the RICA.<sup>325</sup> In an effort to prevent the financing of terrorism and organised crime, the RICA provides for the authorisation for the purpose of gathering information concerning property which is or may be an instrumentality of a serious offence, or could be the proceeds of unlawful activity.<sup>326</sup> The interception of communication violates the right to privacy provided by the Constitution.<sup>327</sup> Violation of the right to privacy was dealt in *Protea Technology v Wainer*<sup>328</sup> where the court held that recording by means of a surveillance device violated the right to privacy. However, violation of the right to privacy may be justified if it is authorised by the court of law and it is in terms of the provisions of section 36 of the Constitution.

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<sup>321</sup> S 1 of the RICA 70 of 2002.

<sup>322</sup> S 2 of the RICA 70 of 2002.

<sup>323</sup> S 16(5)(a)(i) of the RICA 70 of 2002; see also Kruger *Organised Crime* 182.

<sup>324</sup> S 16(5)(a) (ii) RICA 70 of 2002.

<sup>325</sup> S 16(5)(a)(iv) RICA 70 of 2002.

<sup>326</sup> S 16(5)(a)(v) of the RICA 70 of 2002.

<sup>327</sup> S 14(d) of the Constitution provides that everyone has the right to privacy, which includes the right not to have the right to privacy of their communication infringed; see also art 12 of the UDHR 1948 and art 17 of the ICCPR 1966 which protects the privacy of correspondence.

<sup>328</sup> *Protea Technology v Wainer* 1997 9 BCLR 1225 (W).

#### 7.8.4 *The right to a fair trial*

The right to a fair trial is one of the important rights outlined in the Constitution.<sup>329</sup> Therefore in terms of the Constitution, the right to a fair trial is a basic right in criminal proceedings.<sup>330</sup> Before 1994, the right to a fair trial was protected by the ICCPR.<sup>331</sup> In *Key v Attorney General, Cape Provincial Division and Another*<sup>332</sup> the court held as follows with regard to the right to a fair trial:

What the Constitution demands is that the accused be given a fair trial. Ultimately fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence albeit obtained unconstitutionally, nevertheless be admitted.

In terms of section 35(3) of the Constitution, every accused person is entitled to a fair trial. The right to a fair trial includes the right to be informed of the charge with sufficient detail to answer to it, to have adequate time and facilities to prepare a defence, to a public trial before an ordinary court, to have the trial begin and conclude without unreasonable delay, to be present when being tried, to choose to be represented by a lawyer and to be informed of this right promptly, to be presumed innocent and to remain silent and not to testify during the proceedings, to mention but a few.<sup>333</sup> In *Freedom of Expression Institute v President, Ordinary Court Martial*<sup>334</sup> the provisions of the *Defence Act*<sup>335</sup> were challenged on the grounds that the Act allowed members of the army to be tried by a Court Martial. The officers of the court were not legally qualified or trained and the court had the power to impose sentences of imprisonment of up to two years. The High Court arrived at the decision that the imprisonment sentence imposed by the court martial was a

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<sup>329</sup> S 35 of the Constitution.

<sup>330</sup> Terblanche *Guide to Sentencing* 11.

<sup>331</sup> Art 14(1) of the ICCPR 1966 provides that: all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair trial and public hearing by a competent, independent and impartial tribunal established by law. The UDHR 1948 provides for the same right in terms of art 10.

<sup>332</sup> *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) at 196 paras B-C.

<sup>333</sup> S 35(3)(a)-(h) of the Constitution.

<sup>334</sup> *Freedom of Expression Institute v President, Ordinary Court Martial* 1999 2 SA 471 (C).

<sup>335</sup> *Defence Act* 44 of 1957.

violation of the right not to be detained without trial as enshrined in the Constitution. The court martial was not an ordinary court and thus, lacked independence.

In *S v Mthwana*<sup>336</sup> the court held as follows:

What an accused person is entitled to, is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice.

The right to a fair trial implies that justice should be done and should be seen to be done, as emphasised in *S v Dzukuda*.<sup>337</sup> The Constitutional Court stressed that at the heart of a fair trial in the field of criminal justice, one has to bear in mind that dignity, freedom and equality are foundational values of the Constitution. The importance of the right to a fair criminal trial is to ensure that innocent people are not wrongly convicted because of the adverse effects which wrong conviction has on the liberty and dignity and other interests of the accused. The rights referred to above will be dealt with in greater detail below.

#### 7.8.4.1 The right to be afforded adequate time and facilities to prepare a defence

The Constitution provides for the right to have adequate time and facilities to prepare a defence.<sup>338</sup> In terms of this right, trial proceedings should only commence once the accused is ready and prepared to begin with trial. The purpose of this right is to ensure that the accused has adequate time to prepare and make an informed decision whether to plead guilty or not guilty to the charge. Furthermore, the right ensures that the accused can decide how to conduct his case as held in *S v Harris*.<sup>339</sup> Therefore, for the court to be sure that the purpose of this right has been complied with, an enquiry must be conducted to determine whether the accused has had a fair opportunity to prepare for trial. The enquiry would include whether the necessary information, such as the contents of the docket, have been furnished to

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<sup>336</sup> *S v Mthwana* 1992 1 SA 343 (A) at 344 paras G-H.

<sup>337</sup> *S v Dzukuda* 2000 2 SACR 443 (CC).

<sup>338</sup> S 35(3)(b) of the Constitution.

<sup>339</sup> See *S v Harris* 1997 1 SACR 618 (C) at 623 where the court on appeal held that the refusal of a postponement of the case against the accused by the Regional Court Magistrate deprived the accused of his right to legal representation. The Regional Magistrate erred in the exercising of his discretion which violated the right to a fair trial of the accused.

the accused as dealt with in *Shabalala v Attorney-General of Transvaal*<sup>340</sup> where the Constitutional Court held that the right to a fair trial would include access to the statements of witnesses and to the contents of a police docket in order to enable an accused person to exercise the right. The *Criminal Procedure Act*<sup>341</sup> makes provision for the exercise of this right. The Act<sup>342</sup> provides that the charge alleging an offence must set out particulars such as the time and place at which the offence is alleged to have been committed, and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed. The rationale is that the charge must be reasonably sufficient to inform the accused of the nature of the charge and to enable him or her to prepare for a trial. Accused persons did not have an opportunity to exercise this right before 1994 as they did not have access to the contents of a police docket.

#### 7.8.4.2 The right to a public trial before an ordinary court

This right is protected by the Constitution.<sup>343</sup> The right to a public hearing is also protected by the provisions of article 10 of the UDHR.<sup>344</sup> The aim of the right is to guard against the inequalities that affect public confidence in the justice system as a result of trials held in secret. Furthermore, the public believe that an independent court will be impartial in reaching its decision. This aspect was illustrated in *In re: Certification of the Constitution of the Republic of SA 1996*<sup>345</sup> where the Constitutional Court held that it is crucial for the judiciary to be independent so that it can enforce the law impartially and that it must function independently from the legislature and the executive. Impartiality of the court is fundamental to a right to a fair trial. In *S v Collier*,<sup>346</sup> the accused requested that the white presiding officer recuse himself from hearing the case and that it be heard by a presiding from previously disadvantaged society. On appeal, the application for recusal was

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<sup>340</sup> *Shabalala v Attorney-General Transvaal* 1996 1 SA 725 (CC).

<sup>341</sup> *Criminal Procedure Act* 51 of 1977.

<sup>342</sup> S 84(1) of the *Criminal Procedure Act* 51 of 1977.

<sup>343</sup> S 35(3)(c) of the Constitution provides that every person has a right to a fair trial which includes the right to a public trial in an ordinary court.

<sup>344</sup> Art 10 of the UDHR 1948 provides that everyone is entitled to a fair public hearing by an independent and impartial tribunal of any charge against him.

<sup>345</sup> *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 10 BCLR 1253 (CC).

<sup>346</sup> *S v Collier* 1995 2 SACR 648 (C) at 650 para G; see also Robinson 1997 *SAJHR* 587.

dismissed. The Court held that the fact that the presiding officer was of a different race did not imply that justice would not be administered impartially. However, before 1994 security legislation such as the *Internal Security Act* 74 of 1982, precluded the hearing of a case in an open court on the ground that the security of the state would be compromised.<sup>347</sup> Section 65 of the *Internal Security Act* specifically excluded the public from terrorism-related trials. Furthermore, the Minister of Law and Order was empowered to determine the court where the trial proceedings involving the violation of the provisions of the *Terrorism Act*, such as sabotage and high treason, could take place.<sup>348</sup> The *Terrorism Act*<sup>349</sup> laid down specific procedures for trial proceedings for those arrested under the Act which meant that cases were not heard by an ordinary impartial court.

#### 7.8.4.3 The right to have the trial begin and conclude without unreasonable delay

Before the constitutional era, the right to have the trial begin and conclude without unreasonable delay was violated by section 29 of the *Internal Security Act* 74 of 1982 which provided for detention without trial which meant that people detained in terms of the Act often never had their day in court. The provisions of section 35(3)(d) of the Constitution outlaws detention without trial that was provided for by section 29 of the *Internal Security Act* during the apartheid era, specifically for those who were arrested for terrorism-related offences. The provisions of the Constitution provide for a right to have the trial commence without a reasonable delay to avoid injustice being suffered by the accused person. The right is further protected by the provisions of article 14 of the ICCPR.<sup>350</sup> Section 342A of the *Criminal Procedure Act*

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<sup>347</sup> S 54 of the *Internal Security Act* 74 of 1982 provided that: (1) Notwithstanding anything to the contrary in any law contained, no person shall be compelled and no person shall be permitted or ordered to give evidence or to furnish any information in any proceedings in any court of law or before any commission as contemplated in the *Communications Act* 8 of 1947, as to any fact, matter or thing as to any communication made to or by such person, and no book or document shall be produced in any such proceedings. If an affidavit purporting to have been signed by the Minister responsible in respect of such fact, matter, thing, communication, book or document, or, in the case of a provincial administration, the Administrator concerned, to the effect that the said Minister or Administrator, as the case may be, he has personally considered the said fact, matter, thing, communication, book or document that, in his opinion, it affects the security of the state and that disclosure thereof will, in his opinion, prejudicially affect the security of the state.

