# COUNTER-TERRORISM LAWS AND HUMAN RIGHTS IN AFRICAN COUNTRIES

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ABSTRACT

*The terrorist attacks on U.S. embassies in Dar es Salaam (Tanzania) and Nairobi (Kenya) on August 7, 1998 made it clear to Africans that they were not immune from the rising tide of international terrorism. Eventually, many terrorist and extremist groups and organizations would emerge to become a major threat to peace and security in many parts of Africa. Today, organizations such as al-Qaeda in the Islamic Maghreb, Boko Haram/Islamic State in West Africa, and Al-Shabaab, continue to wreak havoc on African societies. In response to widespread terrorism and extremism, not just in Africa, but also around the world, the UN took action to establish legal mechanisms for the suppression and prevention of this international crime. In addition to establishing a committee dedicated to coordinating global efforts to confront terrorism, its perpetrators, and its supporters and financiers, the UN also adopted several conventions to fight this global crime, including the International Convention for the Suppression of the Financing of Terrorism, 1999. Taking a cue from the UN, the Organization of African Unity adopted the Convention on the Prevention and Combating of Terrorism on July 1, 1999 (Algiers Convention). As directed by the Algiers Convention, many African countries established criminal offenses for terrorist acts either by revising their national laws or enacting new statutes dedicated specifically to suppressing and preventing terrorism. It soon became evident, however, that each African country must balance its concern for peace and security with the need to protect the fundamental rights and freedoms of its citizens. International human rights scholars have argued that human rights*

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*principles and jurisprudence allow for sufficient flexibility to achieve a balance between security and human rights. Unfortunately, some African countries have been turning their anti-terrorism laws into tools for the violation of the fundamental rights and freedoms of their citizens. An examination of Maseko and Others v. the Prime Minister of Swaziland and Others, a case of the High Court of the Kingdom of Swaziland (Eswatini), reveals that through effective Bill of Rights litigation, national courts in the African countries can significantly improve the legal environment for fighting terrorism while, at the same time, minimizing the ability of national governments to use counter-terrorism laws as a tool of oppression.*

## INTRODUCTION

On August 7, 1998, almost simultaneously, bombs exploded at U.S. embassies in Dar es Salaam, Tanzania and Nairobi, Kenya. The explosions killed at least 224 people, wounded thousands more, and destroyed several buildings on the embassy compounds and the surrounding areas.[1] Andrea Mitchell, Chief Foreign Affairs Correspondent for NBC News, and Haley Talbot, NBC News Associate Producer, noted that "[w]hat no one knew then, [that is, in August 1998] . . . was that the bombers were ushering in a new era of terror that would culminate in the 9/11 attacks."[2] Today, Africa is considered "fertile breeding ground for the recruitment of terrorists, a potential terrorist hideout, a secured location for the acquisition of illegal arms as well as a privileged territory for obscure financial transactions linked to terrorist activities."[3]

Specifically, many parts of Africa, notably the Horn of Africa, East Africa, West Africa, and the Maghreb, are now considered breeding grounds for terrorist activity. In fact, among organizations that have been designated by the international community as terrorist organizations, several are found in Africa. These include (1) al-Qaeda in the Islamic Maghreb;[4] (2) Boko Haram;[5] (3) al-Shabaab;[6] and (4) the Lord's Resistance Army.[7] Cognizant of the important threat to international peace and security posed by these extremist groups, the UN Counter-Terrorism Committee ("CTC"), a subsidiary body of the UN Security Council ("UNSC"), and which was established in the wake of the September 11, 2001 terrorist attacks in the United States, called on African States "to ratify the international treaties against terrorist acts and to harmonize their internal

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1 *See* Andrea Mitchell & Haley Talbot, *Two Far-Away Bombings 20 Years Ago Set Off the Modern Era of Terror*, NBC NEWS (Aug. 7, 2018, 7:26 AM), https://www.nbcnews.com/news/world/two-far-away-bombings-20-years-ago-set-modern-era-n898196.

2 Mitchell & Talbot, *supra* note 1.

3 Int'l Fed'n for Hum. Rts., *Counter-Terrorism Measures and Human Rights: Keys for Compatibility/Human Rights Violations in Sub-Saharan African Countries in the Name of Counter-Terrorism: A High Risks Situation* (Nov. 2007), https://www.fidh.org/en/region/Africa/Human-rights-Violations-in-Sub [hereinafter IFHR 2007].

4 *See* Zachary Laub & Jonathan Masters, *Al-Qaeda in the Islamic Maghreb*, COUNCIL ON FOREIGN RELS. (Mar. 27, 2015), https://www.cfr.org/backgrounder/al-qaeda-islamic-maghreb (providing background information on the Salafi-jihadist militant group, al-Qaeda in the Islamic Maghreb (AQIM)).

5 *See Who Are Nigeria's Boko Haram Islamist Group?*, BBC NEWS (Nov. 24, 2016), https://www.bbc.com/news/world-africa-13809501.

6 *See Who Are Somalia's al-Shabab?*, BBC NEWS (Dec. 22, 2017), https://www.bbc.com/news/world-africa-15336689.

7 *Q&A on Joseph Kony and the Lord's Resistance Army*, HUM. RTS. WATCH (Mar. 21, 2012, 6:31 PM), https://www.hrw.org/news/2012/03/21/qa-joseph-kony-and-lords-resistance-army.

law accordingly."[8]

The CTC was established through UN Security Council Resolution No. 1373 (2001).[9] In the resolution, the UNSC reaffirmed "its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and [expressed] its determination to prevent all such acts" and noted that "such acts, like any act of international terrorism, constitute a threat to international peace and security."[10] The UNSC also stated that it was "[d]eeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism" and then called "on all States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism."[11]

The UNSC then instructed UN Member States to:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories 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 of persons and entities acting on behalf of or at the direction of

8 IFHR 2007, *supra* note 3.
9 S.C. Res. 1373, ¶ 6 (Sept. 28, 2001).
10 *Id.*, pmbl.
11 *Id.*, pmbl.

such persons.[12]

The UNSC also asked Member States to (1) refrain from assisting or supporting any "entities or persons involved in terrorist acts"; (2) take all necessary actions to "prevent the commission of terrorist acts"; (3) "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens"; (4) prevent those individuals or groups, "who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens"; (5) ensure that anyone who participates in terrorist activities is brought to justice—Member States were also required to criminalize terrorist acts and make them serious criminal offenses in domestic laws; and (6) prevent the movement of terrorists or terrorist groups, as well as cooperate with other Member States and grant them necessary assistance in connection with the investigation and prosecution of individuals accused of committing terrorist acts.[13]

Member States were also directed by the UNSC to, with deliberate speed, become States Parties to "relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999."[14] Specifically, the UNSC instructed Member States to "harmonize their international law accordingly," criminalize all terrorist acts, as well as the financing of terrorism, and restructure their asylum and immigration policies to minimize the chances of granting residency or citizenship to asylum-seekers and immigrants who have committed terrorist acts.[15]

Many African countries, "under political and economic pressure from the international community," as well as what the IFHR calls "internal security opportunism," signed and ratified "the international and regional treaties against terrorism, notably the OAU Convention on the Prevention and Combating of Terrorism" ("Algiers Convention").[16] In addition to signing and ratifying it, some African countries have actually incorporated specific provisions of the Algiers Convention in their domestic law in an effort to enhance their ability to fight terrorism. For example, in 2004 the Parliament of the Republic of South Africa enacted the Protection of Constitutional Democracy Against Terrorist and Related Activities Act

12 *Id.*, ¶ 1.
13 *Id.*, ¶ 2.
14 *Id.*, ¶ 3(d).
15 *Id.*, ¶ 1.2(e).
16 *See* Organization of African Unity Convention on the Prevention and Combating of Terrorism, Dec. 6, 2002 [hereinafter African Terrorism Convention].

33.[17]

However, laws designed to enhance the ability of African countries to fight terrorism could potentially conflict with provisions of international human rights instruments or national laws designed to protect fundamental rights. The IFHR has noted, for example, that "under the pretext of fighting terrorism, numerous states have adopted and applied provisions that derogate from international human rights instruments binding upon them."[18] Other African countries have actually used the fight against terrorism as "a pretext to act outside of any legal context and judicial control."[19] For example, Amnesty International ("AI") has determined that Cameroon is using its anti-terrorism law to abuse many basic rights.[20] AI noted that the country's new anti-terrorism law is "so broad and vague in its definition of terrorism that it's effectively opened the way for authorities to treat anyone as a suspect, with devastating consequences."[21] In fact, as noted by AI, "[m]ore than 1,000 people [in Cameroon] have been accused of supporting Boko Haram, mostly based on very little evidence." In addition, "[w]hole villages have been destroyed and hundreds of men and boys have been rounded up, loaded into military trucks, and never seen again."[22]

Throughout many countries, the fight against terrorism is considered a very sensitive issue and is often undertaken through processes that lack transparency and are carried out by government operatives (e.g., special anti-terrorism regiments) who can act with impunity.[23] Former UN Secretary-General Kofi Annan argued that all States must ensure "the compatibility of anti-terrorist laws with human rights and democratic principles for the very success of the fight against the authors of such terrorist acts."[24] In fact, in his keynote address to the closing plenary of the International Summit on Democracy, Terrorism and Security in Madrid, Spain, in March 2005, Kofi Annan noted that he had "strongly endorse[d] the recent proposal to create a special rapporteur who would report to the

17 *See* Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (S. Afr.).

18 *See* IFHR 2007, *supra* note 3, at 5.

19 *See id.*

20 AMNESTY INT'L, *Cameroon Protect Our Rights*, https://www.amnesty.org/en/get-involved/take-action/cameroon-protect-our-rights/ (last visited on June 19, 2021).

21 *See* AMNESTY INT'L, *supra* note 20.

22 *See* AMNESTY INT'L, *supra* note 20.

23 *See, e.g.*, Lewis Mudge, *Cameroonian Lawyers Say 'Enough is Enough'*, HUM. RTS. WATCH (Sept. 18, 2019, 1:20 PM), https://www.hrw.org/news/2019/09/18/cameroonian-lawyers-say-enough-enough (noting the "widespread use of incommunicado detention and torture" at the *Secrétariat d'État à la Défense*/State Defense Secretariat).

24 *See* IFHR 2007, *supra* note 3, at 5.

Commissioner on Human Rights on the compatibility of counter-terrorism measures with international human rights laws."[25]

Human rights advocates argue that counter-terrorism measures that are compatible with and respect fundamental rights can actually contribute positively to the fight against terrorism. Research shows that "terrorism results in and sometimes is ultimately aimed at annihilating the principles of democracy, freedom and humanity."[26] Hence, it is important that any effort to fight terrorism not deviate from the principles of democracy and the rule of law for, if it does, it would only help the terrorists and support "them in their aversion to the universal standards on the basis of which our societies, whether global, regional, national or local, are organized."[27]

The Committee of Ministers of the Council of Europe has adopted guidelines on "human rights and the fight against terrorism."[28] In this document, the Council of Europe imposes an obligation on Member States "to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines."[29] The Council of Europe Guidelines prohibit arbitrariness in the fight against terrorism, stating:

> All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.[30]

In addition, the Guidelines mandate that "[a]ll measures taken by States to combat terrorism must be lawful" and "[w]hen a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued."[31] Many of today's human rights advocates believe that "[r]espect for human rights and the fight against terrorism are compatible" and that the two parties—those who fight terrorism, on the one hand, and those who fight to protect human rights, on

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25 Kofi Annan, UN Secretary-General, Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security (Mar. 10, 2005).

26 *See* IFHR 2007, *supra* note 3, at 5.

27 *See id.*

28 *See* Comm. of Ministers of the Council of Eur., *Guidelines on Human Rights and the Fight Against Terrorism*, Doc. No. H (2002) 4 (July 11) [hereinafter Council of Europe Guidelines].

29 *Id.* at 14.

30 *Id.*

31 *Id.*

the other—must not see themselves in antagonistic terms.[32] Like the prevention of other criminal activities, the fight against terrorism must be undertaken according to the *law* and that *law* must be that which is in line with or conforms with and does not offend the provisions of international human rights instruments.

Given the global nature of terrorism, the United Nations, the world's most important multilateral organization, must be at the forefront of the fight to suppress and prevent this international crime. In fact, at the International Summit on Democracy, Terrorism and Security, which was organized as a memorial to the horrific terrorist attack that took place in Madrid on March 11, 2004, then UN Secretary-General, Kofi Annan, declared that:

> [T]errorism is a threat to all States, to all peoples, which can strike anytime, anywhere. It is a direct attack on the core values the United Nations stands for: the rule of law; the protection of civilians; mutual respect between people of different faiths and cultures; and peaceful resolution of conflict . . . *the United Nations must be at the forefront in fighting against it*, and first of all in proclaiming, loud and clear, that terrorism can never be accepted or justified, in any cause whatsoever.[33]

In a paper prepared for the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders,[34] Jean-Paul Laborde,[35] argued that "recent developments clearly show that terrorism has become indiscriminate and global in nature. Therefore, it is natural that, as *the only truly global organization with the goals and means of preserving peace and security*, the UN is expected to be at the forefront of the global action against terrorism."[36] He added, however, that "due to the sensitive nature of the phenomenon under scrutiny, many countries have taken steps to fight terrorism either through regional forums, bilateral arrangements and/or through their national agencies."[37] Nevertheless, Laborde emphasized that "[d]espite these options, it has to be highlighted again and

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32 IFHR 2007, *supra* note 3.

33 Annan, *supra* note 25.

34 Jean-Paul Laborde, *The Role of the United Nations and United Nations Office on Drugs and Crime in the Facilitation, Accession and Implementation of the 13 Universal Legal Instruments Against Terrorism*, *in* U.N. ASIA & FAR E. INST. FOR THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, RESOURCE MATERIAL SERIES NO. 71, at 3 (2007).

35 Jean-Paul Laborde was, at the time, Chief of the Terrorism Prevention Branch, UN Office on Drugs and Crime (UNODC), Vienna Center, Vienna, Austria.

36 Laborde, *supra* note 34, at 3 (emphasis in original).

37 *Id.*

again that as the only global organization, [the] UN has a unique comparative advantage—its multilateral tools that are crucial and indispensable to fight terrorism. It cannot be overstated that *a global threat requires a global response*."[38]

Laborde then went on to elaborate roles, which the UN can play in the fight against international terrorism. These include:

- Establishing a universal legal framework against terrorism (international conventions and protocols, General assembly and Security Council resolutions including those adopted under Chapter VII);
- Reinforcing international co-operation in criminal matters against terrorism (universal legal instruments at work);
- Fostering international co-ordination against terrorism (Counter Terrorism Committee, Al-Qaeda/Taliban Committee, 1540 Committee, 6th Committee of GA);
- Strengthening the capacity of Member States to comply with their international obligations (Terrorism Prevention Branch of the United Nations Office on Drugs and Crime and several other UN agencies).[39]

The UN is an intergovernmental organization whose purposes include:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

38 *Id.* (emphasis in original).
39 *Id.*

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.[40]

The UN is headquartered in New York and maintains additional offices in Geneva, Nairobi, Vienna and The Hague. Established in San Francisco (USA) in the aftermath of World War II on April 25, 1945, as a replacement for the League of Nations, it was expected to operate pursuant to its Charter.[41] According to the UN's Charter, one of its most important purposes is "[t]o maintain international peace and security" and in doing so, it is expected to "take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."[42] Since terrorism is a major threat to international peace and security, its prevention and suppression are within the purview of the UN and its various agencies. Nevertheless, given the fact that the UN does not have an enforcement arm, it must rely on the governments of Member States to carry out the actual suppression and prevention of terrorist acts.

Given the fact that the United Nations is the most important organization in the fight against international terrorism, the next section of this Article provides an overview of the evolution of the UN's involvement with the global community's counter-terrorism initiatives.

40 U.N. Charter art. 1.
41 *Id.* pmbl.
42 *Id.* art. 1, ¶ 1.

## II. THE UN AS THE MAIN COORDINATOR OF THE INTERNATIONAL FIGHT AGAINST TERRORISM

Global efforts to fight terrorism began before the establishment of the United Nations in 1945. As argued by Javier Rupérez, former Executive Director of the UN Security Council Counter-Terrorism Committee, "[t]errorism was of concern to the international community as early as 1937, when the League of Nations prepared a draft convention for the prevention and punishment of terrorism."[43] On November 16, 1937, twenty-four members of the League of Nations adopted the Convention for the Prevention and Punishment of Terrorism ("CPPT").[44] The CPPT defines "acts of terrorism" as "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."[45]

The CPPT, however, never entered into force. In addition, the definition of acts of terrorism does not cover criminal acts against civilians. Nevertheless, as argued by Rupérez, the League of Nations convention on terrorism "did serve as a point of reference for later discussion of terrorism when the United Nations and regional intergovernmental organizations dealt with the issue from a legal and political perspective."[46]

Over the years, there has been a lot of controversy surrounding the definition of "terrorism." Part of the problem comes from the fact that it has been quite difficult to determine when use of force is legitimate and, hence, is not considered illegal. Throughout the world, it is quite common for state and non-state actors to use violence to achieve political ends. Given the fact that many of the definitions of terrorism are crafted by agencies that are either directly related to or are part of the government of a State, these definitions usually exclude activities carried out by State agents. In a UN General Assembly Resolution adopted on December 9, 1994, there is a provision that describes terrorism as:

> [c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for

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43 Javier Rupérez, *The United Nations in the Fight Against Terrorism*, *in* RESOURCE MATERIAL SERIES NO. 71, *https://www.unafei.or.jp/english/publications/Resource_Material_71.html*, at 14.

44 The Convention was drafted at the League of Nations Conference for the Repression of Terrorism held at the League's headquarters in Geneva. *See* Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 L.N.T.S. 23.

45 *Id.* art. 1(2).

46 Rupérez, *supra* note 43, at 14.

> political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[47]

Without a universally-agreed upon definition for terrorism, it would be quite difficult for the international community to coordinate activities and cooperate on countermeasures against this insidious international crime. In order to enhance the development of effective measures to fight terrorism, it is necessary that the global community agree on two important things: (1) a universal and comprehensive single convention on the prevention and punishment of terrorism; and (2) an internationally agreed upon definition for terrorism. It has been argued that the word terrorist "is used indiscriminately as a synonym for rebel, insurgent, freedom fighter or revolutionary."[48]

Over the years, some scholars and practitioners have argued that a person who might be considered by some individuals and groups as a "terrorist" might actually be viewed by others as a "freedom fighter."[49] Reference is usually made to Nelson Mandela who fought to abolish the racially-based apartheid system in the Republic of South Africa.[50] To African groups in apartheid South Africa, Mandela was a *freedom fighter* who was leading the fight against a cruel, exploitative, and dysfunctional governance system based on the principles of white supremacy and permanent black inferiority; to the governing National Party and most whites in South Africa, Mandela was a *communist*, *agitator*, and *terrorist*, determined to destroy a country they had supposedly built since Jan van Riebeeck, a Dutch explorer, arrived in the Cape in 1652.[51]

This confusion over whether one is a freedom fighter or terrorist can be resolved through the adoption, by the international community, of a

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47 G.A. Res. 49/60, art. 1(3) (Feb. 17, 1995).

48 Pamela Kleinot, *One Man's Freedom Fighter is Another Man's Terrorist: A Selected Overview of Psychoanalytic and Group Analytic Study of Terrorism*, 31 PSYCHOANALYTIC PSYCHOTHERAPY 272, 273 (2017).

49 *Id.*

50 *See, e.g.*, ZELDA LA GRANGE, GOOD MORNING MR. MANDELA: A MEMOIR 18 (2014) (noting that her Afrikaner parents considered Mandela a terrorist). The author was Mandela's personal assistant for nearly twenty years. *See* JOHN CARLIN, PLAYING THE ENEMY: NELSON MANDELA AND THE GAME THAT MADE A NATION 36 (2008) (making reference to a statement by Kobie Coetsee, a member of the governing National Party and a negotiator during South Africa's transition to democracy, that "prison did indeed seem to have mellowed Mandela, that he was not the firebrand terrorist type anymore").

51 *See, e.g.*, LESLIE WITZ, GARY MINKEY & CIRAJ RASSOOL, UNSETTLED HISTORY: MAKING SOUTH AFRICAN PUBLIC PASTS 52 (2017); GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981) (comparing and contrasting white supremacy as governance principles in South Africa and the United States).

comprehensive definition of terrorism and other related concepts (e.g., terrorist acts; terrorist groups; terrorist financier). Given the global nature of terrorism, such a universally accepted definition should be crafted by Member States of the United Nations through the General Assembly and made part of a single comprehensive convention on the suppression and prevention of terrorism. On October 8, 2004, the UN Security Council adopted a resolution in which it defined terrorism.[52] In this resolution, terrorism was defined as:

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or 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 organization to do or to abstain from doing any act.[53]

It has been argued that "the United Nations and, more specifically, the General Assembly has thus far been unable to establish a commonly accepted definition of terrorism. Nor has it been capable of concluding a global counter-terrorism convention, of which a definition should be a fundamental part."[54] Sometimes, it is argued that one way to more fully understand terrorism is to distinguish between the use of force by state and non-state actors. Both the report of the UN Secretary-General and the High Level Panel on Threats, Challenges and Change, have commented on the use of violence by state- and non-state actors. In the transmittal letter dated December 1, 2004 from the Chair of the High-level Panel to the UN Secretary-General, mention is made of efforts at the UN to define terrorism. The High Level Panel notes that:

> [t]he United Nations[']ability to develop a comprehensive strategy [to fight terrorism] has been constrained by the inability of Member States to agree on an anti-terrorism convention including a definition of terrorism. This prevents the United Nations from exerting its moral authority and from sending an unequivocal message that terrorism is never an acceptable tactic, even for the most defensible of causes.[55]

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52 S.C. Res. 1566 (Oct. 8, 2004).

53 *Id.* ¶ 3.

54 Rupérez, *supra* note 43, at 5.

55 U.N. General Assembly, *A More Secure World: Our Shared Responsibility—Report of the High-Level Panel on Threats, Challenges and Change*, ¶ 157, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter Rep. of the High-Level Panel].

The High Level Panel then went on to state that:

> [s]ince 1945, an ever stronger set of norms and laws—including the Charter of the United Nations, the Geneva Conventions and the Rome Statute for the International Criminal Court—has regulated and constrained States' decisions to use force and their conduct in war—for example in the requirement to distinguish between combatants and civilians, to use force proportionally and to live up to basic humanitarian principles. Violations of these obligations should continue to be met with widespread condemnation and war crimes should be prosecuted.[56]

Unfortunately, argues the High Level Panel, "[t]he norms governing the use of force by non-State actors have not kept pace with those pertaining to States. This is not so much a legal question as a political one. Legally, virtually all forms of terrorism are prohibited by one of 12 international counter-terrorism conventions, international customary law, the Geneva Conventions or the Rome Statutes."[57] The High Level Panel then notes that "[t]he United Nations must achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force. Lack of agreement on a clear and well-known definition undermines the normative and moral stance against terrorism and has stained the United Nations[']s image. Achieving a comprehensive convention on terrorism, including a clear definition, is a political imperative."[58]

The High Level Panel argues further that:

> [t]he search for an agreed definition usually stumbles on two issues. The first is the argument that any definition should include States' use of armed forces against civilians. We believe that the legal and normative framework against State violations is far stronger than in the case of non-State actors and we do not find this objection to be compelling. The second objection is that peoples under foreign occupation have a right to resistance and a definition of terrorism should not override this right. The right to resistance is contested by some. But it is not the central point: the central point is that there is nothing in the fact of occupation that justifies the targeting and killing of civilians.[59]

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56 *Id.* ¶ 158.
57 *Id.* ¶ 159.
58 *Id.*
59 *Id.* ¶ 160.

At the same Madrid conference in which the High Level Panel delivered its report, then UN Secretary-General, Kofi Annan, argued that:

> the High-Level Panel offers us a way to end these arguments. We do not need to argue whether States can be guilty of terrorism, because deliberate use of armed force by States against civilians is already clearly prohibited under international law. As for the right to resist occupation, it must be understood in its true meaning. It cannot include the right to deliberately kill or maim civilians. The Panel calls for a definition of terrorism which would make it clear that *any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from any act*. I believe this proposal has clear moral force, and I strongly urge world leaders to unite behind it.[60]

The United Nations must provide the leadership for the development of a universally-accepted and recognized counter-terrorism policy. It would be helpful, of course, for the international community to develop a *universal counter-terrorism convention* which incorporates a *definition for terrorism.* While the UN is expected to provide the leadership necessary to develop and adopt a convention that includes a definition for terrorism, it is important that the process be inclusive and participatory and hence, provide the opportunity for all Member States to participate. Such participation is critical, especially given the fact that the General Assembly will have to agree on the draft of the counter-terrorism convention.

It has been noted that "the absence of a definition of terrorism has not prevented the General Assembly from preparing counter-terrorism conventions and protocols which the international community has adopted in the past and which contain descriptions of all the elements associated with the perpetration of terrorist acts" and that "the international community's heightened awareness of terrorism, as reflected in the decisions of the General Assembly, is proof that tolerance of terrorism and its manifestations is minimal if not non-existent."[61] The approach taken by the UN to address international terrorism has involved the development of "a normative framework that identifies terrorism as a problem [that is] common to all Member States" and the encouragement of "concerted

60 Annan, *supra* note 25 (emphasis added).
61 *See* Rupérez, *supra* note 43, at 8–9.

governmental action to develop more specific national and international instruments to address it."[62]

However, in presenting its prescriptions for dealing with terrorism, the UN emphasizes that they must be undertaken only "within the framework of respect for international law and cooperation between States which is the cornerstone of the [UN] Charter."[63] These prescriptions, it is noted, "have been gradually strengthened to the point that they have become obligatory as the scope and deadliness of terrorism continue to grow."[64] The UN's "counter-terrorism policies and doctrines are today a critical point of reference when confronting one of the most serious and visible threats to the security of mankind at the dawn of the twenty-first century."[65]

The Security Council ("SC" or "UNSC") is one of the UN's most important organs. The functions of the SC are defined and elaborated in Article 24 of the UN Charter.[66] Article 24 states as follows:

> 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.[67]

Given the fact that one of the most important functions of the SC is to maintain international peace and security, it is no wonder that the SC has taken the lead in the fight against international terrorism. On December 21, 1988, a Pan-Am airline was destroyed by a bomb, killing all its 243 passengers and 16 crew members in a disaster that was eventually christened the *Lockerbie Bombing* because large portions of the destroyed aircraft were found in the Scottish village of Lockerbie.[68] Following an investigation that was carried out by the Scottish police and the U.S. Federal

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62 *Id.* at 9.
63 *Id.*
64 *Id.*
65 *Id.*
66 *See* U.N. Charter art. 24.
67 *Id.* art. 24, ¶¶ 1–2 (emphasis added).
68 *See* RODNEY WALLIS, LOCKERBIE: THE STORY AND THE LESSONS 1 (2001) (examining terrorist bombing of Pan-Am Flight 103 and implications for the fight against terrorism).

Bureau of Investigation ("FBI"), arrest warrants were issued in November 1991 for two Libyan nationals suspected of masterminding the bombing of Flight 103.[69]

In January 1992, the UN Security Council issued a resolution in which it warned the Libyan Arab Jamahiriya of what the international community would do to the country and the government if then Libyan president, Muammar al-Gaddafi, failed to turn over the suspected terrorist masterminds. In its Resolution 731 of January 21, 1992,[70] the SC noted that it was:

> [d]eeply disturbed by the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States;

and that it was also:

> [d]eeply concerned by all activities directed against international civil aviation and affirming the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security.[71]

The SC also expressed its concern:

> over results of investigations which implicate officials of the Libyan Government and which are contained in Security Council documents that include the requests addressed to the Libyan authorities by France, the United Kingdom of Great Britain and Northern Ireland and the United States of America in connection with the legal procedures related to the attacks carried out against Pan Am flight 103 and UTA flight 772.[72]

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69 The Scottish police unit that worked with the U.S. FBI in the investigation was the Dumfries and Galloway Constabulary, which until April 1, 2013, was the territorial police force for the council area of Dumfries and Galloway. On April 1, 2013, the Police and Fire Reform (Scotland) Act 2012 created a single Police Service of Scotland known as Police Scotland. *See* Police and Fire Reform (Scotland) Act 2012, (ASP 8). The two Libyans indicted were Abdelbaset al-Megrahi and Lamin Khalifah Fhimah. *See* PETER JOYCE, THE POLICING OF PROTEST, DISORDER AND INTERNATIONAL TERRORISM IN THE UK SINCE 1945, at 260 (2016).

70 S.C. Res. 731 (Jan. 21, 1992).

71 *Id.* pmbl.

72 *Id.* pmbl. The UN Security documents are (S/23306*, S/23307*, S/23308*, S/23309*, and

After noting that it was determined to eliminate international terrorism, the SC then condemned "the destruction of Pan Am flight 103 and UTA flight 772 and the resultant loss of hundreds of lives," and deplored the fact that "the Libyan Government has not yet responded effectively to . . . requests to cooperate fully in establishing responsibility for the terrorist acts . . . [against] Pan Am flight 103 and UTA flight 772."[73] The SC then urged "the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism."[74]

On March 31, 1992, the SC adopted Resolution 748 in which it reaffirmed its Resolution 731 (1992) of January 21, 1992.[75] The SC then noted that it was "[d]eeply concerned that the Libyan Government [had] still not provided a full and effective response to the requests in its resolution 731 (1992)" and that it was "[c]onvinced that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security."[76] Having determined "that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security," the SC then invoked its power to act under Chapter VII of the UN Charter and declared that:

> the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests addressed to the Libyan authorities by France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.[77]

And that:

> the Libyan Government must commit itself definitely to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of

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S/23317).

73 *Id.* ¶¶ 1–2.

74 *Id.* ¶ 3.

75 *See* S.C. Res. 748 (Mar. 31, 1992); S.C. Res. 731 (Jan. 21, 1992).

76 S.C. Res. 748, pmbl. (Mar. 31, 1992).

77 *Id.* ¶ 1. Charter VII of the UN Charter deals with "action with respect to threats to the peace, breaches of the peace, and acts of aggression." U.N. Charter ch. VII.

terrorism.[78]

On November 11, 1993, the SC adopted Resolution 883 (1993), which reaffirmed its resolutions 731 (1992) of January 21, 1992 and 748 (1992) of March 31, 1992.[79] Then, the SC noted that it was deeply concerned that "after more than twenty months the Libyan Government [had] not fully complied with these resolutions"[80] and "[c]onvinced that those responsible for acts of international terrorism must be brought to justice,"[81] and invoking its power to act under Chapter VII of the UN Charter, it demanded that "the Libyan Government comply without any further delay with resolutions 731 (1992) and 748 (1992)."[82]

The SC then went on to impose various sanctions on Libya when it stated that:

> all States in which there are funds or other financial resources (including funds derived or generated from property) owned or controlled, directly or indirectly by:
>
> (a) the Government or public authorities of Libya, or
> (b) any Libyan undertaking,
>
> shall freeze such funds and financial resources and ensure that neither they nor any other funds and financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly, to or for the benefit of the Government or public authorities of Libya or any Libyan undertaking, which for the purposes of this paragraph, means any commercial, industrial or public utility undertaking which is owned or controlled, directly or indirectly, by
>
> (i) the Government or public authorities of Libya,
> (ii) any entity, wherever located or organized, owned or controlled by (i), or
> (iii) any person identified by States as acting on behalf of (i) or (ii) for the purposes of this resolution.[83]

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78 S.C. Res. 748, ¶ 2 (Mar. 31, 1992).
79 *See* S.C. Res. 883, ¶ 1 (Nov. 11, 1993).
80 *Id.* pmbl.
81 *Id.* pmbl.
82 *Id.* ¶ 1.
83 *Id.* ¶ 3. The sanctions, however, did not apply to funds derived from the sale of "petroleum or petroleum products, including natural gas and natural gas products, or agricultural products or commodities, originating in Libya and exported therefrom after the time specified in paragraph 2 above,

On August 27, 1998, the SC adopted Resolution 1192 (1998) in which it recalled resolutions 731 (1992) of 21 January 1992, 748 (1992) of March 31, 1992 and 883 (1993) of November 11, 1993.[84] The SC also made reference to letters written by representatives of the governments of the United Kingdom of Great Britain and Northern Ireland, and the United States of America to the UN Secretary General, as well as resolutions adopted by and communications of the Organization of African Unity, the League of Arab States, the Non-Aligned Movement and the Islamic Conference.[85] The SC then invoked its power to act under Chapter VII of the UN Charter and demanded that the Libyan Government immediately comply with the various resolutions mentioned above.[86]

In addition, the SC welcomed "the initiative for the trial of the two persons charged with the bombing of Pan Am flight 103 ("the two accused") before a Scottish court sitting in the Netherlands"[87] and called upon "the Government of the Netherlands and the Government of the United Kingdom to take such steps as are necessary to implement the initiative, including the conclusion of arrangements with a view to enabling the court described in paragraph 2 to exercise jurisdiction in the terms of the intended Agreement between the two Governments."[88] Finally, the SC called on Member States to cooperate in the prosecution of the two accused individuals and specifically asked the Government of Libya to "ensure the appearance in the Netherlands of the two accused for the purpose of trial by the [Scottish court]" and that "the Libyan Government shall ensure that any evidence or witness in Libya are, upon the request of the court, promptly made available at the court in the Netherlands for the purpose of the trial."[89]

As a result of the sanctions imposed on Libya by the UN Security Council, the Libyan government cooperated with France in the trial and conviction of six Libyan nationals for their participation in the terrorist attacks on the UTA plane.[90] In addition, the two Libyan nationals who were suspected of having orchestrated the attack on Pan Am's Flight 103 were handed to the Dutch authorities on January 5, 1999 for trial by Scottish judges under Scottish law at a former U.S. Air Force base in the Netherlands

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provided that any such funds are paid into separate bank accounts exclusively for these funds." *See id.* ¶ 4.

84 S.C. Res. 1192 (Aug. 27, 1998).

85 *Id.* pmbl.

86 *Id.* ¶ 1.

87 *Id.* ¶ 2.

88 *Id.* ¶ 3.

89 *Id.* ¶ 4.

90 *See* Rupérez, *supra* note 43, at 11.

called Camp Zeist—the camp was converted into a Scottish court and a detention center for the two defendants.[91] The Security Council eventually lifted the sanctions imposed on Libya on September 12, 2003, after the Libyan government announced that it had "accepted responsibility for the actions of its officials and agreed to pay billions of dollars to the victims' families."[92]

Besides Libya, the UN Security Council has also imposed sanctions on other countries in connection with the refusal of those countries to extradite their citizens who are wanted in other jurisdictions to stand trial for their complicity in terrorism. For example, in a Press Release issued on April 26, 1996, the Security Council demanded that the Republic of Sudan extradite suspects in the attempted assassination of Egyptian president, Hosni Mubarak. The Egyptian president's motorcade was attacked in the Ethiopian capital, Addis Ababa, while he was there to attend the Assembly of the Heads of State and Government of the Organization of African Unity ("OAU") on June 26, 1995.[93]

In Resolution 1054 (1996), which was adopted by the Security Council at its 3660th meeting on April 26, 1996, the Republic of Sudan was effectively sanctioned for failing to comply with requests from the OAU to have the suspects in the assassination attempt against President Mubarak extradited to Addis Ababa to stand trial.[94] In this resolution, the Security Council noted that it was "[d]eeply alarmed that the Government of Sudan has failed to comply with the requests set out in paragraph 4 of resolution 1044 (1996)."[95] The sanctions against Sudan included a reduction in "the

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91 *See The Bombing of Pan Am Flight 103: 30 Years Later, Still Actively Seeking Justice*, FBI (Dec. 14, 2018), https://www.fbi.gov/news/stories/remembering-pan-am-flight-103-30-years-later-121418.

92 *See* Rupérez, *supra* note 43, at 11.

93 Press Release, Security Council, Security Council Demands Sudan Act to Extradite Suspects in Assassination Attempt of Egyptian President by 10 May, or Face Limited Sanctions, U.N. Press Release SC/6214 (Apr. 26, 1996); *see also* Craig Turner, *Egypt's Leader Survives Assassination Attempt: Africa: Muslim Extremists Suspected in Attack on Mubarak's Motorcade in Ethiopia: President is Unharmed*, L.A. TIMES (June 27, 1995, 12:00 AM), https://www.latimes.com/archives/la-xpm-1995-06-27-mn-17703-story.html.

94 The OAU's request is found in paragraph 4 of the Security Council's Resolution 1044 (1996) and reads as follows: "Calls upon the Government of the Sudan to comply with the requests of the Organization of African Unity without further delay to: (a) Undertake immediate action to extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan and wanted in connection with the assassination attempt on the basis of the 1964 Extradition Treaty between Ethiopia and the Sudan; (b) Desist from engaging in activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements and act in its relations with its neighbors and with others in full conformity with the Charter of the United Nations and with the Charter of the Organization of African Unity." S.C. Res. 1044, ¶ 4 (Jan. 31, 1996).

95 S.C. Res. 1054, pmbl. (Apr. 26, 1994).

number and the level of the staff at Sudanese diplomatic missions and consular posts" and a restriction on entry or transit through the territory of Member States of "members of the Government of Sudan, officials of that Government and members of the Sudanese armed forces."[96]

The SC then called upon "all States, including States not members of the United Nations and the United Nations specialized agencies to act strictly in conformity with this resolution, notwithstanding the existence of any rights granted or obligations conferred or imposed by any international agreement or of any contract entered into or any license or permit granted prior to the entry into force of the provisions set out in paragraph 3 above."[97]

In a resolution adopted by the UN Security Council at its 4384th meeting on September 28, 2001, the sanctions against the Republic of Sudan were lifted after Khartoum decided to expel several individuals suspected of engaging in terrorist activities, including al-Qaeda's Osama bin Laden.[98] In Resolution 1372 (2001), the SC welcomed the "the accession of the Republic of the Sudan to the relevant international conventions for the elimination of terrorism, its ratification of the 1997 International Convention for the Suppression of Terrorist Bombing and its signing of the 1999 International Convention for the Suppression of Financing of Terrorism"[99] and after declaring that it was acting pursuant to its power under "Chapter VII of the Charter of the United Nations,"[100] the SC declared that it had decided to terminate, "with immediate effect, the measures referred to in paragraphs 3 and 4 of resolution 1054 (1996) and paragraph 3 of resolution 1070 (1996)."[101]

After the terrorist attacks that took place on September 11, 2001 in the

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96 *Id.* ¶ 3.

97 *Id.* ¶ 5. Paragraph 3 contains the sanctions against the Republic of Sudan. *Id.* ¶ 3.

98 *See* S.C. Res. 1372 (Sept. 28, 2001). See, especially, *id.* ¶ 1.

99 *Id.* pmbl.

100 *Id.*

101 *Id.* ¶ 1. Here is the information in paragraphs 3 and 4 of Resolution 1054 (1996): "3. Decides that all States shall: (a) Significantly reduce the number and the level of the staff at Sudanese diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain; (b) Take steps to restrict the entry into or transit through their territory of members of the Government of Sudan, officials of that Government and members of the Sudanese armed forces; 4. Calls upon all international and regional organizations not to convene any conference in Sudan." S.C. Res. 1054, ¶¶ 3–4 (Apr. 26, 1994). Here is the information in paragraph 3 of Resolution 1070: "3. Decides that all States shall deny aircraft permission to take off from, land in, or overfly their territories if the aircraft is registered in Sudan, or owned, leased or operated by or on behalf of Sudan Airways or by any undertaking, wherever located or organized, which is substantially owned or controlled by Sudan Airways, or owned, leased or operated by the Government or public authorities of Sudan, or by an undertaking, wherever located or organized, which is substantially owned or controlled by the Government or public authorities of Sudan." S.C. Res. 1070, ¶ 3 (Aug. 16, 1996).

