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A Re-Assesment [sic] of the Effectiveness of OAU (AU) Conventions on Preventing and Combating Terrorism

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

**A RE-ASSESSMENT OF THE EFFECTIVENESS OF OAU (AU)
CONVENTIONS ON PREVENTING AND COMBATING
TERRORISM.**

BY

CHINYERE CHRISTIANA OKPALA.

**SUBMITTED TO THE GOLDEN GATE UNIVERSITY SCHOOL OF
LAW, DEPARTMENT OF INTERNATIONAL LEGAL STUDIES, IN
FULFILMENT OF THE REQUIREMENT FOR THE CONFERMENT
OF THE DEGREE OF *SCIENTIAE JURIDICAE* DOCTOR (SJD)**

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**SAN FRANCISCO, CALIFORNIA.
AUGUST, 2014.**

DEDICATION

This dissertation is dedicated to the memory of my ever loving parents, Barrister Chris O. Okpala (KSM; Chief Magistrate *Emeritus*) and Lady Theresa O. Okpala. (LSM);

AND

My dearest husband, Engineer Peter Chukwudi Chukwuka.

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ABBREVIATIONS

ACSRT	African Centre for the Study and Research on Terrorism
AEC	African Economic Community
AfCHPR	African Court of Human and Peoples Right
AG	Attorney General
AIAI	Al-Ittihad Al Islamiya
AMISOM	African Union Mission in Somalia
ATA	Anti-Terrorism Assistance
AU	African Union
CID	Criminal Investigation Department
CJTF-HOA	Combined Joint Task Force –Horn Of Africa
CSSDCA	Conference on Security, Stability, Development and Co-Operation in Africa
CTC	Counter Terrorism Committee
CTITF	Counter-Terrorism Implementation Task Force
EAC	East African Community
EFCC	Economic and Financial Crimes Commission
EIJ	Egyptian Islamic Jihad
FAFT	Financial Action Task Force
FLN	Front De Liberation Nationale
FRC	Financial Reporting Centre
GCTF	Global Counter-Terrorism Forum

GIABA	Inter-Governmental Action Group against Money Laundering In West Africa
HRL	Human Right Law
HRW	Human Right Watch
I-ACT	Integrated Assistance for Counter Terrorism
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IGAD	Inter-Governmental Authority on Development
IHL	International Humanitarian Law
ILC	International Law Commission
ILFO	Islamic Liberation Front of Oromo
ILS	Islamic Lecture Series
LRA	Lord's Resistance Army
MEND	Movement for the Emancipation Of Niger Delta
NDPVF	Niger Delta People's Volunteer Force
NDV	Niger Delta Vigilante
OAU	Organization of African Unity
OIC	Organization of Islamic Conference
OIC	Organization of Islamic Cooperation
OLC	Oromo Liberation Council
OLF	Oromo Liberation Front
ONLF	Ogaden National Liberation Front
OPLO	Oromo Peoples Liberation Organization

PIJ	Palestinian Islamic Jihad
PISCES	Personal Identification Secure Comparison and Evaluation System
POTA	Prevention of Terrorist Act
PREACT	Partnership for Regional East African Counter-Terrorism
PSC	Peace and Security Council
SARS	Special Anti- Robbery Squad
TFG	Transitional Federal Government
TSCTP	Trans-Sahara Counter –Terrorism Partnership
ULFO	United Liberation Front of Oromiya
UN	United Nations
UNSC	United Nations Security Council
UOPLF	United Oromo Peoples Liberation Front

ABSTRACT.

Combating terrorism in Africa seems to be a mission impossible despite numerous anti-terrorism Laws in existence. Africa has a union, known as African Union (AU), comprising of all independent States in Africa, except Morocco. This AU has a well known anti-terrorism Law known as 'OAU Convention on Preventing and Combating Terrorism, 1999 and other national anti-terrorism laws in existence in its Member States nations.

Despite all these anti-terrorism laws, including Plan of Actions for the Prevention and Combating of Terrorism, Protocol to the OAU Convention on the Prevention and Combating of Terrorism in existence, terrorist acts are on the increase daily in the continent.