<sup>348</sup> S 4(1) of the *Terrorism Act* 83 of 1967.

<sup>349</sup> S 4(2) of the *Terrorism Act* 83 of 1967.

<sup>350</sup> Art 14(3)(c) of the ICCPR 1966 provides that everyone charged with a criminal offence shall have the right to be tried without undue delay.

provides a remedy where the delay in the starting and finalisation of the proceedings is unreasonable.<sup>351</sup> In providing a remedy, the court may refuse an application for a further postponement and order that the trial proceeded.<sup>352</sup> In *Sanderson v Attorney General, Eastern Cape*<sup>353</sup> it was held that the court should be more tolerant of systematic delays as a result of resource limitations that hamper police investigations or prosecution of the case. This means that before a decision can be taken whether the delay is reasonable or unreasonable and violates the accused's rights, the court must hold an enquiry into the cause of the delay. In *S v Maredi*<sup>354</sup> the decision of the court was that the fundamental right to a speedy trial had been breached as the accused person had been on trial for a period of 22 months and had been in custody for seventeen months.

#### 7.8.4.4 The right to be assisted by a legal representative

The presence of a legal practitioner at trial proceedings serves as a yardstick of the fairness of the trial proceedings. In terms of section 35(2)(b) of the Constitution a detained person has the right to choose to consult with a legal representative and to be promptly informed of this right.<sup>355</sup> The provisions of section 35(2)(b) above are complemented by the provisions of section 73(1) of the *Criminal Procedure Act*<sup>356</sup> which provides that on detention, a detainee immediately qualifies for this right and the right may be invoked during detention, trial, or after trial.<sup>357</sup> In *S v Marx*,<sup>358</sup> the court held that the police were obliged to inform an accused person of his right to legal representation at each and every stage of the case after the arrest, when he made a confession, or when a statement was taken from the accused by the police or when he was questioned. In *S v Sibiya*<sup>359</sup> the accused was not represented

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<sup>351</sup> *Criminal Procedure Act* 51 of 1977.

<sup>352</sup> S 342A(3)(a) of the *Criminal Procedure Act* 51 of 1977.

<sup>353</sup> *Sanderson v Attorney General Eastern Cape* 1998 2 SA 38 (CC).

<sup>354</sup> *S v Maredi* 2000 1 SACR 611 (T); see also *S v Sochop* 2008 (1) SACR 552 (C) at 553 paras I-J where it was held that unreasonable delay to bring a criminal case to trial is not only prejudicial to the accused person, but also brings the justice system into disrepute.

<sup>355</sup> *Kemp et al Criminal Procedure* 133.

<sup>356</sup> *Criminal Procedure Act* 51 of 1977.

<sup>357</sup> *S v Melanie* 1996 1 SACR 335 (E); see also *Bekker et al Criminal Procedure Handbook* 77-79.

<sup>358</sup> *S v Marx* 1996 2 SACR 140 (C); see also *S v Agnew and Another* 1996 2 SACR 535 (C) at 542 para D where the court stressed the fact that the police must on arrest inform the accused of his right to legal representation.

<sup>359</sup> *S v Sibiya* 2004 2 SACR 82; see also *S v Radebe* 1988 1 SA 191 T at 196 paras B-C, the court held as follows with regard to be assisted by a legal representative and be informed of the right,

during the criminal proceedings in the court *a quo*. As a result of not being informed of this right, the appellant could not make an informed decision on whether or not to obtain legal representation. On appeal the proceedings of the court *a quo* were set aside because the appellant had not been informed of his right to legal representation and this constituted a material procedural irregularity which invalidates the proceedings of the court *a quo*. The accused person in a criminal trial should also be afforded a reasonable opportunity to obtain legal assistance.<sup>360</sup> Where the accused person cannot afford the services of a legal representative at his own cost, the accused is entitled to a legal representative at the state's expense.<sup>361</sup> The fear is that where the legal representative is not appointed, an injustice may result. In *S v Mthwana*<sup>362</sup> the court held that each accused person who is accused of a serious crime and is not able to afford a legal representative, should be afforded a legal representative at the expense of the state to avoid an unfair trial. The *Legal Aid Act*<sup>363</sup> also contains a provision for granting legal aid to needy accused persons.<sup>364</sup> This right was protected even before the 1994 democratic era, by article 14(3)(d) of the ICCPR.<sup>365</sup>

#### 7.8.4.5 The accused's right to be present in court and challenge evidence

During the pre-constitutional era, the right to challenge and adduce evidence was excluded by the ouster clause in terms of the provisions of section 29 of the *Internal Security Act* that precluded the court from pronouncing on the validity of the

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"a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place."

<sup>360</sup> Kemp *et al Criminal Procedure* 139; see also *S v Lusu* 2005 2 SACR 538.

<sup>361</sup> Steytler *Constitutional Criminal Procedure* 169; see also Goredema 1997 *SACJ* 241.

<sup>362</sup> *S v Mthwana* 1992 1 SA 343 (A).

<sup>363</sup> *Legal Aid Act* 22 of 1969.

<sup>364</sup> S 3B (a)(i)-(III) of *Legal Aid Act* 22 of 1969 provides that before a court in criminal proceedings directs that a person be provided with legal representation at state expense, the court shall take into account the personal circumstances of the person, the nature and gravity of the charge on which a person is charged or convicted and whether legal representation at state expense has been provided.

<sup>365</sup> Art 14(3)(d) of the ICCPR 1966 provides that everyone charged with a criminal offence shall have the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.



detention of the suspected terrorist detainees.<sup>366</sup> The objective of this right is to afford the accused person an opportunity to challenge evidence linking him or her to the commission of the offence, and further to elicit the truth through cross examination of the witness. The right to adduce and challenge evidence is further supported by a rule of natural justice namely, *audi alteram partem*, which ensures that the accused presents his case before the court. The right protects an accused person from being convicted before he can be heard.<sup>367</sup> In *Meyer v Director of Public Prosecutions, KwaZulu-Natal*<sup>368</sup> the court held that failure to afford the accused an opportunity to cross-examine a witness violated his or her right to a fair trial. This right is bolstered by the right to have access to the statements by witnesses. The access to witness statements enables the accused to challenge the evidence effectively. This aspect was dealt with at length in *Shabalala v Attorney-General Transvaal and Another; Gumede and Others v Attorney-General Transvaal*.<sup>369</sup> The applicants in the case had been served with the summary of the substantial facts which indicated that the four suspects had held the deceased, while others stabbed him with knives. The applicants had been supplied with a list of witnesses. The applicants then applied for access to witness statements and to consult with state witnesses. The court held that for the requirements of the right to a fair trial to be complied with, the accused were entitled to the contents of the police docket. For this right to be effectively exercised, it is important that an accused be present in court as provided by the Constitution<sup>370</sup> and the *Criminal Procedure Act*.<sup>371</sup> In confirming the importance of the presence of an accused in court, the court in *S v Roman and Others*<sup>372</sup> held that the accused's legal representative could not waive the right of an accused to be present in court during the trial proceedings. It is only where the presence of the accused makes it impracticable to continue with the trial

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<sup>366</sup> Basson 1987 *SAJHR* 29.

<sup>367</sup> Mureinik 1989 *SAJHR* 63; see also Van der Leeuw 1987 *SAJHR* 331.

<sup>368</sup> *Meyer v Director of Public Prosecutions KwaZulu-Natal* 2006 4 All SA 598 (N).

<sup>369</sup> *Shabalala v Attorney-General Transvaal and Another; Gumede and Others v Attorney-General Transvaal* 1995 1 SACR 88 (T).

<sup>370</sup> S 35(3)(e) of the Constitution.

<sup>371</sup> S 158 of the *Criminal Procedure Act* 51 of 1977 provides that criminal proceedings shall take place in the presence of the accused.

<sup>372</sup> *S v Roman and Others* 1994 1 SACR 436 at 442 paras H-J.

proceedings, that the court may order that the proceedings be continued in the absence of the accused.<sup>373</sup>

#### 7.8.4.6 The accused's right to be presumed innocent and to remain silent

The right to remain silent and to be presumed innocent was violated by the pre-democratic legislation such as section 6 of *Terrorism Act* 83 of 1967 and section 29 of the *Internal Security Act* 74 of 1982 which empowered the Commissioner of Police to detain persons suspected of being involved in or to have committed terrorism-related acts for interrogation until he was of the opinion that the detainee had satisfactorily answered questions posed to him. This implied that a suspected terrorist was forced to divulge information that could satisfy the interrogator.<sup>374</sup> This right is protected by the provisions of article 14 of the ICCPR.<sup>375</sup> The effect of this right was further dealt with by the Constitutional Court in *Ferreira v Levin NO*,<sup>376</sup> where the court stated as follows:

The right to be silent, the right not to be a compellable witness against oneself, the right to be presumed innocent until proven guilty and refusal to permit evidence of admissions that were not made freely and voluntarily are all composite and mutually re-enforcing parts of the adversarial system of criminal justice that is deeply implanted in our Constitution.

In terms of this right, the prosecution must, without the assistance of the accused person incriminating himself, prove the guilt of the accused as illustrated in *S v Nkwampana*.<sup>377</sup> The purpose of the right against self-incrimination is to protect the accused person from the abuse of criminal procedures by the state and making confessions under duress.<sup>378</sup> It is therefore the duty of the court to inform the accused of the right to remain silent. Once the accused has elected to remain silent, the court is bound to respect the accused's choice. However, the court must inform

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<sup>373</sup> S 159 of the *Criminal Procedure Act* 51 of 1977.