United States,[102] the UN took prompt and decisive action to confront this evolving threat to international peace and security. On September 12, 2001, the SC adopted Resolution 1368 (2001), officially invoking the "inherent right of individual or collective self-defense in accordance with the Charter [of the UN]."[103] The Resolution also called on all Member States of the UN "to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and [stressed] that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable."[104] Resolution 1368 (2001) is considered a turning point in the struggle to minimize threats to international peace and security because "it legitimized the use of force to fight terrorism."[105]

On September 28, 2001, the Security Council, acting pursuant to its power under Chapter VII of the UN Charter, adopted Resolution 1373 (2001).[106] The Resolution, which is binding on all Member States, imposed a range of obligations on Member States that dealt directly with the fight against global terrorism. These include, for example, that States should "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts."[107] In addition, States must "[p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens."[108]

In addition to establishing a Counter-terrorism Committee consisting of members of the Security Council, Resolution 1373 (2001) also called on all Member States to ratify and domesticate provisions of "relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism

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102 On September 11, 2001, nineteen men hijacked four U.S. commercial airplanes bound for the west coast of the country. The planes were intentionally crashed into specific targets in New York City, Shanksville, Pennsylvania, and the Pentagon in Washington, D.C. Thousands of people were killed and a lot of property destroyed. *See, e.g.*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004) (representing an account of the official U.S. investigation into the events of September 11, 2001); GARRETT M. GRAFF, THE ONLY PLANE IN THE SKY: AN ORAL HISTORY OF 9/11 (2019) (providing an eye-witness account of the events of September 11, 2002 in the United States).

103 S.C. Res. 1368, pmbl. (Sept. 12, 2001).

104 *Id.* ¶ 3.

105 *See* Rupérez, *supra* note 43, at 13.

106 S.C. Res. 1373, ¶ 6 (Sept. 28, 2001).

107 *Id.* ¶ 2(a).

108 *Id.* ¶ 2(d).

of 9 December 1999."[109] Member States were then instructed to report to the Committee, "no later than 90 days from the date of adoption of [the] resolution . . . on steps they have taken to implement this resolution."[110]

While UN Security Council Resolution 1373 (2001) did not impose sanctions on States that are responsible for acts that the SC considered to be threats to international peace and security, it elaborated measures, which all Member States of the United Nations were to adopt in order to fight terrorism. Member States, for example, were required to criminalize terrorism, perpetrators of terrorist acts, as well as accomplices and financiers of terrorism.[111] On March 26, 2004, the Security Council adopted Resolution 1535 (2004), which proposed the establishment of a permanent Counter-Terrorism Executive Directorate ("CTED"), which was expected "to enhance the Committee's ability to monitor the implementation of resolution 1373 (2001) and effectively continue the capacity-building work in which it is engaged."[112] On May 18, 2004, the UN Secretary-General appointed Spanish Ambassador to the UN, Javier Rupérez, as the Executive Director of CTED.[113]

The establishment of the CTED by the Security Council represented a bold move by the international organization to engage its Member States in implementing the Security Council's Resolution 1373 (2001) in particular and the fight against terrorism in general.[114] In addition to the fact that Member States are expected to send reports to the CTED on the steps that they have taken to implement Resolution 1373 (2001) and which "serve as the basis for an active dialogue with the Committee and CTED," the CTED can engage in more focused dialogue with Member States through "country visits."[115]

Each country visit is undertaken with the permission and cooperation of each Member State. After each visit, "the counter-terrorism experts compile a report based on their on-site observations in order to assist the State in its implementation [of] the resolution and to identify the State's assistance needs. On that basis, and in full cooperation with the Member State, CTED then works with donor countries and international

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109 *Id.* ¶ 3(d).
110 *Id.* ¶ 6.
111 *See* Rupérez, *supra* note 43, at 14.
112 S.C. Res. 1535, ¶ 2 (Mar. 26, 2004).
113 *See* Walter Gehr, *The Universal Legal Framework Against Nuclear Terrorism*, 79 NUCLEAR L. 5, 5 (2007).
114 *See, e.g.*, S.C. Res. 1373, ¶ 6 (Sept. 28, 2001).
115 Rupérez, *supra* note 43, at 16.

organizations to facilitate provision of the necessary assistance."[116]

On April 28, 2004, the Security Council adopted Resolution 1540 (2004)[117] in which it affirmed that the "proliferation of nuclear, chemical and biological weapons, as well as their *means of delivery*, constitutes a threat to international peace and security."[118] The SC then noted that it was "[g]ravely concerned by the threat of terrorism and the risk that *non-State actors* such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery."[119]

The Security Council also noted that it was "[g]ravely concerned by the threat of illicit trafficking in nuclear, chemical, or biological weapons and their means of delivery, and *related materials*, which adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security."[120] Acting pursuant to the Security Council's power under Chapter VII of the Charter of the United Nations, the Security Council imposed an obligation on Member States to make sure that "non-State actors" do not have access to and possession of chemical, biological and nuclear weapons—weapons of mass destruction.[121]

Through a few key resolutions, the Security Council established three subordinate bodies that were dedicated to dealing with terrorism. In Resolution 1267 (1999), adopted on October 15, 1999, the Security Council deplored the fact that the Taliban had continued to "provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory," noted the "indictment of Usama bin Laden and his associates by the United States of America for, *inter alia*, the August 7, 1998, bombings of the United

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116 *Id.* at 16.

117 S.C. Res. 1540 (Apr. 28, 2004).

118 *Id.* pmbl. (emphasis added). Resolution 1540 (2004) defines "means of delivery" as consisting of: "missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use." *Id.*

119 *Id.* pmbl. (emphasis added). Resolution 1540 (2004) defines "non-State actor" as an "individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution." *Id.*

120 *Id.* pmbl. (emphasis added). "Related materials" is defined as: "materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery." *Id.*

121 *Id.* ¶ 2.

Sates embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States," stressed "its determination to ensure respect for its resolutions," and acting pursuant to its power under Chapter VII of the Charter of the United Nations, the SC established a Committee whose membership would be made up of all the members of the Security Council to monitor, inter alia, compliance, by Member States, with the sanctions imposed on Al-Qaeda and the Taliban.[122]

Through Resolution 1267, the SC also imposed an obligation on Member States "to bring proceedings against persons and entities within their jurisdiction that violate the measures imposed by paragraph 4 . . . and to impose appropriate penalties"[123] and to "cooperate fully with the Committee established by paragraph 6 above in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of this resolution."[124] In addition to the *1267 Committee*, the SC also established the *Counter-Terrorism Committee*—that is the CTC, which was created through Resolution 1373 (2001),[125] and the 1540 Committee, which was established by Resolution 1540.[126] All these committees, which are subordinate to the Security Council, are designed to assist the Security Council in its efforts to fight terrorism and maintain international peace and security.

On October 8, 2004, the Security Council adopted Resolution 1566 (2004),[127] whose origins can be found in a "draft presented by the Russian Federation following the terrorist attacks on Beslan, in the Russian republic of North Ossetia, in September 2004."[128] Although Resolution 1566 (2004) is similar to Resolution 1373 (2001), the former provides a definition for terrorism and unambiguously condemns terrorism, as well as "any attempt to justify it."[129] Here is the outline of the definition of terrorism provided in Resolution 1566 (2004):

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group

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122 S.C. Res. 1267 (Oct. 15, 1999). *See*, *especially*, *id.* ¶¶ 4 and 6 (sanctions and establishment of a Committee of the Security Council to monitor the implementation of sanctions, respectively).

123 *Id.* ¶ 8. Paragraph 4 of Resolution 1267 (1999) elaborates sanctions imposed on the Taliban. *See id.* at para. 4.

124 *Id.* ¶ 9. The Committee is referred to as the "1267 Committee."

125 *See* S.C. Res. 1373 (Sept. 28, 2001).

126 *See* S.C. Res. 1540, ¶ 4 (Apr. 28, 2004).

127 S.C. Res. 1566 (Oct. 8, 2004).

128 *See* Rupérez, *supra* note 43, at 18.

129 *Id.*

> of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.[130]

In addition, Resolution 1566 (2004)[131] calls upon Member States of the UN to:

> cooperate fully with the Counter-Terrorism Committee (CTC) established pursuant to resolution 1373 (2001), including the recently established Counter-Terrorism Committee Executive Directorate (CTED), the "Al-Qaida/Taliban Sanctions Committee" established pursuant to resolution 1267 (1999) and its Analytical Support and Sanctions Monitoring Team, and the Committee established pursuant to resolution 1540 (2004), and further calling upon such bodies to enhance cooperation with each other.[132]

The Resolution also reminded Member States that "they must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[133] This provision is very important, especially given the fact that throughout the African continent, many governments are being accused of using national laws designed to fight terrorism to tyrannize their own citizens.[134] Resolution 1566 (2004) also establishes a working group ("1566 (2004) Working Group") "to consider and submit recommendations to the Council on practical measures to be imposed upon individuals, groups

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130 S.C. Res. 1566, ¶ 3 (Oct. 8, 2004).

131 *Id.*

132 *Id.* pmbl.

133 *Id.*

134 *See, e.g.*, Off. of the U.N. High Comm'r for Hum. Rts., *Human Rights, Terrorism and Counter-Terrorism, Fact Sheet No. 32* (July 2008), https://www.ohchr.org/documents/publications/factsheet32En.pdf (noting that in recent years, "measures adopted by States to counter terrorism have themselves often posed serious challenges to human rights and the rule of law" and that "[s]ome States have engaged in torture and other ill-treatment to counter terrorism, while the legal and practical safeguards available to prevent torture, such as regular and independent monitoring of detention centers, have often been disregarded").

or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaida/Taliban Sanctions Committee"[135] and "to consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families."[136] Resolution 1566 (2004), thus, provided the Security Council with additional and important tools to confront international terrorism.[137]

The 1566 (2004) Working Group submitted its report to the Security Council on December 16, 2005.[138] Ambassador Javier Rupérez has noted that although the 1566 (2004) Working Group's report provided recommendations "on the future work of the Security Council in the area of counter-terrorism, there was no agreement to expand the list of individuals, groups and entities involved in or associated with terrorist activities established under the Al-Qaida/Taliban Sanctions Committee."[139] The 1566 (2004) Working Group's recommendations to the Security Council can be found in paragraphs 16–30 of their December 14, 2005 letter to the President of the Security Council.[140] These recommendations include the freezing of the financial assets of terrorist groups, as well as those of their supporters as a way to prevent the financial support of terrorism;[141] preventing the mobility of terrorists;[142] preventing the "supply of all types of arms and related materials to terrorists";[143] making sure that those accused of committing terrorist acts are fully prosecuted and if necessary, extradited to jurisdictions where they can be prosecuted;[144] paying attention to the prevention of the recruitment of potential terrorists, as well as the training of such persons;[145] preventing "public provocation to commit acts of terrorism";[146] and the curbing of cybercrime, including "the use of the Internet by individuals, groups and entities involved in or associated with

135 S.C. Res. 1566, ¶ 9 (Oct. 8, 2004).

136 *Id.* ¶ 10.

137 *See* Rupérez, *supra* note 43, at 18.

138 Rep. of the S.C. Working Group Established Pursuant to Resolution 1566 (2004), U.N. Doc. S/2005/789 (2005). This is the note from the President of the Security Council transmitting a report of the 1566 (2004) Working Group, which was established pursuant to Resolution 1566 (2004). The President's letter contains an Annex titled "Letter dated 14 December 2005 from the Chairman of the working group established pursuant to resolution 1566 (2004) addressed to the President of the Security Council." *Id.* at 2.

139 *See* Rupérez, *supra* note 43, at 19.

140 *See* Rep. of the S.C. Working Group Established Pursuant to Resolution 1566 (2004), *supra* note 138, ¶¶ 16–30.

141 *See id.* ¶¶ 16–20.

142 *See id.* ¶¶ 21–22.

143 *Id.* ¶¶ 23–24.

144 *See id.* ¶¶ 25–26.

145 *See id.* ¶¶ 27–28.

146 *Id.* ¶ 29.

terrorist activities to spread hate and to incite violence."[147]

With respect to the compensation of victims of terrorist acts, the 1566 (2004) Working Group concluded that "the establishment of a compensation fund for victims of terrorist acts at the international level was premature."[148] Instead, it encouraged "individual States to determine ways and means to extend assistance to victims of terrorist acts."[149] In his address to the closing plenary of the International Summit on Democracy, Terrorism and Security, in Madrid (Spain) on March 10, 2005, Kofi Annan, then UN Secretary General, presented a comprehensive strategy to fight terrorism. In doing so, he drew on the report of the High-level Panel on Threats, Challenges and Change.[150] The following are the five elements of what the Secretary General referred to as the five "Ds" of a strategy to fight terrorism:[151]

- first, to *dissuade* disaffected groups from choosing terrorism as a tactic to achieve their goals;
- second, to *deny* terrorists the means to carry out their attacks;
- third, to *deter* States from supporting terrorists;
- fourth, to *develop State capacity* to prevent terrorism; and
- fifth, to *defend human rights* in the struggle against terrorism.[152]

The Secretary General also stated that "[a]ll departments and agencies of the United Nations can and must contribute to carrying out this strategy."[153] He then added that he was creating "an implementation task force," under his office, which would "meet regularly to review the handling of terrorism and related issues throughout the UN system, and make sure that all parts of it play their proper role."[154]

What is emerging from these discussions about terrorism is that an effective strategy to eradicate it must be comprehensive and global and

147 *Id.* ¶ 30.
148 *Id.* ¶ 32.
149 *Id.*
150 *See* Rep. of the High-Level Panel, *supra* note 55. Through this note, the Secretary General, Kofi Annan, transmitted to the General Assembly, the report of the High-level Panel on Threats, Challenges and Change. The High-level Panel's report begins at page six and is titled "Transmittal letter dated 1 December 2004 from the Chair of the High-level Panel on Threats, Challenges and Change addressed to the Secretary-General." *See id.* at 6.
151 *See* Press Release, Secretary-General, *Secretary-General Offers Global Strategy for Fighting Terrorism in Address to Madrid Summit*, UN Press Release SG/SM/9757 (Mar. 10, 2005).
152 *Id.*
153 *Id.*
154 *Id.*

involve all Member States and their citizens. It has also been noted that the terrorist attacks of September 11, 2001 in the United States may have forced the international community to realize that geopolitical considerations must be set aside if the fight against terrorism is to succeed.[155]

Since its establishment in 2004, the UN Security Council Counter-Terrorism Committee Executive Directorate ("CTED")[156] has issued several reports and briefs dealing with different aspects of the fight against international terrorism. For example, on April 29, 2020, the CTED published a brief on how to deal with terrorist narratives online and offline.[157] In the Brief, the CTED noted that "[t]errorist narratives are designed to achieve multiple strategic communications objectives and target several types of audience, which range from those unaware of the underlying terrorist ideology to devout ideological adherents seeking avenues for engagement in violent activity."[158]

In addition, the CTED Analytical Brief also noted that:

> [t]errorists have continued to use both large and small Internet platforms to spread propaganda and maximize the online virality of their attacks, with a quantitative analysis of more than 45,000 URLs across more than 330 platforms showing that half of the top 50 platforms used by ISIL since 2014 were small and micro platforms. As a consequence, Member States have been forced to expand their efforts to combat terrorist communications beyond merely blocking or removing online terrorist propaganda and have increasingly emphasized countering terrorist narratives.[159]

On May 24, 2017, the UN Security Council unanimously adopted Resolution 2354 (2017) in which it welcomed the Counter-Terrorism Committee's "Comprehensive International Framework to Counter

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155 *See* Janvier Rupérez, *The Role of the United Nations in the Fight Against Terrorism: A Provisional Balance*, 10 PERCEPTIONS 41, 47–48 (2005).

156 *See* S.C. Res. 1535, ¶ 2 (Mar. 26, 2004).

157 Sec. Council Counter-Terrorism Comm. Exec. Directorate, *CTED Analytical Brief: Countering Terrorist Narratives Online and Offline* (2020). This Brief was prepared by the CTED pursuant to Security Council Resolution 2395 (2017). *See* S.C. Res. 2395, ¶ 8 (Dec. 21, 2017) (directing the CTED to undertake analytical work on "emerging issues, trends, and developments to support Member States and United Nations entities in taking measures, pursuant to international law, to address conditions conducive to terrorism and violent extremism as and when conducive to terrorism, in accordance with the United Nations Global Counterterrorism Strategy, in coordination with and support of UNOCT").

158 *CTED Analytical Brief*, *supra* note 157, at 2.

159 *CTED published Analytical Brief about countering terrorist narratives online and offline*, UNITED NATIONS, (April 29, 2020), https://www.un.org/securitycouncil/ctc/news/cted-publishes-analytical-brief-about-countering-terrorist-narratives-online-and-offline.

Terrorist Narratives."[160] The latter document "recommended guidelines and good practices to effectively counter the ways that ISIL (Da'esh), [Al Qaeda] and associated individuals, groups, undertakings and entities use their narratives to encourage, motivate, and recruit others to commit terrorist acts."[161]

In its Analytical Brief, the CTED also noted that "it is essential to ensure that government counter-narrative strategies are consistent with their obligations pursuant to international human rights law."[162] In addition, stated the CTED in its Brief, "[a]ll measures, including those taken offline, must ensure respect for the rights to freedom of expression, association, conscience, religion and related rights."[163] The CTED then emphasized that the CTED keeps the United Nations apprised of efforts by Member States to implement Security Council resolutions on terrorism. The CTED Analytical Briefs also provide the United Nations relevant data on its interactions with various multilateral, regional and subregional organizations, and members of the CTED Global Research Network ("GRN").[164]

Before the Security Council adopted Resolution 1373 (2001)[165] and subsequently established the Counter-Terrorism Committee, "the international community had already promulgated twelve of the current nineteen international counter-terrorism legal instruments."[166] The Counter-Terrorism Committee, however, has lamented the low rate of adherence to these conventions and protocols.[167] Nevertheless, after the terrorist attacks on the United States on September 11, 2001 and the adoption of UN Security Council Resolution 173 (2001), which called on all Member States to sign and ratify the international counter-terrorism instruments, "the rate of adherence has increased: some two-thirds of UN Member States have either ratified or acceded to at least ten of the nineteen instruments, and there

160 S.C. Res. 2354, ¶ 1 (May 24, 2017). The document "Comprehensive International Framework to Counter Terrorist Narratives" is found as an appendix to the "Letter dated 26 April 2017 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council." U.N. Sec. Council, *Comprehensive Framework to Counter Terrorist Narratives*, UN Doc. S/2017/375 (Apr. 28, 2017).

161 S.C. Res. 2354, ¶ 1 (May 24, 2017).

162 *CTED Analytical Brief*, *supra* note 157, at 7.

163 *Id.*

164 *See id.*

165 *See* S.C. Res. 1373 (Sept. 28, 2001).

166 *International Legal Instruments*, U.N. OFF. OF COUNTER-TERRORISM, https://www.un.org/sc/ctc/resources/international-legal-instruments/ (last visited on June 20, 2021).

167 *Id.*

is no longer any country that has neither signed nor become a party to at least one of them."[168]

In the section that follows, this Article examines universal counter-terrorism instruments. Currently, there are at least nineteen universal legal instruments and additional amendments dealing with terrorism. These instruments can be grouped into the following categories:

(I) Instruments regarding civil aviation (7 instruments):

1. *1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft*
2. *1970 Convention for the Suppression of Unlawful Seizure of Aircraft*
3. *1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*
4. *1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving international Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*
5. *2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*
6. *2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*
7. *2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft*

(II) Instrument regarding the protection of international staff (1 instrument):

8. *1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons*

(III) Instrument regarding the taking of hostages (1 instrument):

9. *1979 International Convention Against the Taking of Hostages*

(IV) Instruments regarding nuclear material (2 instruments)

10. *1980 Convention on the Physical Protection of Nuclear Material*

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168 *Id.* (providing a list of the nineteen international counter-terrorism instruments).

11. *2005 Amendments to the Convention on the Physical Protection of Nuclear Material*

(V) Instruments regarding maritime navigation (4 instruments):

12. 1988 Convention for the Suppression of Unlawful Acts Against the Safety of *Maritime Navigation*

13. *2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*

14. *1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*

15. *2005 Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*

(VI) Instrument regarding explosive materials (1 instrument):

16. *1991 Convention on the Making of Plastic Explosives for the Purpose of Detection*

(VII) Instrument regarding terrorist bombings (1 instrument):

17. *1997 International Convention for the Suppression of Terrorist Bombings*

(VIII) Instrument regarding the financing of terrorism (1 instrument):

18. *1999 International Convention for the Suppression of the Financing of Terrorism*

(IX) Instrument regarding nuclear terrorism (1 instrument):

19. *2005 International Convention for the Suppression of Acts of Nuclear Terrorism*[169]

Although all these instruments are important to the fight against international terrorism, this Article will examine only three of them. Specifically, the Article examines the International Convention for the Suppression of Terrorist Bombings (1997), the International Convention for the Suppression of the Financing of Terrorism (1999), and International Convention for the Suppression of Acts of Nuclear Terrorism (2005).

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169 *Id.*

## III. UNIVERSAL INSTRUMENTS RELATED TO THE SUPPRESSION AND PREVENTION OF INTERNATIONAL TERRORISM

### *A. Introduction*

In a declaration titled "Measures to Eliminate International Terrorism,"[170] the UN General Assembly invited "[t]he United Nations, the relevant specialized agencies and intergovernmental organizations and other relevant bodies [to] make every effort with a view to promoting measures to combat and eliminate acts of terrorism and to strengthening their role in this field."[171] In 1996, the General Assembly, in its Resolution 51/210,[172] decided "to establish an Ad Hoc Committee . . . to elaborate an international convention for the suppression of acts of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement further developing a comprehensive legal framework of conventions dealing with international terrorism."[173]

The General Assembly, in its 1996 resolution,[174] also noted that the Ad Hoc Committee "will meet from 24 February to 7 March 1997 to prepare the text of a draft international convention for the suppression of terrorist bombings, and recommends that work continue during the fifty-second session of the General Assembly from 22 September to 3 October 1997 in the framework of a working group of the Sixth Committee."[175] The Ad Hoc Committee's work produced the following conventions on the suppression of international terrorism: (1) International Convention for the Suppression of Terrorist Bombings;[176] (2) International Convention for the Suppression of the Financing of Terrorism;[177] and (3) International Convention for the Suppression of Acts of Nuclear Terrorism.[178] In its overview of international instruments related to the suppression and prevention of international terrorism, this Article examines only two of the various counter-terrorism treaties—the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the

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170 G.A. Res. 49/60 (Feb. 17, 1995).

171 *Id.* ¶ 9.

172 G.A. Res. 51/210 (Jan. 16, 1997).

173 *Id.* ¶ 9.

174 *Id.*

175 *Id.* ¶ 10.

176 G.A. Res. 52/164, International Convention for the Suppression of Terrorist Bombings (Dec. 15, 1997), 2149 U.N.T.S. 256 [hereinafter Terrorist Bombings Convention].

177 G.A. Res. 54/109, International Convention for the Suppression of the Financing of Terrorism (Dec. 9, 1999), 2178 U.N.T.S. 197 [hereinafter Financing of Terrorism Convention].

178 International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S. 89 (April 13, 2005).

Financing of Terrorism.

### *B. International Convention for the Suppression of Terrorist Bombings*

The International Convention for the Suppression of Terrorist Bombings ("Terrorist Bombings Convention")[179] was adopted by the UN General Assembly on December 15, 1997 and entered into force on May 23, 2001. In the Preamble, the States Parties to the Terrorist Bombings Convention noted that they were "[d]eeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations."[180] They then recalled several UN General Assembly resolutions, in which they had "solemnly [reaffirmed] their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States."[181] Additionally, they noted that "terrorist attacks by means of explosives or other lethal devices have become increasingly widespread" and concluded that there was "urgent need to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators."[182]

The Terrorist Bombings Convention consists of 24 articles. Article 1 is devoted to providing definitions for important words and phrases used in the Convention. These include "State or government facility," "infrastructure facility," "explosive or other lethal device," "military forces of a State," and "public transportation system." In Article 2, the Convention defines the offense of "terrorist bombing":

> Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:
>
> (a) With the *intent* to cause death or serious bodily injury; or

179 Terrorist Bombings Convention, *supra* note 176.
180 Terrorist Bombings Convention, *supra* note 176, pmbl.
181 *Id.* pmbl.
182 *Id.*

> (b) With the *intent* to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.[183]

Thus, for a person to commit the offense of "terrorist bombing," that person must not only, for example, "unlawfully and intentionally deliver[], place[], discharge[] or detonate[] an explosive device or other lethal device in, into or against a place of public use, . . ." they must do so [w]ith *intent* to cause death or serious bodily injury."[184] Hence, the crime of "terrorist bombing" has an intent requirement.

Article 2 of the Terrorist Bombings Convention also defines an "attempted terrorist bombing": "Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1."[185] This article also defines the crime of being an *accomplice* to a "terrorist bombing":

> Any person also commits an offence if that person:
>
> (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2; or
>
> (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2; or
>
> (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.[186]

The Terrorist Bombings Convention, however, "shall not apply where the offence is committed within a single State" and the "alleged offender and the victims are nationals of that State" and, in addition, "the alleged offender is found in the territory of that State and no other State has a basis under Article 6, paragraph 1, or article 6, paragraph 2, of this Convention to exercise jurisdiction, except that the provisions of articles 10 to 15 shall, as appropriate, apply in those cases."[187] Thus, in order for the crime to be

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183 *Id.* art. (2)(1)(a)–(b) (emphasis added).

184 *Id.* art. 2(1)(a) (emphasis added).

185 *Id.* art. 2(2). The paragraph 1 referred to here is Article 2(1).

186 *Id.* art. 2(3).

187 *Id.* art. 3. Article 6 requires that each State Party should "take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2"—the offence is committed

considered a terrorist bombing, it must meet the requirements of articles 2, 3, and 6.[188]

Article 4 imposes an obligation on the States Parties to domesticate the Convention and establish criminal offences that are justiciable in each State Party's domestic courts. According to Article 4, "[e]ach State Party shall adopt such measures as may be necessary: (a) [t]o establish as criminal offences under its domestic law the offences set forth in article 2 of this Convention" and "[t]o make those offences punishable by appropriate penalties which take into account the grave nature of those offences."[189] Recognizing the fact that the prosecution of acts of terrorism is within the purview of national governments, the Convention imposes an obligation on States Parties to "adopt such measures as may be necessary, including where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature."[190]

Articles 8 and 9 of the Terrorist Bombings Convention deal with the extradition of alleged offenders "in cases to which article 6 applies."[191] If a State Party in which the alleged offender is located decides not to extradite the accused, it must, "without exception whatsoever and whether or not the offence was committed in its territory, . . . summit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State."[192] States Parties shall deem offenses set forth in article 2 "as extraditable offences in any extraditable treaty existing between any of the States Parties before the entry into force of this Convention."[193] In addition, States Parties must undertake to "include such offences as extraditable offences in every extradition treaty

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"in the territory of that State" or "on board a vessel flying the flag or that State or an aircraft which is registered under the laws of that State at the time the offence is committed" or "by a national of that State." *Id.* art. 6. Article 6(2) shows how a State Party "may also establish its jurisdiction over any such offence." *Id.* art. 6(2).

188 *Id.* arts. 2, 3, 6.

189 *Id.* art. 4.

190 *Id.* art. 5.

*191 Id.* art. 8(1).

192 *Id.*

193 *Id.* art. 9(1).

to be subsequently concluded between them."[194]

If a State Party makes extradition conditional on the existence of a treaty and such a State "receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2."[195] Under these conditions, extradition, however, shall also be "subject to the other conditions provided by the law of the requested State."[196] In the case of States Parties that do not make extradition conditional on the existence of a treaty, they shall "recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State."[197]

Prosecuting individuals for terrorist bombings requires *investigations* and *criminal* or *extradition proceedings* associated with the offences set forth in article 2 of the Terrorist Bombings Convention. It is important to note that States Parties may need assistance from one another, especially in the case where extradition is necessary and/or witnesses and evidence are located in more than one State Party. The Convention imposes an obligation on States Parties to cooperate with one another and provide necessary assistance to obtain the evidence that they need to prosecute or extradite individuals accused of committing an offence within the meaning of the Convention.[198]

Cooperation and mutual assistance between States Parties can be based on "treaties or other arrangements on mutual legal assistance that may exist between them."[199] However, in the case where no such treaties or arrangements exist, "States Parties shall afford one another assistance in accordance with their domestic law."[200] The obligation to provide "legal assistance" or "extradite" shall be rendered ineffective if the "requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would

194 *Id.*
195 *Id.* art. 9(2).
196 *Id.*
197 *Id.* art. 9(3).
198 *See id.* art. 10(1).
199 *Id.* art. 10(2).
200 *Id.*

cause prejudice to that person's position for any of these reasons."[201]

States Parties are expected to guarantee the rights of individuals who have been taken into custody in connection with the Terrorist Bombings Convention. Such individuals must be guaranteed "fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights."[202] In addition, States Parties are obligated to "cooperate in the prevention of the offences set forth in article 2" of the Convention.[203]

Once the alleged perpetrator of a terrorist bombing has been prosecuted, the State Party in which the crime was prosecuted shall, "in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties."[204] In carrying out their obligations under the Convention, they must do so "in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."[205]

With respect to "disputes between two or more States Parties concerning the interpretation or application of [the Terrorist Bombings Convention] which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, [they shall] be submitted to arbitration."[206] If, however, arbitration is not successful, "any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court."[207] A State Party may, when it signs, ratifies, accepts or approves this Convention, make declarations and reservations. For example, when Bahrain acceded to the Terrorist Bombings Convention, it made the following reservation/declaration: "The Kingdom of Bahrain does not consider itself bound by Paragraph 1 of Article 20 of the Convention."[208] Several States

201 *Id.* art. 12.
202 *Id.* art. 14.
203 *Id.* art. 15.
204 *Id.* art. 16.
205 *Id.* art. 17.
206 *Id.* art. 20.
207 *Id.* art. 20.
208 See Status of Terrorist Bombings Convention, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&clang=_en (last visited June 20, 2021), for Bahrain's reservation.

Parties, upon ratification, acceptance, approval or accession, make a declaration with respect to the establishment of jurisdiction over the offences set forth in the Convention. For example, Singapore made the following declaration: "In accordance with Article 6, paragraph 3 of the Convention, the Republic of Singapore declares that it has established jurisdiction over offences set forth in Article 2 of the Convention in all the cases provided for in Article 6, paragraph 1, and Article 6, paragraph 6."[209]

Finally, "[a]ny State Party may denounce this Convention by written notification to the Secretary-General of the United Nations."[210] If a State Party does denounce the Convention, its denunciation shall "take effect one year following the date on which notification is received by the Secretary-General of the United Nations."[211]

Although the title of the Terrorist Bombings Convention refers only to *bombings*, this counter-terrorism instrument also deals with "weapons of mass destruction,"[212] such as an explosive or lethal device. For example, Article 1(3) defines *explosive* or other *lethal device* as:

> (a) An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or
>
> (b) A weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.[213]

Article 2 of the Convention imposes an obligation on States Parties to create an offence "of *intentionally* placing or using an explosive or other lethal device with the intent to cause death, serious injury or major economic loss."[214] The offence created by Article 2.1 of the Terrorist Bombings Convention is *a general criminal intent crime*—it is defined as carrying out certain acts (e.g., delivering, placing, discharging, or detonating specific weapons or devices): "(a) With the intent to cause death or serious bodily injury; or (b) With the intent to cause intensive destruction

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209 See *id.* for Singapore's reservation.

210 Terrorist Bombings Convention, *supra* note 176, art. 23.

211 *Id.*

212 *See* U.N. Off. on Drugs & Crime, *Legislative Guide to the Universal Legal Regime Against Terrorism*, at 16, Sales No. E.08.V.9 (2008) [hereinafter Legislative Guide].

213 *See* Terrorist Bombings Convention, *supra* note 176, art. 1(3).

214 *See* Legislative Guide, *supra* note 212, at 17 (emphasis added).

[. . .] where such destruction results in or is likely to result in major economic loss."[215]

Scholars and policymakers, however, have talked about whether national legislation dealing with terrorism should include the terrorist's *motivation* for engaging in the act of terrorism as an element of the offence.[216] If counter-terrorism legislation includes the motivation of the terrorist, that implies that the "act must be committed with a political, ideological or religious motive."[217] An example of a terrorism offence that has a "motivational element" can be found in § 1 of the UK Terrorism Act 2000:

> 1.—(1) In this Act "terrorism" means the use or threat of action: where—
>
> (a) the action falls within subsection (2),
>
> (b) *the use or threat is designed to influence the government or to intimidate the public or a section of the public*, and
>
> (c) *the use or threat is made for the purpose of advancing a political, religious or ideological cause.*
>
> (2) Action falls within this subsection if it—
>
> (a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the action,
>
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system.[218]

The prosecution of individuals for terrorist acts under legislation that includes an ideological motive may create *evidentiary* difficulties. This problem may arise when it becomes necessary for the prosecution to prove or establish "a defendant's mental state or purpose without proof of oral or

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215 *See* Terrorist Bombings Convention, *supra* note 176, art. 2(1)(a)–(b).
216 *See* Legislative Guide, *supra* note 212, at 26.
217 *See id.* at 26.
218 Terrorism Act 2000, c.11, § 1 (UK) (emphasis added).

written statements or a post-arrest confession revealing a terrorist purpose."[219] Prosecutors in some jurisdictions might "be reluctant to infer a defendant's mental state because of the proverbial impossibility of seeing into a person's mind or heart."[220] Suppose a group of individuals commit an Article 2 offence (e.g., detonate an explosive or other lethal device in a Christian Church on Easter Sunday), could the prosecutor in the jurisdiction where this offence took place consider this as sufficient, "without a public claim by the responsible group, to establish an underlying religious motivation"?[221]

Most legal scholars would answer in the negative and argue that it would be necessary for the prosecutor and/or investigating authorities in such a case to seek out associates and/or relatives of members of the responsible group who may be able to offer testimony that can reveal a suspect's or suspects' intent and motive. Alternatively, the investigating authorities may be compelled to extract a confession from the accused persons.[222] Some scholars have noted that if prosecuting authorities are forced to extract confessions from accused individuals as a way to establish intent and motive, this could create "pressures that may contribute to improper interrogation or investigative practices, and [that] this danger should be anticipated and guarded against by policy makers and executive authorities."[223]

Many legal scholars would consider making a confession "the only feasible way to prove an element of an offence [as] unhealthy"—such an approach may "lead to coercion and conflicts with Article 14,3(g) of the ICCPR," which provides that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (g) Not to be compelled to testify against himself or to confess guilt."[224] Over the years, "criminology and criminal law have moved away from reliance upon confessions, placing more emphasis upon the reasonable inferences to be drawn from other elements of proof."[225] In fact, this is reflected in the UN Convention Against Corruption (2002), which, at Article 28, states that: "Knowledge, intent or purpose required as an element of an offence established in accordance with

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219 Legislative Guide, *supra* note 212, at 26.

220 *Id.*

221 *Id.*

222 *See id.*

223 *Id.* at 26.

224 International Covenant on Civil and Political Rights art. 14(3)(g), Dec. 16, 1966, 999 U.N.T.S. 171.

225 Legislative Guide, *supra* note 212, at 27.

this Convention may be inferred from objective *factual circumstances*."[226]

Thus, in prosecuting a person or group for having committed a crime that requires an ideological element, the prosecutor must adopt a realistic approach to the proof of the offence's mental element. For example, "evidence of membership in an organization endorsing political violence, possession of extremist literature attacking other religions, past expressions of hatred of the victim group, or the circumstances and target of the attack itself could substitute for a confession as evidence of the defendant's motive."[227]

### C. *International Convention for the Suppression of the Financing of Terrorism*

The International Convention for the Suppression of Terrorist Bombings deals with what can be considered or referred to as "tangible terrorist crimes," which include, for example, the unlawful and intentional delivering, placing, discharging, or detonating of an explosive or other lethal device "in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility."[228] The main purpose of the International Convention for the Suppression of the Financing of Terrorism ("Financing of Terrorism Convention"), however, is to suppress and prevent terrorism by cutting off the flow of the funds that terrorists need to finance their operations.

As argued by Anthony Aust, who represented the UK in the negotiations that led to the drafting of the Financing of Terrorism Convention, negotiating this Convention "took two two-week sessions in New York in 1999" and "[t]his was particularly remarkable since, unlike the previous nine counter-terrorism conventions the new one [i.e., the Financing of Terrorism Convention] is quite different in nature in that it is not concerned with terrorist crimes, like planting a bomb on board a civil aircraft but with the financing of such crimes."[229] Faust also noted that "[a]lthough financing aids the commission of terrorist crimes," it is, however, "not itself a terrorist act" and, as a consequence, "the drafters of

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226 United Nations Convention Against Convention art. 28, Oct. 31, 2003, 2349 U.N.T.S. 41; G.A. Res. 58/422, art. 28, U.N. Convention Against Corruption (Oct. 31, 2003).

227 Legislative Guide, *supra* note 212, at 27.

228 Terrorist Bombings Convention, *supra* note 176, art. 2(1).

229 Anthony Aust, *Counter-Terrorism: A New Approach*, 5 Max Planck Y.B.U.N.L. 285, 285–286 (2001).

the [Financing of Terrorism Convention] encountered some unusual problems."[230]

The two most important problems, according to Faust, were (1) "the precise scope of the new offence, in particular how to define the terrorist acts the financing of which would be criminalized" and (2) "how to deal with corporate bodies involved in terrorist financing."[231] In drafting the Financing of Terrorism Convention, the drafters used the Terrorist Bombings Convention as precedent and followed it closely. Faust notes that the Terrorist Bombings Convention has now become "the benchmark for new UN counter-terrorism conventions."[232] Some provisions are common to both Conventions. For example, the definition of "a State or governmental facility" are the same in both Conventions.[233]

The definition of "funds" is quite broad and covers:

> assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.[234]

It is important to note that the Financing of Terrorism Convention does not care how the funds were acquired, whether legally or illegally. The only relevant issue is that these funds be used as indicated in Article 2 of the Convention.[235] In other words, the Convention was aware that terrorists could be given funds that were legally acquired and, as a consequence, it was necessary to let States Parties and other concerned parties appreciate the fact that the Convention was not concerned only with funds that were acquired illegally.

Anthony Aust, who participated in the drafting of the Financing of Terrorism Convention, has noted that during the negotiations, representatives of several Western European States "questioned whether there was need for a new convention, since, in their view, the financier of a

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230 *Id.* at 286.

231 *Id.*

232 *Id.*

233 Terrorist Bombings Convention, *supra* note 176, art. 1(1); Financing of Terrorism Convention, *supra* note 177, art. 1(2).

234 Financing of Terrorism Convention, *supra* note 177, art. 1(1).

235 Article 2 defines offenses within the meaning of the Financing of Terrorism Convention. *See id.* art. 2.

terrorist act would commit the ancillary offence of being an accomplice, and existing counter-terrorism conventions provide for the offence of being an accomplice."[236] Some delegates to the negotiating convention also "had difficulty with the concept that financing a terrorist act is as serious a crime as committing the terrorist act itself, though the whole point of the [Financing of Terrorism Convention] is to tackle the difficult problem of financial 'godfathers', without whom most terrorist crimes would not be possible."[237]

Nevertheless, argues Aust, other Western European States, as well as States from other regions, welcomed the creation of a new principal offence and argued that "the provisions on accomplices in existing conventions were not enough, and that those who finance terrorist crimes should be treated as severely as those who commit the crimes."[238]

Article 2 defines the scope of the Convention:

> Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, 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 treaties listed in the annex; 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 act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[239]

Another issue that came up during the negotiations, notes Aust, is that a few States argued that there was a need to "distinguish between 'legitimate national liberation movements' and terrorist groups."[240] When the draft convention was submitted to the Sixth Committee to be considered, notes Aust, some States, notably Cuba, Iraq, Lebanon, Oman, Qatar, Pakistan and

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236 Aust, *supra* note 229, at 288.
237 *Id.*
238 *Id.*
239 Financing of Terrorism Convention, *supra* note 177, art. 2(1).
240 Aust, *supra* note 229, at 292.