This dissertation reviews the said OAU (AU) Conventions on Preventing and Combating Terrorism, identifies its deficiencies and analyses its inefficacies in preventing and combating terrorism in Africa. It also discusses the Member States' response to the Convention.

The dissertation, therefore, argues that terrorism will be better combated on regional level than leaving it on the hands of individual Member States; and recommends that AU should establish a regional court vested with the jurisdiction of terrorism, for an effective combating of terrorism in the Continent of Africa.

CHAPTER ONE.

1.0. INTRODUCTION.

Terrorism is the world's greatest 'nightmare', yet, effectiveness of combating it is still unattained. Generally, nearly all nations are, or have been affected by terrorism in one way or another.

Combating terrorism has become a critical issue of major concern to both international and domestic laws. Much has been said and scholarly written about legal provisions on terrorism, such as, treaties, conventions, protocols and resolutions, but less discourse on the effectiveness of those legal provisions in combating terrorism.

There are many legal status of universal International instruments relating to the combating and suppression of terrorism such as, the 1996 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Aircraft Convention), 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Unlawful Seizure Convention), 1971 Civil aviation Convention, 1973 Diplomatic agents Convention, 1980 Nuclear Materials Convention, 1988 Airport Protocol, 1997 Terrorist Bombing Convention, 1999 Terrorist Financing Convention, 2005 Nuclear terrorism Convention, etcetera.

No doubt, there are also several regional and sub regional legislations on terrorism, such as, OAS Convention to Prevent and Punish acts of Terrorism Taking the form of Crimes against Persons and Related Extortion, that are of International Significance, 1971, European Convention on the Suppression of Terrorism, 1977, SAARC regional Convention on Suppression of Terrorism, 1987, Arab Convention on the Suppression of Terrorism, 1998, Convention on the Islamic Conference on Combating International terrorism, 1999, Organization of African Unity(OAU) Convention on the prevention and Combating terrorism, 1999 and so on.

The issue is, are the Member States to these legal provisions in compliance with the requirements of international law (United Nations) in combating and preventing terrorism?

The United Nation's (UN)¹ Charter, which is at the top of the hierarchy of international law; enshrined in Art.103², obligations, rights and duties of all members of the United Nations.

Chapter I, Art.2 (2) of the Charter provides thus;

*“All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter ”*³

¹ The UN is an international organization which came into being with the entry into force of the UN Charter, a multilateral treaty, which forms a kind of constitution for the union, on October 24, 1946. The UN currently has 193 Member States

² Charter of the UN

³ Id. at Art.2(2)

Also, Art. 2 (4) of the same Charter, provides that;

“All members shall refrain in their international relations from the threat or use of force against territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations”⁴

The same charter also provides for obedience and compliance to decisions of the Security Council by its members:

“The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”⁵

Further, the United Nations Security Council (UNSC)⁶ had made many resolutions in combating of terrorism which must be complied with by all UN Member States. For instance, Security Council resolution, 1373 (2001), which was adopted in response to the 9/11, 2001 terrorist attack, requires all United Nations Member States, to take necessary steps to prevent the commission of terrorist acts, to criminalize assistance to terrorist activities, deny financial support and safe haven to terrorists, and to afford one another the greatest measure of assistance in connection with criminal investigation and criminal proceedings.⁷

Also, Security Council Resolution 1456, 2003 provides:

“States must ensure that any measure taken to combat

⁴ Id. at Art.2(4)

⁵ Id. at Chap. V, Art.25.

⁶ The United Nations Security Council (UNSC) is one of the major organs of the UN, set up by the UN in its Charter. It consists of 15 members, five permanent members and ten non permanent members, which are to be elected for two years term. Its' functions and powers are enshrined in Chapter V of the Charter of UN. The permanent members are republic of China, France, Russia federation, United Kingdom and United States of America.

⁷ See Security Council Resolution 1373, 2001.

terrorism comply with all the obligations under International law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.”