<sup>374</sup> Foster and Luyt 1986 *SAJHR* 297.

<sup>375</sup> Art 14(2) of the ICCPR 1966 provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law."

<sup>376</sup> *Ferreira v Levin NO* 1996 1 BCLR 1 (CC) at 246; see also *S v Mbatha* 1996 3 BCLR 293 (CC) where the court held that "the rights entrenched as a fundamental constitutional value the fact that it is the duty of the prosecution to prove the guilt of the accused person in the criminal case;" see further *S v Thebus and Another* 2003 3 SACR 319 (CC) at 555 para F-G where the Constitutional Court stressed the fact that the rights to remain silent during trial and to be presumed innocent are important rights aimed at protecting the fundamental freedom and dignity of the accused person.

<sup>377</sup> *S v Nkwampana* 1990 4 SA 735 (A) at 744.

<sup>378</sup> Theophilopoulos 2003 *TSAR* 258; see also Currie and De Waal *The Bill of Rights* 746.

the accused of the consequences of remaining silent, and whatever choice he or she opts for must be made voluntarily as illustrated in *S v Cloete and Another*.<sup>379</sup> Therefore, when the accused waives his or her right to remain silent, such decision is constitutionally valid when it is made voluntarily.<sup>380</sup> In addition to informing the accused person of his or her right to remain silent, the court must also inform the accused of the proceedings in terms of section 115 of the *Criminal Procedure Act*.<sup>381</sup> Notwithstanding the fact that the accused has elected to remain silent, the court may ask him or her certain questions with the aim of finding out what is in dispute as regards his or her plea. If the accused remains silent, the court may enter a plea of not guilty on his or her behalf, and this will not imply that a negative inference must be drawn from the silence of the accused person.<sup>382</sup> The right to remain silent should not be confused with the right to be presumed innocent. The objective of the right to be presumed innocent is that a person must not be convicted where there is reasonable doubt with regard to his guilt.<sup>383</sup> The right to remain silent is further protected by the provisions of section 174 of the *Criminal Procedure Act*.<sup>384</sup>

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<sup>379</sup> See *S v Cloete and Another* 1999 2 SACR 137 (C) at 149 para C-E where the court held as follows: "Our criminal procedure placed significant emphasis on a lack of compulsion and upon the case insofar as witnesses are concerned in terms of s 203, it stands to reason that in terms of the spirit, purport and objects of the Constitution the constitutional rights in terms of section 35 with regard to silence and self-incrimination should be similarly considered. The conclusion arrived at, places a considerable burden upon presiding officers, particularly magistrates. They have to inform an accused of his or her constitutional rights and particularly with undefended accused they must ensure that knowledge of such rights, if relevant, is adequately and properly conveyed to the accused and the if there is a waiver the act of a waiver of such rights is carefully considered."

<sup>380</sup> Steytler *Constitutional Criminal Procedure* 330.

<sup>381</sup> S 115(2)(a) provides that where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish when allegations in the charge are in dispute, (b) the court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from accused the whether the allegation which was not placed in issue by the plea or not guilty and may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under S 220.

<sup>382</sup> Steytler *Constitutional Criminal Procedure* 331.

<sup>383</sup> Van Dijkhorst 2001 *SALJ* 26.

<sup>384</sup> S 174 of the *Criminal Procedure Act* provides that at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

In *S v Legote*<sup>385</sup> the Court of Appeal held that it is the duty of the court, at the close of the case for the prosecution where there is no case proved against the accused, to protect the accused from incriminating himself or herself. The same sentiments were echoed in *S v Lubaxa*<sup>386</sup> where the court held that failure to discharge the accused when there is no *prima facie* case against him, is a violation of a right guaranteed by the Constitution in allowing self-incriminatory evidence.

#### 7.8.4.7 The right to have evidence obtained in an unfair manner excluded

The practice of obtaining evidence by means of torture and violence was a common before 1994.<sup>387</sup> The Constitution places a duty upon the court to exclude evidence that has been obtained in a manner that violates any constitutional right.<sup>388</sup> Therefore, evidence obtained in an unfair manner, and which would render a trial unfair if admitted or would otherwise be detrimental to the administration of justice if admitted, should be excluded. Therefore, in *Key v Attorney-General Cape Provincial Division*<sup>389</sup> the court held that it is unfair to admit unconstitutionally obtained evidence if it would render the trial unfair. However, the discretion lies with the trial judge. In *Prokureur-General, Natal v Khumalo*<sup>390</sup> it was held that a pointing out is not admissible as it forms part of an inadmissible confession or admission. The pointing out may be inadmissible for reasons such as that it was obtained by means of violence. The objective of excluding the evidence obtained improperly, illegally or unconstitutionally is to protect the fundamental rights of an accused person in a criminal trial. The Supreme Court of Appeal in *S v Tandwa*<sup>391</sup> dealt with the factors that the court should take into account in determining whether the admission of the challenged evidence would render a trial unfair. The Court held that the competing social interests, the severity of the rights violated, and the degree of prejudice

<sup>385</sup> *S v Legote* 2001 2 SACR 179 (SCA).

<sup>386</sup> *S v Lubaxa* 2001 4 SA 1251 (SCA); see also *S v Mathebula* 1997 10 BCLR 123 (W) where the court held that the right to be presumed innocent and remain silent curtailed the discretion conferred on the court by the provisions of s 174 of the *Criminal Procedure Act*. Consequently the court does not have the discretion to refuse to discharge the accused when there is no evidence implicating him.

<sup>387</sup> Swart and Fowkes 2009 *SALJ* 780; see also Foster and Luyt *SAJHR* 297.

<sup>388</sup> De Vos 2011 *TSAR* 270.

<sup>389</sup> *Key v Attorney-General Cape Provincial Division* 1996 2 SACR 113 (CC); see also *S v Mthembu* ZASCA 51 wherein the Supreme Court of Appeal held that evidence, including real evidence of an accomplice obtained through torture is inadmissible.

<sup>390</sup> *Prokureur-General, Natal v Khumalo* 1994 2 SACR 801 (A).

<sup>391</sup> *S v Tandwa* 2008 1 SACR 613 (SCA); see also Schwikkard *et al Principles of Evidence* 215 – 216.

should be considered. The court went further to state in this case that rights violations are severe when they stem from deliberate conduct by the police. The reason for the exclusion of unlawfully obtained evidence is to protect the accused against self-incrimination which renders the trial proceedings unfair.

7.8.4.8 The right not to be convicted of an omission that was not an offence when it was committed.

This right is protected by article 15 of the ICCPR.<sup>392</sup> In addition to the protection provided by the ICCPR 1966, the Constitution<sup>393</sup> protects the right not to be convicted for an act or omission that was not an offence under either national or international law when it was committed or omitted; and to benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.<sup>394</sup> The objective of this right is to protect people against criminalisation of conduct after it has been committed. For example the pre-1994 South African security legislation such as the *Terrorism Act*<sup>395</sup> provided for the retrospective application to conduct that occurred in 1962.<sup>396</sup> Snyman<sup>397</sup> has dealt extensively with the prohibition against retrospective application of legislation under what is termed the principle of legality as follows: (a) a person ought not to be convicted for conduct which is not recognised by law as a crime; (b) the crime should be defined in clear terms; (c) the crime should have been recognised as a crime before the conduct took place; (d) the elements of an offence should not be interpreted retrospectively; and (e) the imposition of punishment should comply with the four

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<sup>392</sup> Art 15(1) of the ICCPR 1966 provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. No shall a heavier penalty be imposed than the one that was applicable at the time when a criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

<sup>393</sup> S 35(3)(l) of the Constitution; see also article 15(1) of the ICCPR 1966; see further article 11(2) of the UDHR 1948 provides that: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

<sup>394</sup> S 35(3)(l) & (n) of the Constitution.

<sup>395</sup> *Terrorism Act* 83 of 1967.

<sup>396</sup> S 9(1) of the *Terrorism Act* 83 of 1967.

<sup>397</sup> Snyman *Criminal Law* 36.

principles above. It is therefore important that when certain conduct is proscribed, people are able to decide whether or not to engage in that conduct. In *Du Plessis and Others v De Klerk and Another*<sup>398</sup> Kentridge AJ defined retroactivity as follows:

A statute is said to be retroactive if it enacts that as at a post date, the law shall be taken to have been what it was not, so as to invalidate what was previously valid or vice versa.

This aspect was further illustrated by the provisions of section 9(1) of the *Terrorism Act 83 of 1967*.<sup>399</sup> In *S v Marwane*<sup>400</sup> the court held that legislation with retrospective application was in conflict with the prohibition of retrospective offences in accordance with the erstwhile Republic of Bophuthatswana Bill of Rights.<sup>401</sup>

#### 7.8.4.9 The right of appeal to, or review by a higher court

Before the constitutional era, the higher court in hierarchy had the power to review the court decisions in terms of the *Internal Security Act 74 of 1982*. However, the review procedure had serious flaws because the affected persons did not have access to the record of the trial proceedings.<sup>402</sup> Furthermore, the trial court did not have a duty to inform the undefended accused of his right to appeal.<sup>403</sup> Article 14(5) of the ICCPR 1966 provides that everyone convicted of a crime shall have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law. This right is entrenched in the Constitution<sup>404</sup> which protects the right of appeal or review by a higher court. The purpose of this right is to protect the accused person against error, as presiding officers may err with regard to a finding of fact or law. Therefore, a court higher in the judicial hierarchy may hear the appeal or review and make a binding decision.<sup>405</sup> The right to appeal or review can only be

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<sup>398</sup> *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 (CC) at 863 para A-B.

<sup>399</sup> S 9(1) of *Terrorism Act 83 of 1967* provides that this Act except section 3, 6 and 7 shall be deemed to have come into operation on the twenty seventh day of June 1962 and shall, notwithstanding anything to the contrary in any law or the common law contained, apply also in respect of or with reference to any act committed including the undergoing of any training or the possession of anything at any time or after the said date.