Syria, stated that there was need to "differentiate between acts of terrorism committed by individuals, groups or states, and the legitimate acts of resistance undertaken by peoples subjected to colonial rule, oppression and foreign occupation with a view to regaining their legitimate rights."[241]

In law, a person is usually classified into two groups: (1) a natural person; or (2) a juridical person.[242] A *natural person* is a "human being, who is an individual being capable of assuming obligations and capable of holding rights."[243] A *juridical person* is defined as "entities endowed with judicial personality who are usually known as a collective person, social person, or legal entity."[244] The law also makes reference to a *legal person*: defined as "a body of persons or an entity (e.g., as a corporation) considered as having many of the rights and responsibilities of a natural person and especially the capacity to sue and be sued."[245] The reason "person" is qualified with the adjective "legal" is because some legal persons are not people (i.e., human beings). For example, *companies* and *corporations* can, under the law, be considered "persons" with the right to sue and be sued. As used or described in Article 2 of the Financing of Terrorism Convention, the word "person" refers to a *natural person*.[246] It is noted that Article 5 extends, for the first time in counter-terrorism conventions, the Convention's scope to legal persons. Here is Article 5:

> 1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized 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 offence set forth in article 2. Such liability may be criminal, civil or administrative.
>
> 2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.
>
> 3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative

241 *Id.*

242 *See, e.g.*, Elvia Arcelia Quintana Adriano, *The Natural Person, Legal Entity or Juridical Person and Judicial Personality*, 4 PENN ST. J.L. & INT'L AFFS. 363 (2015).

243 *Id.* at 366.

244 *Id.* at 366.

245 *Juridical Person*, MERRIAM-WEBSTER'S DICTIONARY OF LAW 286 (1996).

246 Financing of Terrorism Convention, *supra* note 177, art. 2(1).

sanctions. Such sanctions may include monetary sanctions.[247]

Under other conventions, an official (i.e., a natural person) who is responsible for a legal person (*e.g.*, a company or corporation) can commit an offence as part of the performance of his or her functions or duties. However, a legal person cannot do so. Nevertheless, the drafters of the Financing of Terrorism Convention may have felt that the financing of terrorism generally, and terrorist activities in particular, which are likely to involve commercial banks and other financial institutions, require more specific treatment in the Convention. Aust argues that "the financing of terrorism, although it will usually involve some handling of cash or other physical assets, is essentially intangible in nature" and that "when large amounts of money are involved it is likely that at some stage a legal entity, such as a bank or trust, will be the means by which the money is made available, directly or indirectly, to the terrorists."[248] If the transfer of funds to a person or group to be used in carrying out terrorist activities is undertaken through, for example, a bank and with the help or assistance of a bank official—that is, "a person responsible for the management or control of the [bank], it is important that the [bank] itself should be held accountable."[249]

The purpose of holding the legal entity responsible under these circumstances is deterrence—there must be a clear warning to those persons who manage and/or control banks and other financial institutions that they must not allow their entities to be used, with the knowledge of managers and controllers, as mechanisms to transfer funds to terrorists and terrorist organizations.[250] It is important to note that, as a legal person, a bank or other financial institution is only vicariously liable if a manager or some other natural person who is responsible for its management or control actually commits the offence. This is due to the fact that the legal person (i.e., the bank) cannot actually commit the offence as defined in Article 2 of the Convention.[251]

Another issue that delegates at the drafting convention considered was that the laws of many States Parties do "not enable legal entities to be

247 *Id.* art. 5.
248 Aust, *supra* note 229, at 301.
249 *Id.* at 301–02.
250 *See id.* at 302.
251 *See* Financing of Terrorism Convention, *supra* note 177, art. 2; *see also* Aust, *supra* note 229, at 302 (discussing in greater detail the liability of legal entities under the Convention).

prosecuted for a criminal offence."[252] The Convention was able to overcome this predicament by granting each State Party the discretion to "apply criminal, civil or administrative liability, according to its own legal principles."[253]

While the entity need not necessarily benefit from the transaction in order to be held liable, the offence must be committed by a person (i.e., natural person) who is not just an employee (e.g., a bank clerk or teller) but someone in a senior position (e.g., a manager or controller). In addition, the legal entity will only be held liable if the official (e.g., manager) committing the offence did so in his or her official capacity. Aust notes that "[d]etermining whether [a transaction] was a private or official act many not be easy."[254] Nevertheless, notes Aust, there seems "to be at least an evidential presumption that if a manager makes use of the bank he works for to commit the offence, he is doing it by virtue of his official position since he would not have access to the computer as a private person."[255]

Article 8 of the Financing of Terrorism Convention provides for the seizure or freezing of funds used or allocated for the purpose of financing of terrorist activities.[256] Specifically, Article 8 states that for the purpose of seizure, "[e]ach State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences."[257] Hence, States Parties may not only seize funds allocated or used for financing terrorist activities but may also confiscate funds that are generated through terrorist activities.[258]

States Parties are expected to fully cooperate with one another "in criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings."[259] The nature of the cooperation envisioned by this article is made evident by phrases, such as, "States Parities shall afford one another the greatest measure of assistance" and "States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy."[260] It has been noted that in cases, such as "drug-

252 Aust, *supra* note 229, at 303.
253 *Id.*; *see also* Financing of Terrorism Convention, *supra* note 177, art. 5(3).
254 Aust, *supra* note 229, at 303.
255 *Id.*
256 *See* Financing of Terrorism Convention, *supra* note 177, art. 8.
257 *Id.*
258 *See id.* art. 8(2).
259 *Id.* art. 12(1).
260 *Id.* art. 12(1)–(2).

trafficking and money-laundering, where the serious nature of the crimes outweighs the otherwise legitimate interest of an individual in keeping his financial affairs private," bank secrecy should be waived.[261]

The Financing of Terrorism Convention specifically makes clear that the offence of "financing terrorism" is not a "fiscal offence" for the purposes of extradition and or mutual legal assistance.[262] Under this Convention, a State Party may not refuse an extradition or mutual legal assistance request "on the sole ground that it concerns a fiscal offence."[263] Additional provisions intended to enhance cooperation among States Parties are provided in Article 18.[264] These provisions are designed "to prevent and counter preparations for terrorist financing, whether inside or outside their territory."[265] States Parties are expected to adapt "their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories."[266] In carrying out the obligations imposed on them by Article 18, States Parties, for example, must take measures "to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2."[267]

In addition, States Parties are required to make sure that "financial institutions and other professions involved in financial transactions . . . utilize the most efficient measures available" to identify all their customers "and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity."[268] Specifically, States Parties should adopt legislation that prohibits "the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable"—all financial institutions, then, must be able to identify the real owners of all accounts in their custody.[269] Measures taken by States Parties under Article 18 must also (1) impose an obligation on financial institutions "to maintain, for at least five years, all necessary records on

261 Aust, *supra* note 229, at 304.

262 Financing of Terrorism Convention, *supra* note 177, art. 13. A fiscal offence is one that is related to money or public revenue. For example, tax evasion is a fiscal offence for which "a person cannot usually be extradited or be the subject of mutual legal assistance." Aust, *supra* note 229, at 304.

263 Aust, *supra* note 229, at 304.

264 *See* Financing of Terrorism Convention, *supra* note 177, art. 18.

265 Aust, *supra* note 229, at 304.

266 Financing of Terrorism Convention, *supra* note 177, art. 18(1).

267 *Id.* art. 18(1)(a).

268 *Id.* art. 18(1)(b).

269 *Id.* art. 18(1)(b)(i).

transactions, both domestic and international"; (2) include the licensing of all money-transmission agencies; (3) enhance the detection or monitoring of "the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure the proper use of information and without impeding in any way the freedom of capital movements"; and (4) allow for the exchange of "accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2."[270]

During the negotiations to design the Financing of Terrorism Convention, the UK's representatives invoked the country's existing legislation against terrorism to propose that "it should be sufficient for the purposes of the offence if a person provides funds in circumstances where there is a *reasonable suspicion* that [these funds] will be used for terrorist purposes, unless the person can prove otherwise."[271] Many delegates opposed the UK proposal, arguing that if accepted, it would effectively shift the burden of proof from the prosecution "on to the accused," which is "contrary to fundamental human rights principles."[272] For the new convention, the delegates agreed that intention or knowledge would be sufficient, hence, the definition of the offense of financing terrorism, as it appears in Article 2(1) is as follows:

> Any person commits an offense within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, 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 treaties listed in the annex; 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

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270 *Id.* art. 18(2)–(3).

271 Aust, *supra* note 229, at 295–96 (emphasis added). The proposal by the UK was based on the Terrorism Act 2000 (UK), which states, at § 57(1)–(2): "(1) A person commits an offence if he possesses an article in circumstances which give rise to a *reasonable suspicion* that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(2) It is a defense for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism." Terrorism Act 2000, c.11, § 57(1)–(2) (UK) (emphasis added).

272 Financing of Terrorism Convention, *supra* note 177, art. 18.

> such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[273]

Paragraph 3 of Article 2, however, notes that "[f]or an act to constitute an offense set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offense referred to in paragraph 1, subparagraphs (a) and (b)."[274] It has been noted that although the phrasing in this paragraph may seem quite strange, it is important to recognize the fact that while "it is possible to trace the supplier of a physical object used in [a] terrorist attack, such as a gun, given the secrecy with which attacks are planned it would be virtually impossible to prove that a *particular* sum of money had been used to finance a particular attack or even a particular category of terrorist act."[275]

Article 2's paragraph 3 renders mute the need for the prosecution to prove that the accused knew or had knowledge of the "precise destination of the funds" or that the accused knew the funds would be used specifically to "finance a particular terrorist act (e.g., the planting of a bomb in a particular airport on a particular day) or even a specific category of terrorist act."[276] Thus, paragraph 3 of Article 2 effectively eliminated a major constraint or obstacle to proving the offense of financing terrorism or terrorist activities.[277]

It has been argued that given the "rather complex state of mind elements" of the Financing of Terrorism Convention, "the evidentiary rule of Article 2.1(b) may need to be introduced into a country's Code of Criminal Procedure or specifically included in special laws dealing with terrorism."[278] This is especially important given the fact that most terrorist trials are likely to be undertaken by domestic courts and not by specially-convened tribunals under the auspices of the UN or some other international or regional organization.[279]

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273 *Id.* art. 2(1).
274 *Id.* art. 2(3).
275 Aust, *supra* note 229, at 297.
276 *Id.* at 297.
277 *See* Aust, *supra* note 229, at 297.
278 Legislative Guide, *supra* note 212, at 27.
279 The creation of the International Criminal Court (ICC) is considered the most important development in the field of international criminal law. However, the Rome Statute, which created the ICC, does not include acts of terrorism in the list of crimes within the ICC's jurisdiction. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3; Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat*

In the section that follows, this Article will examine regional counter-terrorism instruments, with particular attention paid to the OAU Convention on the Prevention and Combating of Terrorism (1999), as well as the Protocol to the OAU Convention on the Prevention and Combating of Terrorism.

## IV. AFRICAN INSTRUMENTS RELATED TO THE SUPPRESSION AND PREVENTION OF TERRORISM

### *A. Introduction*

It is generally argued that Africa's brush with terrorism did not begin with the events of September 11, 2001 in the United States.[280] On August 7, 1998, near simultaneous bombs were exploded at U.S. embassies in Dar es Salaam, Tanzania and Nairobi, Kenya, by terrorists linked to the extremist group al-Qaeda.[281] These terrorist attacks on the U.S. embassies, it is argued, ushered "in a new era of terror that would culminate in the 9/11 attacks" on various targets in the United States.[282] After the terrorist attacks on the U.S. embassies in Kenya and Tanzania, as well as, on various targets in the United States, suppressing and preventing terrorism became a top priority for American foreign policy.[283]

As part of the post-9/11 change in U.S. foreign policy, Washington shifted its interests in Africa to focus almost exclusively on terrorism. As part of that plan, the United States established the Combined Joint Task Force Horn of Africa (CJTF-HOA) on October 19, 2002. The mission was established at Cape Lejeune, North Carolina, and was taken to the Horn of

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*Terrorism*, 20 MICH. ST. J. INT'L L. REV. 219 (2012) (arguing, inter alia, that the ICC and the global community would benefit by allowing the ICC to have jurisdiction over the prosecution of terrorism and that the ICC would represent a viable legal tool for combating terrorist activities); Fiona McKay, *U.S. Unilateralism and International Crimes: The International Criminal Court and Terrorism*, 36 CORNELL INT'L L.J. 455 (2004) (noting that terrorism is not included in the list of crimes in the ICC's jurisdiction).

280 On September 11, 2001, nineteen men hijacked four U.S. commercial airplanes bound for the west coast of the country. The planes were intentionally crashed into specific targets in New York City, Shanksville, Pennsylvania, and the Pentagon in Washington, D.C. Thousands of people were killed and a lot of property destroyed. *See, e.g.*, THE 9/11 COMMISSION REPORT, *supra* note 102 (representing an account of the official U.S. investigation into the events of September 11, 2001).

281 *See* Mitchell & Talbot, *supra* note 1.

282 *Id.*

283 *See, e.g.*, Kurt M. Campbell & Yuki Tatsumi, *In the Aftermath of the Storm: U.S. Foreign Policy in the Wake of 9/11 and Its Implications for the Asia-Pacific Region*, 9 ASIA PAC. REV. 31 (2002) (examining the changes that have taken place in U.S. foreign policy in the aftermath of the terrorist attacks of September 11, 2001); Philip H. Gordon, *September 11 and American Foreign Policy*, BROOKINGS INST. (Nov. 1, 2001), https://www.brookings.edu/articles/september-11-and-american-foreign-policy/ (noting a radical change in U.S. foreign policy following the September 11, 2001, attacks on various targets in the United States).

Africa aboard the USS Mount Whitney. CJTF-HOA arrived at the Horn of Africa on December 8, 2002, and operated out of the Mount Whitney until May 13, 2003, when it moved permanently to Camp Lemonnier in Djibouti City, Djibouti.[284]

CJTF-HOA, which is a joint task force of the U.S. Africa Command, grew out of Operation Enduring Freedom—Horn of Africa (OEF-HOA). The latter was part of the U.S. response to the September 11, 2001 terrorist attacks.[285] Operation Enduring Freedom ("OEF") was launched under the administration of George W. Bush as part of the U.S. government's war on terror.[286] OEF was designed to replace Operation Infinite Justice and was expected to function on two fronts on the African continent: (1) Operation Enduring Freedom—Horn of Africa; and (2) Operation Enduring Freedom Trans Sahara ("OEF-TS). [287]

After the Islamic Courts Union ("ICU") took control of most of southern Somalia, U.S. counter-terrorism activities in Africa, particularly in the Horn of Africa, became more intense.[288] Jon Abbink notes that the ICU emerged in Somalia at a time when state authority and public security were absent in most parts of the country. The ICU is generally considered "an intriguing example of a movement that emerged in extreme conditions of statelessness, civil war, humanitarian crisis and social disarray in southern Somalia."[289] At the height of its power, the ICU controlled most of southern Somalia. However, in December 2006, as part of its support of the Transitional Federal Government of Somalia, the Ethiopian army launched a military campaign that ousted the ICU.[290] After its ouster, the ICU's "socio-religious program[] waned, its violent militant agenda re-emerged and it morphed into a new nationalist movement."[291]

It has been argued that most countries in Africa are characterized by

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284 *See* Jessica Piombo, *Dynamics of Humanitarian Assistance: Civil Affairs in the Horn of Africa*, *in* UNDERSTANDING COMPLEX MILITARY OPERATIONS: A CASE STUDY APPROACH 162, 164 (Volker Franke, Karen Guttieri & Melanne A. Civic eds., 2014).

285 *See* CHRISTOPHER DANIELS, SOMALI PIRACY AND TERRORISM IN THE HORN OF AFRICA 88 (2012).

286 *See* DANIELS, *supra* note 285, at 88.

287 *See id.*

288 The Islamic Courts Union (ICU) was a group of Sharia courts that came together to form a rival governmental administration to the Transitional Federal Government of Somalia. *See, e.g.*, Jon Abbink, *The Islamic Courts Union: The Ebb and Flow of a Somali Islamic Movement*, *in* MOVERS AND SHAKERS: SOCIAL MOVEMENTS IN AFRICA 87 (Stephen Ellis & Incke van Kessel eds., 2009).

289 *Id.* at 88.

290 *See id.* at 87.

291 *Id.* at 87.

economic and political conditions that render them extremely susceptible to threats of terrorism. These conditions include extreme poverty, relatively weak states, dysfunctional governments, failure to effectively manage ethnic and religious diversity, and the fact that, in many communities, state authority is absent, creating a vacuum that has usually been filled by extremist groups.[292] For example, in 2018 CNN International reported that Nigeria, a country endowed with significant amounts of natural resources, had overtaken India as the country with the largest number of citizens living in extreme poverty, with "an estimated 87 million Nigerians, or around half of the country's population, thought to be living on less than [U.S.] $1.90 a day."[293]

In Nigeria, as is the case in other African countries, terrorism and extreme poverty seem to be feeding each other—extreme poverty makes the poor, who are mostly young people, susceptible to radicalization and eventual participation in terrorist activities; the terrorism perpetuated by these radicalized persons threatens peace and security and creates an environment that is not conducive to entrepreneurship, investment and wealth creation. Perhaps, more important is the fact that the young, who are recruited into extremist groups and then induced into activities that force them to forfeit the opportunity to stay in school and develop the skills that they need to function as productive adults, become part of the large adult population living in extreme poverty. In addition, terrorism kills a lot of people, many of them in their most productive years, depriving the country of resources for economic growth and development.[294] Of course, the resources devoted by the government to fight terrorism could have been used to provide services (e.g., primary and secondary education; basic health care; nutrition, especially for vulnerable children) that support economic growth and development.

Research, for example, has determined that the Boko Haram insurgency in West Africa is the region's deadliest conflict.[295] In fact, from June 2011 to June 2018 the Nigeria Security Tracker ("NST") "documented 2,021 incidents involving Boko Haram, in which 37,530 people were killed" and these "totals reflect deaths of alleged Boko Haram fighters, government

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292 *See* Bukola Adebayo, *Nigeria Overtakes India in Extreme Poverty Ranking*, CNN (June 26, 2018, 4:07 AM), https://www.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html.

293 *Id.*

294 *See, e.g.*, John Campbell & Asch Harwood, *Boko Haram's Deadly Impact*, COUNCIL ON FOREIGN RELS. (Aug. 20, 2018, 8:00 AM), https://www.cfr.org/article/boko-harams-deadly-impact.

295 *See id.*

forces, and civilians combined."[296] In addition, UNICEF has determined that since 2013, "more than 1,000 children have been abducted by Boko Haram in northeastern Nigeria, including 276 girls taken from their secondary school in the town of Chibok in 2014."[297]

In a UN-sponsored debate on ways to prevent violent extremism, presenters argued that "deadly links between violent extremism and extreme poverty could be broken through the creation of jobs, a reduction in inequalities and by building just and inclusive societies."[298] Participants in the debate noted that the absence of actions to ameliorate extreme poverty in many African countries has "triggered the radicalization of otherwise law-abiding, responsible individuals."[299] Many of these individuals feel frustrated, deprived, disillusioned and pushed to the economic and political margins. Throughout the continent, economically and politically marginalized individuals, many of them members of minority ethnic and religious groups, often "opt for violent and destructive mobilization in an effort either to capture the government or secede and form their own State."[300]

When subcultures that are either marginalized or perceive themselves to be marginalized engage in violent mobilization in an effort to improve their economic and political participation, they are often condemned by their governments as terrorists—many of these groups consider their struggles as legitimate efforts to fight their oppression by their central governments so that they can exercise their right to self-determination. In order to delegitimize the aspirations of these groups, their governments often label them agitators and terrorists. For example, in the Republic of Cameroon, when the country's Anglophone minority engaged in peaceful demonstrations to protest their political and economic marginalization, the Francophone-dominated central government labelled them "terrorists and responded [to their complaints] with extremely repressive measures, including the arrest of Anglophone leaders, and the banning of Internet

296 *Id.*

297 *More than 1,000 Children in Northeastern Nigeria Abducted by Boko Haram Since 2013*, UNICEF (Apr. 13, 2018), https://www.unicef.org/wca/press-releases/more-1000-children-northeastern-nigeria-abducted-boko-haram-2013.

298 U.N. Gen. Assembly, Links Between Extreme Poverty, Violent Extremism Can Be Broken by Creating Jobs, Reducing Inequalities, General Assembly Hears as Debate Concludes, U.N. Doc. GA/11761 (Feb. 16, 2016), https://www.un.org/press/en/2015/ga11761.doc.htm.

299 *Id.*

300 John Mukum Mbaku, *Threats to the Rule of Law in Africa*, 48 GA. J. INT'L & COMPAR. L. 293, 326 (2020).

access to the Anglophone Regions."[301]

Since the turn of the century, many regions of Africa have seen a significant increase in terrorism. Several terrorist and/or extremist groups have emerged and currently operate in the continent. First is *Al-Qaeda in the Islamic Maghreb* ("AQIM"), whose primary objective has been the overthrow of the legitimate government of Algeria in order to establish an Islamic State.[302] Second is *Boko Haram*, founded by Mohammed Yusuf in 2002 in the Nigerian city of Maiduguri as a nonviolent religious organization with the objective of purifying Islam in northern Nigeria.[303] As a result of a confluence of events, which included the execution of its leader by the Nigerian police, Boko Haram eventually transformed itself from a relatively little known Salafist group "to a Salafi-jihadi group that has demonstrated the capacity to carry out major operations, including suicide attacks in central Nigeria."[304] On March 7, 2015, Boko Haram's leader, Abubakar Shekau, pledged allegiance to the Islamic State of Iraq and the Levant and rebranded itself as the Islamic State in West Africa.[305]

Third is the *Lord's Resistance Army*, a heterodox Christian rebel group, which operates in northern Uganda, South Sudan, the Central African Republic, and the Democratic Republic of Congo and is led by Joseph Kony.[306] Fourth is *Al-Shabaab*, which operates primarily in the Horn of Africa. Al-Shabaab began as the armed wing of the Islamic Courts Union in Somalia. The group, which describes itself as a fighter against the enemies of Islam, has been engaged in a struggle against the Federal Government of

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301 John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?*, 42 SUFFOLK TRANSNAT'L L. REV. 1, 84 n.491 (2019).

302 *See* Dario Cristiani & Riccardo Fabiani, *Al Qaeda in the Islamic Maghreb (AQIM): Implications for Algeria's Regional and International Relations* 11 (Instituto Affari Internazionali Working Papers, Paper No. 11/07, Apr. 7, 2011). Although AQIM initially focused its activities on opposition to the Algerian government, it has since shifted its activities to the Sahel (Mauritania, Mali, Niger and Chad). *See id.* Cristiani and Fabiani state that AQIM's origins are "found in the Algerian civil war that broke out in 1992, following the army's decision to step in and prevent the Islamist party *Front islamique du Salut* (FIS) from winning the first democratic elections in the history of the country." *Id.* at 1–2. After the army's intervention and the subsequent banning of the FIS, Algeria became "the theatre of an all-out conflict pitting the military against various armed Islamist groups." *Id.* at 3.

303 *See* Zacharias P. Pieri & Jacob Zenn, *The Boko Haram Paradox: Ethnicity, Religion and Historical Memory in Pursuit of a Caliphate*, *in* UNDERSTANDING BOKO HARAM: TERRORISM AND INSURGENCY IN AFRICA 41, 46 (James J. Hentz & Hussein Solomon eds., 2017).

304 David Cook, *The Rise of Boko Haram in Nigeria*, CTC SENTINEL (Sept. 2011), https://ctc.usma.edu/the-rise-of-boko-haram-in-nigeria/.

305 *See Who are Nigeria's Boko Haram Islamist Group?*, BBC NEWS (Nov. 24, 2016), https://www.bbc.com/news/world-africa-13809501.

306 *See* LAWRENCE E. CLINE, THE LORD'S RESISTANCE ARMY 1 (2013) (providing an overview of the founding of the Lord's Resistance Army and its activities in various countries in Central Africa).

Somalia and the African Union Mission to Somalia for many years.[307]

Although there are other extremist groups in the continent that commit acts of terrorism, the four mentioned above are considered among the deadliest. Al-Qaeda, the Islamic State and Boko Haram are considered among the world's three most dangerous terrorist organizations.[308] Boko Haram, which operates mainly in northern Nigeria, parts of Chad, Niger and northern Cameroon, has, nevertheless, also carried out terrorist attacks in Burkina Faso.[309] On March 7, 2015, the leader of Boko Haram, Abubakar Shekau, officially pledged allegiance to the Islamic State and changed the organization's name to Islamic State in West Africa.[310] The Somali-based Al-Shabaab and the West Africa-based Boko Haram are considered the two most lethal terrorist organizations in Africa.[311] Along with Boko Haram, al-Qaeda in the Islamic Maghreb (AQIM), are the major terrorist groups operating in West Africa.[312]

The Lord's Resistance Army ("LRA"), which operates in the Central African Republic, Democratic Republic of Congo, South Sudan, and Uganda, has been active since 1986, which makes it "one of Africa's oldest, most violent, and persistent armed groups."[313] On November 22, 2011, the African Union Peace and Security Council ("AU-PSC") formally designated the Lord's Resistance Army as a "terrorist group and authorized an initiative to enhance regional cooperation toward the elimination of the LRA."[314] The declaration was made through a Communiqué ("PSC Communiqué) issued by the AU-PSC at its 299th Meeting in Addis Ababa

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307 *See* HARUN MARUF & DAN JOSEPH, INSIDE AL-SHABAAB: THE SECRET HISTORY OF AL-QAEDA'S MOST POWERFUL ALLY (2018) (providing an overview of the emergence of Al-Shabaab as a terrorist group in the Horn of Africa).

308 *See The 3 Most Dangerous Terrorist Organizations*, WORLDREMIT (Mar. 20, 2020), https://www.investopedia.com/articles/investing/032615/3-most-dangerous-terrorist-organizations.asp (noting that Al-Qaeda, Boko Haram, and the Islamic State are the world's most dangerous terrorist organizations).

309 *See* Dominic Dudley, *The Most Lethal Terrorist Groups in the World*, FORBES (Nov. 20, 2019), https://www.forbes.com/sites/dominicdudley/2019/11/20/most-lethal-terrorist-groups/#3d222bee641a.

310 *See* Adam Chandler, *The Islamic State of Boko Haram?*, ATLANTIC (Mar. 9, 2015), https://www.theatlantic.com/international/archive/2015/03/boko-haram-pledges-allegiance-islamic-state/387235/ (noting Boko Haram's pledge of allegiance to the Islamic State).

311 *See* Dudley, *supra* note 309.

312 *See Profile: Al-Qaeda in North Africa*, BBC NEWS (Jan. 17, 2013), https://www.bbc.com/news/world-africa-17308138.

313 Press Release, U.S. Dep't of State, The Lord's Resistance Army, Press Release No. 2012/448 (Mar. 23, 2012), https://2009-2017.state.gov/r/pa/prs/ps/2012/03/186734.htm.

314 *Id.*; *see also* Aaron Maasho, *African Union Declares Uganda's LRA a Terror Group*, REUTERS (Nov. 22, 2011, 7:08 AM), https://www.reuters.com/article/ozatp-uganda-rebels-africanunion-idAFJOE7AL0A120111122.

on November 22, 2011.[315]

In the PSC Communiqué, the AU-PSC expressed its "deep concern about the continuation of the criminal activities of the LRA and the resulting serious humanitarian consequences, as well as about the threat this situation poses to regional security and stability."[316] The AU-PSC then decided, "in line with the relevant AU instruments, to declare the LRA a terrorist group, and requests the UN Security Council to do the same."[317]

### *B. Terrorist Threats in Africa*

Terrorist threats in the African continent have over the years been shaped by the following terrorist organizations: (1) Al-Qaeda in the Islamic Maghreb ("AQIM"); (2) Boko Haram (now the Islamic State in West Africa); (3) Al-Shabaab; and (4) the Lord's Resistance Army ("LRA").[318] The AU-PSC has also included the Movement for Unity and Jihad in West Africa (MUJAO),[319] a splinter group of AQIM, which emerged on October 23, 2011 after it abducted three humanitarian workers from a refugee camp in the Algerian commune of Tindouf near the border with Mauritania, Western Sahara and Morocco; the Vanguards for the Protection of Muslims in Black Africa, which is commonly known as Ansaru and which is based in northeast Nigeria—Ansaru split from Boko Haram and became an independent entity in 2012;[320] and Ansar al-Sharia, a Salafist Islamist militia group that has advocated the implementation of strict Sharia law across all of Libya. Ansaru came into being in 2011 during the Libyan Civil War.[321]

The Report of the Chairperson of the Commission on Terrorism and Violent Extremism in Africa argued that the "emergence and redeployment of terrorist groups in Africa and, in particular, in the Sahelo-Saharan region

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315 *See* Communiqué, Afr. Union Peace & Sec. Council, No. PSC/PR/COMM.(CCSCIX) (Nov. 22, 2011).

316 *Id.* ¶ 3.

317 *Id.*

318 *See* Afr. Union Peace & Sec. Council, Rep. of the African Union High-Level Panel on Darfur (AUPD), No. PSC/AHG/2(CDLV) (Sept. 2, 2014).

319 MUJAO stands for *Mouvement pour l'unité et le djihad en Afrique de l'Ouest*, the organization's French name. MUJAO is also referred to as the Movement for Oneness and Jihad in West Africa. *See* Anne Look, *Islamic Militant Group in Northern Mali Expanding Southward*, VOA (Sept. 4, 2012, 12:41 PM), https://www.voanews.com/africa/islamic-militant-group-northern-mali-expanding-southward (noting that the Movement for Unity and Jihad in West Africa is an offshoot of al-Qaeda).

320 *See* Farouk Chothia, *Profile: Who are Nigeria's Ansaru Islamists?*, BBC NEWS (Mar. 11, 2013), https://www.bbc.com/news/world-africa-21510767.

321 *See* Henrik Gråtrud & Vidar Benjamin Skretting, *Ansar al-Sharia in Libya: An Enduring Threat*, 11 PERSPS. ON TERRORISM 40 (2017) (examining the emergence of the Ansar al-Sharia group in Libya).

can be explained by six main reasons":

> (i) poverty, illiteracy and high rate of unemployment among the youth and the general population, which render them vulnerable to the manipulative messages of terrorist groups and their promises of quick gain;
>
> (ii) poor working conditions, insufficient training and discipline of law enforcement personnel that make them easy prey for corruption;
>
> (iii) the search for safe havens and refuge by criminal networks in a zone characterized by vast territorial expanses, low and insufficient security coverage and administrative presence;
>
> (iv) the quest for new sources of funding, especially through smuggling, drug trafficking and illegal migration;
>
> (v) the need to conquer new areas for recruitment and redeployment with the objective of expanding the confrontation field beyond their traditional zone of operations; and
>
> (vi) Government institutional weaknesses and the existence of long stretches of porous, largely ill-monitored and poorly-controlled borders, which, combined with vast, ill-administered spaces of territory, facilitate illegal cross-border movement of people and goods and provide fertile ground for exploitation by terrorists and transnational organized criminals.[322]

It is very important that the AU and its Member States understand that in order to fully and effectively fight terrorism, they must eliminate the conditions that force or attract their citizens, especially young citizens, to join extremist groups. Each African country must address issues of extreme poverty, joblessness (especially among young people), and illiteracy, particularly that among historically vulnerable groups (e.g., women and girls and ethnic minorities). Each country must also provide itself with a governing process that effectively constrains the State and prevents civil servants and political elites from engaging in various forms of political opportunism (e.g., corruption and rent seeking). Such a governing process can also enhance the maintenance of law and order, minimize threats to peace and security, and create an environment that is conducive to entrepreneurship and the creation of wealth. When citizens, including

322 Rep. of the African Union High-Level Panel on Darfur (AUPD), *supra* note 318, ¶ 8.

especially young people, are provided opportunities for self-actualization, they are less susceptible to radicalization.

The Chairperson of the Commission on Terrorism also noted that while many of these terrorist groups pursue their "locally-driven agenda," they have also "committed themselves to a more global one" after pledging their allegiance to groups, such as al-Qaeda, that have a global reach.[323] This has forced some of these terrorist groups to: (1) develop new ways to recruit members; (2) change their *modus operandi* and the way they propagandize, especially as it relates to their basic ideological message; and (3) develop ways of financing their operations.[324] As part of their restructuring, many of Africa's terrorist groups have taken "[r]ecourse to suicide attacks and Improved Explosive Devices (IEDs), as well as the use of teenagers and disabled individuals as suicide bombers."[325] In addition, "[k]idnapping-for-ransom and drug-trafficking have also emerged as major sources of financing for terrorist groups in Africa."[326]

The West Africa and Sahel parts of Africa continue to suffer from terrorist attacks—in fact, during the last few years, Boko Haram has significantly increased both the intensity and frequency of its attacks in Nigeria, Cameroon, Chad and Niger.[327] Many of the terrorist groups operating in this region "seem to have links with AQIM and other groups such as Al-Shabaab in Somalia, while pursuing local agendas."[328] In West Africa, Boko Haram continues to wreak havoc and has, in recent years, significantly increased the intensity and frequency of its attacks in Nigeria and Cameroon. In particular, it has indiscriminately bombed civilians, attacked security forces and destroyed a lot of property and public infrastructure and in the process, has displaced a lot of people from their homes and communities. In 2017, for example, Boko Haram carried out attacks in Nigeria (109 attacks), Cameroon (32 attacks), Chad (2 attacks), and Niger (7 attacks).[329]

The BBC reports that Boko Haram killed at least 967 people in 2017, an increase from 2016 when it killed 910 people. Most of the facilities were found in Maiduguri and adjacent communities in northeast Nigeria.[330] The

323 *Id.* ¶ 9.
324 *See id.*
325 *Id.*
326 *Id.*
327 *Id.* ¶ 10.
328 *See id.*
329 *See* Mark Wilson, *Nigeria's Boko Haram Attacks in Numbers—As Lethal as Ever*, BBC NEWS (Jan. 25, 2018), https://www.bbc.com/news/world-africa-42735414.
330 *See id.*

group has used kidnapping, particularly of young girls, in an effort to force the Nigerian government to release its members who have been convicted of terrorism and imprisoned. On April 14, 2014, for example, Boko Haram kidnapped more than 200 young girls from a school in the village of Chibok in Borno State and on August 10 of the same year, it attacked the village of Doron Baga near the shores of Lake Chad and kidnapped 100 people, most of whom were later rescued by Chadian armed forces. [331] In its 2014 Report, the AU Peace and Security Council noted that all these acts "further illustrate the magnitude of the challenge posed by Boko Haram terrorist activities" to Cameroon, Chad, and Niger.[332]

According to the Chairperson of the Commission on Terrorism, Al-Shabaab represents the most important terrorist threat, especially in Somalia and Kenya.[333] Although this extremist group has been driven out of key cities and communities in Somalia, it has retained its capacity "to launch attacks against the Federal Government of Somalia (FGS), civilians, international organizations and AMISOM, as well as the ability to expand its terror campaign beyond the Somali borders, into other countries in the region."[334] Nevertheless, during the last several years, Kenya has borne "the brunt of most of the attacks" that have been carried out by Al-Shabaab.[335]

Meanwhile, in Central and East Africa, the Lord's Resistance Army ("LRA") began its campaign of terror in the late-1980s. Since its early

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331 *See* Haruna Umar, *Boko Haram Kidnaps 100 People, Most of them Freed*, AP NEWS (Aug. 15, 2014), https://apnews.com/0226e47984a1411a8e465f18e3014845.

332 *Id.*

333 *See* Rep. of the African Union High-Level Panel on Darfur (AUPD), ¶ 12.

334 *Id.*

335 *Id.* For example, on January 5, 2020, Al-Shabaab attacked a military base in Kenya—the Manda Bay airfield—and killed three U.S. Department of Defense personnel and destroyed several U.S. aircraft and vehicles. *See* Associated Press, *Al-Shabaab Kills Three Americans in Attack on U.S. Military Base in Kenya*, GUARDIAN (Jan. 5, 2020, 4:52 PM), https://www.theguardian.com/world/2020/jan/05/al-shabaab-attack-us-military-base-kenya. Also, on April 3, 2015, Al-Shabbab gunmen attacked Kenya's Garissa University College, "singled out and shot those [students] identified as Christians as they roamed from building to building" and by the end, "148 people had been killed—mostly students." *Garissa University College Attack in Kenya: What Happened?*, BBC NEWS (June 19, 2019), https://www.bbc.com/news/world-africa-48621924. On January 15, 2020, Al-Shabaab militants conducted a terrorist attack on the luxury DusitD2 hotel in Nairobi, killing eleven Kenyans and several foreigners, including at least one American. They claimed that they had undertaken the brutal attack as a response to President Donald Trump's declaration of Jerusalem as the capital of the State of Israel. *See, e.g.*, Alex Ward, *Al-Shabaab's Kenya Attack Proves the Terrorist Group is Still Deadly*, VOX (Jan. 16, 2019, 2:20 PM), https://www.vox.com/world/2019/1/16/18185182/nairobi-kenya-hotel-attack-spindler-american. At midday on September 21, 2013, Al-Shabaab terrorist stormed Nairobi's Westgate Mall, Kenya's premier shopping center, and killed sixty-seven people. *See* Daniel Howden, *Terror in Nairobi: The Full Story Behind Al-Shabaab's Mall Attack*, GUARDIAN (Oct. 4, 2013, 8:09 AM), https://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya.

beginnings in northern Uganda, the LRA has extended its base of operations to include parts of the Democratic Republic of Congo ("DRC"), South Sudan, and the Central African Republic.[336] In 2014, renewed LRA activities in the DRC forced as many as thirteen hundred civilians to flee to South Sudan in search of refuge.[337] The LRA is also involved in the poaching of elephants in the DRC's Garamba National Park and using the ivory harvested to purchase arms and other military equipment.[338]

Finally, noted the Report of the Chairperson of the Commission on Terrorism, today's terrorist groups are extremely "sophisticated, resilient and determined to unleash terror."[339] According to the UN, terrorist groups have become very skilled at using the Internet for communication, expounding various forms of propaganda to spread their basic ideology, and for the recruitment of new members.[340] A study conducted in Mali has revealed the extent to which social media is being used by violent extremist groups to recruit young people. The study, by the International Center for Counter-Terrorism ("ICCT") and the UN Interregional Crime and Justice Research Institute ("UNICRI"), notes that although "[t]he affordability of mobile services has given rise to a vast number of changes, including economic development and increased political engagement," nevertheless, "it [has also facilitated] the easy and widespread dissemination of extremist beliefs and recruitment propaganda by violent extremist groups."[341]

### *C. Counter-Terrorism Instruments in Africa*

For many years, Africa and Africans have faced threats from terrorism and perpetrators of terrorist acts. Terrorist groups that have menaced and imposed significant hardship on the peoples of Africa include Al-Qaeda, al-Shabaab, Boko Haram, and the Lord's Resistance Army.[342] The struggle to suppress and prevent terrorism in the continent has been led and coordinated

336 *See* Rep. of the African Union High-Level Panel on Darfur (AUPD), ¶ 14.

337 *See id.* ¶ 14.

338 *See id.* ¶ 15.

339 *Id.* ¶ 16.

340 *See* U.N. Off. on Drugs & Crime, U.N. Counter-Terrorism Implementation Task Force, *The Use of the Internet for Terrorist Purposes* (Sept. 2012).