Are these legal provisions theoretically applicable? If so, to what extent are the Member States to the legal provisions complying with provisions enshrined therein? How have these legal provisions helped to combat terrorism in this present time? Or are there loopholes in these legal documents that urgently need to be amended for more effective results in combating terrorism? These are some of the questions this dissertation sets forth to unfold.

Such resolutions, though, maybe difficult to comply with in combating terrorism, nevertheless, are expected to be complied with by Member States. More often than none, especially in the recent time, global issue of concern is on terrorism and continual havoc being committed by terrorists. Terrorist activities are on the increase day by day, and it is becoming obvious that how to fight it is not yet legally effective, hence the increase in their incessant activities, daily.

There are certain possibilities that could be militating against effectiveness of combating terrorism. It may be as a result of ineffectiveness of applicable laws or that the procedure enshrined in the legal document for combating terrorism cannot be achieved because of certain circumstances beyond the control of the state or states, such as poverty, security laxity, corruption, to mention but a few.

The Charter of the United Nations and Resolutions of the General Assembly urges Member States to make National Laws to combat and suppress terrorism. How possible will this be, especially with the low economic level of some African countries and other third world countries that are still developing? Lack of modern technology and facilities are in those countries. More so, International Law requires a State to carry out its international obligation but neither prescribes nor concerned about how the state will do that.

Another factor that affects the effectiveness of combating terrorism is culture diversity and religious differences, especially in the same country. Some people try to justify terrorist acts by claiming that it is their right to religion, (which is one of the fundamental human rights) that they are asserting. In other words, what may be regarded as terrorism in one country or part of a country may actually be normal and legal in another. As rightly put by D'Amato 'one man's terrorist is another man's freedom fighter.'

But basic questions are: Is terrorism actually justifiable? If no, how can social stability be achieved in a diverse culture and religion? Does attainment of such social stability require certain universal legal provision to achieve it?

On these hypothetical questions will this dissertation anchor its central thesis, which is: 'a case for removal of combating terrorism from national level to regional level for effectiveness of combating terrorism'.

As mentioned before, some of the reasons behind the central thesis are level of corruption, poverty, lack of resources especially in developing states and more so for avoidance of conflict between combating terrorism and Humanitarian and Human Rights law. Unfortunately, those developing States happen to be the ones that are greatly affected by terrorist acts.

It is paramount therefore, that the concept of terrorism should be understood because one of the major reasons affecting inefficiency in combating terrorism is lack of universal acceptable definition of the term 'terrorism'. At the International level, attempts to define terrorism have fallen short of its purpose. Either that some crucial elements are lacking in the definition or that the scope of the definition is not comprehensive enough to cover all areas of terrorist acts.

Terrorism should also be differentiated from insurgency, despite the fact that at times the two concepts are at play at the same time. In combating, under insurgency, regards to human rights and humanitarian law are so essential and should not be infringed upon, unlike in combating terrorism.

Further, human rights and humanitarian law can also be better adhered to, if the case advocating in this dissertation will be followed effectively. Perpetrators of the act will be captured and tried accordingly by the universal law, in a universal court, acceptable by its Member States.

“Universal Court” means, in the context of this dissertation, “Regional Court or International Court for all or some Member States of a particular Region or Union”. Limitation to the definition of universal court is due to the fact that discourse on the effectiveness of combating terrorism all over the world will be beyond the scope of this paper, so also will discussing each of the Conventions and Protocols enumerated above. Therefore this dissertation is limited to some parts of Africa.

There are much terrorist acts going on in Africa, such as different Islamic extremist radical groups and some countries are known or rather accused of harbouring terrorists.

Although there are Conventions on combating of terrorism that are of African Origins; how effective are these conventions in combating terrorism? Or are they just enacted for compliance with the United Nations requirements? What is the originality of these conventions and how have they helped to advance mechanisms of combating terrorism in Africa? Hence, the reason for the topic of this dissertation: A Re-Assessment of the Effectiveness of the OAU (AU) Conventions on Preventing and Combating Terrorism.