<sup>400</sup> *S v Marwane* 1982 3 SA 717 (A) at 747 para B.

<sup>401</sup> *Republic of Bophuthatswana Constitution Act 18 of 1977*.

<sup>402</sup> Mathews 1985 *SAJHR* 200.

<sup>403</sup> Steytler *Constitutional Criminal Procedure* 397.

<sup>404</sup> S 35(3)(O) of the Constitution.

<sup>405</sup> Steytler *Constitutional Criminal Procedure* 394.

exercised once the trial has been concluded before the trial court. The trial court, therefore, has a duty to ensure that the undefended accused person is informed of the right to appeal or review. In *S v Sunday and Another*<sup>406</sup> the court held that the right to a fair trial requires that in cases brought on appeal, the court should be empowered to rectify miscarriages of justice in the form of sentences which are manifestly too light. This view was further supported by the court in *Attorney-General, Eastern Cape v D*.<sup>407</sup> However, for the appeal to be effective, the accused is entitled to the following rights: (a) adequate time and facilities to prepare the appeal; (b) the accused must be provided with reasons for the trial court's decision to prepare for the appeal; and (c) for the undefended accused, the record of the proceedings must be furnished.

#### 7.8.4.10 Right of the accused against double jeopardy

The Constitution<sup>408</sup> provides that the accused has the right not to be tried for an offence in respect of an offence for which he has previously been convicted or acquitted.<sup>409</sup> The aim of this right is that it is in the interest of the accused and the administration of justice that criminal proceedings be brought to finality. This right is supported by the right to have trial proceedings commenced without unreasonable delay.<sup>410</sup> Finality of criminal proceedings precludes re-prosecution of an accused for the same offence or omission.<sup>411</sup> It protects the accused against state oppression as was sanctioned, in the main, by apartheid-era security legislation such as the *Terrorism Act 83 of 1967*. The *Terrorism Act 83 of 1967* provided that when an accused person had been acquitted under the Act, further charges could be instituted under the common law or any other law. In *S v Khoza*<sup>412</sup> the accused were convicted of public violence in their initial trial, and were subsequently charged for the offence of murder emanating from the same conduct. The court, however,

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<sup>406</sup> *S v Sunday* 1994 2 SACR 810 (C) at 821 para H - I.

<sup>407</sup> *Attorney-General, Eastern Cape v D* 1997 1 SACR 473 (E) at 475 para J.

<sup>408</sup> S 35(3)(n) of the Constitution.

<sup>409</sup> S 35(3)(l) of the Constitution; see also art 14(7) of the ICCPR 1966 that provides that: " No one shall be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

<sup>410</sup> S 35(3)(d) of the Constitution; see also article 14(3)(c) of the ICCPR 1966.

<sup>411</sup> Steyler *Constitutional Criminal Procedure* 384.

<sup>412</sup> *S v Khoza* 1989 3 SA 60 (T); see also *S v Mc Intyre* 1997 2 SACR 333 (T) at 337 para D where the court upheld the plea of the *autrefois acquit*.

held that where the conduct occurred at the same time, the court had the discretion to refuse that the case be retried.

### **7.9. Chapter summary**

The aim of Chapter Seven has been to evaluate the effectiveness of the South African counter-terrorism legislation. Although the Republic of South Africa has to date not been the target of significant international terrorist attacks, the country has long implemented legislation to counter acts of terrorism. During the apartheid era counter-terrorism legislation such as the *Public Safety Act*,<sup>413</sup> the *Riotous Assemblies Act*,<sup>414</sup> the *Affected Organisations Act*,<sup>415</sup> the *Internal Security Act*,<sup>416</sup> and other pieces of legislation were promulgated. Although the legislation attempted to prevent and combat terrorism, it was not without controversy. The counter-terrorism legislation before 1994 made serious inroads into the civil and political liberties of the individual. This is evident from legal provisions that permitted detention without trial, and the sweeping provisions on the declaration of a state of emergency. The state of emergency provided the police with draconian powers to arrest without warrant. Furthermore, the *Public Safety Act* had the ouster clause which prohibited courts from interfering in detention powers. Suppression of the right to freedom of expression and the right to association and the exclusion of people from specified areas, were some of the violations resulting from the *Riotous Assemblies Act* and the *Regulation of Gatherings Act*.<sup>417</sup> The provisions of the pre-democratic era counter-terrorism legislation violated numerous of the individual's fundamental human rights. Currently, in the democratic era the Republic of South Africa has experienced an influx of refugees across its borders which makes the country vulnerable to terrorist attacks. In response, the Republic has adopted new legislation such as the POCDATARA,<sup>418</sup> the POCA,<sup>419</sup> and the FICA.<sup>420</sup> This legislation also violates fundamental human rights as provided for by the Constitution. Of utmost

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<sup>413</sup> *Public Safety Act* 3 of 1953.

<sup>414</sup> *Riotous Assemblies Act* 17 of 1956.

<sup>415</sup> *Affected Organisations Act* 31 of 1974.

<sup>416</sup> *Internal Security Act* 74 of 1982.

<sup>417</sup> *Regulation of Gatherings Act* 205 of 1993.

<sup>418</sup> POCDATARA 33 of 2004.

<sup>419</sup> POCA 121 of 1998.

<sup>420</sup> FICA 38 of 2001.



importance, is that this legislation defines terrorist activity rather than terrorism as such. The inability of the legislation to define terrorism creates a loophole which may leave acts of terrorism unpunished. The freezing and forfeiture of property in terms of the POCA violates the right of the individual to possess property as provided for by section 25 of the Constitution. However the violation of rights may be justified in terms of section 36 of the Constitution<sup>421</sup> which provides for the limitation of rights.

South Africa is a signatory member of the *African Charter on Human and Peoples' Rights*<sup>422</sup> (hereafter the *African Charter*) which in its preamble recognises that fundamental rights stem from the attributes of human beings which justify their international protection. The *African Charter* does not provide for the suspension of human rights during emergencies which threaten the security of the state. While the *African Charter* does encourage protection of the security of the state and human rights, the omission of a limitation clause does effect state parties' ability to fight terrorism. The *African Charter* does not encourage protection of human rights from the threat posed by international terrorism.

However, for South Africa to achieve the objective of adopting human rights complaint legislation, it needs to draw on the experience of other states, such as the USA which is at the forefront of the fight against terrorism, and the UK. Ratification of international instruments such as the international conventions against terrorism, the ICCPR 1966, the *Convention against Torture, Cruel or Degrading Treatment or Punishment* 1984, the *International Convention for the Suppression of the Financing of Terrorist Activities* 1999, and other international conventions will help the Republic of South Africa to meet its obligations of complying with international human rights while preventing and combating terrorism within her borders.

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<sup>421</sup> S 36(1) of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extend of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>422</sup> *African Charter on Human and Peoples' Rights* 1981.

## CHAPTER 8

### CONCLUSION AND RECOMMENDATIONS

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#### **8.1 Introduction**

International terrorism poses an increasingly dangerous and difficult threat to counter throughout the world. The USA and UK have on numerous occasions suffered attacks by international terrorist organisations such as Al-Qaeda. Although the Republic of South Africa has not suffered any actual attack by international terrorist organisations, the country remains vulnerable to terrorist attacks. This aspect is complemented by rumours of the presence of Al-Qaeda in South African territory.<sup>1</sup> Like other countries in the world, the three states therefore needed to strengthen their counter-terrorism measures in an effort to prevent and combat terrorism in their respective territories. More aggressive anti-terrorism strategies by the USA, UK and SA needed to be adopted in order to strengthen efforts to discourage states from supporting terrorism; to improve border controls; and to review legislation to counter terrorist activity. States need to prioritise the combating and prevention of terrorist attacks within their borders.<sup>2</sup>

#### **8.2 Background to the research and the research question**

The research question was phrased as follows in Chapter One: How can the Republic of South Africa better protect itself against the threat of international terrorism without violating fundamental human rights?

The research examined the historical context of national counter-terrorism responses by the Republic of South Africa both before and during the democratic era. The legality of different counter-terrorism legislation, such as the *Internal Security Act*,<sup>3</sup> the *Terrorism Act*,<sup>4</sup> and the POCDATARA<sup>5</sup> together with other important legislation, was analysed. The study also compared the legislative regimes against terrorism in

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<sup>1</sup> Rosand and Ipe 2009 ASR 4.

<sup>2</sup> Anon date unknown accessed at: <http://www.fas.org/irp/threat/commission.html> [date of use 12 Nov 2012].

<sup>3</sup> *Internal Security Act* 74 of 1982.

<sup>4</sup> *Terrorism Act* 83 of 1967.

<sup>5</sup> POCDATARA 33 of 2004.

the Republic of South Africa, the USA and the UK. The objective of the comparative study was to identify lessons which the Republic of South Africa can learn in her effort to prevent and combat terrorism within her territory. This was informed by the view that because the USA and UK have been hard-hit by terrorist attacks perpetrated by international terrorist organisations such as Al-Qaeda, and that has led these two countries to develop counter-terrorism legislation, that may provide useful lessons for South Africa. This study also examined the international legal framework against international terrorism. A critical analysis of the importance of the rule of law and human rights-based responses to international terrorism were also addressed.