341 Elise Vermeersch, Julie Coleman, Méryl Demuynck & Elena Dal Santo, U.N. Interreg'l Crime & Just. Rsch. Inst., Int'l Ctr. for Counter-Terrorism, *The Role of Social Media in Malia and Its Relation to Violent Extremism: A Youth Perspective*, at 2 (2020), https://icct.nl/publication/social-media-in-mali-and-its-relation-to-violent-extremism-a-youth-perspective/.

342 These groups were examined earlier in this Article. *See* Lansana Gberie, *Terrorism Overshadows Internal Conflicts*, AFR. RENEWAL (Apr. 2016), https://www.un.org/africarenewal/magazine/april-2016/terrorism-overshadows-internal-conflicts.

by the Organization of African Unity ("OAU")[343] and its successor organization, the African Union ("AU").

The two continental institutions—the OAU and the AU—however, had different approaches to terrorism because of the nature of their constitutive acts or charters. While the founding of the OAU was premised on the principle of non-intervention in the internal or domestic affairs of its Member States, the AU's Constitutive Act granted it the power to intervene on matters critical to the maintenance of peace and security in the continent.[344] Article III of the OAU Charter notes that "[t]he Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles:

1. The sovereign equality of all Member States.
2. Non-interference in the internal affairs of States.
3. Respect for the sovereign and territorial integrity of each State and for its inalienable right to independent existence.[345]

In the Constitutive Act of the African Union, on the other hand, one of the principles of the AU is: "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[346]

The first continental legal instrument relevant to the fight against terrorism was the OAU Convention for the Elimination of Mercenarism in Africa (1977) ("African Mercenarism Convention").[347] The African Mercenarism Convention effectively criminalized mercenarism.[348] Mercenarism was defined as a crime "committed by the individual, group or association, representative of a State or the State itself who with the aim

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343 The Organization of African Unity was established on May 25, 1963, in Addis Ababa (Ethiopia) and was subsequently disbanded on July 9, 2002. It was replaced or succeeded by the African Union (AU)—the AU was established on May 26, 2001, in Addis Ababa, Ethiopia, and launched on July 9, 2002, in Durban, South Africa. *See* THE AFRICAN UNION AND NEW STRATEGIES FOR DEVELOPMENT IN AFRICA (Said Adejumobi & Adebayo Olukoshi eds., 2008) (presenting a series of essays that examines the OAU and the African Union).

344 *See* Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39; Constitutive Act of the African Union, Nov. 7, 2000, 2158 U.N.T.S. 3.

345 Charter of the Organization of African Unity, *supra* note 344, art. III.

346 Constitutive Act of the African Union, *supra* note 344, art. 4(h); *see also* James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFFS. 169 (2002) (classifying terrorism as a crime against humanity).

347 OAU Convention for the Elimination of Mercenarism in Africa, July 3, 1977, OAU Doc. CM/817 (XXIX) Annex II Rev. 1. [hereinafter African Mercenarism Convention].

348 *See id.* art. 1(2) (providing a definition for the crime of mercenarism).

of opposing by armed violence a process of self-determination stability or the territorial integrity of another State."[349]

The next counter-terrorism measure enacted by the OAU was the Resolution on the Strengthening of Cooperation and Coordination Among African States, which was adopted by the Assembly of Heads of State and Government of the Organization of African Unity at its Twenty-Eighth Ordinary Session in Dakar, Senegal during the period June 29 to July 1, 1992.[350] In this Resolution, the Member States pledged to fight extremism and terrorism.[351] During their 30th Ordinary Session in Tunis (Tunisia), from June 13–15, 1994, the Assembly of Heads of State and Government of the OAU adopted the Declaration on a Code of Conduct for Inter-African Relations.[352] In this Declaration, the Member States rejected all forms of "discrimination, injustice, extremism and terrorism," whether caused by tribalism, religion or ethnocultural differences.[353] The Member States, through the Declaration, also condemned extremism and terrorism, which "under the pretext of sectarianism, tribalism, ethnicity or religion undermine the moral and human values of peoples, particularly fundamental freedoms and tolerance."[354]

The principal counter-terrorism instrument in Africa today is the *OAU Convention on the Prevention and Combating of Terrorism*, which was adopted on July 1, 1999 in Algiers, Algeria.[355] The Convention, which will be examined in greater detail later, imposes an obligation on States Parties to criminalize terrorist acts, as defined in the Convention, under their national laws. In addition to establishing State jurisdiction over terrorist acts, the Convention also defines areas of cooperation among States Parties and provides a legal framework for the extradition of individuals accused of committing terrorist acts.[356]

On July 1, 2004, the Assembly of the Heads of State and Government of the African Union adopted the Protocol to the OAU Convention on the

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349 *Id.* It is important to note that the Convention identifies non-State actors as a threat to peace and security in the continent.

350 Resolution on the Strengthening of Cooperation and Coordination Among African States, June 29–July 1, 1992, OAU Doc. AHG/Res. 213 (XXVIII).

351 *See id.* ¶¶ 1–2.

352 *See* OAU Declaration on a Code of Conduct for Inter-African Relations, June 3–4, 1994, OAU Doc. AHG/Decl.2 (XXX).

353 *Id.* pmbl.

354 *Id.*

355 *See* African Terrorism Convention, *supra* note 16.

356 *See id.* arts. 2, 4–6.

Prevention and Combating of Terrorism ("African Terrorism Protocol").[357] In addition to recognizing the growing threat of terrorism and terrorist acts, the Protocol also recognized the "growing risks of linkages between terrorism and mercenarism, weapons of mass destruction, drug trafficking, corruption, transnational organized crimes, money laundering, and the illicit proliferation of small arms."[358]

### *D. A Closer Look at Africa's Counter-Terrorism Instruments*

Although the main legal framework for suppressing and preventing terrorism in Africa consists of the two counter-terrorism instruments that were developed by the Organization of African Unity ("OAU") and the African Union called the *OAU Convention on the Prevention and Combatting of Terrorism* ("the Algiers Convention") and the *Protocol to the OAU Convention on the Prevention and Combatting of Terrorism* ("African Terrorism Protocol") respectively,[359] there are other sub-regional counter-terrorism instruments. For example, some African countries, including the Comoros, Djibouti, Mauritania, Sudan and Somalia, are also members of the League of Arab States and the Organization of the Islamic Conference—these organizations have adopted the *Arab Convention for the Suppression of Terrorism* and *Convention of the Organization of the Islamic Conference on Combating International Terrorism*, respectively.[360]

On May 27, 2004, in Libreville, Gabon, Member States of the Central African Economic and Monetary Community (*Communauté économique et monétaire de l'Afrique centrale*—CEMAC) "adopted a regulation on the adoption of the Convention on the Combating of Terrorism in Central Africa."[361] In general, other regional organizations within Africa have adopted instruments to fight and suppress terrorism. For example, on July

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357 *See* Protocol to the OAU Convention on the Prevention and Combating of Terrorism, July 8, 2004, U.N.T.S. No. 39464 [hereinafter African Terrorism Protocol].

358 *Id.* pmbl.

359 *See* African Terrorism Convention, *supra* note 16; *see also* Protocol to the OAU Convention on the Prevention and Combating of Terrorism, *supra* note 357.

360 *See* Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999, *in* INTERNATIONAL INSTRUMENTS RELATED TO THE PROVISION AND SUPPRESSION OF INTERNATIONAL TERRORISM 410 (4th ed. 2019); *see also* The Arab Convention for the Suppression of Terrorism, May 7, 1999, *in* INTERNATIONAL INSTRUMENTS RELATED TO THE PROVISION AND SUPPRESSION OF INTERNATIONAL TERRORISM 178 (3d ed. 2008).

361 Cent. Afr. Econ. & Monetary Cmty., Règlement No. 08/05-UEAC-057-CM-13 Portant Adoption de la Convention Relative à la Lute Contre le Terrorisme en Afrique Centrale [Regulation Adopting the Convention on the Fight Against Terrorism in Central Africa] (Feb. 5, 2005), http://www.droit-afrique.com/upload/doc/cemac/CEMAC-Reglement-2005-08-lutte-terrorisme.pdf.

29, 1992, Member States of the Economic Community of West African States ("ECOWAS"), adopted the Convention A/P1/7/92 on Mutual Assistance in Criminal Matters.[362] This Article, however, will not examine these sub-regional legal instruments for fighting terrorism. Instead, the Article will examine only the *OAU Convention on the Prevention and Combating of Terrorism* and its *Additional Protocol.*

### *1. Origins of the OAU Convention on the Prevention and Combating of Terrorism*

Africa's formal efforts to prevent and combat terrorism can be traced to the OAU's 28th Ordinary Session that was held from June 29–July 1, 1992, in Dakar, Senegal.[363] At this Ordinary Session, delegates adopted a *Resolution on the Strengthening of Cooperation and Coordination among African States* ("OAU Cooperation and Coordination Resolution")[364] in which Member States pledged to fight terrorism and extremism.[365] Specifically, through the OAU Cooperation and Coordination Resolution, Member States of the OAU decided:

> [not to allow] any movement using religion, ethnic or other social or cultural differences to indulge in hostile activities against Member States as well as to refrain from lending any support to any group that could disrupt the stability and territorial integrity of Member States by violent means, and to strengthen cooperation and coordination among the African countries in order to circumstances the phenomenon of extremism and terrorism.[366]

From June 13–15, 1994, the OAU Heads of State and Government held its 30th Ordinary Session in Tunis, Tunisia, where it adopted the *Declaration on a Code of Conduct for Inter-African Relations* ("Tunis Declaration").[367] Through the Tunis Declaration, OAU Member States rejected all forms of extremism and terrorism, even if they are justified

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362 U.N. Off. of Drugs & Crime, Terrorism Prevention Branch, *A Review of the Legal Regime Against Terrorism in West and Central Africa* (Oct. 2008), https://www.unodc.org/documents/terrorism/Publications/Review_West_African_CT_Legal_Regime/A_Review_of_the_Legal_Regime_Ag_Terr_in_W_and_C_Africa_V09837531.pdf.

363 *See, e.g.*, Resolution on the Strengthening of Cooperation and Coordination Among African States, *supra* note 350.

364 *See id.*

365 *See id.*

366 *Id.* ¶ 2 (emphasis in original).

367 Declaration on a Code of Conduct for Inter-African Relations, OAU Doc. AHG/Decl. 2 (XXX) (June 13–15, 1994).

"under the pretext of sectarianism, tribalism, ethnicity or religion."[368] These efforts resulted in the adoption of the OAU Convention on the Prevention and Combating of Terrorism ("Algiers Convention") at the 35th Ordinary Session of the OAU Summit, which was held in Algiers from July 12–14, 1999.[369]

In an effort "[t]o give concrete expression to the commitments and obligations of Member States under the 1999 Convention and the other international [counter-terrorism] instruments, the AU High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa, held in Algiers in September 2002, adopted the AU Plan of Action on the Prevention and Combating of Terrorism" ("AU Plan of Action").[370] The AU Plan of Action notes that "Member States of the African Union have long espoused the need to counter terrorism at both the individual and collective levels" and this concern led to the adoption of the Algiers Convention in Algiers in July 1999.[371]

The AU Plan of Action then noted that on October 17, 2001, the Heads of State and Government and Representatives of several African countries adopted the Dakar Declaration Against Terrorism, reaffirming their unequivocal rejection of terrorism. Specifically, the delegates strongly condemned "any act of terrorism, be it perpetrated in the African continent or in any other part of the world."[372] The delegates also noted that preventing and combating terrorism requires the full and firm commitment of Member States, particularly in the areas of "exchange of information among Member States on the activities and movements of terrorist groups in Africa; mutual legal assistance; exchange of research and expertise; and the mobilization of technical assistance and cooperation, both within Africa and internationally, to upgrade the scientific, technical and operational capacity

368 *Id.* pmbl., ¶ 13.

369 *See* Declarations and Decisions Adopted by the Thirty-Fifth Assembly of Heads of State and Government, OAU Docs. AHG/Decl. 1-2 (XXXV), AHG/Dec. 132-142 (XXXV), AHG/OAU/AEC/Dec.1 (III).

370 Afr. Ctr. for Study & Rsch. on Terrorism, *The African Union Counter Terrorism Framework*, http://caert.org.dz/official-documents/AU-CT-Framework.pdf (last visited on July 6, 2020); *see also* Afr. Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Afr., *Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa*, AU Doc. Mtg/HLIG/Conv. Terror/Plan.(I) (Sept. 11–14, 2002) [hereinafter AU Plan of Action].

371 *See* AU Plan of Action, *supra* note 370, ¶ 1.

372 Dakar Declaration Against Terrorism pmbl., Oct. 17, 2001, https://www.refworld.org/docid/3deb22b14.html.

of Member States."[373]

According to the AU Plan of Action, joint action by Member States to combat and prevent terrorism in Africa "must be taken at the inter-governmental level. This includes: coordinating border surveillance to stem illegal cross-border movement of goods and persons; developing and strengthening border control-points; and combating the illicit import, export and stockpiling of arms, ammunition and explosives."[374] These joint activities are expected to enhance the ability of the AU to fully and effectively destroy terrorist networks and their access to the African continent.[375]

The AU Plan of Action also notes that extreme poverty and high levels of material deprivation suffered by many communities in Africa have created "a fertile breeding ground for terrorist extremism."[376] Unfortunately, many African countries do not have enough resources to develop and implement effective anti-terrorism programs without external assistance. Hence, cooperation and the pooling of resources and fighting terrorism at a regional or continental level is highly advised.[377] The Plan of Action then noted that Member States had agreed "to take the measures detailed hereunder, in the spirit of the Constitutive Act of the African Union, particularly Articles 9(e) and 23(2) thereof, on monitoring implementation of the policies and decisions of the Union."[378]

As part of the effort to implement the 2002 Plan of Action, the AU established the African Center for the Study and Research on Terrorism ("ACSRT") in Algiers in 2004.[379] The ACSRT was established "to contribute to and strengthen the capacity of the African Union through the PSC in the prevention and combating of terrorism in Africa, with the ultimate objective of eliminating the threat posed by terrorism to peace, security, stability and development in Africa."[380] The ACSRT's functions are

- Assist Member States of the African Union in developing strategies

373 AU Plan of Action, *supra* note 370, ¶ 3.
374 *Id.* ¶ 4.
375 *See id.*
376 *Id.* ¶ 5.
377 *See id.* ¶ 6.
378 *Id.* ¶ 9. The measures are listed in ¶¶ 10–21.
379 *See* AFR. CTR. FOR STUDY & RSCH. ON TERRORISM, http://caert.org.dz/ (last visited June 20, 2021).
380 *Profile: African Center for the Study and Research on Terrorism*, INST. FOR SEC. ISSUES, https://issafrica.org/profile-african-centre-for-the-study-and-research-on-terrorism-acsrt (last visited June 20, 2021).

for the prevention and combating of terrorism;

- Establish operating procedures for information gathering, processing and dissemination;
- Provide technical and expert advice on the implementation of the African Union counter-terrorism regimes, in particular, the 1999 OAU Convention, the Plan of Action on the Prevention and Combating of Terrorism, and the Protocol to the OAU Convention, as well as on the updating and strengthening of policies and programs of the Union relating to counter-terrorism;
- Develop and maintain a database on a range of issues relating to the prevention and combating of terrorism, particularly on terrorist groups and their activities in Africa, as well as on experts and technical assistance available. This database, that will include analyses, will be accessible to all Member States;
- Promote the coordination and standardization of efforts aimed at enhancing the capacity of Member States to prevent and combat terrorism;
- Initiate and disseminate research studies and policy analyses periodically to sensitize Member States, based on the current trends, and/or on the demand of Member State(s). The Center shall periodically publish, its research and analyses, in an "African Journal for the Prevention and Combating of Terrorism";
- Develop cooperation and assistance programs with similar and/or interested institutions at national, regional, continental and international levels, in the areas of research, information gathering and analyses on issues relating to the prevention and combating of terrorism;
- Undertake research and converging studies on other global security problems with links to terrorism, which pose a threat to peace and security in Africa;
- Develop capacity for early warning to encourage early response, integrating the concept of Preventive Management of Crisis;
- Provide technical and expert advice on how best Africa can contribute in a more meaningful way to the international campaign against terrorism, particularly the implementation of relevant international instruments by Member States of the African Union;

- Undertake studies and make recommendations on the strengthening and standardization of legal norms and cooperation in matters of information-sharing among Member States, mutual assistance, extradition, police and border control (including land, maritime and air) in Africa;
- Conduct studies and analyses on the best strategies and methods for suppressing the financing of terrorism;
- Organize workshops, seminars, symposia and training programs for enhancing the capacity of Member States and Regional Mechanisms in the prevention and combating of terrorism in Africa;
- Submit annual reports on its activities to the Chairperson of the Commission, for consideration by the policy Organs of the Union. The annual report shall include a financial statement on the activities undertaken in the previous year and the budget of activities envisaged for the following fiscal year.[381]

The ACSRT was established to function under the AU Peace and Security Council and hence, its director reports directly to the Chairperson of the Commission of the PSC. The ACSRT organizes workshops, seminars, symposia and training programs that significantly enhance the capacity of Member States to prevent and combat terrorism. As a consequence, it is a very important vehicle for dealing with terrorism generally and terrorist acts in particular.[382]

### 2. *Overview of the OAU Convention on the Prevention and Combating of Terrorism*

The Algiers Convention was adopted by OAU Assembly of Heads of State and Government at its 35th ordinary session on July 1, 1999. It entered into force on December 6, 2002.[383] The Algiers Convention consists of a Preamble, 23 articles, and an Annex, which provides a list of international instruments for suppressing and preventing terrorism.[384]

In the Preamble, the Member States make reference to the "purposes and principles enshrined in the Charter of the Organization of African Unity,

381 *Id.*
382 *Id.*
383 OAU Convention on the Prevention and Combating of Terrorism, July 1, 1999, OAU Doc. AHG/Dec. 132 (XXXV) 1999 [hereinafter Algiers Convention].
384 *See id.*

in particular its clauses relating to the security, stability, development of friendly relations and cooperation among Member States."[385] In addition, the Member States also noted that they were "[a]ware of the need to promote human and moral values based on tolerance and rejection of all forms of terrorism irrespective of their motivations."[386] The delegates at the Algiers Assembly also made reference to the various resolutions made by the UN "on measures aimed at combating international terrorism and, in particular, resolution 49/60 of the General Assembly of 9 December, 1994 together with the annexed Declaration on Measures to Eliminate International Terrorism as well as resolution 51/210 of the General Assembly of 17 December, 1996 and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism."[387]

Additionally, the delegates were "[d]eeply concerned over the scope and seriousness of the phenomenon of terrorism and the dangers it poses to the stability and security of States" and desired to strengthen "cooperation among Member States in order to forestall and combat terrorism."[388] The Heads of State and Government of the OAU/AU also noted the link between terrorism and human rights—they stated that "terrorism constitutes a serious violation of human rights and, in particular, the rights to physical integrity, life, freedom and security, and impedes socio-economic development through destabilization of States."[389] Finally, the delegates at the Algiers Assembly argued that "terrorism cannot be justified under any circumstances and, consequently, should be combated in all its forms and manifestations, including those in which States are involved directly and indirectly, without regard to its origin, causes and objectives" and that Member States must be determined to eliminate terrorism in all its forms and manifestations.[390]

Article 1 defines important terms and expressions used in the Convention. One of the most important is the expression "terrorist act." A *terrorist act* is defined as:

> (a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of

385 *Id.* pmbl.
386 *Id.*
387 *Id.*
388 *Id.*
389 *Id.*
390 *Id.*

> persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
>
> (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
>
> (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
>
> (iii) create general insurrection in a State;
>
> (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).[391]

The definition of a terrorist act has been criticized for being too broad and for creating problems for effective efforts to fight terrorism and, at the same time, recognize and protect the rights of individuals who are legitimately exercising their right to self-determination, as well as defend themselves against "aggression and occupation."[392] In a paper titled "Human Rights Violations in sub-Saharan African Countries in the Name of Counter-Terrorism: A High Risks Situation," the International Federation for Human Rights (Paris) ("IFHR"), argued that "lawmakers have great difficulty in distinguishing the boundary between terrorism and 'the legitimate combat of people to exercise their right to self-determination and legitimate defense when faced with aggression and occupation' and equally as concerns recognition of State terrorism."[393]

The IFHR also argued that "[t]he result of this plethora of concepts is a lack of clarity and precision in the incrimination of terrorism at national and international levels."[394] There is the risk, then, that "certain crimes or offenses [can] be incorporated in the category of terrorist act that, by nature, should not be considered as such."[395] In fact, the failure of the Algiers Convention to provide a definition for terrorism that is "ideologically neutral" and "meets the requirements of the principle of legality" places

391 *Id.* art. 1(3).
392 IFHR 2007, *supra* note 3, at 6.
393 *Id.*
394 *Id.*
395 *Id.*

opportunistic governmental regimes in the continent in a position to use laws against terrorism to tyrannize fellow citizens who are protesting their political and economic marginalization (e.g., members of religious and ethnic minorities) or muzzle the media.[396] It appears that, in defining terrorism, Member States of the OAU/AU were interested primarily in seeking out a definition for a terrorist act that could significantly enhance the ability of prosecuting authorities to easily identify both the "tangible consequences" and perpetrators of the act.[397]

A close examination of the definition for "a terrorist act" reveals a few ambiguities, including, for example, expressions such as, "according to certain principles," "which may," and "causes or may cause."[398] In addition to the fact that various components of the definition of a terrorist act, including those mentioned above, are not well-articulated, they fail to effectively "spell out the ways in which the acts they refer to are criminal."[399] In a report completed for and issued by the International Commission of Jurists in 2003, its author, Federico Andreu-Guzman, argued that:

> [t]he Algiers Convention also eliminates the frontier between political crimes and terrorist acts. By assimilating insurrection to terrorism, the Algiers Convention denies the existence of any political crimes. Terrorist acts and political crimes are two different criminal categories, subject to distinct rules, especially as regards extradition. It is likely that, during an insurrection, terrorist acts are committed (and their authors must be tried for those acts). This is a problem of cumulated incriminations. International law does not prohibit insurrection. What is forbidden, and illicit, is the perpetration of certain acts, because the prohibition of the recourse to terror and terrorist acts is not general nor abstract and is in strict relationship with the notions of civil population and protected persons under international humanitarian law.[400]

The *principle of legality* in criminal law guarantees the primacy of the

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396 As an example, the government of Paul Biya in the Republic of Cameroon has used its anti-terrorism law to silence and intimidate the media, as well as prosecute Anglophone activists who are protesting against the political and economic marginalization of the Anglophone Regions of the country. *See, e.g.*, *Cameroon Using 'Anti-Terror' Law to Silence Media: CPJ*, AL JAZEERA (Sept. 20, 2017), https://www.aljazeera.com/news/2017/9/20/cameroon-using-anti-terror-law-to-silence-media-cpj.

397 IFHR 2007, *supra* note 3, at 6.

398 *Id.* at 7.

399 *Id.*

400 *Id.*

law in criminal procedure in order to ensure that arbitrary bias is eliminated from criminal prosecutions. More importantly, the principle of legality states that no defendant may be punished arbitrarily or retroactively by the State. Under this principle, a person cannot be convicted of behavior that has not previously been defined as criminal by law and has been made generally known to citizens. In addition, the law must not be excessively broad or unclear and must not be applied retroactively to criminalize a behavior or an action that was not criminal at the time that it took place. Finally, the principle of legality is related to the rule of law—it mandates that no individual, no matter their economic and political position, is above the law; the law is supreme.[401]

Beth Van Schaak, a professor of law at Santa Clara University School of Law, has noted that "[o]ne of the most fundamental defenses to a criminal prosecution is that of *nullum crimen sine lege, nulla poena sine lege ('no crime without law, no punishment without law')*."[402] This maxim, it is argued, translates into the principle that "conduct must be criminalized and penalties fixed in advance of any criminal prosecution."[403] Van Schaack notes that the maxim has also been invoked more broadly "in connection with corollary legislative and interpretive principles compelling criminal statutes to be drafted with precision (*the principle of specificity*)."[404] The latter principle—that is, specificity—is often invoked in criticisms of definitions of *terrorism* or a *terrorist act*, such as that presented in the Algiers Convention. For example, according to the IFHR, the Algiers Convention's definition of a terrorist act is not "sufficiently precise to avoid any arbitrary application."[405]

To deal with the issue of specificity, some authors have attempted to provide their own definition of terrorism. For example, Professor Boaz Ganor, the Founder and Executive Director of the International Institute for Counter-Terrorism,[406] has defined terrorism as follows: "terrorism is the intentional use of, or threat to use, violence against civilians or against

401 *See* Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT'L L. 293, 302 (2009) (noting that "[t]he law is superior to all members of society, including government officials vested with either executive, or judicial power").

402 Beth Van Schaack, Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119, 121 (2008–2009).

403 *Id.*

404 *Id.*

405 IFHR 2007, *supra* note 3, at 7.

406 The International Institute for Counter-Terrorism (ICT) is a non-profit organization located at the Interdisciplinary Center (IDC), in Herzliya, Israel. Founded in 1996, the ICT is a leading academic institute for the study of counter-terrorism and has, since its founding, provided a forum for international cooperation on research and exchange of information on how to suppress and prevent terrorism.

civilian targets, in order to attain political aims."[407] This definition appears to strike the right balance between three important principles, generality, specificity, and objectivity, that make the definition of terrorism less likely to be misused by opportunistic political elites.[408]

Professor Ganor's definition contains three important elements: (i) *the essence of the activity* (the deliberate use of, or the threat to use, violence); hence, an activity that "does not involve violence or a threat of violence," such as nonviolent protest, which include strikes, peaceful demonstrations, tax revolts, designed to force accountability in the government, do not fall under the umbrella of terrorism or terrorist acts; (ii) the *underlying goal or aim of the activity* (achieving political gain): the activity must be carried out in order to attain a political aim; hence, an act of criminal delinquency, a felony, a simple act of insanity, or an even violent act against civilians that does not have a political aim or objective, cannot be included in the definition of a terrorist act; and (iii) *the target of the attacks* (civilians): this element effectively separates terrorism from other forms of political violence (*e.g.*, guerrilla warfare; civil insurrection; and even secessionist movements).[409]

Professor Ganor has argued that "[t]errorism exploits the relative vulnerability of the civilian 'underbelly'—the tremendous anxiety, and the intense media reaction evoked by attacks against civilian targets."[410] He argues further that "[t]he proposed definition [of terrorism] emphasizes that terrorism is not the result of an accidental injury inflicted on a civilian or a group of civilians who stumbled into an area of violent political activity, but stresses that this is an act purposefully directed against civilians."[411]

The IFHR has argued that the definition of terrorism proposed by the UN Secretary-General's High Level Panel on Threats, Challenges and Changes is one that best meets the principle of legality.[412] According to the Secretary-General's High Level Panel, terrorism is:

any action, in addition to actions already specified by the existing

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407 Boaz Ganor, *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?*, 3 POLICE PRAC. & RSCH. 287, 294 (2002).

408 *See id.*; *see also* Jerry Nockles, *Why the World Needs an Agreed Definition of Terrorism (Part 2)*, INTERPRETER (Oct. 31, 2013, 9:45 AM), https://www.lowyinstitute.org/the-interpreter/why-world-needs-agreed-definition-terrorism-part-2.

409 Ganor, *supra* note 407, at 294–295.

410 *Id.* at 295.

411 *Id.*

412 *See* IFHR 2007, *supra* note 3, at 7.

> conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[413]

Another problem that has been identified with the Algiers Convention is related to the principle of *aut dedere aut judicare*, which deals with the legal obligation of States under public international law to extradite or prosecute.[414] With respect to the Algiers Convention, the goal must be to ensure that a principle of systematic extradition is implemented in each State Party so that individuals accused of committing terrorist acts are extradited to the State where the terrorist act took place, as well as ensure that "political crimes are not invoked to justify a refusal to extradite."[415] The IFHR notes that "[b]eyond the general safeguard clause set out in Article 22, the [Algiers] Convention contains no specific provision prohibiting the extradition of someone whose crime is punishable by death or who risks torture or cruel, inhuman and degrading treatment in the country requesting extradition."[416]

One can argue, of course, that a State can deny a request for extradition "if the crime for which the extradition has been requested is punishable by [the] death penalty according to the criminal code in the country requesting extradition, unless the requesting country can guarantee that the death penalty will not be applied."[417] Reference has also been made to major international human rights treaties that prohibit the forceful extradition of individuals to States where they may be subject to torture, cruel, inhuman or degrading punishment or treatment.[418] It has also been noted that the provisions dealing with the monitoring of groups and the collection of data on them (*e.g.*, art. 4(2)(b, e)), especially if they are directed at members of the opposition and their organizations, can violate their right to privacy.[419]

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413 Rep. of the High-Level Panel, *supra* note 55, ¶ 44(d).

414 *See* Int'l L. Comm'n, *Final Rep. on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)* (2014), https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf. This report also appears in 2 Y.B. Int'l L. Comm'n, pt. 2 (2014).

415 IFHR, *supra* note 3, at 7.

416 *Id.*

417 *Id.*

418 *See id.*; *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (December 10, 1984).

419 *See* IFHR, *supra* note 3, at 7.

### 3. *The Provisions of the Algiers Convention*

This Article has already examined Article 1 of the Algiers Convention, which defines the important terms and expressions used in the Convention. In this section, the Article will examine the rest of the Convention's provisions. In Article 2, States Parties undertake to: "(a) review their national laws and establish criminal offenses for terrorist acts as defined in this Convention and make such acts punishable by appropriate penalties that take into account the grave nature of such offenses."[420] Article 2 also imposes an obligation on States Parties to "consider, as a matter of priority, the signing or ratification of, or accession to, the international instruments listed in the Annexture, which they have not yet signed, ratified or acceded to."[421]

The Algiers Convention makes a distinction between terrorist acts, as defined in Article 1, and the actions of individuals and groups fighting for the right to free themselves from colonial and other forms of oppression. Specifically, Article 3 states as follows:

> Notwithstanding the provisions of Article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.[422]

In addition, Article 3 deals with the issue of "justification" for a terrorist act as defined in Article 1 and mandates that "[p]olitical, philosophical, ideological, racial, ethnic, religious or other motives *shall not* be a justifiable defense against a terrorist act."[423] Articles 1, 2 & 3 are classified under Part I, which deals with the "scope of application."[424] Articles 4 and 5 are found in Part II, which is devoted to the "areas of cooperation" as relates to the fight against terrorism.[425] Article 4 instructs States Parties to

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420 Algiers Convention, *supra* note 383, art. 2(a).

421 *Id.* art. 2(b). The Annexture contains twelve treaties dealing with various aspects of terrorism, including, for example, terrorist acts (i) committed on board aircraft; (ii) related to civil aviation; (iii) involving the taking of hostages; (iv) related to nuclear material; (v) at airports; (vi) in connection with fixed platforms located on the Continental Shelf; (vii) related to maritime navigation; (viii) related to the production of plastic explosives; (ix) related to the use, stockpiling, production and transfer of anti-personnel mines; and (x) associated with the production of plastic explosives. *See id.* annex.

422 *Id.* art. 3(1).

423 *Id.* art. 3(2) (emphasis added).

424 *Id.* arts. 1–3.

425 *Id.* arts. 4–5.

"undertake to refrain from any acts aimed at organizing, supporting, financing, committing or inciting to commit terrorist acts, or providing havens for terrorists, directly or indirectly, including the provision of weapons and their stockpiling in their countries and the issuing of visas and travel documents."[426] Article 4 makes clear that a State can directly commit terrorist acts or aid someone else in carrying out such acts. For example, the State of Libya was accused of "state terrorism" following the Lockerbie bombing incident.[427]

Article 4 also imposes an obligation on States Parties to "adopt any legitimate measures aimed at preventing and combating terrorist acts in accordance with the provisions of this Convention and their respective national legislation."[428] Particular attention is paid to (i) the prevention of the territories of States Parties from being utilized as a base for carrying out terrorist acts; (ii) developing and strengthening, within each State Party, methods and mechanisms to monitor and detect plans or activities designed to foster the "illegal cross-border transportation, importation, export, stockpiling and use of arms, ammunition and explosives and other materials and means of combating terrorist acts";[429] (iii) significantly strengthening mechanisms for protecting the security of members of diplomatic and consular missions accredited to a State Party, as well as the "premises of regional and international organizations to a State Party, in accordance with the relevant conventions and rules of international law";[430] and (iv) taking all necessary measures to "prevent the establishment of terrorist support networks in any form whatsoever."[431]

Articles 4(b) and 4(e) deal with monitoring and the collection of data on, for example, "terrorist elements, groups, movements and organizations."[432] Nevertheless, this provision is defined in an extremely broad manner, creating opportunities for States Parties to engage in behaviors that could constitute a serious violation of the right to privacy. Perhaps, more importantly, a State Party's monitoring and the collection of data can be extended to groups that are legitimately protesting government tyranny and

426 *Id.* art. 4(1).

427 KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM: PROBLEMS AND PROSPECTS 235 (2011) (noting that Libya eventually accepted "civil responsibility for the actions of its officials in the Lockerbie affair, in conformity with international law," and subsequently "agreed to pay compensation to the victims of the Lockerbie bombing").

428 Algiers Convention, *supra* note 383, art. 4(2).

429 *Id.* art. 4(b).

430 *Id.* art. 4(d).

431 *Id.* art. 4(f).

432 *Id.* art. 4(b), (e).

are not engaging in any criminal activities.[433]

According to Article 5, States Parties are instructed to cooperate with one another so that they can prevent and combat "terrorist acts in conformity with national legislation and procedures of each State," with specific reference to "(a) acts and crimes that are committed by terrorist groups, their leaders and elements, their headquarters and training camps, their means and sources of funding and acquisition of arms, the types of arms, ammunition and explosives used, and other means in their possession,"[434] as well as "their communication and propaganda methods and techniques."[435]

In addition to instructing States Parties to effect the arrest of "any person charged with a terrorist act against the interests of a State Party or against its nationals," Article 5 also imposes an obligation on States Parties to "undertake to respect the confidentiality of the information exchanged among them and not to provide such information to another State that is not party to this Convention, or to a third Party, without the prior consent of the State from where such information originated."[436] Under Article 5, Member States are also instructed to cooperate in other areas related to apprehending and bringing accused terrorists to justice.[437] This article, however, does not deal specifically with the privacy rights of persons accused of committing terrorist acts.[438]

Part III of the Algiers Convention, which consists of Articles 6 and 7, deals with "jurisdiction over terrorist acts" and how a State can establish jurisdiction over a terrorist act as defined in Article 1. Article 7 informs a State Party about the measures that it should take if it receives information that "a person who has committed or who is alleged to have committed any

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433 An example is the treatment of the Anglophone activists in the Republic of Cameroon by the central government. After studying the present crisis in the country, Human Rights Watch presented the government of Cameroon with several policy recommendations. One of them is for the government to "[e]nsure that any security operations are conducted with full respect for international human rights law." Jonathan Pedneault & Bede Sheppard, *"These Killings Can be Stopped": Abuses by Government and Separatist Groups in Cameroon's Anglophone Regions*, HUM. RTS. WATCH (June 19, 2018), https://www.hrw.org/report/2018/07/20/these-killings-can-be-stopped/abuses-government-and-separatist-groups-cameroons.

434 Algiers Convention, *supra* note 383, art. 5(1)(a).

435 *Id.* art. 5(1)(b).

436 Algiers Convention, *supra* note 383, at art. 5(2)(a) & 5(3).

437 *See id.* art. 5(3)–(6).

438 *See generally* COMM. ON L. & JUST. & COMP. SCI. & TELECOMMS. BD., PROTECTING INDIVIDUAL PRIVACY IN THE STRUGGLE AGAINST TERRORISTS: A FRAMEWORK FOR PROGRAM ASSESSMENT (2008).

terrorist act as defined in Article 1 may be present in its territory."[439] Article 7(3) provides some protections for an individual who is accused of committing terrorist acts and these include the right to communicate with "an appropriate representative of the State of which that person is a national," the right to "be assisted by a lawyer of his or her choice," and "be informed of his or her rights" as provided for in "sub-paragraphs (a), (b) and (c)" of Article 7.[440] It is not clear whether the State will pay for a lawyer for suspects who are unable or unwilling to do so.

Part IV, which consists of Articles 8–13, deals with extradition of individuals accused of committing terrorist acts. Article 8(2) allows States Parties to define "the grounds on which extradition may not be granted."[441] However, in doing so, the State Party must also "indicate the legal basis in its national legislation or international conventions to which it is a party which excludes such extradition."[442] This information was to be sent to the OAU Secretary General who was then directed to forward the grounds on which extradition may not be granted to the States Parties to the Convention.[443]

Limitations to the granting of extradition requests are provided in Article 8(3). If, for example, a person accused of committing a terrorist act has been prosecuted for that terrorist act by a competent authority of the "Requested State"[444] and a final judgment has been rendered, an extradition request for this individual should not be granted.[445] In addition, an extradition request may be denied "if the competent authority of the requested State has decided either not to institute or terminate proceedings in respect of the same act or acts."[446] Finally, Article 8 instructs States Parties to bring alleged offenders within their jurisdiction to trial by a competent authority and "without undue delay" regardless of whether or not the offense was committed in their territory.[447]

Through Article 9, States Parties are mandated and obligated to include

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439 Algiers Convention, *supra* note 383, arts. 6–7.

440 *Id.* art. 7.

441 *Id.* art. 8(2)

442 *Id.* This implies that a State Party has the right to pass legislation that defines the conditions under which extradition shall be granted. Once that is done, the State Party must then transmit that information to the OAU Secretary General.

443 *See id.*

444 That is, the State Party that is harboring or has jurisdiction over the accused person and who is also subject to an extradition request.

445 *See id.* art. 8(3).

446 *Id.*

447 *Id.* art. 8(4).

any terrorist act, as defined in Article 1, as an "extraditable offense," in any extradition treaty existing between them and other States Parties to the Convention and this should be done "before or after the entry into force of [the] Convention."[448] Article 10 provides the avenues through which extradition requests between the States Parties may be effected—they may be effected through "diplomatic channels" or "other appropriate organs in the concerned States."[449] Article 11 notes that extradition requests must be in writing and must be accompanied by certain prescribed documents and these are:

> (a) an original or authenticated copy of the sentence, warrant of arrest or any order or other judicial decision made, in accordance with the procedures laid down in the laws of the requesting State;
>
> (b) a statement describing the offenses for which extradition is being requested, indicating the date and place of its commission, the offense committed, any convictions made and a copy of the provisions of the applicable law; and
>
> (c) as comprehensive a description as possible of the wanted person together with any other information which may assist in establishing the person's identity and nationality.[450]

Article 12 instructs States Parties on how to deal with extradition requests in "urgent cases" and Article 13 provides States Parties with advice on how they can deal with multiple requests for the extradition of "the same suspect and for the same or different terrorist acts."[451] In the case of multiple requests to extradite the "same suspect and for the same or different terrorist acts," the requested State Party "shall decide on these requests having regard to all the prevailing circumstances, particularly the possibility of subsequent extradition, the respective dates for receipt of the requests, and the degree of seriousness of the crime."[452] Once a State has agreed to the extradition request, it must "seize and transmit all funds and related materials purportedly used in the commission of the terrorist act to the requesting State as well as relevant incriminating evidence."[453] When the requested State has confirmed that the "funds and related materials" mentioned in

448 *Id.* art. 9.
449 *Id.* art. 10.
450 *Id.* art. 11(a)–(c).
451 *Id.* arts. 12, 13(1).
452 *Id.* art. 13(1).
453 *Id.* art. 13(2).

paragraph 2 of Article 8 were, indeed, used in the terrorist act, these resources must be transmitted to the requesting State even if, "for reasons of death or escape of the accused, the extradition in question cannot take place."[454]

Legal scholars have noted that modern extradition treaties have not functioned very well because of several reasons. One of the most important is the lack of capacity by parties to the extradition treaty. Professor M. Cherif Bassiouni, a former professor of law at DePaul University, has noted that "[i]n almost every country of the world there are too few people in the departments and ministries of foreign affairs and justice who administer the mechanics of extradition."[455] In addition, argues Professor Bassiouni, "there are far too few people at the prosecutorial level who are familiar with extradition and its intricacies" and, as a result, "the process bogs down, it becomes slower, and more difficult to implement."[456]

In 1983, the Institute of International Law (*l'Institut de Droit international*) released a Resolution titled *New Problems of Extradition*.[457] In the Preamble to the Resolution, the Institute of International Law ("IIL") recalled "previous Resolutions of the Institute on matter of extradition (Oxford 1880, Geneva 1892, Paris 1984),"[458] noted the IIL's eagerness "to contribute to a more effective suppression of crimes by means of a better regulation of the systems of extradition," and recognized "the need to ensure in this field the observance of fundamental rights of the accused in particular of his rights of defense."[459]

### *4. More on Extradition in International Law*

With respect to the treaty system on extradition, the IIL noted that "[b]oth systems of extradition at present in use, the bilateral and the multilateral, should be developed and extended."[460] The Resolution advised States Parties to "agree upon a system of extradition in accordance with the general principles of this Resolution"—the hope is that such efforts may

454 *Id.* art. 13(3).