Africa is the second largest continent in the world and also the second continent with highest population after Asia. It contains fifty four countries and Western Sahara. It also contains the world’s longest Nile River system and the world’s

largest massive Sahara Desert. Africa is bounded by the Mediterranean sea to the North, both the Suez Canal and the red Sea along the Sinai peninsula to the Northeast, the Indian Ocean to the south east and the Atlantic Ocean to the west.⁸

As mentioned in the beginning, combating terrorism in Africa had never been a much debated topic, maybe, because of the developing nature of the countries in Africa. In this dissertation, focus shall be made on comparing and analyzing the Organization of African Unity (OAU) Convention on Preventing and Combating Terrorism, 1999 (known as OAU Algiers Convention, 1999), with Arab Convention for Suppressing Terrorism, 1998 and Convention of the Organization of Islamic Conference (OIC) on Combating of Terrorism, 1999 because of their African Origins.

Further, researching on the whole of African countries will be too enormous for this dissertation, thus the discourse shall be limited to Ethiopia, Kenya, Somalia, Sudan and Nigeria; some of the African countries (in my opinion), that has been focused as African countries with high rate of terrorist activities, especially Islamic extremists terrorist activities.

African States have a Union known as African Union (formerly known as OAU) that unites all Africans. One of their major objectives among others is to “achieve greater Unity and Solidarity for African countries and the peoples.”⁹ The Union is

⁸ See Map of Africa; at <http://www.worldatlas.com/webimage/countrys/af.htm>.

⁹ Art.3 (a) of the African Union Constitutive Act, 2000.

also a member of the United Nations. They have many Conventions, Protocols and Treaties in force, but the one under review in this dissertation is the OAU Algiers Convention, 1999.

1.1. A BRIEF HISTORY OF ORGANIZATION OF AFRICAN UNITY (OAU), NOW AFRICAN UNION (AU).

The origin of OAU, can be traced back to late 19th century during the colonization of African continent. The self-centeredness of the colonial masters in the 19th century before the end of second world war, which is called ‘the scramble of Africa’, and the imposition of their own systems of law on African societies, which were brutal and denial of African’s basic human rights was what led to the demands for independence and “uhuru” or freedom from colonial masters at the end of second world war.¹⁰ In addition, the influence of the spread of socialism and the cold war rivalry led to the rapid political de-colonization of Africa.¹¹

Based on the grounds supra and fight against apartheid, the leaders of the then independent African Countries established the OAU. OAU came into existence on May 25, 1963 in Addis Ababa by the signing of the OAU Charter by 32 governments’ representatives. Another 21 States have joined gradually with South

¹⁰ Organization of African Unity (OAU)/south African history. www.sahistory.org.za/topic/organization-afr

¹¹ Id.

Africa being the 53rd member on May 1994.¹² Morocco remains the only African Country that is not a member of the OAU.

Article I of the OAU Charter states thus,

“The High Contracting Parties do by the present Charter establish an Organization to be known as the ORGANIZATION OF AFRICAN UNITY.”

The first premier president of the Union is Dr. Kwame Nkrumah, the then president of Ghana. This is why May, 25 is celebrated as African Unity day.

1.1.1. STATED OBJECTIVES AND UNDERLYING PURPOSE OF THE OAU CONVENTION ON PREVENTING AND COMBATING TERRORISM:

The OAU'S Charter objectives are to promote the unity and solidarity of African States, co-ordinate and intensify their co-operation and efforts to achieve a better life for the people of Africa, defend their sovereignty, territorial integrity and independence, eradicate all forms of colonialism from Africa, promote international co-operation, giving due regard to the Charter of United Nations and the Universal Declaration of Human Rights; and co-ordinate and harmonize members' political, diplomatic, economic, educational, cultural, health, welfare, scientific, technical and defence policies.¹³

¹² Organization of African Unity (OAU) /African Union (AU)
<http://www.dfa.gov.za/foreign/Multilateral/Africa/oau.htm>.