It is, however, a fact that in order to deal effectively with the problem of terrorism, states require a universally accepted definition of terrorism. States have to date been able to adopt different definitions of terrorism in their respective territories. While there is a lack of a universally accepted definition for terrorism, there is clarity regarding acts of terrorism. The countries under discussion in this research also developed their own national definitions of terrorism. For instance, in the Republic of South Africa, terrorism is defined as:

An incident of violence or the threat thereof against a person, a group of persons or property not necessarily related to the aim of the incident, to coerce a government or civil population not to act according to certain principles.<sup>6</sup>

It was established that the USA has a number of different definitions of terrorism. For example, under USA federal law, terrorism is defined as a crime calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct and to other crimes mentioned in USA legislation, such as unlawful acts against the safety of civil aviation, crimes against internationally protected persons, and so forth.<sup>7</sup> The USA Department of State defines terrorism as:

The premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents.<sup>8</sup>

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<sup>6</sup> Masuku 2002 accessed at: <http://www.humanrightsinitiative.org/publications/nl> [date of use 20 Feb 2012].

<sup>7</sup> Laos date unknown accessed at: <http://www.sam.gov.tr/wp-content/uploads/2012/01/Nicolus-Laos.pdf> [date of use 13 Aug 2013].

<sup>8</sup> See chapter 2 para 2.2.

In the UK the *Terrorism Act* defines terrorism as:

The use of threat of action designed to influence the government or to intimidate the public or a section of the public, and where the use or threat is made for the purpose of advancing a political, religious or ideological cause.<sup>9</sup>

While the three countries have each developed a definition of terrorism applicable within their national borders, the UN has adopted a definition with an international application. However, a decision has not yet been reached regarding an acceptable international definition of terrorism. As a result, the prevention and combating of international terrorism remains a problem within the international community. What follows is a comparative analysis of anti-terrorism legislation in the USA, UK and South Africa.

### **8.3 Analysis of legislation countering terrorism in the USA, UK and South Africa**

The following discussion focuses mainly on the counter-terrorism legislation in the USA, UK and the Republic of South Africa. It is argued that although the legislation in the three states does prevent and combat terrorism, it does have an adverse impact on the human rights of individuals.

#### *8.3.1 United States of America*

The USA Constitution is renowned for its extensive guarantees of civil liberties. The USA participated actively in the drafting of the UDHR thereby infusing it with the values and rights that underpin the USA Constitution. However, in practice many concerns have been raised about the USA's human rights track record especially in relation to how it deals with the suspected terrorists. The *Patriot Act* 2001 is the legislation most strongly criticised for violating the human rights of suspected terrorists. For instance, the *Patriot Act* 2001 provides for the detention without trial of terrorist suspects which was practised mostly at Guantanamo Bay. Preventative detention of the suspected terrorist was based on the fact that their presence in the USA threatens the security of the state.<sup>10</sup> Therefore, preventative detention is based on the thought of what may happen in future which poses a risk of innocent persons being subjected to detention. Consequently, what is criminalised is the thought or

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<sup>9</sup> *Terrorism Act* 2000.

<sup>10</sup> See chapter 5 para 5.4.2.

intentions instead of the actual criminal act, which contradicts the principle of innocent until proven guilty. In addition, preventative detention discriminates against aliens in the USA, for example, it has been used mostly with regard to foreign nationals of Muslim and Arab origin.<sup>11</sup> In *Turkmen v Ashcroft*,<sup>12</sup> Arab and Muslim nationals were detained as suspected terrorist although it was found that they were not involved in the commission of terrorist act and the court had given the detainees voluntary departure to leave the USA.

### 8.3.2 United Kingdom

The UK does not have a written constitution and follows the parliamentary sovereignty form of government. As a measure to protecting human rights, the UK enacted the *Human Rights Act* 1998. In order to combat terrorism the UK enacted counter-terrorism legislation such as the *Prevention of Terrorism (Temporary Provisions) Act* 1974, the *Terrorism Act* 2000, *Anti-Terrorism and Security Act* 2001, and the *Terrorism Act* 2006. The *Anti-Terrorism and Security Act* 2001 provided for severe restrictions on the liberty and privacy of individuals. For example, the Act allowed the Treasury Department to block funds to be given to an individual where it was believed that the individual receiving the funds would act to the detriment of the national security of the UK.<sup>13</sup>

### 8.3.3 South Africa

In line with the principle of constitutionalism, South Africa is described as a constitutional state. The Constitution is the supreme law of the country, and contains a Bill of Rights. The Bill of Rights enshrines the human rights of the people in the country and affirms the democratic values of human dignity, equality and freedom. The pre-1994 counter-terrorism legislation such as the *Public Safety Act* 3 of 1953, the *Internal Security* 74 of 1982 and *Riotous Assemblies Act* 17 of 1956 and others, seriously violated the civil liberties of individuals. With the introduction of the democratic government, a new approach in dealing with international terrorism had

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<sup>11</sup> See chapter 5 para 5.3.1.

<sup>12</sup> *Turkman v Ashcroft* US Dist Lexis 39170 E.D.N.Y June 16 2006; see also *US v Awadallah* 349 F 3d 42, 64 (2d Cir 2003) where the court held detention for the purposes of preventing commission of terrorist acts permits the arrest of a witness to furnish evidence in terrorists related cases.

<sup>13</sup> See chapter 6 para 6.3.1.

to be considered. New counter-terrorism legislation such as the POCDATARA was enacted with the primary objective of preventing and combating terrorism in South Africa. The POCDATARA has its own shortcomings, for example the Act does not define the term terrorism but broadly defines a terrorist act to include offences such as murder, attempted murder, arson, malicious damage to property, and kidnapping.<sup>14</sup> The POCDATARA excludes from its ambit acts committed during a struggle waged by people fighting for self-determination.<sup>15</sup> As a result, there is a possibility that even an unlawful strike may fall within the definition of terrorist activity.<sup>16</sup> Section 16 of the *Anti-Terrorism Draft Bill* 2000 made provision for detention of a suspected terrorist for a period of up to fourteen days with the objective of affording the police an opportunity to interrogate detainees and conducting investigations.<sup>17</sup> The provisions of section 16 were seen and criticised as an attempt to return to apartheid counter-terrorism legislation such as the *Public Safety Act* 3 of 1953 and the *Internal Security Act* 74 of 1982 which provided for detention without trial.<sup>18</sup> Fortunately, the detention clause was not included in the POCDATARA.<sup>19</sup> However, the POCDATARA makes provision for the freezing of assets suspected of benefiting terrorist organisations.<sup>20</sup> The freezing of property is based on a suspicion and not a finding made by a court of law after hearing an application presented before it. Therefore, the POCDATARA contains a reverse onus with regard to the property of suspected terrorists. The reverse onus clause is in contradiction of the established criminal law norm of the presumption of innocence until guilt has been proved beyond a reasonable doubt. The freezing of the property of the suspected terrorist violates the right of the individual in the use of his or her property. Furthermore, the POCDATARA obliges a private person to report the presence of a person suspected of intending to commit or having committed a terrorist offence.<sup>21</sup> The provisions of section 12 of the POCDATARA apply to both past and the future commissions of terrorist acts. Noteworthy is the fact that the

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<sup>14</sup> See chapter 7 para 7.5.3.

<sup>15</sup> See chapter 7 para 7.5.3.

<sup>16</sup> Hubschle 2005 *ASR* 2.

<sup>17</sup> Steyn 2001 *SACJ* 180; see also Cowling 2000 *SAYIL* 344.

<sup>18</sup> Steyn 2001 *SACJ* 193.

<sup>19</sup> Powell 2005 *SACJ* 152.

<sup>20</sup> S 23 of the POCDATARA 33 of 2004.

<sup>21</sup> S 12 of the POCDATARA 33 of 2004; see also Powell 2005 *SACJ* 152.

provisions of section 12 do not allow for the exemption of a person who reports that he or she believes that a terrorist offence has been committed which may result in the 'whistleblower' being prosecuted for contravening the provisions of section 13(1)(b) which prohibit hoaxes.<sup>22</sup> Similarly, failure to report suspicions about a commission of a terrorist offence may be prosecuted. Furthermore, the provisions of section 12 of the POCDATARA do not provide for the privilege against self-incrimination, professional legal privilege, and marital privilege which protects certain communications that may be of use as evidence in trial proceedings.

**8.4 Differences and similarities between the USA, UK and South African counter-terrorism legislation**

The following is a schematic comparative presentation of similarities and differences between the counter-terrorism legislation in the USA, UK and South Africa. It is argued that South African can learn important lessons from the application of the provisions of the different pieces of legislation that could also apply in South Africa.

USA	UK	RSA
(1) S 412 of the <i>Patriot Act</i> 2001 provides for detention without trial for suspected terrorists.	<i>Terrorism Act</i> 2006 provides for 90-day detention without trial for suspected terrorists.	The Constitution of the RSA and the POCDATARA do not permit detention without trial.
(2) Provision for secret trials in terms of the <i>Military Court Act</i> 2006 provides for secret trial proceedings in terrorism-related cases.	Special Immigration tribunals adjudicating on applications for deportation of suspected terrorists are not open to public.	In terms of section 35(3) (c) of the Constitution everyone is entitled to a public hearing in an ordinary court.

<sup>22</sup> S 13(1)(b) of the POCDATARA 33 of 2004 provides that "any person who directly or indirectly Communicates any information, which he or she knows, or ought reasonably to have known or suspected or believes to be false, with the intention of inducing in a person anywhere in the world a belief that a noxious substance or thing or an explosive or other lethal device is likely to be present (whether at the time the information is communicated or later) in or at any place, is guilty of an offence."