455 M. Cherif Bassiouni, Christopher L. Blakesley, David P. Stewart, John F. Murphy, Bruce Zagaris & Yoram Dinstein, *Major Contemporary Issues in Extradition Law*, 84 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 389, 389 (1990).

456 *Id.*

457 *See* Inst. of Int'l L., *New Problems of Extradition* (Sept. 1, 1983), https://www.idi-iil.org/app/uploads/2017/06/1983_camb_03_en.pdf.

458 *Id.* pmbl.

459 *Id.*

460 *Id.* art. (I)(1).

lead to the development of a modern system of extradition.[461] In the case where there is no extradition treaty between the requesting State and the requested State, the IIL advises the parties to respect the requirements of international law.[462]

Article II of the IIL Resolution is devoted to the political offense. It notes that "[w]here the extradition treaty does not expressly contain the right to refuse extradition for political offenses, a State may nevertheless invoke this defense in support of its refusal."[463] Also, argued the IIL, "[t]he right to refuse extradition for a political offense should not be replaced by the mere right to grant asylum from political persecution; the prosecution of a political offender does not always necessarily amount to prosecution justifying the grant of asylum by third States."[464] Acts that are of a "particularly heinous character, such as acts of terrorism, should not be considered political crimes."[465]

Article III is devoted to the *attentat* clause and states that "[t]he traditional *attentat* clause should be maintained, and its application should be extended to representatives of States, in particular members of the diplomatic missions, and to representatives to, and officials of, international organizations."[466] Finally, "[t]he application of the *attentat* clause should be extended to acts of a particularly heinous nature."[467] Under the principle of the *attentat* clause, "it is not [a] political offense to murder or to make an attempt at the life of the head of a state, or a member of his family, or sometimes, a member of the government."[468] The clause is found in many treaties and statutes and it usually excludes "from being considered political a crime involving an attempt upon the life of the head of a state and members of his family, or, in addition, upon the lives of the ministers of state, or, in further addition, upon the lives of vice-presidents, governors, and other state functionaries."[469]

The protection of the fundamental rights of the human person is covered in Article IV of the IIL's Resolution. It is noted that "[i]n cases where there is a well-founded fear of the violation of the fundamental human rights of

461 *See id.* art. (I)(2).
462 *See id.* art. (I)(4).
463 *Id.* art. (II)(1).
464 *Id.* art. (II)(2).
465 *Id.* art. (II)(3).
466 *Id.* art. (III).
467 *Id.*
468 S. PRAKASH SINHA, ASYLUM AND INTERNATIONAL LAW 178 (1971).
469 *Id.*

an accused in the territory of the requesting State, extradition may be refused, whosoever the individual whose extradition is requested and whatever the nature of the offense of which he is accused."[470] Article V clarifies the relationship between the grant of political asylum and the duty to extradite and states that "the right to refuse extradition by granting asylum against political persecution should not be exercised where there is reason to conclude that the requesting State will prosecute the accused with due observance of all requirements, both substantive and procedural, of the rule of law. Where the treaty to be applied contains pertinent provisions, the right to refuse extradition for a political offense should depend on those provisions."[471]

Article VI deals with the rule *aut judicare aut dedere* and notes that this rule "should be strengthened and amplified, and it should provide for detailed methods of legal assistance."[472] When a State has undertaken to prosecute an accused individual, "other interested States, in particular the State on the territory of which the offense was committed, should be entitled to send observers to the trial unless serious grounds related to the preservation of State security in fact justify the non-admittance of such observers."[473]

While in principle every State should remain free to refuse the extradition of its nationals, the State should "in that event try the offense under its own law. The extradition of nationals, on a reciprocal basis, may serve to reduce crime."[474] With respect to the relationship between an obligation to extradite and municipal law, Article VIII of the IIL Resolution provides that all "[e]xtradition treaties or appropriate national legislation should provide that a person whose extradition is requested is entitled to invoke before national courts any protective treaty provision," as well as, "rely before national courts on rules of customary international law which provide for his protection."[475] In addition, although the "extradition of an alien may be forbidden by municipal law," his "expulsion by legal

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470 *New Problems of Extradition*, *supra* note 457, art. (IV).

471 *Id.* art. (V).

472 *Id.* art. (VI)(1).

473 Inst. of Int'l L., *supra* note 457, at art. (VI)(2). The expression *aut judicare aut dedere is* Latin for either extradite or prosecute and refers to the legal obligation of States under international law to bring persons who commit serious international crimes where no other state has requested the extradition of the accused individual to justice. *See, e.g.*, M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3 (1995).

474 Inst. of Int'l L., *supra* note 457, at art. (VII).

475 *Id.* art. (VIII)(1).

procedure" should not be prevented.[476]

Nevertheless, "[t]he exercise of any right to expel an alien should, internationally, be limited by the duty to respect human rights, in particular by avoiding the deportation of the person to a State which might persecute him and by avoiding any arbitrary expulsion."[477] Finally, disputes concerning treaties on extradition are to be "submitted to arbitral or judicial settlement, in particular to the International Court of Justice."[478]

*5. The Algiers Convention and International Law*

In 2001, through its Resolution 1373, the UN created the Counter-Terrorism Committee ("CTC") to monitor the implementation of Resolution 1373, as well as the steps that Member States were taking to implement the Resolution.[479] But, does the Algiers Convention meet the requirements of the UN regarding the suppression and prevention of terrorist acts as detailed in Resolution 1373? Although the Algiers Convention is a regional treaty, its foundation is found in several UN conventions and resolutions dealing with terrorism. The Preamble to the Algiers Convention states as follows:

> Believing in the principles of international law, the provisions of the Charters of the Organization of African Unity and of the United Nations and the latter's relevant resolutions on measures aimed at combating terrorism and, in particular, resolution 49/60 of the . . . General Assembly of 9 December, 1994 together with the annexed Declaration of Measures to Eliminate International Terrorism as well as resolution 51/210 of the General Assembly of 17 December, 1996 and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism. . . .[480]

UN General Assembly Resolution 49/60, which was adopted on December 9, 1994, and titled "Measures to Eliminate International Terrorism," urged States Parties, "in accordance with the provisions of the Declaration, to take all appropriate measures at the national and international levels to eliminate terrorism."[481] The Annex to Resolution

476 *Id.* art. (VIII)(2).
477 *Id.*
478 *Id.* art. (IX).
479 *See* S.C. Res. 1373 (Sept. 28, 2001).
480 Algiers Convention, *supra* note 383, pmbl.
481 G.A. Res. 49/60 (Feb. 17, 1995).

49/60 is titled "Declaration on Measures to Eliminate International Terrorism" and in it, the UN General Assembly noted that it was deeply concerned about "the increase, in many regions of the world, of acts of terrorism based on intolerance or extremism," as well as of "the growing and dangerous links between terrorist groups and drug trafficking and their paramilitary gangs."[482]

The UNGA then stated that it was determined "to eliminate international terrorism in all its forms and manifestations."[483] Member States, through the UNGA, were also convinced that "the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is an essential element for the maintenance of international peace and security" and that "those responsible for acts of international terrorism must be brought to justice."[484] The UNGA then declared that:

> States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts.[485]

The UNGA also mandated that:

> States must also fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism.[486]

At the 88th Plenary Meeting of the UN General Assembly on December 17, 1996, the UNGA adopted Resolution 51/210.[487] In Resolution 51/210, the General Assembly recalled its Resolution 49/60 of December 9, 1994[488] and reaffirmed "the Declaration on Measures to Eliminate International Terrorism contained in the annex to resolution 49/60."[489] The Assembly

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482 *Id.* pmbl.
483 *Id.*
484 *Id.*
485 *Id.* ¶ 4.
486 *Id.* ¶ 5.
487 *See* G.A. Res. 51/210 (Jan. 16, 1997).
488 *See* G.A. Res. 49/60 (Feb. 17, 1995).
489 G.A. Res. 51/210, ¶ 7.

then approved the "Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism," whose text is attached to Resolution 51/210.[490] These UN Resolutions, as well as other international instruments, form the foundation of the OAU Convention on the Prevention and Combating of Terrorism ("Algiers Convention").

In addition, Article 22 of the Algiers Convention notes that "[n]othing in [the Algiers Convention] shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and People's Rights."[491] Thus, in addition to the fact that the Algiers Convention was built on the requirements of international law, it also sought to make sure that, in fighting terrorism, States Parties to the Convention had to consider not only their obligations under international law, but also the African Charter on Human and Peoples' Rights and general principles of international law. This provision of the Algiers Convention implies that, in fighting terrorism, States Parties to the Algiers Convention must respect human rights, including even those of accused terrorists.[492]

### 6. *Protocol to the OAU Convention on the Prevention and Combating of Terrorism*

At the Third Ordinary Session of the Assembly of the African Union on July 8, 2004, in Addis Ababa, the Heads of State and Government of the Member States of the African Union adopted the Protocol to the OAU Convention on the Prevention and Combating of Terrorism ("African Terrorism Protocol").[493] In the Preamble to the African Terrorism Protocol, States Parties noted that they were "[g]ravely concerned at the increasing incidence of terrorist acts worldwide, including in Africa, and the growing risks of linkages between terrorism and mercenarism, weapons of mass

490 In the Annex to G.A. Res. 51/210, Member States of the UN reaffirmed their "unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable," and called upon all States to "take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts, considering in this regard relevant information as to whether the asylum-seeker is subject to investigation for or is charged with or has been convicted of offenses connected with terrorism and, after granting refugee status, for the purpose of ensuring that that status is not used for the purpose of preparing or organizing terrorist acts intended to be committed against other States or their citizens." *See id.*, annex ¶ 3.

491 Algiers Convention, *supra* note 383, art. 22(1).

492 *See generally* Algiers Convention, *supra* note 383, art. 22(1); African Charter on Human and People's Rights, June 17, 1981, 1520 U.N.T.S. 217.

493 African Terrorism Protocol, *supra* note 357.

destruction, drug trafficking, corruption, transnational organized crimes, money laundering, and the illicit proliferation of small arms."[494]

In addition, the delegates at the July 8, 2004 Ordinary Session in Addis Ababa were "[d]etermined to combat terrorism in all its forms and manifestations and any support thereto in Africa" and guided "by the principles and regulations enshrined in international conventions and the relevant decisions of the United Nations (UN) to prevent and combat terrorism, including resolution 1373 adopted by the Security Council on 28 September 2001, and the relevant General Assembly resolutions," they reaffirmed their "commitment to the OAU Convention on the Prevention and Combating of Terrorism," which was adopted at the 35th OAU Summit in Algiers, Algeria, in July 1999.[495]

Article 1 of the African Terrorism Protocol is devoted to a definition of various terms used in the Protocol and these include, inter alia, Assembly, Chairperson, State Party, Terrorist Act, and Weapons of Mass Destruction. The purpose of the African Terrorism Protocol is detailed in Article 2—the Protocol's main purpose is "to enhance the effective implementation of the Convention and to give effect to Article 3(d) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, on the need to coordinate and harmonize continental efforts in the prevention and combating of terrorism in all its aspects, as well as the implementation of other relevant international instruments."[496]

Article 3 details commitments by States Parties and these include taking "all necessary measures to protect the fundamental human rights of their populations against all acts of terrorism," preventing "the entry into, and the training of terrorist groups on their territories," identifying, detecting, confiscating and freezing or seizing "any funds and any other assets used or allocated for the purpose of committing a terrorist act, and to establish a mechanism to use such funds to compensate victims of terrorist acts or their families," and becoming "parties to all continental and international instruments on the prevention and combating of terrorism."[497]

The mechanism for implementing the Algiers Convention is provided in Article 4. The African Terrorism Protocol grants the Peace and Security Council ("PSC") of the African Union the responsibility to harmonize and

494 *Id.* pmbl.
495 *Id.*
496 *Id.* art. 2.
497 *Id.* art. 3.

coordinate all continental efforts to prevent and combat terrorism.[498] The African Terrorism Protocol also grants a role for the African Union Commission. Article 5 states that "[u]nder the leadership of the Chairperson of the Commission, and in conformity with Article 10 paragraph 4 of the Protocol Relating to the Establishment of the Peace and Security Council, the Commissioner in charge of Peace and Security shall be entrusted with the task of following-up on matters relating to the prevention and combating of terrorism."[499]

The Commissioner is expected to "provide technical assistance on legal and law enforcement matters, including on matters relating to combating the financing of terrorism, the preparation of model laws and guidelines to help Member States to formulate legislation and related measures for the prevention and combating of terrorism," "follow-up with Member States and with regional mechanisms on the implementation of decisions taken by the PSC and other Organs of the Union on terrorism related matters," and carry out other duties designed to enhance the prevention and combating of terrorism.[500]

Article 6 provides a role for regional mechanisms—"[r]egional mechanisms shall play a complementary role in the implementation of this Protocol and the Convention. They shall among other activities undertake the following:

> (a) establish contact points on terrorism at the regional level;
> (b) liaise with the Commission in developing measures for the prevention and combating of terrorism;
> (c) promote cooperation at the regional level, in the implementation of all aspects of this Protocol and the Convention, in accordance with Article 4 of the Convention;
> (d) harmonize and coordinate national measures to prevent and combat terrorism in their respect Regions;
> (e) establish modalities for sharing information on the activities of the perpetrators of terrorist acts and on the best practices for the prevention and combating of terrorism;
> (f) assist Member States to implement regional, continental and international instruments for the prevention and combating of terrorism; and

498 *See id.* art. 4.
499 *Id.* art. 5.
500 *Id.* art. 5(2).

(g) report regularly to the Commission on measures taken at the regional level to prevent and combat terrorist acts."[501]

With respect to disputes or differences between States Parties "arising from interpretation or application of the provisions of [the African Terrorism] Protocol," these shall be resolved "amicably through direct consultations between the States Parties concerned."[502] However, if the States Parties are unable to resolve the disputes themselves, either State Party is free to "refer the dispute to the Assembly [of the Heads of State and Government of the African Union] through the Chairperson, pending entry into force of the Court of Justice of the African Union, which shall have jurisdiction over such disputes."[503] But, if either one or both of the States Parties are not Members of the Court of Justice of the African Union, then either of the States Parties or both may refer the matter "to the International Court of Justice for settlement in conformity with its Statutes."[504]

Finally, the African Terrorism Protocol states that "[t]he [Algiers] Convention shall constitute an adequate legal basis for extradition for States Parties that do not have extradition arrangements" and that "[s]hould any dispute arise between State[s] Parties on the interpretation or applicability of any existing bilateral extradition agreement or arrangement, the provisions of the Convention shall prevail with respect to extradition."[505]

One of the most important obstacles to effective suppression and prevention of terrorism in Africa today is the gross misuse of anti-terrorism laws by governmental regimes for their own benefit. In many countries, counter-terrorism laws are not being used to prevent terrorist acts or prosecute individuals who carry out these dastardly acts. Instead, governmental regimes in these countries are using national suppression of terrorism laws to suffocate the opposition through, for example, the prevention of freedom of expression and of assembly.[506] In these countries, the judiciary can use its power to interpret the constitution, particularly the Bill of Rights, to (1) make sure that provisions of national constitutions conform to international and regional human rights instruments, and (2)

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501 *Id.* art. 6.
502 *Id.* art. 7(1).
503 *Id.* art. 7(2).
504 *Id.* art. 7(3).
505 *Id.* art. 8.
506 For example, shortly after the Kingdom of Eswatini enacted the Suppression of Terrorism Act No. 3 in 2008, the government declared the People's United Democratic Movement (PUDEMO), one of the country's largest opposition parties, a terrorist organization and swiftly banned it. *See, e.g.*, *Faceless Bombers Sow Insecurity*, NEW HUMANITARIAN (June 14, 2010), https://www.thenewhumanitarian.org/report/89483/swaziland-faceless-bombers-sow-insecurity.

declare unconstitutional and hence invalid, provisions of counter-terrorism legislative enactments that offend or are inconsistent with the national constitution and international rights instruments. In such countries, the independent judiciary remains the last guardian of constitutionalism and constitutional government. The judiciary can hold provisions of counter-terrorism laws that are inconsistent with the constitution, unconstitutional to the extent of the inconsistency, and force lawmakers to either create a new anti-terrorism law or amend the impugned provisions. In the section that follows, this Article will use evidence from the Kingdom of Eswatini to show how the judiciary, even in countries with dysfunctional counter-terrorism legislative enactments, can function as an enabling legal instrument in the fight against international terrorism.

## V. THE JUDICIARY, SUPPRESSION OF TERRORISM LAWS AND THE UNDERMINING OF HUMAN RIGHTS IN AFRICA: LESSONS FROM ESWATINI

### *A. Introduction*

As of this writing (2020), forty-three African countries have ratified and ascended to the Algiers Convention.[507] In addition, several of them have either passed new laws that incorporate provisions of the Convention or have incorporated provisions of the Convention into existing laws.[508] Some of these new anti-terrorism or suppression of terrorism laws have the potential to negatively affect human rights in many of these countries. In this section of the paper, the Article will examine, first, the relationship between terrorism and human rights, and then, second, it will take a look at the Kingdom of Swaziland's (hereinafter "Kingdom of Eswatini") Suppression of Terrorism Act No. 3 of 2008 ("STA").[509] Specifically, this section will examine the role of the judiciary in addressing dysfunctional counter-terrorism acts, those that grant the government significant power to infringe on the rights of citizens in the name of fighting terrorism. In doing so, the Article will examine the role of the High Court of the Kingdom of

507 Status of the OAU Convention on the Prevention and Combating of Terrorism, AFR. UNION, https://au.int/sites/default/files/treaties/37289-sl-oau_convention_on_the_prevention_and_combating_of_terrorism_1.pdf (last visited June 20, 2021).

508 *See, e.g.*, Criminal Law (Codification and Reform) Act [ch. 9:23] Act 23/2004 (June 3, 2005) (Zim.) (noting that terrorism is a crime against the State); *id.* ch. III.

509 *See* Suppression of Terrorism Act No. 3 of 2008, 46 SWAZ. GOV'T GAZETTE 81, Apr. 11, 2008 (Supp.).

Eswatini in the case, *Maseko v. Prime Minister of Swaziland and Others*,[510] which was decided by the Court in 2016.

This Article will use the majority judgment of that case, which was written by Judge Mamba, with Judge Annandale concurring, to illustrate the important role that progressive African judiciaries can play in constitutional or Bill of Rights interpretation in litigation dealing with the misuse of counter-terrorism laws. Additionally, the Article will also examine the dissenting opinion of Judge Hlophe to show that such an approach to limitation litigation is "antithetical to constitutionalism, and is irreconcilable with accepted notions of Bill of Rights litigation."[511] However, before the Article examines *Maseko* and its impact on the nexus between counter-terrorism laws and human rights in Eswatini and, by implication, other African countries, it will provide an overview of the relationship between anti-terrorism laws and human rights.

### *B. Counter-Terrorism Laws and Human Rights*

On November 7, 2003, the International Peace Academy, the Office of the UN High Commissioner for Human Rights and the Center on International Organization at Columbia University, convened a conference on Human Rights, the United Nations and the Struggle Against Terrorism.[512] At an earlier conference held in New York during the period October 25–26, 2002, titled "Responding to Terrorism: What Role for the United Nations?" and convened by the International Peace Academy, it had become apparent to participants that human rights issues must be taken into consideration in any effective effort against terrorism. As argued by one of the participants, Hans-Peter Gasser, "all those who are involved in the fight against international terrorism" must be "aware of their duty to respect international humanitarian law."[513] Gasser continued and argued that "[i]ncreased security measures, if applied disproportionately, can amount to violations of a government's commitment to respect international human

510 Maseko v. Prime Minister of Swaz. (*Maseko I*) (2180/2009) [2016] SZHC 180 (Sept. 16).

511 Angelo Dube & Sibusiso Nhlabatsi, *On Amorphous Terms, Terrorism and a Feeble Judiciary: Analyzing the Dissenting Judgment in Maseko v. Prime Minister of Swaziland and Others* (2016), 12 INT'L J. AFR. RENAISSANCE STUD. 157 (2017).

512 Int'l Peace Acad., U.N. Off. of the High Comm'r for Hum. Rts., Colum. Univ. Ctr. on Int'l Org., *Human Rights, the United Nations, and the Struggle Against Terrorism* (Nov. 7, 2003), https://www.ipinst.org/wp-content/uploads/2015/06/human_rights.pdf. The conference was held in New York City with the help of the Government of The Netherlands.

513 Int'l Peace Acad., *Responding to Terrorism: What Role for the United Nations?*, at 3 (Oct. 25–26, 2002), https://www.ipinst.org/wp-content/uploads/publications/conference_report_terr.pdf.

rights and humanitarian law obligations."[514]

In addition to more effectively articulating the role that the United Nations, and more particularly, the UN Security Council, should play in the recognition and protection of human rights and the suppression and prevention of terrorism, attendees at the *Responding to Terrorism: What Role for the United Nations?* Conference also noted that there must be a balance between fighting terrorism and maintaining peace and order and protecting fundamental rights.[515] At the 2003 conference held in New York on human rights, the UN, and the struggle against terrorism,[516] the then UN High Commissioner for Human Rights, the late Sérgio Vieira de Mello, "suggested in the spring of 2003 that more rigorous thinking was needed concerning the different ways terrorism affected human rights and *what his office and the rest of the UN System should do to uphold human rights while fighting terrorism.*"[517]

Unfortunately, High Commissioner de Mello was killed in a terrorist attack against UN facilities and workers in Baghdad on August 19, 2003.[518] The organizers of the November 7, 2003 conference in New York, were determined "to do justice to the sacrifice and legacy of Sergio Vieira de Mello and the other murdered colleagues by engaging in the most focused and purposeful discussion of human rights and terrorism possible."[519] Hence, the UN and other interested parties brought together in New York on November 7, 2003, "experts on terrorism, security, human rights and international policy, along with senior officials from the United Nations and several regional inter-governmental organizations—the Organization of American States (OAS), the African Union (AU) and the OSCE."[520] This conference presented an opportunity "for high-level experts from counter-terrorism and human rights communities, the UN, and regional organization representatives to sit down together and dissect the complex inter-

514 *Responding to Terrorism: What Role for the United Nations?*, *supra* note 513, at 3.

515 *See id.* at 1 (noting, inter alia, there is need to "uphold human rights standards in the fight against terrorism").

516 *See Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 2.

517 *Id.* (emphasis added).

518 *See, e.g.*, United Nations, *Top UN Envoy Sergio Vieira de Mello Killed in Terrorist Blast in Baghdad*, UN NEWS (Aug. 19, 2003), https://news.un.org/en/story/2003/08/77212-top-un-envoy-sergio-vieira-de-mello-killed-terrorist-blast-baghdad; United Nations, *UN Should Never Be a Target, Baghdad Bombing Survivors Stress, 15 Years After Deadly Attack*, UN NEWS (Aug. 10, 2018), https://news.un.org/en/story/2018/08/1016462.

519 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 2.

520 *Id.*

relationships between terrorism, counter-terrorism and human rights standards."[521]

One of the questions that attendees at the New York conference on human rights, the United Nations, and the struggle against terrorism had to confront was "whether existing human rights law is flexible enough to meet the new challenges posed by international terrorism."[522] Legal scholars have argued, however, that "human rights principles and jurisprudence allow for sufficient flexibility to achieve a balance between security and human rights."[523] It is argued further that it is possible to combat terrorism while still remaining true to the norms that undergird the recognition and protection of human rights.[524]

UN Member States, including those in Africa, must "balance [their] real security concerns with protecting human rights."[525] With respect to a threat to security, there must be a mechanism (e.g., the courts) that can independently review and scrutinize the threat assessment to determine that it is, indeed, genuine, especially given the fact that "an erroneous evaluation can have a colossal impact on human rights."[526] The assessment of the level and extent, as well as, the authenticity of a threat to security, must not be left entirely to the caprices of the executive branch of government.[527] For, in African countries with opportunistic presidents,[528] the political elites can manufacture threats to the government to use the fight against these "threats" to oppress and tyrannize their opponents, who, in several countries, are other ethnocultural groups besides that which the president hails from.[529] It has been argued that the main purpose of developing and

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521 *Id.*

522 *Id.*

523 *Id.*; *see also* Council of Eur., *Human Rights and the Fight Against Terrorism: The Council of Europe Guidelines* (Mar. 2005) (noting that "in crises, such as those brought about terrorism, respect for human rights is even more important" and that "[a]ny other choice would favor the aims of terrorists and would undermine the foundations of our society").

524 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 2.

525 *Id.* at 3.

526 *Id.*

527 *See id.*

528 For example, Cameroon (Paul Biya, who has been in power since 1982); Egypt (Abdel Fattah el-Sisi, who came to power through the overthrow of a democratically elected president); Equatorial Guinea (Teodoro Obiang Nguema Mbasogo, who has been in power since a 1979 coup); and Chad (Idriss Déby, who has been in power since 1990).

529 For example, during the time when Daniel arap Moi, a member of the Kalenjin ethnic group, was President of the Republic of Kenya (1978–2002), he and members of his ethnocultural group considered political organizations formed by other subcultures, such as the Gikuyu, as a threat to the government. It is no wonder that in many areas of the country, so-called "Kalenjin warriors," determined to purge Gikuyu from areas which the Kalenjin considered as their ancestral lands, "raided farms, torched homes, stole cattle, and maimed and killed Gikuyu and other non-Kalenjin people in the area."

adopting a security architecture is to "protect freedom, so it is self-defeating if security concerns arbitrarily undermine freedom."[530] Hence, the fight against terrorism must be undertaken in such a way that does not open the door for the executive to violate the fundamental rights of citizens. In other words, States should not use counter-terrorism laws or the actual process of suppressing and preventing terrorism to violate the rights of citizens.[531]

At the November 7, 2003 conference on human rights, the UN, and the struggle against terrorism, which took place in New York, the participants came up with several take-aways. The first one was that national "security bodies and human rights bodies must work much more closely together than they have in the past."[532] Through such cooperation, they can ensure that the fight against terrorism, which includes making certain that terrorists are brought to justice, does not become a platform for the gross violation of human rights, as is occurring in some African countries (e.g., Cameroon).[533]

The second take-away is that the most effective way to break "'the vicious circle' is to jettison 'political correctness' and not be afraid to confront those committing acts of terror, regardless of their ultimate cause."[534] This is especially important in cases where terrorists claim that they engage in their insidious acts to protect religious beliefs or the values and welfare of their ethnocultural group. Such individuals, when they commit crimes that qualify as terrorist acts as defined by Article 1 of the Algiers Convention or relevant national law, must be brought to justice. Third, the UN must transform itself into an effective mechanism for the fight against international terrorism. In order to do so, it must make certain that those who direct counter-terrorism programs in its headquarters in New York are fully informed of what is actually happening in the field where the terrorist acts are taking place. UN officials in New York and Geneva must make effective use of the reports and analyses sent to them by their several

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*See* ATO KWAMENA ONOMA, THE POLITICS OF PROPERTY RIGHTS INSTITUTIONS IN AFRICA 163 (2010).

530 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 3.

531 *See Cameroon Protect Our Rights*, *supra* note 20 (noting that the government of the Republic of Cameroon is using laws against terrorism to oppress citizens, particularly those of the Anglophone Regions). A survey of the human rights situation in Cameroon by the U.S. Department of State has also determined that the government is using the country's anti-terrorism law to deny people the right to a fair trial, regardless of the crimes that they are accused of committing. *See* U.S. Dep't of State, *2019 Country Reports on Human Rights Practices: Cameroon* (2019), https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/cameroon/.

532 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 3.

533 *See id.* at 3; *see also* Mbaku, *supra* note 301 (examining the abuse of human rights in the Anglophone Regions of Cameroon in the name of the fight against terrorism).

534 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 3.

agencies around the world—as a result of their closeness to the terrorists and their activities, these agencies have the necessary time-and-place information that can help in the design and implementation of effective counter-terrorism policies and programs.[535]

Delegates at the 2003 New York conference also noted that it was critical that in fighting terrorism in Africa and the Middle East the first thing to do was to come up with a definition of terrorism.[536] There was fear and apprehension that, without a generally accepted definition of terrorism, national governments can follow practices that are prevalent in some Middle Eastern countries and "label any opposition group 'terrorist,' declare never-ending states of emergency, use military tribunals, apply torture and generally restrict human rights, thereby generating more frustration, anger and potential recruits for terrorists."[537] Attendees at the New York conference on terrorism also noted that, in defining terrorism, it must be understood that both state and non-state parties can commit crimes of terrorism.[538]

On November 6, 2003, then U.S. President George W. Bush delivered a speech at the 20th Anniversary of the National Endowment for Democracy in which he emphasized the need for democracy and the rule of law in the Middle East.[539] At the November 7, 2003 New York meeting on terrorism, delegates made reference to President Bush's pronouncements but argued that "the American policy of supporting non-democratic regimes in the region, coupled with its policy of detaining without charge or trial suspects in Guantanamo Bay, Cuba, undercuts the power of this pro-human rights message" promulgated by the U.S. President.[540]

It was argued further that it was necessary for all countries and regions of the world to take an honest look at the "root causes of terrorism," since fully understanding "the conditions conducive to terrorism could help yield a clear definition, which in turn could produce a more logical and consistent approach to combating terrorism."[541] Perhaps more important, argued the attendees at the 2003 New York conference on terrorism, is that popular

535 *See id.*
536 *See id.*
537 *Id.*
538 *See id.*
539 George W. Bush, President of the U.S., Remarks by the President at the 20th Anniversary of the National Endowment for Democracy at United States Chamber of Commerce (Nov. 6, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/11/20031106-2.html.
540 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 3; *see also* Bush, *supra* note 539.
541 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 3.

participation is essential and critical for effectively fighting terrorism and "marginalizing terrorists."[542] In fact, community support is critical for both sides—counter-terrorism activities require significant support from local communities in order for them to succeed, especially given the fact that terrorists usually seek the cooperation of the communities in which they operate to successfully carry out their activities, and secure new recruits.[543] The attendees then noted that throughout Africa and the Middle East, "anti-terrorism legislation has draconian impacts on non-violent opposition movements and skews the balance of security and human rights."[544] This, the attendees argued, "raises the specter in Africa and elsewhere that the human rights movement might be the next victim in the war on terrorism."[545]

The key to an effective counter-terrorism effort is that, however terrorism is defined and regardless of the laws designed to fight it, constitutional guarantees of fundamental rights must not be trampled upon. Of course, such national constitutional guarantees must conform to the provisions of international human rights instruments, particularly those found in the International Bill of Human Rights.[546] In Africa, three other instruments are important and these are: (1) the Constitutive Act of the African Union; (2) the African (Banjul) Charter on Human and Peoples' Rights; and (3) the African Charter on the Rights and Welfare of the Child ("African Children's Charter").

Unfortunately, there are many problems that render some African countries incapable of fully safeguarding the rights of their citizens generally and in particular during counter-terrorism activities. First, many countries on the continent have not yet internationalized their national

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542 *Id.*

543 *See, e.g.*, Rachel Briggs, *Community Engagement for Counterterrorism: Lessons from the United Kingdom*, 86 INT'L AFFS. 971 (2010) (emphasizing the role played by local communities in the fight against international terrorism, with specific emphasis on the UK).

544 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 4. This is exactly what happened in the Republic of Cameroon when Anglophone school teachers and lawyers went on peaceful demonstrations to protest the marginalization and tyrannization of the Anglophone Regions by the Francophone-dominated central government. In response to the peaceful protests, the central government sent security forces that killed thousands of Anglophones, including women and children and burned down hundreds of Anglophone villages. *See, e.g.*, Mbaku, *supra* note 301.

545 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 4.

546 The International Bill of Human Rights consists of (1) the Universal Declaration of Human Rights; (2) International Covenant on Economic, Social and Cultural Rights; (3) International Covenant on Civil and Political Rights; (4) Optional Protocol to the International Covenant on Civil and Political Rights; and (5) Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty.

constitutions to make the rights guaranteed by the International Bill of Human Rights, as well as those contained in the Banjul Charter and the African Children's Charter, directly justiciable in domestic courts.[547] Second, most African countries lack judiciaries that are independent of the other branches of government, particularly the executive, and hence, those judiciaries are not able to function effectively as a check on the exercise of government power. As a consequence, many of the country's national judiciaries are not able to make certain that the executive is not abusing power in the name of fighting terrorism.[548] Finally, since many countries in Africa have extremely poor human rights records and are notorious for gross violations of human rights, most Africans do not trust their governments to protect or safeguard their rights.[549]

The UN, particularly the Counter-Terrorism Committee ("CTC"), and the African Union, have a very important part to play in helping make certain that African countries fight terrorism but do so in a way that does not infringe on the rights of their citizens. The AU should help each African country provide itself with a governing process that is undergirded by an independent judiciary, particularly one that is capable of performing the necessary watchdog role and making certain that the executive does not abuse his or her power and the CTC should challenge and investigate all country reports on counter-terrorism measures and human rights and make certain that the former do not violate the latter.[550]

The UN's Global Counter-Terrorism Strategy ("Global Strategy"),

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547 *See, e.g.*, John Mukum Mbaku, *International Law, African Customary Law, and the Protection of the Rights of Children*, 28 MICH. ST. INT'L L. REV. 535 (2020) (noting, inter alia, that most African countries have not yet brought "both national constitutional law and customary law into line with the provisions of international human rights instruments").

548 For example, since conflict broke out between Anglophone activists and the central government in the Republic of Cameroon, government military forces have killed thousands of Anglophone civilians and burned down their villages. Yet, there is no evidence that anyone of the perpetrators of these gross human rights abuses has been brought to justice. *See* Mbaku, *supra* note 301; *see also* Omar Shakir, Hum. Rts. Watch, *All According to Plan: The Rab'a Massacre and Mass Killings of Protesters in Egypt* (Aug. 12, 2014), https://www.hrw.org/report/2014/08/12/all-according-plan/raba-massacre-and-mass-killings-protesters-egypt (noting that in 2013, Egyptian police and army forces "systematically and intentionally used excessive lethal force in their policing, resulting in the killings of protesters on a scale unprecedented in Egypt"). There is no evidence, however, that any of the perpetrators in what came to be known as the Rab'a massacre was ever prosecuted for those human rights violations.

549 *See* Monkey Cage, *Many Africans Distrust their Government. How Will That Affect Their Coronavirus Response?*, WASH. POST (May 1, 2020, 6:00 AM), https://www.washingtonpost.com/politics/2020/05/01/many-africans-distrust-their-governments-how-will-that-affect-their-coronavirus-response/ (noting that the COVID-19 pandemic has revealed the extent to which Africans do not trust their governments and lamenting how difficult it would be for these countries to confront the pandemic effectively without public trust).

550 *See Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 4.

which was adopted by the General Assembly on September 8, 2006, makes clear that in fighting terrorism, Member States must "recognize that international cooperation and any measures that [they] undertake to prevent and combat terrorism must comply with [each country's] obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law."[551] The Global Counter-Terrorism Strategy also provided a Plan of Action for Member States,[552] which consists of (1) "Measures to address the conditions conducive to the spread of terrorism"; (2) "Measures to prevent and combat terrorism"; (3) "Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard"; and (4) "Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism."[553]

The most important part of the Global Strategy is Part IV, which imposes an obligation on Member States to make sure that the rule of law remains the "fundamental basis of the fight against terrorism."[554] The Global Strategy reaffirms the UN General Assembly's Resolution 60/158, which was adopted on December 16, 2005 and dealt with the "protection of human rights and fundamental freedoms while countering terrorism."[555] It also reaffirmed that "States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law."[556] The Global Strategy also instructed Member States:

> [t]o make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with our obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or persecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offenses in

551 G.A. Res. 60/288, annex ¶ 3, U.N. Global Counter-Terrorism Strategy (Sept. 8, 2006) [hereinafter UN Global Counter-Terrorism Strategy].

552 *See id.* at 3.

553 *Id.* at 4–9.

554 *Id.* at 9.

555 G.A. Res. 60/158 (Dec. 16, 2005) (Protection of Human Rights and Fundamental Freedoms While Countering Terrorism).

556 UN Global Counter-Terrorism Strategy, *supra* note 551, at 9, ¶ 2.

domestic laws and regulations.[557]

This provision of the Global Strategy imposes obligations on Member States of the United Nations to, first, establish and maintain an effective rule of law-based criminal justice system; second, such a system must be based on and undergirded by each Member State's obligations under international law; third, each Member State must bring all individuals who are complicit in terrorist acts to justice and do so based on the principle of "extradite or persecute"; fourth, due respect must be given to human rights and fundamental freedoms; and fifth, each Member State must establish terrorist acts as "serious criminal offenses in domestic laws and regulations."[558]

Respect for human rights is a critical component of the Global Counter-Terrorism Strategy, as well as, of the UN Secretary-General's Plan of Action to Prevent Violent Extremism (PVE).[559] The PVE defines "violent extremism" and describes how Member States can deal with it; discusses the impact of violent extremism, particularly on peace and security, sustainable development, human rights and the rule of law, as well as the provision of international humanitarian assistance; the context and drivers of violent extremism, with special emphasis on conditions conducive to and the structural context of violent extremism, and the process of radicalization; and recommendations on how to prevent violent extremism.[560]

The take-away from examining these UN documents is that any effort to suppress and prevent terrorism must be based on the rule of law and respect for human and fundamental rights. Hence, States must not use their national counter-terrorism laws to oppress their citizens and infringe on their rights and that includes the rights of those people who are accused of committing terrorist acts. Persons accused of carrying out terrorist acts must be prosecuted under a criminal justice system that conforms to the provisions of international human rights instruments.[561] In other words, human rights-compliant rule of law frameworks are the best long-term guarantee of peace and security in the African countries.[562]

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557 *Id.* ¶ 4.

558 *Id.*

559 *See* Vladimir Voronkov, Under-Sec'y Gen., U.N. Off. of Counter-Terrorism, Statement on Respecting Human Rights while Countering Terrorism (Sept. 11, 2018), https://www.un.org/counterterrorism/statements.