¹³ Art.ii of the Charter of Organization of Africa

The principles of the Charter are the sovereign of equality of all Member States, non-interference in the internal affairs of States, respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence, peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration, unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other States, absolute dedication to the total emancipation of the African territories which are still dependent, and affirmation of a policy of non-alignment with regards to all blocs.¹⁴

The Charter also provides among others in its Articles, Membership, Rights and duties of Member States, Institutions, the Assembly of heads of State and Government, the Council of Ministers, General Secretariat and so on.

There is also the Abuja treaty establishing the African Economic Community (AEC) in May, 1994, which made OAU to operate under the basis of two legal instruments. For this reason the OAU was officially referred to as OAU/AEC.¹⁵

The need for the amendment of the OAU Charter to meet the challenges of the twenty first century gave birth to African Union (AU). AU was established in an Extraordinary Summit of the OAU held in Sirte, Libya on September 9, 1999, with the ultimate objectives of the OAU Charter and the provisions of the Treaty

¹⁴ Art. iii of the Charter of Organization of Africa.

¹⁵ Supra note 3.

establishing the African Economic Community. The Constitutive Act of the African Union was adopted on July, 11th, 2000 during the Lome Summit.¹⁶ AU merged OAU and AEC into one unified institution.

The AU was created to take up the multifaceted challenges confronting the African continent and peoples “in the light of social, economic and political changes taking place in the world.”¹⁷ The AU objectives are somehow different and more comprehensive than the one contained in OAU. They are as follows:

- “(a) achieve greater unity and solidarity between the African Countries and the peoples of Africa;*
- (b) defend the sovereignty, territorial integrity and independence of its Member States;*
- (c) accelerate the political and socio-economic integration of the continent;*
- (d) promote and defend African common positions on issues of interest to the continent and its peoples;*
- (e) encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;*
- (f) promote peace, security, and stability on the continent;*
- (g) promote democratic principles and institutions, popular participation and good governance;*
- (h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;*
- (i) establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;*
- (j) promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;*
- (j) promote co-operation in all fields of human activity to raise the living standards of African peoples*

¹⁶ Id.

¹⁷ Nsongurua J. Udombana., The institutional structure of the Africa Union: A Legal Analysis. 33 CAWILJ 69 at 2.

- (k) coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union*
- (l) advance the development of the continent by promoting research in all fields, in particular in science and technology;*
- (m) work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.*¹⁸

The AU provided for a smooth transitional period from OAU/AEC by the Act entering into force thirty days after two-third of the fifty three Member States have ratified it. Also the OAU charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, for the purpose of enabling the OAU/AEC undertake the necessary measures regarding the devolution of its assets and liabilities to the African Union and all matters relating thereto.¹⁹

The African Union built on the successes of the OAU, which, since its inception, has developed into political and economic fulcrum of Africa.²⁰ The AU entered into force on May 26, 2001, less than one year after its adoption. The OAU was formerly dissolved on July 9, 2002, during the last session of the OAU Assembly in Durban, South Africa.²¹ The AU was also launched the same period at the same session. With the launching of the AU, the OAU ceased to be an umbrella international organization for collective Africa.²²

¹⁸ The Constitutive Act of African Union, 2000, supra note 9.

¹⁹ Supra note 3.

²⁰ Id.

²¹ Nsongurua J. Udombana., supra note 17.

²² Id.

The present leaders are dedicated to the principles of the OAU and “to the ideals of freedom, unity and development which the founding leaders sought to achieve in establishing the organization”.²³ Therefore, the AU takes over the rights, powers and obligations of the OAU as its successor.