USA	UK	RSA
<p>(3) S 3161 of the <i>Speedy Trial Act</i> 1974 provides for a speedy finalisation of the cases against accused persons.</p> <p>No speedy trial is provided in the military courts in terms of the <i>Military Courts Act</i>.</p>	<p>Rule 1(2)(e) of the <i>Criminal Procedure Rules</i> 2005, provides for the criminal case to be dealt with efficiently and expeditiously.</p>	<p>Section 35(3)(d) of the Constitution provides for the right to speedy trial.</p>
<p>(4) Counter-terrorism legislation discriminates against non-citizens who can be detained and deported on suspicion of involvement in terrorist acts.</p>	<p>Counter-terrorism legislation discriminates against non-UK subjects who can be deported for involvement in terrorist acts.</p>	<p>No discrimination is permitted. Section 9 of the Constitution provides for the right to equality.</p>
<p>(5) Section 206 of the <i>Patriot Act</i> permits eavesdropping</p>	<p>Section 5 of the <i>Regulation of Investigatory Powers Act</i> permits eavesdropping</p>	<p>Section 3 of the <i>Regulation of Interception of Communications and Provision of Communication-Related Information Act</i> 70 of 2002 permits eavesdropping</p>
<p>(6) Section 106 of the <i>Patriot Act</i> provides for seizure of the assets of those suspected of involvement</p>	<p>Section 11A of the <i>Crime (International Co-operation) Act</i> 2003 allows the freezing and</p>	<p>Section 23 of the POCDATARA allows the freezing of assets suspected of benefiting</p>



USA	UK	RSA
in terrorist acts.	forfeiture of the suspected terrorist's property inside and outside of EU states.	terrorist organisations.
(7) Article 1 of section 9 USA Constitution provides that the privilege of the writ of <i>habeas corpus</i> shall not be suspended unless during rebellion or invasion, or where the public safety requires the suspension.	Section 14 of the <i>Human Rights Act</i> provides for the limitation of rights	Section 36 of the Constitution provides for limitation of rights. Section 36 provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) less restrictive

USA	UK	RSA
		<p>means to achieve the purpose.</p> <p>(2) Except as provided in subsection (1) or in any other provision of the <i>Constitution</i>, no law may limit any right entrenched in the Bill of Rights.</p>
<p>(8) The US Constitution does not explicitly provide for the declaration of a state of emergency.</p>	<p>The <i>Human Rights Act</i> 1998 does not provide for the declaration of the state of emergency</p>	<p>Section 37 of the Constitution provides for the declaration of a state of emergency in terms of the Act of Parliament and only when: (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace.</p>
<p>(9) Article 27 of the American Convention on Human Rights provides for derogation of human rights during emergencies that threaten the security of</p>	<p>Article 15 of the <i>European Convention on Human Rights</i> provides for derogation of human rights during emergencies that threaten the security</p>	<p>The <i>African Charter</i> to which South Africa is a party does not provide for the derogation of human rights</p>

USA	UK	RSA
the state.	of the state.	

From the above discussion, it is clear that the USA, UK and SA can learn valuable lessons from each country's legislation aimed at countering terrorism.

### **8.5 Principal Findings**

While legislation has been adopted in the different jurisdictions to counter terrorism, it is apparent that this legislation does not deal effectively with the threat posed by terrorism. Legislation such as the POCDATARA, despite having been signed into law, took a long time to be implemented. Furthermore, the legislation is not adequate to fight international terrorism. To be able to fight terrorism effectively, legislation must respect human rights and the rule of law. In the USA legislation aimed at fighting terrorism violated human rights such as the right to liberty, the right to privacy, the right not to be tortured, and the right to life. Detention without trial of suspected terrorists who were then subjected to torture such as waterboarding, are some of the notorious human rights violations sanctioned by counter-terrorism legislation. Legislation such as the *Anti-Terrorism and Death Penalty Act* 1996 authorised the death penalty for those convicted of committing terrorist acts.

In South Africa, the pre-democratic era fight against terrorism had been accompanied by systematic violations of fundamental human rights which are nowadays guaranteed under the Constitution. Most of the counter-terrorism legislation which was enacted such as the *Public Safety Act* 3 of 1953, the *Internal Security Act* 74 of 1982 and others violated the fundamental rights of suspected terrorists. The UK counter-terrorism legislation, such as the *Prevention of Terrorism Act* 2005, violated the right to liberty of those suspected of committing terrorist acts by imposing on them control orders that curtailed movement. The ratification and application of international instruments aimed at combating terrorist acts are still insufficient. The Republic of South Africa has signed most of the international conventions and protocols countering international terrorism, but has not ratified a number of these instruments.

It is submitted that the research addresses the question asked in chapter one. However a balance between prevention and combating terrorism and protection of human rights must be maintained. South Africa must adopt the following measures in order to prevent and combat terrorism in its jurisdiction:

- Development of national legislation to adequately define terrorism to enhance prevention and combating of terrorism;
- Development of adequate national legislation criminalising and punishing acts of terrorism;
- Encourage more prosecution of terrorist offences;
- Development of more stricter laws criminalising the financing of terrorism;
- Accelerate more accession to the outstanding conventions countering terrorism;
- Encourage more judicial cooperation between different jurisdictions to combat terrorism.

### **8.6 Recommendations**

Despite the fact that states have not yet agreed on a common definition of terrorism, there is still an obligation to fight terrorism to protect citizens in different territories. According to the UNSC resolutions, states must ensure that any measure taken to combat terrorism complies with their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee law and humanitarian law. Therefore, the use of force or the military in the fight against terrorism is unacceptable because of the violence involved which results in the violation of the fundamental human rights of the civilians whose interests are to be protected. Examples of such violations include coalition attacks by the USA and UK armies on Afghanistan and Iraq in the fight against terrorism.<sup>23</sup>

In order to fight international terrorism, fundamental human rights must be respected. There is consequently a need to monitor compliance with human rights

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<sup>23</sup> Chesterman 2005 *J.Int'l L&P* 283.

by states. Interrogation practices involving torture of the suspected terrorists should not be tolerated at the expense of national security. The interrogation practices adopted by the USA at Guantanamo Bay such as water boarding and sleep deprivation are regarded as inhumane and are inconsistent with acceptable human rights standards. The practices are further in violation of the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.<sup>24</sup> Therefore, the infliction of torture, cruel inhumane or degrading punishment on any one cannot be justified, even during the threat posed by terrorism.

Legislation providing for detention without trial as a measure of fighting terrorism is not in conformity with accepted human rights standards. Detention without trial results in arbitrary deprivation of liberty. The USA and UK have legislation providing for detention without trial as a means of protecting national security. In South Africa, the Constitution has outlawed detention without trial.<sup>25</sup> The POCDATARA also excluded a proposed provision which would have allowed investigative detention.<sup>26</sup> Consequently, the fight against terrorism will only be legitimate if it does not undermine the fundamental values of humanity.<sup>27</sup>

The South African government has adopted a policy on terrorism which obliges the government to uphold the rule of law, never to resort to any form of general or discriminatory repression, to defend and uphold freedom and security and to acknowledge and respect its obligations to the international community. From the above discussion, it is clear that South Africa still lacks adequate legislation to effectively prevent and combat terrorism in her area of jurisdiction.

What follows are counter-terrorism recommendations that may be adopted in order for the Republic of South Africa to strengthen her legislative measures against the threat of international terrorism.

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<sup>24</sup> Art 7 of the ICCPR 1966; s 12(1)(d) & (e) of the Constitution.

<sup>25</sup> S 12(1)(b) of the Constitution.

<sup>26</sup> *Plyler v Doe* 457 US 202 1982 wherein the court arrived at the decision that even if the presence of a person is illegal in the USA, such a person cannot be deprived of his liberty without the due process of the law; see also *Zadvydas v Davis* 533 US 678 at 691 where the court held that the provision authorizing detention does not apply narrowly to a small segment of particularly dangerous individuals referring to suspected terrorists, but broadly to aliens removed for many different reasons including for tourists violations.

<sup>27</sup> Jakob Kellenberger 2004 accessed at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/5Z5DKQ> [date of use 16 Nov 2012].

### 8.6.1 *Some recommendations on a possible definition of terrorism*

There has been a lack of success in agreeing to a definition of terrorism. Despite the adoption of different international conventions to counter terrorism, a universally accepted definition of terrorism has not been reached. Attempts by the *Draft Comprehensive Convention on International Terrorism*<sup>28</sup> to define terrorism have not borne fruit. Notwithstanding failure to reach a common definition of terrorism, terrorism is understood as an international crime. It is understood as a method of violence that is aimed at creating a state of fear in order to achieve political goals. In arriving at a generally acceptable definition of international terrorism, it is of crucial importance that the following problems concerning the definition be resolved.

First, it must be agreed whether the definition should include both state and non-state actors in its context and what kind of crimes should be criminalised by the definition. Secondly, the definition must identify the nature of the international element, which means that the definition must clearly state that a terrorist offence must have an international effect. Thirdly, the definition should include a motive for the commission of a terrorist offence, whether the offence committed is politically motivated or not. Lastly, there must be agreement on what categories of persons and property are to be protected against acts of terrorism. Of importance, acts of terrorism must be distinguished from ordinary criminal acts although there are difficulties in separating the two.

Whilst on the issue of a definition of international terrorism, it can be argued that the *International Convention for the Suppression of Financing of Terrorism*<sup>29</sup> provides the most suitable definition. The Convention provides that:

Any person commits an offence within the meaning of the Convention if that person by any means, directly or indirectly, unlawfully and wilfully provides or collects funds with the intention that they should be used or in the knowledge that they are to be used in full or in part in order to carry out:<sup>30</sup>

An act which constitutes an offence within the scope of and as defined in one of the United Nations twelve counter-terrorism conventions; or any other act intended to cause death or serious bodily injury to a civilian, or to any other

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<sup>28</sup> See chapter 3 para 3.4.2.

<sup>29</sup> See Chapter 3 para 3.4.13.

<sup>30</sup> Art 2(1) of the *International Convention for the Suppression of Financing of Terrorism* 1999.

person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or compel a government or an international organisation to do or to abstain from doing any act.