560 U.N. Secretary General, *Plan of Action to Prevent Violent Extremism*, U.N. Doc. A/70/674 (Dec. 24, 2015).

561 *See id.*

562 *See* Joylon Ford, *Counter-Terrorism, Human Rights and the Rule of Law in Africa* (Inst. for

It has been argued that after the uprisings that came to be known as the Arab Spring and which resulted in the overthrow of dictatorships in Egypt and Tunisia, there emerged in Africa, "a greater understanding among authorities that more principled, rule-based approaches to dissent (including violent dissent)" which are "likely to reinforce the state's perceived legitimacy (i.e., social license to apply laws and use force), corroborate the justness of state authority and prevent more widespread discord."[563] Nevertheless, it has been argued that "this realization and the associated political will for reform may not necessarily translate into national measures that meet global minimum standards."[564]

The counter-terrorism laws of many African countries provide definitions of terrorism that are so vague that they can allow governments in these countries to easily criminalize legitimate efforts by citizens to exercise rights guaranteed by the constitution, which include, for example, the right to freedom of expression and association; the right to form political parties and participate in governance; and the right to engage in other legitimate political and social activities. In other words, throughout the continent, many governmental regimes are taking advantage of poorly-crafted counter-terrorism laws to oppress legitimate opposition to the regime, including, for example, opposition political elites and their political organizations, other civil society organizations (e.g., non-governmental human rights organizations), journalists, university professors (especially those who publish research on areas such as bureaucratic corruption and government impunity or openly oppose the government), and ethnic and religious groups that are not part of the ruling coalition. Below, this Article will examine the Kingdom of Eswatini's Suppression of Terrorism Act No. 3 of 2008 ("STA") to show its misuse by the government to violate the rights of citizens. In addition, the Article will also analyze the role that Eswatini's courts are playing in trying to minimize the government's (i.e., the executive branch's) efforts to use the STA to destroy the country's democratic order and prevent the practice of constitutional government and constitutionalism.

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Sec. Stud., Paper No. 248, Nov. 2013), https://media.africaportal.org/documents/Paper248.pdf.

563 *Id.* at 3.

564 *Id.*

### C. *The Kingdom of Eswatini's Suppression of Terrorism Act No. 3 of 2008*

On September 21, 2015, *CIVICUS: World Alliance for Citizen Participation*[565] and *Lawyers for Human Rights* (Kingdom of Eswatini) made a presentation to the *United Nations Universal Periodic Review* ("UPR")[566] at the 25th Session of the UPR Working Group (Kingdom of Swaziland).[567] CIVICUS and Lawyers for Human Rights ("LHR") noted that during the October 12, 2011 review of Eswatini's human rights situation under the 12th Session of the UN Working Group of the UPR, the Kingdom's government had agreed to "repeal or urgently amend the Suppression of Terrorism Act, which had been enacted in 2008," as well as other pieces of "security legislation to harmonize them with international human rights standards."[568]

The Government of the Kingdom of Eswatini also "agreed to remove all legislative and practical restrictions impeding the rights of citizens to freely exercise civil and political rights, in particular, those related to freedom of association and expression, with a view to allow the creation of political parties and respect of trade unions."[569] The Kingdom also agreed that it would repeal the Sedition and Subversive Activities Act (1938) and the Proscribed Publications Act (1968)."[570] Additionally, the Kingdom agreed "to repeal or urgently amend the Suppression of Terrorism Act of 2008 and other pieces of security legislation to bring them in line with international

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565 CIVICUS is "a global network of civil society organizations and activists dedicated to strengthening citizen action and civil society around the world" while Lawyers for Human Rights (Eswatini) "is a non-partisan group of lawyers that advocates for respect of human rights and promotes good governance." CIVICUS, Laws. for Hum. Rts., *Joint Submission to the UN Periodic Review, 25th Session of the UPR Working Group, Kingdom of Swaziland* (Sept. 21, 2015), https://www.upr-info.org/sites/default/files/document/swaziland/session_25_-_may_2016/js1_upr25_swz_e_main.pdf.

566 The Universal Periodic Review (UPR) is a UN-backed process, which involves the review of the human rights records of all UN Member States. It is "a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situation in all countries and address their human rights obligations." *Universal Periodic Review*, U.N. HUM. RTS. COUNCIL, https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx (last visited June 21, 2021).

567 In 2018, King Mswati changed the name of the country from the *Kingdom of Swaziland* to the *Kingdom of eSwatini*. *See, e.g.*, *Swaziland King Renames Country 'the Kingdom of eSwatini'*, BBC NEWS (Apr. 19, 2018), https://www.bbc.com/news/world-africa-43821512.

568 CIVICUS, Laws. for Hum. Rts., *supra* note 565, ¶¶ 1.4–1.5; *see also* Suppression of Terrorism Bill, 46 SWAZ. GOV'T GAZETTE 81, Apr. 11, 2008 (Supp.).

569 CIVICUS, Laws. for Hum. Rts., *supra* note 565, ¶ 1.5.

570 Amnesty Int'l, *Swaziland: Discrimination Against Women and Restriction of Fundamental Freedoms, Amnesty International Submission to the UN Universal Periodic Review*, at 2 (May 2016), https://www.amnesty.org/en/documents/afr55/3466/2016/en/ [hereinafter *Swaziland: Discrimination Against Women and Restriction of Fundamental Freedoms*].

human rights standards," as well as, "take concrete and immediate measures to guarantee the independence and impartiality of the judiciary."[571] Nevertheless, Eswatini rejected recommendations "to remove restrictions on political parties and to introduce multi-party democratic elections, to extend a standing invitation to the UN Special Procedures, and to decriminalize same-sex relations."[572]

Despite the promises and guarantees made by King Mswati's government, "the rights to freedom of expression, association and assembly remain threatened and human rights defenders (HDs) and civil society organizations (CSOs) are [still being] targeted for the work they do."[573] CIVICUS and LRS also noted that they were quite concerned about the government's use of "draconian colonial era laws and others promulgated by the authorities," which include "the Sedition and Subversive Activities Act (1938) and the Suppression of Terrorism Act (2008)," to muzzle the press, tyrannize civil society and other organizations, and generally deprive citizens of their right to freedom of assembly, expression, and association.[574] In fact, threats to the rule of law remain an ever present danger in Eswatini, as "[r]epressive legislation continues to be used to suppress dissent and there has been an upsurge in politically motivated trials" and most notably, "[u]nfair trials have resulted in people being imprisoned for reasons of opinion and conscience."[575]

On May 2, 2012, the African Commission on Human and Peoples' Rights ("the African Commission"), which is tasked with interpreting and enforcing the African (Banjul) Charter on Human and Peoples' Rights, adopted a resolution during its 51st Ordinary Session in Banjul, The Gambia, in which it addressed the human rights situation in the Kingdom of Swaziland (Eswatini).[576] In its resolution, the African Commission noted that it was "[d]eeply concerned about allegations of the violation of the right to freedom of expression, freedom of assembly, and freedom of association" and "about the allegation of the violations of the rights of workers as seen in the de-registration of the recently formed Trade Union Congress of Swaziland (TUCVOSWA) by the Office of the Commissioner of Labor

571 *Id.*
572 *Id.*
573 CIVICUS, Laws. for Hum. Rts., *supra* note 565, ¶ 1.5.
574 *Id.* ¶ 1.6.
575 *Swaziland: Discrimination Against Women and Restriction of Fundamental Freedoms*, *supra* note 570.
576 *See* Afr. Comm'n on Hum. & Peoples' Rights Res.216(LI)2012 (May 2, 2012).

acting on the advice of the Attorney General of the Swaziland Government."[577]

In their submission to the UN Universal Periodic Review, the CIVICUS and LHR referred to the resolution adopted by the African Commission on the human rights situation in the Kingdom of Eswatini. In that report, the African Commission then called on the Government of the Kingdom of Eswatini "to respect, protect and fulfil the rights to freedom of expression, freedom of association, and freedom of assembly as provided for in the African [Banjul] Charter, the [Universal Declaration of Human Rights], the [International Covenant on Civil and Political Rights] and other international and regional instruments."[578] Finally, the African Commission called on the government of the Kingdom of Ewastini to implement the decision of the African Commission in *Communication 251/2002: Lawyers for Human Rights v. Swaziland.*[579] In making its decision on the merits in *Communication 251/2002*, the African Commission noted that it "was disappointed with the lack of cooperation from the [Government of the Kingdom of Eswatini]."[580] The African Commission then recommended that the Government of Eswatini bring certain of its laws, notably the Proclamation of 1973 and Decree No. 3 of 2001 in conformity with provisions of the African (Banjul) Charter, as well as engage members of civil society in the process of drafting the Kingdom's new constitution.[581]

The CIVICUS and LHR submission also directly addressed Eswatini's Suppression of Terrorism Act (2008) and, in doing so, it noted that the draft legislation was "sent to Parliament with a certificate of urgency and was thus not subjected to the regular procedure in which Bills are published in the government gazette for 30 days for citizens to provide feedback before they are signed into law."[582] After the bill was enacted by Parliament, King Mswati III signed it into law on August 7, 2008.[583] CIVICUS and LHR noted that the new counter-terrorism law's definition of "terrorist act" is excessively broad and "can include conduct that is non-violent or considered to be driven by an intent to incite fear."[584]

The Kingdom of Eswatini's Suppression of Terrorism Act defines a

577 *Id.*
578 *Id.* ¶ i.
579 *See* Laws. for Hum. Rts. v. Swaziland, Communication 251/2002, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Apr. 27, 2005).
580 *Id.* ¶ 41.
581 *See id.* ¶ 53.
582 CIVICUS, Laws. for Hum. Rts., *supra* note 565, ¶ 2.2.
583 *Id.*
584 *Id.*

"terrorist act" in Article 2(1) as follows: "an act or omission which constitutes an offense under this Act or within the scope of a counter-terrorism convention."[585] Part III of the law, which describes "terrorist offenses and punishments," states, for example, that "[a]ny person who—(b) intentionally and without lawful excuse, sends or communicates to another person or institution a false alarm or by any deed causes a false alarm or unwanted panic . . . . commits an offense and, on conviction, shall be liable to imprisonment for a period not exceeding three (3) years or such fine as the Court may impose."[586]

Even a casual examination of these descriptions of terrorist offenses reveals that they are so broad that they grant the government significant powers to "target individuals, civil society organizations and political movements labelled 'specified entities' who are critical of government actions and who engage in [legal and peaceful] public protests."[587] For example, in 2008, shortly after the Suppression of Terrorism Act (2008) was enacted, the country's pre-eminent pro-democracy groups, the People's United Democratic Movement ("PUDEMO"), the Swaziland Youth Congress (SWAYOCO"), and the Swaziland Solidarity Network, among other opposition groups, were declared terrorist organizations and summarily banned.[588] It has been noted that the proscription of these groups came after a "bomb blast near a bridge along the Mbabane-Manzini highway on 21 September 2008—two days after the country's parliamentary elections."[589] Since then, government harassment of PUDEMO members has included arresting and charging them with frivolous charges, such as wearing T-shirts with the party's logos and chanting the party's slogans—these acts have been deemed by the government as qualifying as terrorist acts under the nation's Suppression of Terrorism Act.[590]

In its investigations of the rule of law and judicial independence in Eswatini, Amnesty International has determined that the country continues to experience a "crisis in the rule of law, affecting protection of human

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585 Suppression of Terrorism Act No. 3 of 2008, art. 2(1), 46 SWAZ. GOV'T GAZETTE 81, Apr. 11, 2008 (Supp.).

586 Terrorism Suppression Act 2002, art. 5(3)(b) (N.Z.).

587 CIVICUS, Laws. for Hum. Rts., *supra* note 565, ¶ 2.2.

588 *See Faceless Bombers Sow Insecurity*, *supra* note 506.

589 Kudzani Ndlovu, *Challenging Anti-terrorism Laws in Swaziland: When the Judiciary Becomes the Stumbling Block*, AFRICLAW (May 11, 2016), https://africlaw.com/2016/05/11/challenging-anti-terrorism-laws-in-swaziland-when-the-judiciary-becomes-the-stumbling-block/.

590 *See id.*

rights, access to justice for victims of human rights violations, and the ability of members of the judiciary to work impartially and independently."[591] Amnesty International also determined that "[t]he process of allocation of cases and decision-making was marred from 2011 onwards by political or other unwarranted interference" and that "[t]his was evidenced by the blatantly unfair trial proceedings against human rights lawyer Thulani Maseko and editor Bheki Makhubu in 2014."[592]

The deterioration into judicial dysfunction in Eswatini continued with King Mswati III's decision to impeach and subsequently dismiss Chief Justice Michael Ramodibedi for "serious misbehavior," including "corruption and abuse of power on 17 June 2015."[593] In addition, then Minister of Justice, Sibusiso Shongwe, and several other judicial officers, including Judge Mpendulo Simelane, were arrested on April 20, 2015 and were expected to face charges that included "abuse of power and defeating or obstructing the course of justice."[594] Amnesty International noted that while there may have been "legitimate grounds for the dismissal and prosecution of these members of the judiciary, the flawed appointment and dismissal process of judicial officers demonstrates the fundamental rule of law problems and the susceptibility of the judiciary to political interference."[595]

In its 2019 review of human rights in the Kingdom of Eswatini, Amnesty International noted that the rule of law in the country continues to face serious challenges and that the government continues to tyrannize and oppress various groups within the country. For example, in September 2019, the government rejected the application for the registration of a Lesbian, Gay, Bisexual, Transgender, and Intersex people organization, which had been created earlier in the year.[596] Amnesty International also noted, in its 2019 report, that a certain Goodwill Sibaya had, on January 1, 2019, claimed that he was a member of the People's United Democratic Movement ("PUDEMO"), the Communist Party of Swaziland ("CPS"), and the Economic Freedom Guerrillas."[597] On the basis of this information,

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591 *Swaziland: Discrimination Against Women and Restriction of Fundamental Freedoms*, *supra* note 570, at 3.

592 *Id.*

593 *Id.* at 3–4.

594 *Id.* at 4.

595 *Id.*

596 *See* Amnesty Int'l, *Human Rights in Africa: Review of 2019*, at 41 (2020), https://www.justice.gov/eoir/page/file/1267211/download. The government rejected the application on the basis that the country's constitution does not recognize same-sex marriage. *See id.*

597 *Id.*

Eswatini's Director of Public Prosecutions charged Mr. Sibaya with "contravening Section 19(1) of the 2018 Suppression of Terrorism Act (STA) and Section 3(1)(A) of the 1938 Sedition and Subversive Activities Act (SSA)."[598]

When Freedom House published its 2020 edition of *Freedom in the World*, it noted that political parties in Eswatini are still banned and that "[e]lection to public office is based on 'individual merit,' according to the constitution."[599] In addition, "[t]here is no legal avenue for [political] parties to register and participate in elections, though some political associations exist without legal recognition. Over the years, political parties seeking legal recognition have suffered court defeats, including a Supreme Court ruling in September 2018 rejecting a challenge by the Swazi Democratic Party (SWADEPA) to the ban on political parties competing in elections."[600]

Freedom House also noted that the country's High Court had ruled earlier in September 2016 "that sections of 1938 Sedition and Subversive Activities Act (SSA) and the 2008 Suppression of Terrorism Act (STA) were invalid as they infringed on constitutionally protected rights to freedom of expression, association and peaceful assembly."[601] The government appealed the decision but the appeal is still yet to be heard.[602]

The case in which certain sections of the SSA and STA were declared invalid is *Maseko and Others v. The Prime Minister of Swaziland and Three Others*.[603] Critics of the government of King Mswati III have argued that he has used the Suppression of Terrorism Act (2008) and the colonial-era 1938 Sedition and Subversive Activities Act to stifle opposition to his regime, silence those who advocate for democracy, human rights and the rule of law,

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598 *Id.* Section 19 of the Suppression of Terrorism Act (2008) states that "[a] person who is a member, or professes to be a member, of a terrorist group commits an offense and shall on conviction, be liable to imprisonment for a term not exceeding ten (10) years." Suppression of Terrorism Act No. 3 of 2008, art. 19(1)(a)–(b), 46 SWAZ. GOV'T GAZETTE 81, Apr. 11, 2008 (Supp.). The political party, PUDEMO, Eswatini's largest opposition political party, was declared a terrorist organization and banned and remains banned. *See, e.g.*, FREEDOM HOUSE, *Freedom in the World 2020: Eswatini*, https://freedomhouse.org/country/eswatini/freedom-world/2020 (last visited June 21, 2021).

599 *Freedom in the World 2020: Eswatini*, *supra* note 598.

600 *Id.*

601 *Id.*; *see* Maseko v. Prime Minister of Swaz. (*Maseko I*) (2180/2009) [2016] SZCH 180 (Sept. 16).

602 *See* Prime Minister of Swaz. v. Maseko (73/2016) [2018] SZSC 01 (May 3) (noting the application for condonation for non-appearance before the Court and reinstatement of an appeal struck off the roll).

603 The three others were the Minister of Justice and Constitutional Affairs, the Director of Public Prosecutions and the Attorney General of the Kingdom of Eswatini. *See Maseko I*, [2016] SZCH 180.

and effectively marginalize voices against the authoritarian monarchy.[604] Given the fact that Eswatini courts do not automatically review legislation, it was necessary that a party bring action in court, challenging the legislation's constitutionality. Such a challenge came through *Maseko and Others v. The Prime Minister of Swaziland and Three Others*,[605] and was brought by Thulani Rudolf Maseko, a human rights lawyer who was jailed on March 18, 2014 for contempt of court for criticizing the country's judicial system and Chief Justice Michael Ramodibedi,[606] together with Mario Masuku, president of the People's United Democratic Movement.[607]

The case was heard in the High Court of Swaziland on September 8–9, 2015, and February 8–9, 2016, before Judges Annandale, Mamba, and Hlophe.[608] The issues before the High Court were based on notice of motions filed by Maseko and three others for an order to declare certain provisions of the Sedition and Subversive Activities Act No. 46 of 1938 and the Suppression of Terrorism Act No. 3 of 2008, null and void on the ground that they were inconsistent with the Constitution of Swaziland Act 011 of 2005[609]

In the majority judgment, written by Judge Mamba for the High Court, the latter made the following order:

> (a) Sections 3(1), 4(a),(e) and 5 of the Sedition and Subversive Activities Act 46 of 1938 are hereby declared inconsistent with sections 23, 24 and 25 of the Constitution Act 001 of 2005 and are therefore declared null and void or invalid.
>
> (b) The following provisions of the Suppression of Terrorism Act 3 of 2008; namely paragraph (1) of section 2, paragraph (2) (f), (g), (i), (ii), (iii), (j), paragraph (b), section 11 (1) (a) and (b), and 11 (2), sections 28 and 29 (4), are declared inconsistent with the

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604 *See, e.g.*, Ndlovu, *supra* note 589.

605 The three others were the Minister of Justice and Constitutional Affairs, the Director of Public Prosecutions, and the Attorney General of the Kingdom of Eswatini. *See Maseko I*, [2016] SZCH 180.

606 *See* S. AFR. LITIG. CTR., *Thulani Maseko and Bheki Makhubu Contempt of Court Case: Timeline of Proceedings* (Apr. 14, 2014), https://www.southernafricalitigationcentre.org/2014/04/14/thulani-maseko-and-bheki-makhubu-contempt-of-court-case-timeline-of-proceedings/; *see also* Thulani Maseko, *Letter to Barack Obama from a Swaziland Jail Cell*, GUARDIAN (Aug. 3, 2014, 8:53 AM), https://www.theguardian.com/world/2014/aug/03/-sp-barack-obama-swaziland-thulani-maseko.

607 *See Swaziland's High Court Shoots Down Anti-Terrorism Law*, ENCA (Sept. 18, 2016, 3:01 PM), https://www.enca.com/africa/swazilands-high-court-shoots-down-anti-terrorism-law.

608 *See Maseko I*, [2016] SZCH 180.

609 *See id.* ¶¶ 1–4. The Constitution of the Kingdom of Swaziland Act, 2005, is the constitution of Swaziland.

> constitutional provisions relating to Freedom of Speech and Association as provided under sections 24 and 25 of the Constitution and are to the extent of such inconsistency unconstitutional and invalid.
>
> (c) The invalidity is to take effect from the 18th June 2009 in respect of the Sedition and Subversive Activities Act; that being the date upon which Mr Maseko filed his application.
>
> (d) The invalidity regarding the provisions of the Suppression of Terrorism Act is to take effect from 12 June 2014, being the date on which Mr Dlamini filed his application before this court.

This decision was supposed to go into effect, as mandated by the High Court, on June 12, 2014. However, the government appealed the decision to the Supreme Court of Eswatini and the appeal is still waiting to be heard. Given the flawed nature of the Suppression of Terrorism Act, there is need for the government, with the help of civil society organizations, which must include opposition political parties (regardless of the fact that they remain banned), to engage in a thorough review of the law, with a view to either amending it or repealing it and producing another one—particularly one whose substantive provisions are consistent with the Kingdom of Eswatini's obligations under international human rights law, regional human rights law, as well as the Constitution of the Kingdom of Eswatini.[610]

Specifically, as noted by the High Court in *Maseko*,[611] several sections of the Sedition and Subversive Activities Act 46 of 1938—notably §§ 3(1), 4(a),(e) and 5—are inconsistent with §§ 23, 24, and 25 of the Constitution of Eswatini 2005 and hence, are "null and void or invalid."[612] In addition, several sections of the Suppression of Terrorism Act No. 3 of 2008—notably paragraph (1) of § 2, paragraph (2)(f), (g), (i), (ii) (iii), (j), paragraph (b), § 11(1)(a) and (b), and § 11(2), §§ 28 and 29(4)—were declared inconsistent with the constitutional provisions relating to freedom of speech and association as provided under §§ 24 and 25 of the Constitution of the Kingdom of Eswatini and were declared, to the extent of the inconsistency,

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610 That constitution, of course, must have provisions that conform to the various international and regional human rights instruments, which include, but are not limited to, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the African (Banjul) Charter on Human and Peoples' Rights.

611 *Maseko I*, [2016] SZCH 180, ¶ 42(a).

612 *Id.*

unconstitutional and invalid.[613]

The High Court held that the invalidity was to take effect from June 18, 2009, in respect of the Sedition and Subversive Activities Act, which was the date on which Mr. Maseko, one of the applicants, filed his application with the High Court. On the other hand, the invalidity regarding the provisions of the Suppression of Terrorism Act was to take effect on June 12, 2014, which was the date on which Mr. Dlamini, another applicant, filed his application before the High Court.[614]

The key here is that all laws in the Kingdom of Eswatini (as should be the case in other African countries), which include the Constitution and legislative acts must conform to provisions of international and regional human rights instruments. If the country determines that there is need for special legislation to deal with terrorism, the provisions of such legislation should be designed "to include only measures necessary and proportionate to deal with those aspects that the effectively operating criminal justice system cannot address" and, in addition, "these measures must also be consistent with [the Kingdom of Eswatini's] human rights obligations and should be enacted only after wider public consultation and debate."[615]

### *D. Maseko v. The Prime Minister: The Judgment of Judge Mamba, with Judge Annandale Concurring*

The High Court of the Kingdom of Eswatini delivered the judgment in *Maseko* on September 16, 2016.[616] The High Court's judgment was written by Judge Mamba, with Judge Annandale concurring and Judge Hlophe dissenting. The Court's judgment, which was delivered in response to a constitutional challenge, was "based on the applicants' freedom of expression, assembly and association."[617] Commentators have noted that this judgment was "unprecedented" in Eswatini's legal history, especially given the fact that three of the four applicants were well-known political activists and one, Thulani Maseko, was a human rights lawyer, known for frequent criticisms of the government of King Mswati III, especially on the King's human rights record.[618]

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613 *See id.* ¶ 42(a)–(d).

614 *See id.* ¶ 42(c)–(d).

615 Amnesty Int'l, *Suppression of Terrorism Act Undermines Human Rights in Swaziland*, at 11 (2009), https://www.amnesty.org/download/Documents/44000/afr550012009en.pdf.

616 *See Maseko I*, [2016] SZCH 180.

617 Dube & Nhlabatsi, *supra* note 511, at 157.

618 *See id.* at 157.

The case was heard on September 8 and 9, 2015, and February 8 and 9, 2016, before a panel of three High Court judges: Mamba, Annandale, and Hlophe.[619] The Court's decision was delivered on September 16, 2016 and is considered very important because it represented a "sharp departure from past decisions, where [Eswatini's] courts have [routinely] ruled in favor of the state, leaving many litigants without a remedy."[620] This was a landmark case because its judgment represented the first time in the history of Eswatini that a court had declared the country's constitution a "living document."[621] Judge Mamba declared as follows:

> The Constitution is a living document, with all its virtues and infelicities, if any. It represents and reflects us, the people of eSwatini. It is the mirror that allows us to stand in front of it, look at ourselves in the eye and see ourselves as we really are. Firm, unshakable and resolute in our traditional institutions, justice, democracy and Human Rights. Section 2(2) of the Constitution enjoins all of us to uphold and defend it.[622]

This section of the Article will examine, first, the majority judgment of Judge Mamba, with Judge Annandale concurring, to illustrate the role that judiciaries in African countries can play in the suppression and prevention of terrorism, particularly, in making certain that counter-terrorism laws are not exploited by governmental regimes to deprive citizens of their rights.[623] More importantly, the Article will use the majority judgment in *Maseko* to show how African courts can use their power to interpret the constitution, particularly the Bill of Rights, to bring the provisions of counter-terrorism legislative enactments in conformity with international human rights instruments. Finally, this section of the Article will examine the dissenting opinion of Judge Hlophe to show that such an approach to constitutional interpretation is "antithetical to constitutionalism, and is irreconcilable with accepted notions of Bill of Rights litigation."[624]

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619 *See Maseko I*, [2016] SZCH 180.

620 Dube & Nhlabatsi, *supra* note 511, at 157.

621 *Maseko I*, [2016] SZCH 180, ¶ 41.

622 *Id.*

623 The majority judgment was delivered on September 16, 2016. *Maseko I*, [2016] SZCH 180.

624 Dube & Nhlabatsi, *supra* note 511, at 158. The dissenting judgment was delivered by Judge Hlophe on September 16, 2016. *Maseko I*, [2016] SZCH 180.

### *1. The Majority Judgment in Maseko, Written by Judge Mamba, with Judge Annandale Concurring*

Judge Mamba began his analysis of the case by determining whether each of the four applicants had the requisite *locus standi* (*i.e.*, legal standing) to bring their applications before the High Court. All of the four applicants,[625] the learned judge noted, "have stated that because of their respective charges, they have requisite *locus standi* or legal standing to bring these applications before this Court."[626] In addition, argued Judge Mamba, "[n]o serious objection to their locus standi has been mounted by the respondents[627] in this case."[628] Finally, noted the learned judge, the "[a]pplicants have, in my judgment, the necessary standing."[629]

Judge Mamba then proceeded to introduce the four respondents in the case and explain the role played by each one of them in initiating the charges faced by the applicants.[630] He noted that the person who actually initiated the charges against the four applicants was the Director of Public Prosecutions in his capacity as the official responsible for all criminal prosecutions in the Kingdom.[631] Next, Judge Mamba established that the issue before the Court was, indeed, a constitutional one. Noting that the "applicants contend that the various provisions in the relevant two Acts[632] are contrary to the provisions of Constitution" and therefore, "[t]his is a Constitutional issue."[633]

The learned justice then proceeded to examine the High Court jurisdiction to hear the matter. Noting that § 151 of the Constitution provides that: "(1) The High Court has—(a) Unlimited original jurisdiction in civil and criminal matters as the High Court possessed at the date of

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625 The applicants were (1) Thulani Rudolf Maseko, an Eswatini human rights lawyer and political activist; (2) Maxwell Manqoba Thandukukhanya Dlamini, Secretary General of SWAYOCO (Swaziland Youth Congress) and former President of the University of Swaziland Students Representative Council; (3) Mario Thembeka Masuku, former President of the People's United Democratic Movement (PUDEMO), the largest democratic movement in the Kingdom of Eswatini; and (4) Mlungisi Makhanya, President of PUDEMO. *See Maseko I*, *supra* note 623.

626 *Maseko I*, [2016] SZCH 180, ¶ 6.

627 The respondents in *Maseko* were (1) the Prime Minister of Swaziland; (2) the Minister of Justice and Constitutional Affairs of the Kingdom of Swaziland; (3) the Director of Public Prosecutions of the Kingdom of Swaziland; and (4) the Attorney General of the Kingdom of Swaziland. *See id.*

628 *Id.*

629 *Id.*

630 *See id.* The applicants were charged with the "crime of contravening the provisions of the two respective Acts that each applicant is challenging in his respective application." *See id.*

631 *See id.* ¶ 7.

632 The Acts in question are (1) the Sedition and Subversive Activities Act 46 of 1938 and (2) the Suppression of Terrorism Act 3 of 1938.

633 *Maseko I*, [2016] SZCH 180, ¶ 8.

commencement of this Constitution," Judge Mamba stated that "(2) Without derogating from the generality of subsection (1), the High Court has jurisdiction—(a) to enforce the fundamental rights and freedoms guaranteed by this Constitution; and (b) to hear and determine any matter of a Constitutional nature."[634] He also made reference to § 2 of the High Court Act 20 (Swaziland) of May 21, 1954.[635]

Additionally, Judge Mamba made reference to *Nombuyiselo Sihlongonyane v. Mholi Joseph Sihlongonyane*, a case heard by the High Court in which the Court noted that "Section 151(2) of the Constitution empowers [the High Court] to generally, 'hear and determine any matter of a Constitutional nature' and specifically, 'enforce the fundamental human rights and freedoms guaranteed by the Constitution.'"[636] The learned judge then went on to note that:

> the applicants submit in their respective applications that the charges that are the subject of these applications, are untenable because the acts complained of were done or committed in the exercise of their fundamental rights and do constitute an exercise of their constitutional fundamental rights either to Freedom of Expression or Freedom of Association or such other similar and related rights.[637]

Next in his analysis, Judge Mamba refers to § 35 of the Constitution of the Kingdom of Swaziland (Eswatini), which provides a remedy for any person or group of persons whose constitutionally guaranteed rights have been infringed. Section 35(1) of the Constitution states as follows:

> Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which

634 *Id.* ¶ 9.

635 Section 2 of the High Court Act of 1954 deals with the "Jurisdiction of the High Court of Swaziland." It states as follows: 2. "(1) The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa. (2) The jurisdiction vested in the High Court in relation to procedure, practice and evidence in criminal cases, shall be exercised in the manner provided by the Criminal Procedure and Evidence Act, No. 67/38." High Court Act No. 20 of 1954, ¶¶ 1–2 (May 21).

636 Sihlongonyane v. Sihlongonyane (470/2013A) [2013] SZHC 144, ¶ 13 (July 18).

637 *Maseko I*, [2016] SZCH 180, ¶ 10.

> is lawfully available, that person (or that other person) may apply to the High Court for redress.[638]

Section 35(2) grants the High Court the jurisdiction "(a) to hear and determine any application made in pursuance of subsection (1); (b) to determine any question which is referred to it in pursuance of subsection (3)."[639] In addition, the High Court is empowered by the Constitution to "make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Chapter [of the Constitution]."[640] Judge Mamba concluded that the cited provisions of the law, examined above, "do, in my judgment sufficiently and amply set out the jurisdiction of this court to hear or entertain these applications."[641]

With respect to the grounds for the applications before the Court, the learned judge noted that the applicants have complained that the pieces of legislation under which they have been charged or for contravening—the *Sedition and Subversive Activities Act No. 46 of 1938* and the *Suppression of Terrorism Act 3 of 1938*—"(a) constitute a violation of their rights to freedom of Expression or Speech and or Freedom of Association as enshrined in the Constitution and or is inconsistent with such constitutional dictates and are therefore null and void to the extent of such inconsistency; and (b) the said statutory provisions are vague, overbroad and oppressive and therefore unconstitutional and ought to be so declared."[642]

Judge Mamba then presented the Respondent's defense: in their presentations to the Court, the Respondents contended that:

> (a) the applicants are guilty of violating the respective provisions of the law under which they have been charged; (b) the relevant statutory provisions are not vague, overbroad and therefore are lawful and constitutional or (c) the impugned legislations constitute reasonable and justifiable limitations or restrictions on the applicable freedoms and these restrictions fall within the purview of sections 24(3) and 25 of the Constitution inasmuch as such restrictions are required in the interest of defense, public safety and public order.[643]

The learned judge then began the substantive analysis of the case by

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638 CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, § 35(1).
639 *Id.* art. 35(2)(a)–(b).
640 *Id.* art. 35(2)(b).
641 *Maseko I*, [2016] SZCH 180, ¶ 10.
642 *Id.* ¶ 11.
643 *Id.* ¶ 12.

noting that the applications submitted to the Court are founded upon the Constitution and, more particularly, "the Bill of Rights [which] is contained in Chapter 3 [of the Constitution]."[644] Further, noted Judge Mamba, the foundation undergirding these applications also finds justification in "the nature and scope of the values and norms espoused [in the Constitution]"[645] and that "[s]ome of these norms, notions or attributes are those that are inherent or intrinsic in a constitutional democracy."[646] Both parties in the litigation, the learned judge noted, had "agreed on this aspect of these matters."[647]

In addition to the fact that "Section 1(1) of the Constitution proclaims Swaziland as a democratic state or kingdom,"[648] "Section 2(1) also decrees that the Constitution is the supreme law of the land and that if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."[649] Judge Mamba then cites to an earlier High Court case, *The Attorney General v. Nkosinathi Simelane & Others*,[650] which holds, at paragraph 17, as follows:

> No-one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law against governmental erosion. The emphatic protection afforded the judiciary under the Constitution therefore has a particular resonance. Recognizing the vulnerability of the judiciary and the importance of enhancing and protecting its moral authority, chapter 8 of the Constitution, which marks off the terrain of the judiciary, significantly commences with the following two statements of principle: (1) The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice.[651]

Judge Mamba then discussed the issues of "justiciability" and the "rule of law" and noted that the former "gives efficacy and meaning to constitutional supremacy" and that the latter, on the other hand, "protect[s] individual rights and require[s] and expect[s] all citizens, the executive and

644 *Id.* ¶ 13; CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, ch. III.
645 *Maseko I*, [2016] SZCH 180, ¶ 13.
646 *Id.*
647 *Id.*
648 *Id.* ¶ 14.
649 *Id.*
650 Att'y Gen. v. Simelane (59/14) [2014] SZCH 77 (Dec. 3).
651 *Id.* ¶ 17.

legislature to play by the rules as set out in the supreme law and adjudicated upon by impartial and independent courts of law."[652] The Kingdom's courts, argued the learned judge, must operate by and be subject to the law as well.[653] Judge Mamba then cited a case heard in the Constitutional Court of South Africa, *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*,[654] in which Chief Justice Chaskalson, Judge Goldstone, and Judge O'Regan held that "it is a fundamental principle of the law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law—to the extent at least that it expresses this principle of legality—is generally understood to be a fundamental principle of constitutional law."[655]

With respect to constitutional guarantees of the rights that are at the center of the case at bar, Judge Mamba noted that "Section 14(1)(b) of the Constitution [of the Kingdom of Eswatini] guarantees and declares freedom of conscience, expression and peaceful assembly and association as fundamental human rights"[656] and that "[a]ll the rights and freedoms enshrined in the Constitution, the Constitution declares and or demands, 'shall be respected and upheld by the three arms of state and other government agencies and all other persons or individuals both natural and legal.'"[657] He noted further that "[f]reedom of thought, conscience or religion is again specifically guaranteed and protected under section 23(1) of the Constitution."[658] In addition, "freedom of expression and opinion, freedom to receive ideas and information and freedom to communicate these ideas and information without interference is provided for in terms of sections 24(1) and (2) of the Constitution," noted Judge Mamba.[659]

Judge Mamba noted, however, that "fundamental rights are . . . not absolute."[660] Then, he proceeded to argue that there are "three main

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652 *Maseko I*, [2016] SZCH 180, ¶ 14. Judge Mamba was making reference to the rule-of-law principle referred to as the "supremacy of law" and which states that no one, even high-ranking members of the government, including the president or prime minister, is above the law. *See, e.g.*, Erwin Chemerinsky, *Towards a Practical Definition of the Rule of Law*, 46 JUDGES J. 4, 6 (2007) (noting that the government must obey the law in all its actions); Mbaku, *supra* note 300, at 313 (noting that the supremacy of law is the first element of the rule of law).

653 *See Maseko I*, [2016] SZCH 180, ¶ 14.

654 *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metro. Council* 1999 (1) SA 374 (CC) (S. Afr.).

655 *Id.* ¶ 56.

656 *Maseko I*, [2016] SZCH 180, ¶ 15.

657 *Id.* ¶ 15.

658 *Id.*

659 *Id.*

660 *Id.* He also cites to two cases of the South African Supreme Court of Appeal that deal with the non-absolute nature of fundamental rights. *See Argus Printing & Publ'g Co. v. Esselen Est.* 1994 (2) SA

justifications for freedom of speech," namely, (1) "one's individual autonomy," (2) "an intrinsic attribute of democracy" and (3) "it is the best way of obtaining the truth or knowledge."[661] He then cited to the U.S. Supreme Court case, *Abrams v. U.S.*, in which Judge Holmes stated that:

> [b]ut when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[662]

The learned justice then turned his attention to the Sedition and Subversive Activities Act 46 of 1938 and noted that, although this Act may be considered an anachronistic relic of the country's colonial past, it is important to note that the law was actually amended in 1987, almost twenty years after independence was achieved.[663] Judge Mamba then proceeded with the analysis of this part of the case by making the assumption that "it is generally agreed by the respondents that the impugned provisions of the Act do adversely affect or infringe the rights of the relevant applicants in their right to Freedom of Speech and Freedom of Association."[664] In their defense, the Respondents, argued, however, that "the restrictions or limitations are lawful or permissible."[665]

To facilitate the analysis, Judge Mamba cited to the relevant sections of the Sedition and Subversive Activities Act ("SSAA"). Section 3(1) of the SSAA defines what constitutes a "seditious intention"; Section 3(2) defines what shall not be considered a *seditious act*—for example, "Notwithstanding subsection (1), an act, speech or publication shall not be seditious by reason only that it intends to—(a) show that His Majesty has been misled or mistaken in any of His measures; or (b) point out errors or defects in the government or constitution of Swaziland as by law established or in legislation or in the administration of justice with a view to the

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1 (AD) (S. Afr.); *see also Argus Printing & Publ'g Co. v. Inkatha Freedom Party* 1992 (3) SA 579 (AD) (S. Afr.).

661 *Maseko I*, [2016] SZCH 180, ¶ 16.

662 Abrams v. United States, 250 U.S. 616, 630 (1919).

663 The Kingdom of Swaziland (Eswatini) gained independence from Great Britain on September 6, 1968. *See generally* HLENGIWE PORTIA DLAMINI, A CONSTITUTIONAL HISTORY OF THE KINGDOM OF ESWATINI (SWAZILAND), 1960–1982 (2019).

664 *Maseko I*, [2016] SZCH 180, ¶ 17.

665 *Id.*

remedying of such errors or defects."[666]

As part of his analysis of the case, Judge Mamba then made reference to the second Respondent, the Minister of Justice and Constitutional Affairs, and argued that "nowhere in his affidavit" did this respondent state "why the limitation is necessary and what purpose it is meant to achieve or serve or what mischief it is meant to address or curb."[667] The second Respondent, the learned judge argued, merely stated "that the limitation or restriction is reasonably required '. . . in the interests of certain public purposes.'"[668] Additionally, Judge Mamba argued, the "interests" and "public purposes" averred by the second Respondent are not disclosed.[669] He concluded that, in his opinion, this was not an adequate answer to the "challenge" presented to the Court by the four applicants.[670]

Judge Mamba then cited to a case of the High Court of Australia, *Lange v. Australian Broadcasting Corporation*,[671] to deal with the determination of when the "law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect" and "if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government."[672] The learned judge then cited to one of the High Court of Eswatini's cases, *R v. Swaziland Independent Publishers (Pty) Ltd.*, in which the Court held that "the onus of establishing that the limitation or restriction is constitutional—in the sense of it being reasonably justifiable in a democratic and free society—lies with the party pleading such justification,"[673] which is based on the dictum that "he who alleges must prove."[674]

Judge Mamba next cited to South African cases in an effort to explain how the infringement of a fundamental right can be legally justified. For example, in *Moise v. Transitional Local Council of Greater Germiston &*

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666 *Id.* ¶ 18.
667 *Id.* ¶ 19.
668 *Id.*
669 *Id.*
670 *Id.*
671 *Lange v. Australian Broad. Corp.* (1997) 189 CLR 520.
672 *Maseko I*, [2016] SZCH 180, ¶ 20.
673 *Id.*
674 *Id.*; *see also* R v. Swaz. Indep. Publishers (53/2010) [2013] SZHC 88, ¶ 92 (Apr. 17). *Swaziland Independent Publishers* was actually quoting Chief Justice Dickson in *R. v. Oakes* [1986] 1 S.C.R. 103, a case of the Supreme Court of Canada. The actual quote from *Oakes* is: "The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation." *Oakes*, 1 S.C.R. at 105.