The definition includes the terrorism-related offences mentioned in other international conventions to counter terrorism, such as the *International Convention for the Suppression of Terrorist Bombings*.<sup>31</sup> This Convention provides for universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in or against public places with the intention to kill or cause serious bodily injury, or with intent to cause extensive destruction of public places.<sup>32</sup>

The *Draft Comprehensive Convention on International Terrorism*<sup>33</sup> also attempts to provide a universally acceptable definition of international terrorism. Article 2 of the Convention provides that:

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

The definition in the *Draft Comprehensive Convention on Terrorism* broadens the scope of the definition in the *International Convention for the Suppression of the Financing of Terrorism* 1999 by including acts intended to cause death or serious injury to any person, or to cause serious damage to public or private property, or to cause damage to property likely to result in major economic loss. Nevertheless, states are yet not satisfied with the current definitions in that they still exclude liberation movements from their ambit which suggest that it is important to include liberation movements in the definitions of terrorism.

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<sup>31</sup> See chapter 3 para 3.4.12.

<sup>32</sup> Art 2 of the *International Convention for the Suppression of Terrorist Bombings* 1998.

<sup>33</sup> Anon date unknown accessed at: [www.aa/co.int/1stsession/international%20Terrorism%202012](http://www.aa/co.int/1stsession/international%20Terrorism%202012) [date of use 22 Nov 2012].

### 8.6.2 Prosecution of terrorism offences

The UNSC resolution 1373(2001) places an obligation on states to criminalise terrorism-related acts and to establish jurisdiction to prosecute the crimes.<sup>34</sup> In accordance with the resolution, states must ensure that any person who participates in financing, planning, preparing or committing terrorist acts or supporting terrorist acts is brought to justice and punished. International conventions such as the *Convention for the Suppression of Terrorist Bombings* 1998, specify the bases on which states can establish jurisdiction over terrorism-related crimes.<sup>35</sup> The Constitution provides that the National Prosecuting Authority has the power to institute criminal proceedings on behalf of the state.<sup>36</sup> Although the prosecution of terrorist cases is difficult, regard should always be had to the right to a fair trial. The right to a fair trial must be guaranteed in terrorism cases as a miscarriage of justice in this type of cases may result in a violation of an accused persons' rights in terms of section 35 of the Constitution.

Although there is a need to prosecute and punish acts of terrorism, the following factors still do hamper the process:

(a) The appropriate forum to prosecute acts of terrorism

Legislation such as the USA *Patriot Act* 2001, *Freedom Act* 2015, the UK *Anti-Crime and Security Act* 2001, and the South African POCDATARA 2004 do provide for prosecution of terrorism-related acts in their respective national courts. However, many states are of the view that terrorism is an international crime which needs to be tried by the ICC.<sup>37</sup> This is despite the repeated objection to the jurisdiction of this court by the USA.<sup>38</sup>

(b) Criminalisation of terrorist offences

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<sup>34</sup> See chapter 3 para 3.3.

<sup>35</sup> Art 6 of the *International Convention for the Suppression of Terrorist Bombings* 1998 provides that each state must take such measures as may be necessary to establish its jurisdiction over the offences committed in the territory of that state, or on board a vessel flying the flag of that state, or an aircraft which is registered under the laws of that state at the time the offence is committed, or the offence is committed by a national of that state.

<sup>36</sup> S 179(2) of the Constitution; see also S 20 of the *National Prosecuting Authority Act* 32 of 1998; see further Geldenhuys, Joubert, Swanepoel *et al* *Criminal Procedure* 47.

<sup>37</sup> Vogts 2003 *EJIL* 324.

<sup>38</sup> Hamalengwa date unknown accessed at: <http://www.isrcl.org/papers/hamalengwab.pdf> [date of use 08 Sept 2014].



Many states have criminalised terrorist acts as required by conventions against terrorism even though a number of states are not party to the conventions. The ratification of conventions countering terrorism remains a vital factor for the uniform application and enforcement of counter-terrorism laws.

(c) Standardisation of penalties for terrorist crimes

Penalties for terrorist crimes differ from state to state, for instance in the USA, in terms of the *Anti-Terrorism and Effective Death Penalty Act* 1996, the death penalty is an appropriate sentence for certain terrorist acts. In South Africa the death penalty has been outlawed under the Constitution.<sup>39</sup> Standardised penalties for terrorist crimes will improve cooperation between states in matters of extradition as it will be known that the extradited person will not be subjected to a harsher penalty than it could be imposed by the extraditing state. Standardised penalties will assure states that the person extradited will receive treatment similar to that which would apply in his or her prosecution in the extraditing state.

*8.6.3 Terrorism-related offences and the principle of legality*

In accordance with the South African criminal justice system, it is important to ensure that the principle of legality is strictly adhered to in developing legislation criminalising terrorism. Concerns have been raised with regard to the many definitions of terrorism that overlap and result in the criminalisation of legitimate activities, for example, lawful protests that do not amount to incitement to violence. The principle of legality specifically excludes vagueness with regard to the conduct that is criminalised. In accordance with the views of Snyman,<sup>40</sup> criminal conduct must be formulated in clear terms so that the courts should not have to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the offender within the meaning of the definition. Section 35(3) of the Constitution provides that every accused has a right to a fair trial. This right to a fair trial is also provided for in the legality principle as follows:

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<sup>39</sup> S 11 of the Constitution.

<sup>40</sup> Snyman *Criminal Law* 39.

The accused person has a right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.<sup>41</sup>

This right prohibits the creation of an offence with retrospective effect. This right is complemented by the provisions of the ICCPR<sup>42</sup> and the *European Convention on Human Rights*.<sup>43</sup> Furthermore, in accordance with the Constitution, the right to a fair trial entitles an accused person to benefit of the least severe of the prescribed punishments for the offence charged between commission and sentencing.<sup>44</sup> Therefore, in creating or formulating the crime of terrorism, ambiguity and vagueness should be avoided at all costs in that a failure to do so could result in a violation of the accused's right to a fair trial.<sup>45</sup> In a nutshell, the principle of legality protects the liberty of a person, it prohibits the arbitrary punishment of persons by state officials, and determines criminal liability. The principle of legality is also a yardstick for determining whether the imposition of a sentence corresponds to clear and existing rules of the law.

#### 8.6.4 International criminal judicial cooperation

Judicial cooperation within the international community is important as international terrorism has transnational effects. International cooperation is established by counter-terrorism conventions and protocols which emphasise the obligation to extradite and prosecute, for example under the *International Convention for Suppression of Terrorist Bombings Convention*.<sup>46</sup> This Convention further provides for jurisdiction regarding offences.<sup>47</sup> Therefore, international cooperation between

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<sup>41</sup> S 35(3)(l) of the Constitution.

<sup>42</sup> Art 15(1) of the ICCPR 1966 provides that no one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

<sup>43</sup> Art 7(1) of *European Convention on Human Rights* 1950 provides that no one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

<sup>44</sup> S 35(3)(n) of the Constitution.

<sup>45</sup> *S v Luvhenga* 1996 2 SACR 453 W where the court held that the right created in s 35(3)(a) implied that the charge should be created in a clear and unambiguous manner. Section 35(3)(a) of the Constitution provides that the right to a fair trial includes the right to be informed of the charge with sufficient detail to answer it; see also *S v Motshari* 2001 1 SACR 550.

<sup>46</sup> Art 8 of the *International Convention for the Suppression of Terrorist Bombing Convention* 1998.

<sup>47</sup> Art 6(1) of the *International Convention for the Suppression of Terrorist Bombings* 1998 provides that state parties to the *Convention* must establish jurisdiction (a) when the crimes are committed in the territory of the state or on board vessels flying a flag or aircraft registered in

states will enhance the control of terrorism both internationally and nationally. Under international law, there is, in the absence of a treaty commitment, no duty on states to extradite a person to a requesting state.<sup>48</sup> Nonetheless, the law of terrorism intersects with the form of international cooperation mostly in the areas of criminal law through mutual legal assistance, refugee laws, and deportation to requesting countries. In respect of the Republic of South Africa, the obligation to cooperate with foreign governments in combating international terrorism is subject to constitutional control and review by the courts.<sup>49</sup> As a result, the Republic of South Africa is precluded from cooperating with other states if there is no assurance that cooperation will not result in a violation of human rights of the subject.<sup>50</sup> Therefore, cooperation with other states must include protection of human rights.<sup>51</sup>

The need for judicial cooperation is emphasised by the fact that terrorist organisations use the internet to perpetrate acts of terrorism and are therefore not restrained by national borders.<sup>52</sup> Cooperation can be improved through states concluding bilateral or multilateral treaties and agreements that enhance international cooperation in international terrorism-related matters.

#### 8.6.5 Extradition

Extradition is important to international cooperation in combating transnational crimes, including terrorism.<sup>53</sup> Therefore, international conventions countering international terrorism require states to agree on the extradition of individuals involved in the commission of terrorist acts. Furthermore, states may agree to extradite on the basis of reciprocity.<sup>54</sup> However, in concluding an international

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the state (b) when the suspects are nationals of the state (active personality jurisdiction) (c) when victims are nationals of the state (passive personality jurisdiction) and (d) when the conduct amounts to serious international crime such as the crime against humanity.

<sup>48</sup> Katz 2003 SACJ 312.

<sup>49</sup> Cachalia 2010 SAJHR 525; see also *Mohamed v The President of the Republic of South Africa* 2001 BCLR CC; *Kaunda v The President of the Republic of South Africa* 2004 BCLR 1009 CC and *Jeebhai v Minister of Home Affairs* 2009 SA 54 SCA where the court was tasked to decide on the constitutionality of the deportation.

<sup>50</sup> *Mohamed v President of the Republic of South Africa* 2001 BCLR 685 CC.

<sup>51</sup> Kemp 2003 SACJ 375.

<sup>52</sup> Anon date unknown accessed at: <http://www.fas.org/irp/threat/commission.html> [date of use 12 Nov 2012].

<sup>53</sup> Griffith & Harris 2005 *Melbourne J Int'l L* 2.