*The Minister of Justice and Constitutional Development (The Women's Legal Center as Amicus Curiae)*, a case that was referred to the Court by the applicants, Somyalo AJ declared as follows:

> If the government wishes to defend the particular enactment, it then has the opportunity—indeed an obligation—to do so. The obligation includes not only the submission of legal argument but placing before court the requisite factual material and policy considerations.[675]

With respect to which party must establish justification for a limitation on a constitutionally-guaranteed right, when the justification depends on "factual material," the learned judge cited to a case of the South African Constitutional Court, *Minister of Home Affairs v. National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others*,[676] in which Chief Justice Chaskalson holds that:

> [w]here justification depends on factual material, the party relying on justification must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion.[677]

After citing to several cases from the Republic of South Africa that examine restrictions or limitations on the individual's freedom of speech or expression,[678] Judge Mamba concluded that the respondents in the case at bar had "been found woefully wanting on this front," because they had "not submitted any evidence or material of whatever nature in justification of the limitations in question. That being the case, the conclusion is, in my view, inescapable that the respondents have failed to satisfy this court that the

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675 *Moise v. Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC) at ¶ 19 (S. Afr.).

676 *Minister of Home Affs. v. Nat'l Inst. for Crime Prev. & Re-Integration of Offenders* 2005 (3) SA 280 (CC) (S. Afr.).

677 *Nat'l Inst. for Crime Prev. & Re-Integration of Offenders*, 2005 (3) SA 280 (CC) at ¶ 36.

678 *See Maseko I*, [2016] SZCH 180, ¶ 21.

restrictions and limitations imposed on the applicants' Freedom of speech or expression are either reasonable or justifiable. Besides, the deeming provisions of subsection 3 of section 3 are plainly contrary to the constitutionally entrenched right of being presumed innocent until proven otherwise."[679]

After noting that because of the conclusion just reached, the Court did not deem it necessary "to examine whether or not the limitations are proportional to the mischief sought to be regulated or whether there is a rational connection between such limitations and objectives to which such restrictions or limitations relate,"[680] Judge Mamba then stated that "[c]onstitutional guarantees of free speech have also had effect elsewhere."[681] For example, argued the learned judge, in *Hector v. Attorney General of Antigua and Barbuda & Others,* the Privy Council[682] "struck down as unconstitutional a section of a criminal statute which made it an offense to publish material which would 'undermine public confidence in the conduct of public affairs.'"[683] Lord Bridge of Harwich, who delivered the judgment for the Court, stated as follows:

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office.[684]

Judge Mamba then concluded that, based on his foregoing analysis, he "would grant the orders sought on or concerning the Sedition and

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679 *Id.*

680 *Id.* ¶ 22.

681 *Id.*

682 The ruling was made by the Judicial Committee of the Privy Council (JCPC), which is the court of final appeal for the UK overseas territories and Crown dependencies, as well as those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of republics, to the Judicial Committee. *See, e.g.*, *About the JCPC*, JUD. COMM. OF PRIVY COUNCIL, https://www.jcpc.uk/about/index.html (last visited June 21, 2021).

683 *Maseko I*, [2016] SZCH 180, ¶ 23; *see also* Hector v. Att'y Gen. of Antigua & Barbuda, [1990] 2 AC 312 (PC) (appeal taken from E. Caribbean Sup. Ct.).

684 *Hector*, [1990] 2 AC 312 (PC) at 4 (emphasis added).

Subversive Activities Act 46 of 1938."[685] He then proceeded to examine the orders sought on the Suppression of Terrorism Act 3 of 2008.

The learned judge started his analysis of this part of the case by noting that "there is no generally accepted meaning of the term or word [terrorism]."[686] In addition, noted Judge Mamba, "the acts or conduct that may be referred to as terrorist acts may be politically, economically, ideologically, and religiously motivated. It would appear that nowadays, terrorist acts refer to both overt and covert conduct in the form of murder or other forms of atrocity or violence perpetuated against lawful authority or non-combatant target for political or religious purposes and designed to have adverse impact on large audiences."[687] He then noted that "the word terrorism is, of course, not defined" in the Suppression of Terrorism Act ("STA")[688] and this is because the Act "regulates and penalizes mere acts or conduct."[689]

Judge Mamba then describes the purposes of the STA, which include, "to provide for the detection, suppression and deterrence of terrorism and for punishment of all forms of terrorist acts and persons engaged in terrorist acts in compliance with the Conventions and Resolutions of the United Nations."[690] The learned judge then notes that the STA provides a definition for "a terrorist act" in Article 2.[691] He then describes *the crime of soliciting and giving support to terrorist groups*[692] and states that the applicants had argued that these provisions, "together with sections 28 and 29(4) of the Act," are "inconsistent with the provisions of section 25 of the Constitution which guarantees one's Freedom of association and peaceful assembly, and to some extent section 24 which guarantees: (a) Freedom of expression and opinion, (b) Freedom to receive ideas and information without interference, (c) Freedom to communicate ideas and information without interference and (d) freedom from interference with one's correspondence."[693]

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685 *Maseko I*, [2016] SZCH 180, ¶ 24.

686 *Id.* ¶ 25.

687 *Id.*

688 *Id.*

689 *Id.*

690 Suppression of Terrorism Act No. 3 of 2008, 46 SWAZ. GOV'T GAZETTE 81, Apr. 11, 2008 (Supp.). The Act states, in the Preamble, that "The object of this Bill is to provide a legal regime that would prevent, fight and suppress terrorists activities in compliance with the United Nations Security Council Resolution 1373 and the United Nations Conventions against terrorism." *Id.* pmbl.

691 *Id.* art. 2.

692 This crime and its punishment is described in Section 11(1). *See id.* § 11(1).

693 *Maseko I*, [2016] SZCH 180, ¶ 27.

Judge Mamba then moved on to note that the applicants had stated that they were charged under the STA because they were members of the Peoples United Democratic Movement (PUDEMO), which is a "specified entity" under § 2(3)(b) as a terrorist group. Judge Mamba noted that although the STA does not, "apart from giving a description of a terrorist act, terrorist group or terrorist property, describe what a terrorist is," one could infer that "a terrorist is the author of a terrorist act."[694] The Respondents, particularly the 4th Respondent, noted Judge Mamba, "have denied that the challenged or impugned provisions of [the STA] do infringe the applicants' right to freedom of expression or opinion or their right to freedom of association" and have argued that "any infringement is justified as may be required in the interests of defense, public safety and public order."[695] Judge Mamba also noted that the Respondents had also denied "that the relevant provisions of the Act are overly broad or vague."[696]

The learned judge then clarified the main issue before the Court: he noted that the Court was not being called upon to "decide on the guilt or otherwise of the applicants, or, whether or not what they are alleged to have done constitutes an offence or crime under the Act. That is, a matter for the trial court, should the matter eventually go to trial."[697] In addition, argued Judge Mamba, the High Court was not being called upon to "review the decision of the relevant minister declaring PUDEMO a terrorist group or specified entity."[698] The Court, argued Judge Mamba, was called upon "to determine and rule on the constitutionality or otherwise of the impugned provisions of the two Acts and also decide or determine whether or not the provisions thereof are not vague or overly broad."[699]

The learned judge then argues that, although the STA makes reference to certain UN counter-terrorism conventions, as well as Swaziland's "obligations in terms of the resolutions of the United Nations," it is important to note that "the United Nations strategic and operational framework to fight terrorism enjoins every country 'to ensure the respect of human rights while countering terrorism.'"[700] Judge Mamba then cites to the *2014 Public Report on the Terrorist Threat to Canada*, whose conclusion was that: "Terrorism is still the leading threat to Canada's national security,

694 *Id.* ¶ 28.
695 *Id.* ¶ 29.
696 *Id.*
697 *Id.* ¶ 30.
698 *Id.*
699 *Id.*
700 *Id.* ¶ 31.

but by adhering to our principled approach, firmly rooted in respect for the rule of law and human rights, Canada will remain resilient against this threat."[701] He then concluded that "respect for human rights must be the foundation or must underpin any legislation or measures taken by any country in its fight against terrorism."[702]

With respect to the charges labelled against the applicants by the Government of Eswatini, the learned judge noted that the applicants were charged for their "involvement with or to PUDEMO" and that this is a matter that "affects or impacts on their right to freedom of association and opinion."[703] In addition, noted Judge Mamba, the views of the applicants "on the policies, aims, ideals and objectives of PUDEMO have drawn them to it" but that their "wearing of any apparel or paraphernalia associated with PUDEMO, may or may not, depending on the particular circumstances of each case, be said to be a crime under the Act."[704] Essentially, argued Judge Mamba, the applicants have been told by the Government of Eswatini that "PUDEMO is a specified entity" and that their "belonging to it or chanting its slogans and wearing its apparels is a crime in terms of the (Suppression of Terrorism Act 3 of 2008]."[705]

Judge Mamba then poses the following question and answers it in the affirmative: "Does the law or regulations that declare PUDEMO a specified entity not interfere with the applicants' constitutional rights to freedom of association and opinion?"[706] Judge Mamba takes note of the failure of the Respondents to present any "fact or material relevant to the enactment of [the] provisions that limit the constitutional rights of the applicants" and states that the only argument that the Respondents have made to the Court is to merely state that "Terrorism is an offense and it is necessary to protect the public against it."[707] This claim or assertion, argues Judge Mamba, "does not address the rationality and proportionality tests" critical to any analysis of the infringement or limitation of constitutionally protected rights.[708] The Court noted that "[t]he fact of the matter is that the respondents have not

701 Pub. Safety Can., *2014 Public Report on the Terrorist Threat to Canada: Feature Focus 2014: Responding to Violent Extremism and Travel Abroad for Terrorism-Related Purposes*, at 42 (2014), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2014-pblc-rpr-trrrst-thrt/index-en.aspx.

702 *Maseko I*, [2016] SZCH 180, ¶ 31.

703 *Id.* ¶ 32

704 *Id.*

705 *Id.*

706 *Id.* ¶ 33.

707 *Id.* ¶ 34.

708 *Id.*

told the court of any fact or material relevant to the enactment of these provisions that limit the constitutional rights of the applicants."[709]

In addition, noted Judge Mamba, "most of the offenses criminalized as terrorist acts in the Act are covered by the ordinary criminal law."[710] What the respondents have said to the Court, argued Judge Mamba, "is to make a recital or regurgitation of what the nature of the limitation should be to be constitutionally permissible or allowable."[711] The learned judge also noted that "[o]n the question or issue of Administrative justice, the applicants contend that their rights to natural justice were violated and are violated by the provisions of section 28 of the Act" and that in terms of Section 28 of the STA, if "the Attorney-General has reasonable grounds to believe that an entity has knowingly committed or participated in the commission of a terrorist act or is acting on the behest and direction of or in association with such entity, he or she may recommend to the minister responsible for national security to have the entity specified."[712] In addition, "[n]either the Attorney-General nor the minister is enjoined to receive representation from the said entity before making the said decision. However, once the decision is made and the entity is declared specified, the entity may make representation to the Attorney-General to have the declaration rescinded. Again, where the decision is not rescinded, the entity has a right to apply to this court for a review of such decision. These provisions are almost similar to section 29(4) of the Act."[713]

It is important to note that in the provisions of Sections 28 and 29(4) only the "specified entity" has the right "to petition the Attorney-General or the court to rescind the declaration of being a specified entity."[714] Specifically, Section 28(3) states that: "A specified entity may apply to the Attorney-General requesting the Attorney-General to recommend to the Minister [of Justice and Constitutional Affairs] the revocation of the notice made under subsection (2), or deemed under section 29(3) to have been made, in respect of that entity."[715]

However, individuals or persons, such as the applicants, who are "members, associates or affiliates or supporters of that entity are declared,

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709 *Id.*
710 *Id.*
711 *Id.*
712 *Id.* ¶ 35.
713 *Id.*
714 *Id.* ¶ 36.
715 Suppression of Terrorism Act No. 3 of 2008, § 28.3, 46 SWAZ. GOV'T GAZETTE 81, Apr. 11, 2008 (Supp.).

in effect, terrorists or at least persons engaged or involved in terrorist acts or criminals before they are given the opportunity to be heard on that issue."[716] Judge Mamba declared that this state of affairs is not right—he states that "[i]t is against the rules of natural justice or procedural fairness or administrative justice that a person be condemned before he has been given the opportunity to be heard on the issue under consideration. This is the case whenever the decision taken or about to be taken adversely affects that person in his personal or property rights."[717] He then noted that "[t]his precept of natural justice has been specifically constitutionally guaranteed in section 33 of the Constitution [of Eswatini] and is a fundamental right or a Chapter III right."[718]

Judge Mamba then cited to the dissent of Justice Douglas of the U.S. Supreme Court in *Adler v. Board of Education of City of New York*, which deals with "guilt by association"—specifically, the case dealt with the constitutional rights of a teacher who had been disqualified from practicing her profession because of "her membership in an organization found to be 'subversive.'"[719] The learned judge found Justice Douglas's opinion in *Adler v. Board of Education of City of New York* so important to the case at bar that he quoted a significant part of it. Here it is:

> The present law proceeds on a principle repugnant to our society—guilt by association. A teacher is disqualified because of her membership in an organization found to be "subversive." The finding as to the "subversive" character of the organization is made in a proceeding to which the teacher is not a party and in which it is not clear that she may even be heard. To be sure, she may have a hearing when charges of disloyalty are leveled against her. But in that hearing the finding as to the "subversive" character of the organization apparently may not be reopened in order to allow her to show the

716 *Maseko I*, [2016] SZCH 180, ¶ 36.

717 *Id.*

718 *Id.* Chapter III of the Constitution of The Kingdom of Swaziland Act, 2005 is titled "Protection and Promotion of Fundamental Rights and Freedoms" and constitutes the Kingdom's Bill of Rights. Section 33 deals with the "Right to Administrative Justice." Here is the full provision: "33.(1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved. (2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority." Suppression of Terrorism Act No. 3 of 2008, art. 33.

719 *Maseko I*, [2016] SZCH 180, ¶ 37 (citing Adler v. Bd. of Educ. of City of N.Y., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting)).

truth of the matter. The irrebuttable charge that the organization is "subversive" therefore hangs as an ominous cloud over her own hearing. The mere fact of membership in the organization raises a prima facie case of her own guilt. She may, it is said, show her innocence. But innocence in this case turns on knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed.

The very threat of such a procedure is certain to raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasms—all long forgotten—become the ghosts of a harrowing present. Any organization committed to a liberal cause, any group organized to revolt against an hysterical trend, any committee launched to sponsor an unpopular program becomes suspect. These are the organizations into which Communists often infiltrate. Their presence infects the whole, even though the project was not conceived in sin. A teacher caught in that mesh is almost certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled. . . .

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry. . . .

A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction. [720]

From the foregoing analysis, Judge Mamba concluded as follows:

[I]t is plain to me that sections 28 and 29(4) [of the Suppression of Terrorism Act 3 of 2008] are to the extent that they deny persons in the position of the applicants to be heard before or after an organization or entity to which they are members, supporters or affiliates, is proscribed as a specified entity, is inconsistent with

720 *Id.* (citing *Adler*, 342 U.S. at 508–11).

> section 33 of the Constitution and therefore, to the extent of such inconsistency invalid or unconstitutional.[721]

He then proceeded to declare that based on the foregoing analysis, he would "again allow the application concerning the unconstitutionality of the impugned provisions of the Suppression of Terrorism Act 3 of 2008."[722] The learned judge then cited to various decisions of the High Court of the Kingdom of Swaziland (Eswatini) that interpret Section 35(2) of the country's Constitution, which grants the High Court original jurisdiction "to hear and determine any application made in pursuance of [Section 53(1)]."[723] Judge Mamba then looked up to a decision of the Constitutional Court of South Africa in *The National Coalition for Gay and Lesbian Equality & Another v. The Minister of Justice & Others.*[724] In this case, Judge Ackermann, writing for the Court, states that:

> [t]he interests of good government will always be an important consideration in deciding whether a proposed order . . . is "just and equitable", for justice and equity must also be evaluated from the perspective of the state and the broad interests of society generally. As in Ntsele's case, it might ultimately be decisive as to what is just and equitable.[725]

Judge Mamba then concluded his analysis of the case by reminding the Court of, and reaffirming, the universal nature of human rights. He declared as follows:

> Finally, may I, with all due respect and humility, end this my uncharacteristically long and elaborate judgment by reminding ourselves of, and reaffirming the universality of Human Rights. Indeed, the norms, values and aspirations discussed and interpreted

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721 *Id.* ¶ 38.

722 *Id.* ¶ 39.

723 *Id.* ¶ 40; *accord* CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, § 35(1). This subsection states as follows: "35.(1) Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress." *Id.* § 35(1); *see also* Sihlongonyane v. Sihlongonyane (470/2013A) [2013] SZHC 144 (July 18). (affirming, inter alia, the High Court's original jurisdiction as defined in § 35(2) of the Constitution).

724 *Maseko I*, [2016] SZCH 180, ¶ 40 (citing *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just.* 1999 (1) SA 6 (CC) (S. Afr.)).

725 *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just.* 1999 (1) SA 6 (CC) at ¶¶ 88, 94 (S. Afr.).

> in this judgment are not foreign to our Swazi way of life. They are clearly and proudly proclaimed in our own home grown or autochthonous Constitution. The Constitution is a living document, with all its virtues and infelicities, if any. It represents and reflects us, the people of eSwatini. It is the mirror that allows us to stand in front of it, look at ourselves in the eye and see ourselves as we really are. Firm, unshakable and resolute in our traditional institutions, justice, democracy and Human Rights. Section 2(2) of the Constitution enjoins all of us to uphold and defend it.[726]

He then presented the Court's Order as follows:

> In summary, I would make the following order:
>
> (a) Sections 3(1), 4(a),(e) and 5 of the Sedition and Subversive Activities Act 46 of 1938 are hereby declared inconsistent with 42 sections 23, 24 and 25 of the Constitution Act 001 of 2005 and are therefore declared null and void or invalid.
>
> (b) The following provisions of the Suppression of Terrorism Act 3 of 2008; namely paragraph (1) of section 2, paragraph (2) (f), (g), (i), (ii), (iii), (j), paragraph (b), section 11 (1) (a) and (b), and 11 (2), sections 28 and 29 (4), are declared inconsistent with the constitutional provisions relating to Freedom of Speech and Association as provided under sections 24 and 25 of the Constitution and are to the extent of such inconsistency unconstitutional and invalid.
>
> (c) The invalidity is to take effect from the 18th June 2009 in respect of the Sedition and Subversive Activities Act; that being the date upon which Mr. Maseko filed his application.
>
> (d) The invalidity regarding the provisions of the Suppression of Terrorism Act is to take effect from 12 June 2014, being the date on which Mr. Dlamini filed his application before this court.[727]

Dube and Nhlabatsi have argued that an effective Bill of Rights analysis must include three things and they use Eswatini to illustrate. These are:

> i. The limitation must be provided for by law.
>
> ii. The limitation must pursue one of the specific purposes set out in

726 *Maseko I*, [2016] SZCH 180, ¶ 41.
727 *Id.*

sections 23 and 24.

iii. The limitation must be reasonably justifiable in a democratic society.[728]

Dube and Nhlabatsi then note that in his limitation analysis in *Maseko*, Judge Mamba followed the three-point approach that is mentioned above. After the analysis, he concluded that the limitation was not justifiable. They went on to state that the "justifiable clause is the source of the divergence of opinion on who bears the onus of proving that the limiting measure is not reasonable and therefore, not justifiable in a democratic society."[729]

It is also noted that the limitation of the two freedoms—freedom of expression and freedom of association—subject the enjoyment of these to the "interests of defense, public safety, public order, public morality, or public health," a process that can enhance the ability of the State to act opportunistically and violate fundamental rights.[730] Although the *International Covenant on Civil and Political Rights* ("ICCPR"), at Article 19(3), imposes limitations on the enjoyment of the right to freedom of expression, those restrictions shall only be those "provided by law and are necessary."[731] The UN Human Rights Committee ("UNHRC"), whose duty is to interpret the ICCPR, has issued a comment on Article 19.[732] With

728 Dube & Nhlabatsi, *supra* note 511, at 161. Sections 23 and 24 refer to those sections of the Constitution of the Kingdom of Swaziland (Eswatini) that deal with the "Protection of freedom of conscience or religion." CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, §§ 23–24. Section 24(3) also notes that any limitation on constitutionally-guaranteed rights must be reasonable. *See id.* § 24(3). Swaziland's Constitution, however, does not have a general limitation clause, but relies "solely on internal limitations [that are] contained within the particular provision sanctioning each right." Dube & Nhlabatsi, *supra* note 511, at 162. This can be compared to the *Constitution of the Republic of South Africa, 1996*, which expressly contains a limitation clause at Article 36:

> (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 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.

S. AFR. CONST., 1996, art. 36.

729 Dube & Nhlabatsi, *supra* note 511, at 160–61.

730 *Id.* at 162.

731 International Covenant on Civil and Political Rights, *supra* note 224, art. 19(3).

732 *See* U.N. Hum. Rts. Comm., *General Comment No. 34, Article 19 (Freedoms of Opinion and Expression)*, UN Doc. CCPR/C/GC/34 (July 21, 2011).

respect to the application of Article 19(3), the UNHRC states as follows:

> [Article 19(3)] expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*), or of public health or morals. However, when a State [P]arty imposes restrictions on the exercise of freedom of expression, *these may not put in jeopardy the right itself.* The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.[733]

Judge Mamba's majority judgment in *Maseko* is well articulated and illustrates how African judiciaries can function as an effective check on the abuse of counter-terrorism laws by their national executives. These executives often use counter-terrorism laws for non-democratic purposes—for example, to stunt or destroy the opposition and continue to maintain a monopoly on legislation. Perhaps more important is the fact that Judge Mamba's step-by-step limitation analysis offers other African judiciaries lessons on how to bring the provisions of their national counter-terrorism statutes into conformity with international and regional human rights instruments.[734]

In *Maseko*, there was not unanimity on the issue of standing—although the majority judgment was of the opinion that the applicants had standing, the dissenting judge did not agree and held that the applicants lacked standing. It has been argued that "[w]hat makes the majority judgment in *Maseko* even more interesting is the fact that impugned pieces of legislation were utilized for political purposes, namely to suppress dissenting voices."[735] Hence, "[i]n the light of an established pattern of political clampdown on both dissenting voices and the judiciary, such a bold and progressive move is indeed commendable."[736]

This case is especially important because it marked the first time that courts in the Kingdom of Eswatini had acknowledged the Constitution as a

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733 *Id.* ¶ 21.

734 These human rights instruments include, for example, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Regional instruments include the African (Banjul) Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child.

735 Angelo Dube & Sibusiso Nhlabatsi, *The (Mis)application of the Limitation Analysis in Maseko and Others v. Prime Minister of Swaziland and Others*, 22 L. DEMOCRACY & DEV. 12, 13 (2018).

736 *Id.*

living document and that it was their duty to interpret it, particularly its Bill of Rights, "in accordance with international standards, influenced by the universality of fundamental rights."[737] This is part of the effort among Africans to bring "mainstream international human rights law into national law either by legislation or by amending existing domestic laws where there is a contradiction."[738]

Internationalization of national constitutional law is very important because, without such a process, citizens of many African countries will continue to be subjected to abuse by opportunistic governments. Of course, the internationalization of domestic law is likely to take some time. However, in the short term, "domestic courts can, through constitutional interpretation," declare unconstitutional and hence, null and void, those provisions of national statutes, as well as customary laws, that violate fundamental rights or do not conform to the provisions of international human rights instruments.[739] The bold steps taken by the majority in *Maseko* are in line with the continental efforts to significantly improve the institutional and legal environment for the protection of human rights in Swaziland (Eswatini) and hence, augurs well for the effective suppression and prevention of terrorism in the country—the fight against terrorism must be undergirded by a respect for human rights.

### 2. *How Not to Undertake a Limitation Analysis: The Dissenting Judgment in Maseko*

This section of this Article will be devoted to an examination of the dissenting opinion in *Maseko*.[740] The approach utilized by Judge Hlophe, the author of that dissent, has been described as "antithetical to constitutionalism, and is irreconcilable with accepted notions of Bill of Rights litigation."[741] Judge Hlophe's judgment, however, did not benefit from "a sequential analysis of the various steps that need to be satisfied in a case where the constitutionality of any law is challenged."[742] It has been argued that in writing the dissenting opinion, Judge Hlophe "conflated issues, created new principles in vacuo, and totally misread previous

737 *Id.*

738 Mbaku, *supra* note 300, at 359.

739 *See generally* Mbaku, *supra* note 547 (noting the important role played by domestic courts in bringing domestic laws in line with the provisions of international human rights instruments).

740 *See* Maseko v. Prime Minister of Swaz. (*Maseko I Dissent*) (2180/2009) [2016] SZHC 180, 181 (Sept. 16) (Hlophe, J., dissenting).

741 Dube & Nhlabatsi, *supra* note 511, at 158.

742 *Id.* at 162.

decisions of the Swaziland High Court," and that his opinion "failed to take into consideration the spirit of the Bill of Rights and the context within which it operates."[743] In addition, the opinion is "heavily steeped in or influenced by mixed notions of absolutism and parliamentary sovereignty."[744]

Since, in rendering his judgment, Judge Hlophe did not undertake a step-by-step analysis similar to that undertaken by Judge Mamba in the majority judgment, the dissenting opinion does not contain an analysis of the standing issue. In addition to the fact that Judge Hlophe appears not to have made the Bill of Rights a core element of his treatment of the applicants' application, as well as of his dissenting judgment, he seemed hostile to the applicants. For example, in paragraph 5 of the dissenting judgment, Judge Hlophe uses the adjective "extreme" to describe the remedy sought by the applicants.[745] Throughout his analysis of the case, Judge Hlophe seemed convinced that the High Court, a constitutional court, was not the appropriate forum for the applicants' requests, since, in his opinion, this was essentially a criminal, as opposed to a constitutional, issue. In fact, most of Judge Hlophe's analysis is devoted to convincing the court that the matter before it was a criminal one and hence, should be sent to a criminal court and not the High Court, which is a constitutional court.[746]

For example, Judge Hlophe makes the following argument: "It is worthy of mention that although the charge talks of the Applicants having chanted terrorist slogans, the sections in question did not say that those particular chants amounted to terrorist slogans. *It therefore remains open to the criminal trial court seized with the matter to determine whether, as a matter of law, the conduct complained of does constitute a terrorist act or put differently, whether the slogans concerned do amount to terrorist slogans.*"[747] In their applications, the prayer that the applicants sought *was not* for the court to determine if the charges that were the subject of their applications qualified as terrorist acts under the law. Instead, the applicants submitted "in their respective applications that the charges that are the subject of [their] applications, are untenable because the acts complained of were done or committed in the exercise of their fundamental rights," and hence, "constitute an exercise of their constitutional fundamental rights either to Freedom of Expression or Freedom of Association or such other

743 *Id.*
744 *Id.*
745 *See Maseko I Dissent*, [2016] SZCH 181, ¶ 5.
746 *See id.* ¶ 20.
747 *Id.* (emphasis added).

similar and related rights."[748] Another way to interpret the applicants' arguments to the court is that the activities that the applicants engaged in can be described as legitimate political actions—an exercise of their right to freedom of expression or freedom of association covered by both the Kingdom's Bill of Rights and international human rights instruments to which Eswatini is a State Party.[749]

In his analysis, Judge Hlophe invokes what he calls a "long established principle of constitutional litigation," which states that "if a matter is [capable] of a decision or determination on any other ground than a constitutional one, the latter ground has to be avoided."[750] He then cites to a case of the South Gauteng High Court in South Africa, particularly to Judge Van Ooster's decision at paragraph 10:

> In the circumstances of this case the requirement of convenience falls to be considered in the light of the general rule of practice laid down by the Constitutional Court that, where possible, cases should be decided without reaching a constitutional issue. Counsel for the applicant contended that the constitutional challenge should be heard first, for the reason that, if successful, it may render the remaining issues moot. The contention flouts the rule of practice I have referred to and must for this reason alone fail.[751]

Judge Hlophe's reliance on *Qwelane* is problematic because the latter is not a criminal case. In *Maseko*, Judge Hlophe argued that the main issue under consideration was criminal. However, in *Qwelane*, the issue before the Court was "whether it is competent for a judge of the High Court to hear equality court proceedings and high court proceedings based on a constitutional challenge in one consolidated case, in the dual capacity of high court judge and dully designated equality court judge."[752] The issue before the South Gauteng High Court was a novel question of law faced by

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748 Maseko v. Prime Minister of Swaz. (*Maseko I*) (2180/2009) [2016] SZHC 180, ¶ 10 (Sept. 16).

749 *See* CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, §§ 24–25. The Kingdom of Eswatini is a State Party to the International Covenant on Civil and Political Rights, which guarantees the right to freedom of expression at Article 19; and the African (Banjul) Charter on Human and Peoples' Rights, which guarantees the right to freedom of association in Article 11. *See* African Charter on Human and Peoples' Rights art. 11, June 27, 1981, 1520 U.N.T.S. 217; *see also* Office of the UN High Commissioner for Human Rights, International Covenant on Civil and Political Rights, *supra* note 224, art. 19.

750 *Maseko I Dissent*, [2016] SZCH 181, ¶ 16.

751 *Qwelane v. Minister of Just. & Const. Dev.* 2015 (2) SA 493 (GJ) at ¶ 10 (S. Afr.) (emphasis added) (Hlophe, J.); *see also Maseko I Dissent*, [2016] SZCH 181, ¶ 16.

752 *Qwelane*, 2015 (2) SA 493 (GJ) at ¶ 1.

South Africa's courts and involved determining whether a judge could serve a dual role: "in his capacity as High Court judge and Equality Court judge."[753]

In *Qwelane*, Judge Van Oosten noted that the Equality Court "has been described as 'a special animal' that could in modern language also be described as 'a special purpose vehicle.'"[754] In addition, noted Judge Van Oosten, the Equality Court was created through the Equality Act and "exists separately and distinct from the High Court."[755] Judge Van Oosten then went on to argue that "[i]n the present scenario the Equality Court has exclusive jurisdiction in respect of the relief sought in the proceedings before it whereas the constitutional challenge can be adjudicated only by the High Court."[756] That is, under normal circumstances, "proceedings would have continued as parallel proceedings before two distinct courts."[757]

Writing for the Court in *Qwelane*, Judge Van Oosten held that "[t]he equality court proceedings and the constitutional challenge proceedings are consolidated for hearing before a single judge sitting as Equality Court and as High Court."[758] In *Manong and Associates (Pty) Ltd. v. Eastern Cape Department of Roads and Transport & Others*, the South African Supreme Court of Appeal ("SCA") held that the Equality Court is not a criminal court; instead, it is "a special purpose vehicle, . . . clearly designed and structured to ensure speedy access to judicial redress by persons complaining of unfair discrimination."[759] While the Equality Court has the exclusive jurisdiction on equality issues, such as the relief sought in *Qwelane*, it is not empowered to adjudicate constitutional challenges. In South Africa, only the High Court and superior courts are granted the power to hear constitutional challenges.[760]

With respect to Judge Hlophe's reliance on *Qwelane*, it is important to note that consolidation will not work in the case of the courts of Eswatini. For one thing, in order to hear a constitutional challenge in the High Court

753 Dube & Nhlabatsi, *supra* note 511, at 163.
754 *Qwelane*, 2015 (2) SA 493 (GJ) at ¶ 5.
755 *See id.*
756 *Id.* ¶ 6.
757 *Id.*
758 *Id.* ¶ 11(1).
759 *Manong & Assocs. Ltd. v. E. Cape Dep't of Roads & Transp.* 2009 (6) SA 589 (SCA) at ¶ 57 (S. Afr.). The Equality Court is supposed to use the "infrastructure of magistrates' and high courts." In addition, "[s]elected and 'specially trained' magistrates and judges are appointed to preside at the seats of their existing respective courts and in relation to a geographical area encompassing the territorial areas of jurisdiction of those courts." *See id.*
760 *See id.* ¶ 16.

in Eswatini, it is necessary to have three judges. This is not the case in South Africa where consolidation of actions before the High Court involves providing for "a single hearing of substantially similar issues in order to avoid a multiplicity of trials."[761] Dube and Nhlabatsi note that "[t]he prospects of Hlophe J, as trial judge, raising these constitutional issues *mero motu* were also very slim, given his demonstrated aversion to constitutional claims."[762]

The analysis adopted by Judge Hlophe and the reasoning that he undertook in *Maseko* seem to imply that the applicants should have allowed the criminal proceedings to run their course and in the case where they were found not guilty, there would "be no need to challenge the two Acts."[763] Specifically, Judge Hlophe stated as follows:

> The reality is that whether or not one is guilty of the offense with which he is charged, is a matter for the evidence availed in proof of the charges. It may as well be that when the trial commenced and the evidence was led, there was no case proved against the accused persons which should lead to their acquittal. Such a result would bring an end to the matter without having had to determine the constitutional question. The legal position is, as stated above, settled that it is not advisable for a court to decide a constitutional question where a matter could be decided on other grounds.[764]

Judge Hlophe then went on to argue that if the defendant is found guilty in a criminal trial, he or she would then be in a position to mount the constitutional challenge to the two legislative Acts—the Suppression of Terrorism Act 3 of 2008 and the Sedition and Subversive Activities Act 46 of 1938. Hearing a constitutional challenge to the impugned provisions before the criminal trial was concluded would, in the words of Judge Hlophe, be unnecessary and premature.[765] There appear to be many flaws in this line of reasoning.

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761 Dube & Nhlabatsi , *supra* note 511, at 163.

762 *Id.*

763 *Id.* at 164.

764 *See* Maseko v. Prime Minister of Swaz. (*Maseko I Dissent*) (2180/2009) [2016] SZHC 180, 181 at ¶ 36 (Sept. 16) (Hlophe, J., dissenting).

765 Specifically, Judge Hlophe declared that "[i]t merits mention that from what the applicants themselves say about the correctness or otherwise of the charges with regards the conduct referred to in those sections amounting to terrorist slogans, there is a strong likelihood no court can realistically say such slogans amounted to terrorist slogans *which would make it unnecessary and therefore prematurely for this court to have decided the constitutionality of the said slogans at this point*." *See id.* ¶ 20 (emphasis added).

First, the Bill of Rights of the Constitution of the Kingdom of Swaziland (Eswatini) offers much more than ex post facto protection of citizens' fundamental rights. Consider, for example, § 35(1), which deals with standing:

> Where a person alleges that any of the foregoing provisions of this Chapter *has been*, *is being*, *or is likely to be*, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, *that person (or that other person) may apply to the High Court for redress*.[766]

It is obvious from § 35(1) that the framers of the Constitution of the Kingdom of Eswatini intended for all beneficiaries of a right guaranteed by the Constitution to be able to apply to the High Court for relief if that right "*has been*, *is being*, or *is likely to be* contravened."[767] In *Maseko*, the rights of the applicants to freedom of expression, assembly and association, as aptly stated by them in their applications, *had already been threatened* when criminal charges had, earlier, been proffered against them.[768] Is it possible that Judge Hlophe did not really understand or appreciate the meaning of § 35(1) on standing and that is why his dissenting judgment does not include a step-by-step analysis of standing? Perhaps, not. It is more likely, however, that, having decided a priori, that the applicants' constitutional challenge should not be heard before the High Court, Judge Hlophe then decided to design his analysis to fit that narrative. Otherwise, he should not have expected the applicants to, "first go through a criminal trial," which, as made clear by § 35(1), is not necessary, before approaching the High Court for a resolution of their constitutional challenge. Interpreting § 35(1) to imply that the applicants had to first go through a criminal trial before seeking relief for their grievances in the High Court represents a failure of the honorable dissenting judge "to appreciate the reach and ambit of section 35 on standing."[769]

Second, Judge Hlophe's analysis was based on the *balance of convenience* principle, implying that the Court "must be alive to the

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766 CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, § 35(1) (emphasis added).

767 *Id.* (emphasis added).

768 *See* Maseko v. Prime Minister of Swaz. (*Maseko I*) (2180/2009) [2016] SZHC 180, ¶¶ 1–4 (Sept. 16) (emphasis added).

769 Dube & Nhlabatsi, *supra* note 511, at 164.

prejudice which the applicant will likely suffer if the matter is not decided on constitutional grounds."[770] In other words, the Court would be required to examine all issues before it in order to first determine what impact its decision or ruling would have on the applicant if the Court decided that the issue should be determined on non-constitutional grounds. In addition, Judge Hlophe relies on *Qwelane*, which employs expressions such as "where possible"—in *Qwelane v. Minister of Justice and Constitutional Development & Another*, a case of the South Gauteng High Court, which is relied upon by Judge Hlophe, Judge Van Oosten, writing for the South Gauteng High Court (South Africa), states as follows: "In the circumstances of this case the requirement of convenience falls to be considered in the light of the general rule of practice laid down by the Constitutional Court that, *where possible*, cases should be decided without reaching a constitutional issue."[771] This implies, of course, that in Judge Hlophe's view, the Court does not have a "carte blanche rule that matters capable of being determined on any other ground than a constitutional one should be settled on that other ground."[772]

In paragraph 21 of the dissenting judgment in *Maseko*, Judge Hlophe seems to be implying that the applicants' constitutional challenge was abstract, without indicating how he came to that conclusion.[773] It is difficult to describe the applicants' case as abstract, especially when one considers the nature of governance generally and the deteriorating relationship between King Mswati III's government with his subjects at this time in the country's history in particular. For one thing, the pro-democracy movement in the Kingdom of Eswatini had long suffered "intense repression at the hands of the monarchy."[774] In fact, being parties to *Maseko* was not the first time that the applicants had been dragged to court involuntarily by the government for exercising their constitutionally guaranteed rights. For example, Thulani Maseko, one of the applicants in *Maseko*, had been jailed on March 18, 2014 for contempt of court after he criticized the Kingdom's judicial system.[775] In April 2014, Mlungisi Makhanya, the General Secretary

770 *Id.*

771 *Qwelane v. Minister of Just. & Const. Dev.* 2015 (2) SA 493 (GJ) at ¶ 10 (S. Afr.).

772 Dube & Nhlabatsi, *supra* note 511, at 164.

773 *See* Maseko v. Prime Minister of Swaz. (*Maseko I Dissent*) (2180/2009) [2016] SZHC 180, 181 at ¶ 21 (Sept. 16) (Hlophe, J., dissenting).

774 JASON HICKEL, DEMOCRACY AS DEATH: THE MORAL ORDER OF ANTI-LIBERAL POLITICS IN SOUTH AFRICA, at ix (2015) (noting the extent of the government's oppressive policies on the democratization movement in the Kingdom of Swaziland).

775 On July 17, 2014, he and journalist Bheki Makhubu were both convicted of "contempt of court" by the High Court of Swaziland and subsequently given two-year prison sentences. *Thulani Maseko*

of the country's major opposition political party, the People's United Democratic Movement (PUDEMO), who was also one of the applicants in *Maseko*, was arrested for wearing a PUDEMO T-shirt to protest the incarceration of Maseko and journalist Bheki Makhubu.[776]

The applicants' applications reflected the level of repression, especially of members of the press and the pro-democracy movement, as well as, government impunity, that was pervasive throughout the Kingdom. In addition, a study by Amnesty International revealed that there is little or no freedom of expression in Eswatini, women are treated as second-class citizens, and civil and political rights are severely restricted.[777] The applicants in *Maseko* were alleging that the charges proffered against them were untenable because the activities which led to the charges were undertaken by the applicants in the exercise of their "constitutional fundamental rights either to Freedom of Expression or Freedom of Association."[778] Hence, justice required that their constitutional challenge be heard by a competent Court before, and not after, the adjudication of the criminal case against them. The High Court had the original jurisdiction to do so: Article 151 of the Constitution of the Kingdom of Swaziland, 2005, states as follows: "Without derogating from the generality of subsection (1) the High Court has jurisdiction (a) to enforce the fundamental human rights and freedoms guaranteed by this Constitution; and (b) *to hear and determine any matter of constitutional nature*."[779]

Since Judge Hlophe raised it, it might be necessary to see how courts around the world generally view *abstract* issues or cases. In a critique of Judge Hlophe's dissenting opinion, Dube and Nhlabatsi make reference to *Ainsbury v. Millington*, a UK House of Lords case, in which Lord Bridge of Harwich holds as follows: "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no

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*Sentenced to 2 Years in Prison*, LAWS. FOR LAWS. (Aug. 22, 2014), https://lawyersforlawyers.org/en/swaziland-thulani-maseko-sentenced-to-2-years-in-prison/. They were subsequently released from prison in June 2015 after the Swazi Supreme Court ordered that they be released. *See* Press Release, Freedom House, Swaziland Court Releases Two Imprisoned For Criticism of Judiciary (June 30, 2015), https://freedomhouse.org/article/swaziland-court-releases-two-imprisoned-criticism-judiciary.

776 *Id.*

777 *See* Lisa Van Wyk, *Five Things You Didn't Know About Human Rights in Swaziland*, AMNESTY INT'L (May 28, 2015, 1:20 PM), https://www.amnesty.org/en/latest/campaigns/2015/05/five-things-you-didnt-know-about-human-rights-in-swaziland/.

778 Maseko v. Prime Minister of Swaz. (*Maseko I*) (2180/2009) [2016] SZHC 180, ¶ 10 (Sept. 16).

779 CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, ¶ 151(2) (emphasis added).

dispute to be resolved."[780] Closely related to this is the idea of mootness. The Constitutional Court of South Africa provided a legal opinion on which an issue before the court might be considered moot and hence, not justiciable. In *The National Coalition for Gay and Lesbian Equality and Others v. The Minister of Home Affairs and Others*, Judge Ackermann, writing for the Constitutional Court ("CC"), stated as follows: "A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."[781]

In *The National Coalition for Gay and Lesbian Equality*, Judge Ackermann also dealt with the related issue of ripeness and noted that "[w]hile the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."[782] Judge Lamminga also deals with ripeness and mootness in *Ramuhovhi and Another v. President of the Republic of South Africa and Others*.[783] Judge Lamminga notes that "[r]ipeness of the litigation refers to the issue that the action is brought prematurely, where alternative remedies have not yet been exhausted or where the matter can be resolved without deciding a constitutional matter."[784]

In his dissenting judgment in *Maseko*, Judge Hlophe not only considers the applicants' cases as abstract but also invokes the doctrine of ripeness—at paragraph 37, he states that "[o]nly where one has been convicted, can [he] claim that the section in question infringes his right depending on how the Constitutional Court will decide the matter" and that "[w]here a person charged under this Act was acquitted, he obviously cannot talk of his aforesaid rights having been infringed in my view."[785] In other words, in Judge Hlophe's opinion, the issue before the High Court, that is, that certain provisions of the Sedition and Subversive Activities Act No. 46 of 1938 and the Suppression of Terrorism Act No. 3 of 2008 should be struck down, was not ripe to be ruled on as a constitutional issue by the Court.

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780 Ainsbury v. Millington [1987] 1 WLR 379, 381 (Eng.).

781 *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Home Affs.* 2000 (2) SA 1 (CC) at ¶ 21 n.18 (S. Afr.).

782 *Id.* ¶ 21.

783 *Ramuhovhi v. President of the Republic of S. Afr.* 2016 (6) SA 210 (LT) at ¶¶ 38–43 (S. Afr.).

784 *Id.* ¶ 38.

785 Maseko v. Prime Minister of Swaz. (*Maseko I Dissent*) (2180/2009) [2016] SZHC 180, 181 at ¶ 37 (Sept. 16) (Hlophe, J., dissenting).

Judge Hlophe's judgment was that the criminal case involving the applicants had to be first tried in a criminal court and, if an applicant was convicted, he could then raise the issue of the infringement of his constitutional rights before the High Court. If, however, he was not found guilty, he, according to the opinion of Judge Hlophe, "obviously cannot talk of his aforesaid rights having been infringed."[786] Various legal scholars have chimed in on the issue of ripeness. For example, Currie and de Waal argue that "[r]ipeness entails consideration of the timing of a constitutional challenge. The fitness of the constitutional issue in a case for judicial decision must be weighed alongside the hardship to the parties of withholding the court's consideration."[787]

Barnett and Blackman argue that the "[r]ipeness doctrine involves more than simply the timing of the case. It mixes various mutually reinforcing constitutional and prudential considerations. One such consideration is the need 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'"[788] They go on to note that other functions of the ripeness doctrine include avoiding "unnecessary constitutional decisions," as well as, recognizing that, "by waiting until a case is fully developed before deciding it, courts benefit from a focus sharpened by particular facts."[789]

But how do these discussions about mootness and ripeness relate to the dissenting judgment in *Maseko*? Judge Hlophe's analysis implied that the case was *not ripe* for adjudication by a Constitutional Court. The applicants, in Judge Hlophe's reasoning, would have had to have their criminal case resolved first and, if convicted, would then be able to bring the constitutional issue before the Court. If, however, they were found not guilty, the constitutional issue, in Judge Hlophe's opinion, would become moot.[790] In other words, according to Judge Hlophe, all the applicants had appeared prematurely before the High Court and, as such, their applications had to be rejected. This is evident in his reliance on ripeness as part of his analysis of the case. Thus, in his reasoning, the applicants had failed to meet the requirements of § 35 on standing.[791]

The majority judgment provided a detailed analysis of the issue of

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786 *Id.*

787 IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK 92 (2005).

788 RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT 764 (3d. ed. 2018); *see also* Abbott Lab'ys v. Gardner, 387 U.S. 136, 148 (1967).

789 BARNETT & BLACKMAN, *supra* note 788, at 764.

790 *See Maseko I Dissent*, [2016] SZCH 181, ¶ 37.

791 *See* CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, § 35.

standing and concluded that the applicants had standing under § 35. A careful examination of the applications before the High Court and § 35 of the Constitution of the Kingdom of Swaziland (Eswatini), shows that the constitutional challenge brought against the impugned provisions was not premature and that Judge Hlophe's analysis and judgment were in error. As argued by Dube and Nhlabatsi, "[t]he challenge brought against the impugned provisions [was] in no way premature, notwithstanding the fact that the prejudice and harm that the applicants would suffer appears to have completely escaped the learned Judge. They would be faced with a 20-year sentence each, with no option of a fine in the event of their conviction. Furthernore, their freedom of movement had already been affected since they were out on bail when the matter was heard by the court."[792] And, as made clear by the Constitution of the Kingdom of Eswatini, "[w]here a person alleges that any of the foregoing provisions of this Chapter[793] *has been*, *is being*, or *is likely to be*, contravened . . . that person . . . may apply to the High Court for redress."[794] In *Maseko*, the applicants' fundamental rights and freedoms had, at the very least, already been contravened, as evidenced by the fact that they were out on bail after having been arrested and jailed for exercising their constitutionally guaranteed rights. Hence, their constitutional challenge could not be considered moot or not ripe for adjudication by the High Court.

In his dissenting judgment, Judge Hlophe concluded that "it would be stretching things too far to say that simply because one has been charged with having uttered vacuous statements which do not prove a seditious intention as contemplated in law and (as) interpreted in numerous judgments of this court and the courts from foreign jurisdictions he can have a statute declared [unconstitutional] when it did not infringe on any of his rights."[795] Compare Judge Hlophe's reasoning on the issue of standing in *Maseko* with that of Judge Yacoob in the following case of the Constitutional Court of South Africa, where standing was an issue to be determined by the Court. In *Abahlali Basemjondolo Movement SA and Another v. Premier of the Province of KwaZulu-Natal and Others*, Judge Yacoob held that:

[e]veryone is entitled to the full benefit of the rights conferred by . . .

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792 Dube & Nhlabatsi, *supra* note 511, at 166.

793 The word "Chapter" refers to Chapter III of the Constitution, which is titled "Protection and Promotion of Fundamental Rights and Freedom" and is the Kingdom's Bill of Rights. CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, ch. III.

794 *Id.* § 35(1) (emphasis added).

795 *Maseko I Dissent*, [2016] SZCH 181, ¶ 38.

> the Constitution. The PIE Act, the national Housing Act and the National Housing Code represent a legislative effort to give effect to the rights conferred by this constitutional mandate. The nub of the complaint on behalf of the applicants is that the Act erodes significantly the benefits conferred upon them by the PIE Act as well as their right of access to reasonable housing as provided for in the national Housing Act and the National Housing Code. Many of the applicants are themselves unlawful occupiers, urgently in need of permanent housing; they are therefore entitled to, and in dire need of, the essential protection that these laws accord. Indeed, the watering down of this protection would be potentially devastating to the applicants. In the circumstances, they allege, in effect, that their rights enshrined in section 26 of the Constitution have been threatened. *If the applicants are right that the protection to which they are entitled has been eroded by the Act, then their rights will as a matter of course have been threatened. Their fears are by no means fanciful. The applicants therefore have standing. In the* circumstances, *they cannot be unsuited on the basis that the challenge to the Act is abstract.*[796]

Unlike Judge Yacoob's reasoning in *Abahlali Basemjondolo Movement SA*, Judge Hlophe's in *Maseko*, suggests that the applicants must wait until they are found guilty in a criminal trial before they can seek relief before a Constitutional Court for what is an actual threat to, or erosion of, their constitutional rights. As the evidence shows, the threats to the constitutional rights of the applicants in *Maseko* were not fanciful or imagined, nor were there prospective or potential—they were real, as evidenced by the fact that the Government of the Kingdom of Eswatini had already proffered charges against them based on the impugned provisions.[797] There was, therefore, no sufficient legal reason to wait until the criminal case was concluded before the applicants could go to the courts to complain that their rights had been violated and pray for relief for those violations.

Judge Hlophe totally misunderstood how a Constitutional Court is supposed to interpret a Bill of Rights or how the latter functions. That misunderstanding led him to the conclusion that, first, the applicants' constitutional challenge was not ripe for a hearing before the High Court—it was premature—and second, because of its premature nature, it was

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796 *Abahlali Basemjondolo Movement SA v. Premier of Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at ¶ 14 (S. Afr.) (emphasis added).

797 *See* Maseko v. Prime Minister of Swaz. (*Maseko I*) (2180/2009) [2016] SZHC 180, ¶ 1–4 (Sept. 16).

abstract.[798] And because it was abstract or moot, there was no need for the Court to waste its time on it. However, courts have held that abstract or moot issues can be justiciable if doing so is in the interests of justice. For example, in *MEC for Education: KwaZulu-Natal and Others v. Vavaneethum Pillay*,[799] Chief Justice Langa, writing for the Constitutional Court of South Africa, declared as follows: "This Court has however held that it may be in the interests of justice to hear a matter even if it is moot if 'any order which [it] may make will have some practical effect either on the parties or on others.'"[800] Resolving the constitutional challenge in *Maseko* would have had a significant impact on the exercise of fundamental rights in the Kingdom of Eswatini in general and particularly on the applicants' ability to exercise their rights to freedom of expression, as well as, of assembly and association. That is, allowing the constitutional challenge in *Maseko* to be heard by the High Court would have had "practical effect" on the applicants specifically and on Swazi society in general.

In *Lawyers for Human Rights and Another v. Minister of Home Affairs and Another*,[801] Judge Yacoob held that "[i]t is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. *There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case.*"[802] Judge Yacoob went on to hold that "the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."[803]

In *Campus Law Clinic (University of KwaZulu-Natal Durban) v. Standard Bank of South Africa Ltd. and Another*,[804] the Constitutional Court of South Africa held that:

> Given the broad provisions of section 38 of the Constitution, the fact that the Campus Law Clinic was not a party to the proceedings in any of the three courts mentioned above is not an absolute bar to it being accorded standing to bring an application for leave to appeal. As

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798 *See* Dube & Nhlabatsi, *supra* note 511, at 167; *see also Maseko I Dissent*, [2016] SZCH 181, ¶ 21.

799 *MEC for Educ. KwaZulu-Natal v. Vavaneethum Pillay* 2008 (1) SA 474 (CC) (S. Afr.).

800 *Id.* ¶ 32.

801 *Laws. for Hum. Rts. v. Minister of Home Affs.* 2004 (4) SA 125 (CC) (S. Afr.).

802 *Id.* ¶ 18.

803 *Id.* (emphasis added).

804 *Campus L. Clinic (Univ. of KwaZulu-Natal Durban) v. Standard Bank of S. Afr. Ltd.* 2006 (6) SA 103 (CC).

> Judge Yacoob pointed out in *Lawyers for Human Rights*, section 38 of the Constitution has introduced a radical departure from the common law in relation to standing. In that matter this Court had to decide whether the applicant organization, a non-profit non-governmental organization, had standing to challenge provisions of the Immigration Act, 13 of 2002, dealing with the deportation of illegal foreigners. *After observing that although it is not ordinarily in the public interest for proceedings to be brought in the abstract, Judge Yacoob emphasized that this was not an invariable principle, and that there might be circumstances in which it would be in the public interest to bring proceedings even if there was no live case.*[805]

The Court then went on to enumerate the factors that would be relevant to such an analysis:

> whether there is another reasonable and effective manner in which the challenge may be brought; the nature of the relief sought and the extent to which it is of general and prospective application; the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the court; the degree of vulnerability of the people affected; the nature of the rights said to be infringed; as well as the consequences of the infringement.[806]

The Court noted, however, that this was not a closed list. It is possible that if Judge Hlophe had applied the factors enumerated in *Campus Law Clinic* in his analysis, he would likely have come to a different result and his dissenting opinion would either have been unnecessary or would, at the very least, been more in line with most of the emerging jurisprudence on the interpretation of the Bill of Rights in the region.[807] What the applicants were praying for was for the High Court to protect their fundamental rights "from unlawful interference by the state."[808] Dube and Nhlabatsi note that "[t]he freedoms of expression and assembly are very important for individual self-fulfillment, and for the democratic process, as they assure stability and the contestation of ideas. This is much more evident in the Swaziland context, where these freedoms were heavily curtailed during the years of colonial

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805 *Id.* ¶ 20 (emphasis added) (citations omitted).

806 *Id.* ¶ 21 (emphasis added) (citations omitted).

807 That emerging Bill of Rights jurisprudence is exemplified by the rulings of the Constitutional Court of South Africa in several cases, including those mentioned in this Article.

808 Dube & Nhlabatsi, *supra* note 511, at 167.

rule and were further rendered non-existent for over three decades between independence and the adoption of the current Constitution."[809] With respect to the relief sought by the applicants, Dube and Nhlabatsi note that "[it] was indeed of general application, as the entire population was affected by the restraint imposed by the impugned provisions. Further, the order was likely to be applied to similar cases in future. The applicants, being individuals who are vocal about their political beliefs were indeed vulnerable in a state where repression of political opposition has formed the bedrock of governance and judicial processes."[810]

In *Maseko*, the onus was on the State to prove that the limitations that had been imposed on the applicants' fundamental rights—through the two Acts—were justified, both in terms of the nation's constitution (particularly its Bill of Rights) and international human rights instruments, to which the Kingdom of Eswatini is a State Party. There is case law in the Kingdom of Eswatini to support such a conclusion: Judge Mamba, in the majority judgment brought it to the attention of the court and it is surprising that Judge Hlophe was either unaware of this precedent or chose to ignore it. In the majority judgment, Judge Mamba cited to *R. v. Independent Publishers (Pty) Ltd. and Another*, a case decided by the Supreme Court of the Kingdom of Eswatini, in which the Court established the principle that in the case of a limitation on fundamental rights, it is the State, which is the author of the limitation, that must establish that the limitation is constitutional and not, as argued by Judge Hlophe, the applicants.[811]

In *Maseko*, the State had the opportunity and responsibility to establish that the limitation on the applicants' rights to freedom of expression, assembly and association, was constitutional. Instead, as noted by Judge Hlophe in the dissenting judgment, the argument advanced by the respondent was that "unlike in the other countries referred to by the applicant, the duty was, in Swaziland, placed on the Applicant to show that the law limiting the rights to freedom of expression and association was not reasonably justified in a democratic society. This means that the duty to prove that the limitation contained in Section 24(3) and 25(3) does not avail lies with the person who contends it is."[812] This reasoning, of course, contradicts the Supreme Court of the Kingdom of Eswatini's ruling in *The*

809 *Id.*

810 *Id.* at 167–68.

811 *See* Maseko v. Prime Minister of Swaz. (*Maseko I Dissent*) (2180/2009) [2016] SZHC 180, 181 at ¶ 48 (Sept. 16) (Hlophe, J., dissenting).

812 *Id.*

*King and Swaziland Independent Publishers (Pty) Ltd.*[813]

The approach to the interpretation of the Bill of Rights followed by Judge Hlophe has been criticized as raising "serious concerns" and that it is "steeped very heavily in pre-constitutional era judicial reasoning."[814] In addition, argued these critics, the approach adopted by Judge Hlophe "seeks to paint Swaziland as a unique legal system, totally divorced from legal developments in the broader global context. This is not the case, and the adherence to the past ignores the point raised by Judge Mamba in the main judgment, that the Constitution is a living document, and that it affirmed the universality of human rights."[815]

The Constitution of the Kingdom of Swaziland Act 2005 specifically shows a commitment to the recognition and protection of human and fundamental rights. For example, in the Preamble, it is stated that "[w]hereas it is necessary *to protect and promote the fundamental rights and freedoms* of ALL in our Kingdom in terms of a constitution which binds the Legislature, the Executive, the Judiciary and the Other Organs and Agencies of the Government" and "[w]hereas all the branches of government are the Guardians of the Constitution, it is necessary that the Courts be the ultimate interpreters of the Constitution."[816] The Kingdom of Eswatini's post-independence constitution was supposed to provide it with the legal and institutional mechanism to break with its exploitative and oppressive colonial past. In fact, the people of Eswatini indicated that eagerness to part with their oppressive past, which was characterized by gross violation of human rights, and forge ahead with a new, post-independence society, undergirded by democracy and the rule of law, by not only producing a new progressive constitution, armed with a Bill of Rights, but by also signing and ratifying several international and regional human rights instruments.[817]

The dissenting judgment did not do justice to this desire by the people of Eswatini for a post-independence society characterized by democracy and the rule of law. The judiciary was granted the power by the Constitution to be the "ultimate interpreters of the Constitution" and ensure that legislation that offends, for example, the Bill of Rights, is declared

813 R v. Swaz. Indep. Publishers (53/2010) [2013] SZHC 88 (Apr. 17).

814 Dube & Nhlabatsi, *supra* note 511, at 169.

815 *Id.*

816 CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, pmbl. (emphasis added).

817 These international human rights instruments include the International Covenant on Civil and Political Rights and the African (Banjul) Charter on Human and Peoples' Rights.

unconstitutional and hence, null and void.[818] Thus, constitutional interpretation would allow the country to maintain its democratic institutions, safeguard human and fundamental rights, and advance peaceful coexistence. Unfortunately, Judge Hlophe's dissenting opinion did not contribute to advancing the rule of law and the protection of fundamental rights in the Kingdom of Eswatini. In addition to other issues, Judge Hlophe appeared to misrepresent holdings in cases that he cited to, using them instead to justify his conclusions. That dissenting judgment effectively crushed all the "constitutional objectives," which included creating, within Swaziland, "a legal culture of accountability and transparency."[819]

For example, as part of his analysis, Judge Hlophe cited to the judgment in *The King and Swaziland Independent Publishers (Pty) Ltd*, a case decided by the High Court of Swaziland (Eswatini), to support his interpretation of the limitation of rights in Eswatini. While part of the judgment in *The King and Swaziland Publishers* supports or affirms the position that rights are not absolute—and this is the part of the judgment that Judge Hlophe relies on—a further reading reveals the rest of the judgment.[820] This is the part of the judgment in *The King and Swaziland Independent Publishers* that Judge Hlophe relies on to justify his dissent judgment: "It is apparent from section 24 that the right of freedom of expression and opinion is *not absolute*; *it is subject to various limitations* as reflected in section 24(3)."[821] In addition, Judge Hlophe also relies on a passage from paragraph 94 of the judgment in *The King and Swaziland Independent Publishers*: "It is apparent from section 24 (3) of the Constitution that the right of freedom of expression and opinion is subject to the limit that it will be sustained unless it is *shown not to be reasonably justifiable in a democratic society*."[822]

However, a complete reading of the judgment in *The King and Swaziland Independent Publishers* shows that the duty to prove that a limitation on a constitutionally guaranteed right is justified *falls on the party responsible for enforcing the limitation*; in the case of Swaziland, that party would be the respondent.[823]The general position in countries with

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818 *See* CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, pmbl.

819 Dube & Nhlabatsi, *supra* note 511, at 170; *see also* The King and Swaziland Independent Publishers (Pty) Ltd and Another (53/2010) [2013] SZHC88.

820 *See* Dube and Nhlabatsi, *supra* note 511, at 170.

821 R v. Swaz. Indep. Publishers (53/2010) [2013] SZHC 88, ¶ 92 (Apr. 17) (emphasis added).

822 *Id.* ¶ 94; *see* Maseko v. Prime Minister of Swaz. (*Maseko I Dissent*) (2180/2009) [2016] SZHC 180, 181 at ¶ 46 (Sept. 16) (Hlophe, J., dissenting).

823 In Maseko, there were four respondents—the Prime Minister, the Minister of Justice and

democratic institutions, particularly those undergirded by the rule of law, is that the party responsible for imposing the constitutional limitation on fundamental rights—that is usually the State—is the one that must prove before a court of law that the limitation is justified and not the applicant or the individual or individuals whose rights have been or are being infringed.[824]

Judge Hlophe, in his dissenting opinion, castigated the applicants for seeking relief from the High Court but failed to do the same to the respondents, who were represented by the Director of Public Prosecutions ("DPP")—it was the DPP who proffered the charges against the applicants and presented the State's case to the Court. Judge Hlophe was especially miffed that the applicants had not provided the Court with any evidence to help it determine "whether in fact there would in law be any basis for the criminal charges they are faced with."[825] Specifically, Judge Hlophe stated that:

> no material whatsoever is placed before this court to enable it determine whether in fact there would in law be any basis for the criminal charges they are faced with. In other words whether the offences they are charged with are sustainable or not. They want to say simply because they were charged with the alleged offences, it was the pieces of [l]egislation complained of that provided they be charged with the specific offences or put differently, that simply because they were so charged then they were already guilty because of the [l]egislation under which they are charged.[826]

The Constitution of the Kingdom of Swaziland Act 2005 vests the DPP with the authority to "institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offense alleged to have been committed by that person against the laws of Swaziland."[827] It is not, as implied by Judge Hlophe, the function of the Court to act as the prosecutorial authority. Dube and Nhlabatsi note that "[c]ourts are enjoined by the law to acquit an accused person if ridiculous charges have been brought against them. Further, he [Judge Hlophe] seemed to be suggesting that apart from establishing that the law in question violates

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Constitutional Affairs, the Director of Public Prosecutions, and the Attorney General. However, the party presenting the case on behalf of the Government of the Kingdom of Swaziland (Eswatini) was the Director of Public Prosecutions (DPP).

824 *See, e.g.*, R. v. Oakes [1986] 1 S.C.R. 103 (Can.).

825 *Maseko I Dissent*, [2016] SZCH 181, ¶ 35.

826 *Id.*

827 CONSTITUTION OF THE KINGDOM OF SWAZILAND, 2005, § 162(4)(a).

a fundamental right, the applicants should have proceeded to convince the court on whether the case against them was 'sustainable or not.'"[828]

Judge Hlophe's approach, it is argued, "suggests a new requirement in constitutional litigation, one which has no basis, neither in case law nor in the Constitution."[829] The High Court in *Maseko* was not called upon to prove the "guilt" or "non-guilt" of the applicants but to decide a constitutional issue—a challenge to the constitutionality of certain provisions of two important counter-terrorism laws—the *Suppression of Terrorism Act 3 of 2008* and the *Sedition and Subversive Activities Act No. 46 of 1938*. Courts in the Kingdom of Eswatini, like those in other countries, are tasked with, inter alia, ensuring that the people's human rights and fundamental freedoms are recognized and protected. These rights are defined, elaborated and entrenched in the Constitution. In addition, Eswatini is a signatory to various regional and international human rights instruments. It is the function of the Courts to make certain that the country's laws, including its Constitution, and particularly its Bill of Rights, conform with the provisions of international human rights instruments.

Judge Mamba's majority judgment in *Maseko* noted that the country's Constitution is a living document, tasked with the job of transforming Eswatini into a democratic society characterized by fully functioning democratic institutions and undergirded by the rule of law. In doing so, the Courts would help the country move away from a colonial past pervaded by gross abuses of human rights. While the majority judgment reflected the open and democratic society that the country claims to and wants to be, the dissenting judgment is backwards looking and, if accepted, would seriously undermine Eswatini's efforts to transform its legal and political systems and bring about a dispensation that respects human rights and is built on fidelity to the rule of law.

828 Dube & Nhlabatsi, *supra* note 511, at 173.
829 *Id.*

## VI. SUMMARY AND CONCLUSION

Since the terrorist attacks on U.S. embassies in Dar es Salaam, Tanzania and Nairobi, Kenya, on August 7, 1998, as well as the rise of extremist groups in various parts of Africa, many countries on the continent have enacted laws to suppress and prevent terrorism.[830] Africa, of course, was not the only part of the world whose peace and security were being threatened by terrorism. In fact, from Dar es Salaam and Nairobi, terrorist groups, such as Al-Qaeda, spread their terror to other parts of the world, including the September 11, 2001 terrorist attacks on various targets in the United States.[831]

In response to the rapid spread of terrorism and extremism around the world, the United Nations established a dedicated committee to fight this major threat to international peace and security. The new global counter-terrorism mechanism, called the UN Counter-Terrorism Committee ("CTC"), was established through UN Security Council Resolution No. 1373 and was charged with, inter alia, preventing and suppressing the financing of terrorist acts.[832] In addition to the creation of the CTC, the international community, working under the auspices of the UN, and specifically, the UN Security Council ("UNSC"), undertook a coordinated effort to confront terrorism, its perpetrators, and its supporters and financiers. As part of that effort, the international community designed and adopted various legal instruments related to the suppression and prevention of international terrorism.

In a 1995 declaration titled "Measures to Eliminate International Terrorism," the UN General Assembly invited the UN and its specialized agencies and intergovernmental organizations to make every effort to fight international terrorism.[833] In 1996, the UN General Assembly established an Ad Hoc Committee to prepare a draft convention for the suppression of

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830 The almost simultaneous explosions in Dar es Salaam and Nairobi killed at least 224 people, wounded thousands more, and destroyed several buildings on both embassy compounds. *See, e.g.*, Mitchell & Talbot, *supra* note 1. Extremist groups emerging in Africa include Al-Shabaab in the Horn of Africa; Boko Haram and al-Qaeda in the Islamic Maghreb in West Africa; and the Lord's Resistance Army in East and Central Africa. *See, e.g.*, AFRICA AND THE WAR ON TERRORISM (John Davis ed., 2016) (presenting a series of essays that examines the emergence of terrorism and terrorist organizations in Africa).

831 THE 9/11 COMMISSION REPORT, *supra* note 102 (being an official report of the commission empowered by the U.S. Congress to investigate the terrorist attacks of September 11, 2001 in the United States).

832 S.C. Res. 1373 (Sept. 28, 2001).

833 G.A. Res. 49/60 (Feb. 17, 1995).

terrorism.[834] The UN Ad Hoc Committee's work produced three conventions on the suppression and prevention of international terrorism: International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism; and International Convention for the Suppression of Acts of Nuclear Terrorism.

The CTC, the umbrella UN organization tasked with coordinating international counter-terrorism activities, eventually encouraged African countries to ratify international anti-terrorism treaties and enact national legislation to help the fight against international terrorism.[835] Since then, several anti-terrorism conventions have been enacted in Africa. The most important of these is the OAU Convention on the Prevention and Combatting of Terrorism, which is also known as the Algiers Convention. Both the Algiers Convention and its protocol—The Protocol to the OAU Convention on the Prevention and Combating of Terrorism—were examined thoroughly earlier in this Article.

As of this writing (2020), 43 African States have ratified and ascended to the Algiers Convention.[836] In addition to ratifying the Algiers Convention, several African countries have enacted new legislation that has incorporated provisions of the continental anti-terrorism convention into their national laws. Unfortunately, some of these counter-terrorism laws have the potential to negatively affect fundamental rights in these countries. This Article has taken a closer look at the High Court of the Kingdom of Eswatini's *Maseko v. Prime Minister of Swaziland and Others*, a case in which four applicants challenged the constitutionality of some provisions of the country's two main counter-terrorism laws, to see how counter-terrorism laws can be used by national governments to infringe on the fundamental rights of citizens. This case was decided by the High Court in 2016 and is considered very important because it provides, at the minimum, two important lessons for the maintenance of a legal and institutional regime that enhances the fight against international terrorism but, at the same time, minimizes the opportunistic use of anti-terrorism laws to infringe on the rights of citizens, as well as, to impede democratic competition.

Nevertheless, before the article examined *Maseko*, it first provided an overview of the nexus between counter-terrorism laws and human rights.

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834 G.A. Res. 51/210 (Jan. 16, 1997).
835 IFHR 2007, *supra* note 3.
836 Status of the OAU Convention on the Prevention and Combating of Terrorism, *supra* note 507.

As far back as 2003, the late Sérgio Vieira de Mello, the UN High Commissioner for Human Rights who was killed in a terrorist attack against UN facilities and workers in Bagdad on August 19, 2003, had suggested that it was necessary for the international community to devote more effort to thinking about how terrorism was affecting human rights, as well as, what the UN system could do to suppress and prevent terrorism and enhance respect for human rights.[837] During the last several years, the international community has struggled to strike a balance between fighting terrorism and remaining true to the norms that undergird the recognition and the protection of human rights.

African and other countries must balance their concerns for peace and security with the need to protect the rights of their citizens. International human rights scholars have argued that "human rights principles and jurisprudence allow for sufficient flexibility to achieve a balance between security and human rights."[838] With respect to the threat to peace and security in African countries, it is important that there be a legal and institutional mechanism (e.g., the judiciary) that can independently review and scrutinize the threat assessment and determine that it is, indeed, real, especially given the fact that an erroneous assessment can have a significantly negative impact on human rights. The executive must not be allowed to be the sole branch of government empowered to assess the level and extent of the threat to peace and security posed by terrorism. That could allow opportunistic executives, as has occurred in Cameroon, to classify genuine and legal protest as threats to national security and then invoke national laws against terrorism to deal with them.[839]

The main purpose of developing and adopting a security architecture is to protect and safeguard freedom—that is, the freedom of citizens. Hence, it would be "self-defeating if security concerns arbitrarily undermine freedom."[840] Therefore, the fight against terrorism must be a unified one—national security agencies or bodies must work together with human rights organizations to ensure that the fight against terrorism does not become a platform for the violation of the rights of citizens.[841] It is important that each State confront all terrorist acts when and where they occur, regardless of who committed the act and why. Quite often, individuals who commit terrorist acts invoke the protection of their religious beliefs or the values of

837 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512.
838 *Id.* at 2.
839 *See* Mbaku, *supra* note 301.
840 *Human Rights, the United Nations, and the Struggle Against Terrorism*, *supra* note 512, at 3.
841 *Id.*

their ethnocultural group as justification for their insidious acts. Nevertheless, regardless of the reasons why they committed the acts, individuals whose activities qualify as terrorist acts under national and international law must be brought to justice under appropriate laws.

In suppressing and preventing terrorism, each African country must make sure that the legal process for fighting terrorism is not turned into an instrument for the violation of the fundamental rights and freedoms of citizens. Unfortunately, throughout the continent there are many problems that render some African countries unable to or incapable of protecting the rights of their citizens, especially in relation to the fight against terrorism. First, many African countries have not yet internationalized their national constitutional law to make the rights guaranteed by the International Bill of Rights, as well as, those contained in the Banjul Charter, to be directly justiciable in domestic courts. Second, a lot of countries in Africa do not have judiciaries that are independent enough, especially from the executive branch of government, to be able to function effectively as a check on the exercise of government power. An independent judiciary is important in the struggle to strike a balance between fighting terrorism and safeguarding human and peoples' rights. Finally, since many African countries have extremely poor human rights records—the violation of human rights, particularly those of ethnic and religious minorities, as well of historically marginalized groups (*e.g.*, women and girls), is pervasive—many Africans do not trust their governments to protect and safeguard their fundamental rights.

While the UN and the African Union have important roles to play in helping African countries fight terrorism, they must do so in a way that does not infringe on the fundamental rights of citizens. However, given the fact that both multilateral organizations cannot directly enforce laws against terrorism, that job falls to national governments. However, in order for each African country to fight terrorism effectively while also protecting human rights, it must provide itself with a governing process that is undergirded by an independent judiciary, particularly one that is capable of performing the role of watchdog and making certain that government power is not abused. The judiciary can, for example, use its interpretive powers to strike down counter-terrorism laws or their provisions that do not conform with national constitutions and/or international human rights instruments.

It is important that the rule of law remains the fundamental principle undergirding the fight against terrorism, whether at the national, regional or global levels. Thus, any measures taken by national governments, for

example, to combat terrorism, must comply with each country's obligations under international law, particularly international human rights law, as well as refugee law and international humanitarian law. For Africa, the African Union must assist each country to provide itself with an effective rule of law-based national criminal justice system, which makes certain that the fight against terrorism is carried out successfully but only in a way that does not undermine the protection of fundamental rights. In addition to making sure that all terrorist acts are established as serious criminal offenses in domestic laws and regulations, each African country must make certain that any person who participates in the financing, planning, or the perpetration of terrorist acts is brought to justice and done so on the basis of respect for human rights and fundamental freedoms.

Throughout Africa, many governments are taking advantage of poorly-crafted counter-terrorism laws to suffocate legitimate political opposition and other civil society organizations and groups (*e.g.*, journalists, university professors, lawyers), that are not part of the ruling coalition. The Article examined a case from the High Court of the Kingdom of Eswatini to show how courts can intervene and use their powers to interpret the constitution to: (1) strike either national statutes or provisions of these legislative acts that violate or infringe the rights of citizens; and (2) generally prevent governments from using their power to assess threats to peace and security to abuse and exploit citizens.

The majority decision in *Maseko*, the case decided by the High Court of Eswatini, was written by Judge Mamba and represents an example of how the judiciary in each African country should use its interpretive powers to ensure that, in fighting terrorism, African countries do not violate human rights. Judge Mamba provided a step by step and well-articulated analysis of the Bill of Rights in the context of the Kingdom of Eswatini. The applicants in *Maseko* prayed the Court to strike down certain provisions of the *Sedition and Subversive Activities Act 46 of 1938* and the *Suppression of Terrorism Act 3 of 2008*. Several charges had been proffered against the applicants pursuant to several provisions of these two Acts, which form the backbone of the Kingdom of Eswatini's anti-terrorism legislation.

In the majority judgment, Judge Mamba made use of case law from the Supreme Court of Eswatini, the Constitutional Court of South Africa (as well inferior South African courts), the Supreme Courts of Canada and the United States, the High Court of Australia, the Privy Council, learned treaties on the law, and other sources of comparative law. Throughout his analysis, Judge Mamba regularly reminded the Court that the universality of human rights and that the norms, values and aspirations that he had

discussed and interpreted in the majority judgment were not foreign to the "Swazi way of life."[842] In arguing that the Constitution of the Kingdom of Eswatini is a living document, he also noted that it was the duty of the people of Eswatini to uphold and defend the fundamental rights and freedoms elaborated in that Constitution.[843]

Judge Mamba's analysis in *Maseko* provides an example of how an effective limitation analysis should be undertaken. It also shows how judges can use their interpretive powers to both strike down statutory provisions that infringe fundamental rights and prevent opportunistic politicians from using national counter-terrorism laws to stunt national transitions to democratic governance and constitutionalism.

Judge Hlophe's dissenting judgment, on the other hand, represents an illustration of how not to undertake a limitation analysis. In addition to the fact that his analysis has been described as "antithetical to constitutionalism, and is irreconcilable with accepted notions of Bill of Rights litigation,"[844] the learned judge failed to provide a sequential analysis of the steps that must be satisfied in a case involving a challenge to the constitutionality of a statutory or legislative act. Such a sequential analysis involves the use of domestic and comparative case law, as well as other sources traditionally employed in constitutional interpretation (*e.g.*, international human rights instruments).

Although Judge Hlophe cited to both domestic and comparative case law, he often did so selectively in an effort to support a legal position that he appears to have already adopted without the benefit of precedent. For example, he incorrectly relied on the judgment in *R v. Swaziland Independent Publishers*, a case decided by the Supreme Court of the Kingdom of Eswatini in 2013. Judge Hlophe cited to that case to support a position that he had taken regarding the applicants' case in *Maseko*, and that was that *rights are not absolute*. While it is true that the Court in *R v. Swaziland Independent Publishers* did rule that rights are not absolute, that was only part of the judgment.[845] At paragraph 92, the Court held that "the right of freedom of expression and opinion is not absolute" and that is in accord with Judge Hlophe's citation.[846] However, a further reading of the

842 Maseko v. Prime Minister of Swaz. (*Maseko I*) (2180/2009) [2016] SZHC 180, ¶ 41 (Sept. 16).
843 *See id.*
844 Dube & Nhlabatsi, *supra* note 511, at 158.
845 R v. Swaz. Indep. Publishers (53/2010) [2013] SZHC 88, ¶ 92 (Apr. 17).
846 *Id.*

judgment reveals a caveat that Judge Hlophe conveniently ignored. The judgment goes on to say that there are "criteria of justification for limits on the rights and freedoms guaranteed . . . [and that] [t]hese criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a [c]onstitutionally guaranteed right or freedom and the fundamental principle of a free and democratic society."[847]

In his analysis, Judge Hlophe had argued that the onus was on the applicant to prove that a limit on a right or freedom guaranteed by the constitution is justified. However, in paragraph 92 of *R v. Swaziland Independent Publishers*, the Supreme Court of Eswatini holds that that onus "rests upon the party seeking to uphold the limitation."[848] This implies that Judge Hlophe's analysis totally ignored or perhaps distorted the precedent set by the Supreme Court of Eswatini in *R v. Swaziland Independent Publishers*.[849]

There are other irregularities in Judge Hlophe's limitation analysis that make the dissenting judgment inappropriate and represents the way not to undertake a Bill of Rights litigation. National courts, especially those with the power to determine the constitutionality of legislative acts, which include counter-terrorism laws, represent an important legal and institutional mechanism to help African countries fight terrorism and do so in a way that respects human rights. However, in addition to the fact that these courts must be granted enough independence to perform their functions without political interference, the notion of a Bill of Rights litigation of each judge sitting on these courts must be one that is undergirded by fidelity to the rule of law, respect for human rights, and a belief in democratic principles.

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847 *Id.*
848 *Id.*
849 *Id.*