<sup>54</sup> D' Oliveira 2003 SACJ 324; see also Katz 2003 SACJ 312; see further *President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases* 2009 2 SA 466 (CC) at 481 para B.

extradition agreement, states must ensure that human rights are protected.<sup>55</sup> The Constitution of South Africa provides for entering into extradition agreements by South Africa and foreign countries.<sup>56</sup> The Constitution further provides that any international agreement becomes law in the country when it is enacted into law by national legislation.<sup>57</sup> The lack of extradition agreements between states is a difficulty that prevents the states from bringing terrorists to court for prosecution. Therefore, ratification of conventions and protocols to facilitate extradition is important in preventing and combating acts of terrorism. South Africa is still to ratify many of the outstanding international counter-terrorism conventions as required by the POCDATARA. In South Africa, offences committed by the liberation movements of the apartheid era fighting for self-determination, have been excluded as offences by the POCDATARA. However, recent terrorist offences by the right wing terrorist organisations such as the Boeremag, have not been excluded as political offences.<sup>58</sup> The accused persons in the case have recently been convicted in the Gauteng North High Court of various terrorist offences.<sup>59</sup> The *Boeremag* case is an example of how excluding political exception clause in prosecuting acts committed by members of terrorist organisations, enables the government to deal effectively with the perpetrators of terrorist offences by bringing them to justice.

Different conventions adopted by countries of the world provide for non-extradition of political offenders. Refusal of extradition in political cases to countries where the death penalty may be imposed for acts of terrorism is also provided for as was held in *Mohamed and Another v President of SA and Others (Society for the Abolition of Death Penalty in SA and Another Intervening)*.<sup>60</sup> The political offence exception has

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<sup>55</sup> Banda, Katz *et al* 2005 ASR 66.

<sup>56</sup> S 231 of the Constitution.

<sup>57</sup> S 231(4) of the Constitution.

<sup>58</sup> Schonteich and Boshoff 2003 *Monograph 2*.

<sup>59</sup> Schonteich and Boshoff 2003 *Monograph 2*.

<sup>60</sup> *Mohamed and Another v President of SA and Others (Society for the abolition of Death Penalty and Another Intervening)* 2001 3 SA 893 CC; see also *Minister of Justice v Burns* 2001 SCC 7 where the Supreme Court of Canada held that it is the duty of the government to seek assurances that death penalty will not be imposed before extraditing a suspect; see further *Tsebe v Minister of Home Affairs and Others, Pitsoe v Minister of Home Affairs and Others* 2012 1 BCLR 77 (GSJ) para 92 where the court held that failure by the South African authorities to obtain an assurance that the death sentence will not be imposed constituted a barrier to a country where a death penalty can be imposed.

created difficulties for extradition processes in different countries.<sup>61</sup> The political offence exception entitles states to refuse extradition on the ground that the individual has committed an offence with a political motive.<sup>62</sup> In *Re Castioni*,<sup>63</sup> Switzerland was denied the extradition of its national accused of murder, based on the political offence exception. In this case the court held that three requirements must be met to allow the application of the political offence exception: (1) there must be a political revolt; (2) the act on which the extradition request is based must be incidental to the political unrest; and (3) there must be political or ideological motivation for the act. The UK has, however, amended its law to allow for the extradition of terrorist offenders without the application of political offence exception.<sup>64</sup> South African laws on extradition exclude terrorist activity from the political offence exception.<sup>65</sup> A political offence exception has the effect that a person who has committed an offence with a political motive cannot be extradited to be prosecuted by the requesting state.<sup>66</sup> It has therefore become evident that the exception of a terrorist act as a political offence has interfered with the extradition of the perpetrators of terrorist acts to stand trial in other countries. Furthermore, lack of uniformity of the political offence exception amongst states is a problem which precludes states from extraditing individuals for the commission of terrorist acts. In order to avoid the problem of the political offence exception, political offences should not include any offence within the scope of international conventions suppressing terrorism.<sup>67</sup>

A further important factor to consider is that extradition is a lengthy process which required the exchange of numerous documents between the states involved.

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<sup>61</sup> Falvey 1986 *B.C Int'l L & Com .L. Rev* 354.

<sup>62</sup> Mullally 1986 *Vill .L.Rev* 1511.

<sup>63</sup> *In re Castioni* 1891 1 QB 149.

<sup>64</sup> Falvey 1986 *B.C Int'l L & Comp .L. Rev* 345; see also Banda, Katz *et al* 2005 *ASR* 65.

<sup>65</sup> S 22 of *Extradition Act* 67 of 1962 provides that a request for extradition based on the offences referred to in sections 4 or 5 of the POCDATARA 33 of 2004 may not be refused on the sole ground that it concerns a political offence, or an offence connected with a political offence or an offence inspired by political motives, or that it is a fiscal offence; see also ss 4 and 5 of the POCDATARA 33 of 2004 which refer to offences associated with the financing of terrorist offences and offences related to explosives or other lethal devices.

<sup>66</sup> Bantekas and Nash *International Criminal Law* 186; see also *Finucane v Mahon* 1990 IR 165 where the court held that if the offences were committed in furtherance of a campaign to create a united Ireland, the political offence exception applies. Consequently the request by the UK to have the accused extradited was refused.

<sup>67</sup> See Chapter 3 para 3.4.13 above.

Legislative provision to address these aspects is important to afford the individual the right to a speedy trial. This may be addressed, for example, through the establishment of agencies dealing specifically with the extradition of those charged with acts of terrorism.

#### *8.6.6 Judicial oversight*

The independence of the judiciary is crucial to the upholding of the rule of law. The judiciary is tasked to decide cases impartially. However, impartiality must be practised without restriction, threat, interference or improper inducements. It is further important that unwarranted interference with the judicial process must be avoided at all costs with the aim of protecting human rights.

Before 1994 the courts in the Republic of South did not have the power of judicial review of legislation. Judicial review promotes democratic constitutional values and the rule of law.<sup>68</sup> Notwithstanding the fact that the South African courts did not have the power judicial review, the judiciary was independent.<sup>69</sup> The South African judges did uphold rules against the state, including where security legislation was involved. The case of *Harris v Minister of Interior*<sup>70</sup> is one of the cases in which the judges showed the independence of the judiciary by invalidating the Bill which the state attempted to pass without the required special majority. Unfortunately, whilst the judges were independent and observed the rule of law, this was different with regard to magistrates. Magistrates implemented and administered policies of the government and thus could not rule against the state during the apartheid era.<sup>71</sup>

The USA courts also echo the same sentiments as South African courts, in that the USA courts have the power to hear cases of detainees subjected to indefinite detention.<sup>72</sup> In *Rasul v Bush*<sup>73</sup> the USA Supreme Court set aside the decision that the

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<sup>68</sup> Delahunty and Yoo 2002 *Harv.J.L & Pub. Pol'y* 304.

<sup>69</sup> Swart and Fowkes *SALJ* 786.

<sup>70</sup> *Harris v Minister of Interior* 1952 2 SA 428 A; see also *Nkondo v Minister of Law and Order* 1986 2 SA 756 A where the court had to examine the provisions of section 28(3)(b) of the *Internal Security Act* which obliged the Minister to give reasons in writing why he has ordered that a person be detained. Instead of giving reasons for the detention, the Minister only gave words of the relevant part of section 28(1) of the *Internal Security Act* which indicated the grounds in terms which he acted. The Court held the notices issued by the Minister were invalid.

<sup>71</sup> Gready and Kgalema 2003 *SAJHR* 156-158.

<sup>72</sup> *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* 2002 EWCA Civ 1598.

<sup>73</sup> *Rasul v Bush* 542 US 2004.

lower court had no jurisdiction to review the detention of the non-USA citizens at Guantanamo Bay. In the UK Lord Steyn's comments on the legitimacy of Guantanamo Bay detentions were that the detentions represented a failure of justice, designed to place prisoners beyond the rule of law and the protection of any courts.<sup>74</sup>

However, the judiciary is responsible for upholding laws and ensuring that the laws adopted comply with the Constitution, while not losing sight of the fact that the Constitution provides for the separation of powers between the executive, the legislature and the judiciary. Therefore, judicial review provides for checks and balances with the aim of preventing the abuse of power by the state.

The Republic of South Africa, the USA, and the UK are constitutional democratic states although the UK does not have a written constitution. Therefore, judicial oversight will ensure the protection of the Constitution by upholding the rule of law and respect for human rights while fighting the threat posed by international terrorism.

#### *8.6.7 Preventing the financing of terrorism*

In an effort to deter the financing of the terrorist organisations, the *International Convention for the Suppression of the Financing of Terrorism*<sup>75</sup> was concluded. The Republic of South is party to this Convention. The preamble to the POCDATARA is clear in the adoption of international conventions, South Africa was complying with her international obligations. The objective of the *International Convention Suppressing the Financing of Terrorism* was to block the flow of terrorist funds without disrupting the circulation of funds and maintenance of business in international markets.<sup>76</sup> However, the Convention does not, on its own, adequately prevent and combat terrorism financing. In South Africa legislation such as the POCA and the FICA help strengthen measures in the fight against terrorism financing. Notwithstanding the legislative measures implemented, the financing of terrorist activities is still on the increase. Much attention has been focused on money laundering as a means of funding terrorism-related activities. Less attention has

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<sup>74</sup> Roberts 2004 *EJIL* 735.

<sup>75</sup> See Chapter 3 para 3.4.13.

<sup>76</sup> Bantekas 2003 *AJIL* 323.

been focused on identity theft that is used by terrorist organisations operating bank accounts that fund terrorist activities. The relationship between organised crime syndicates and international terrorist organisations fuel the theft of identity with the view of funding terrorist activities.

Fraudulent South African identity documents have come to light, notably in the UK. Despite measures by the South African Department of Home Affairs to guard against the issue of false identity, identity theft is still on the increase. Implementation of measures that deal effectively with identity theft is important in order to prevent funding of terrorist activities.

Lastly, while it is important that more robust laws should be enacted to prevent and combat terrorism, such laws should be in conformity with the rule of law and not violate fundamental human rights.



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