The AU Constitutive Act has thirty three (33) articles, besides its preamble. Article 2 establishes the Union, while Articles 27 and 28 provides for signature, ratification, accession and entry into force.²⁴

1.1.2. MEMBERS OF OAU (Now AU).

By Article IV of the OAU Charter, 1963, each independent sovereign African State shall be entitled to become a member of the organization. The members of AU, therefore, include all African independent Countries except Morocco. There are actually fifty four(54) countries that are members, namely: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central Africa republic, Cape Verde, Chad, Cote d’Ivoire, Comoros, Congo, Djibouti, Democratic Republic of Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Malawi, Mozambique, Mauritania, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic republic, Senegal, Seychelles, Sierra Leone, Somalia, Sao Tome & Principe, Sudan, Swaziland, Tanzania, Togo, Tunisia,

²³ Id.

²⁴ Supra note 18.

Uganda, Zambia, Zimbabwe and South Sudan recently joined in July, 2011, three weeks after it attained its independence. Morocco resigned from OAU membership because the Union recognizes the Sahrawi Arab Democratic Republic, which is a portion of Western Sahara.²⁵

The headquarters of AU is in Addis Ababa, Ethiopia. The Union's official languages are English, French, Arabic and Portuguese; nevertheless, many documents are printed in Swahili and other local languages.

The OAU in 1999 adopted the Convention on the Prevention and Combating of Terrorism, known as the Algiers Convention, which entered into force on 6 December, 2002. As of today, 49 states out of 54 Member States had signed it, while 40 had ratified it. Cape Verde, Malawi, Mauritius and Zimbabwe are the countries that are yet to sign it, while Botswana, Cameroon, Central Africa Rep., Cote d' Ivore, Democratic Rep. of Congo, Liberia, Namibia, Sierra Leone, Somalia, Sao Tome & Principe, Swaziland, Zambia and Zimbabwe had not ratified it.

1.1.3. CHARTER OF OAU PRINCIPLES AND PURPOSES, 1963.

The Algiers Convention stemmed from the purposes and principles enshrined in the Charter of the Organization of African Unity, particularly, its clauses relating to security, stability, development of friendly relations and cooperation among its

²⁵ Katherin Schulz Richard, Africa Union: organization of 54 African Countries forms African Union. <http://geography.about.com/od/africamaps/a/african-union.htm>

Member States and the provisions of the declaration on the Code of Conduct for Inter-African Relations. It refers to the need to promote human values based on tolerance and rejects all forms of terrorism irrespective of their motivations.²⁶

The AU Constitutive Act, which succeeded OAU Charter as discussed supra, also enshrined in its Art. 4, among its other principles, “respect for the sanctity of life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities”.²⁷

The AU Peace and Security Council (PSC) is mandated to request all Member States to report annually on the steps they had taken to prevent and combat terrorism, and specifically to implement the Algiers Convention. Additionally, the solemn Declaration on the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA)²⁸ adopted by the Lome Summit in July 2000, refers to terrorism under the principle of stability and declared “terrorism, in all its manifestations, is inimical to stability”.²⁹

In the Plan of action, meant to translate into concrete actions for the principles governing the CSSDCA process, the Member States agreed, on the necessity to

*“exchange information and co-operation, at the sub-regional level, on security matters, especially on issues relating to terrorism”*³⁰

²⁶ See the preamble of the OAU Convention on the Prevention and Combating of Terrorism, 1999.

²⁷ Art. 3 (a) of the African Union Constitutive Act, 2000, supra note 9.

²⁸ AHG/Decl.4 (XXXVI). CSSDCA Solemn Declaration.

²⁹ Id., at par.11 (e).

³⁰ Id., at par. 14(d))

Pursuant to the decision adopted by the 72nd Ordinary Session of the Council of Ministers, held in July 2000, in Lome, Togo,³¹ the OAU convened an experts Meeting to consider a Draft Convention on Mutual Legal Assistance in criminal matters, in Addis Ababa, from April 2 to 5, 2001.³²

AU has also established an African Centre for Study and Research on Terrorism (ACSRT) in Algiers, Algeria, as an institution of the AU Commission. It was established as enshrined in Section H, Par.19-21 of the Plan of Action of African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa, on September 11 to14, 2002. Its' functions are set out in Section F, Par. 16(a-d) of the same Plan of Action. Some of the functions includes, evaluating terrorist threat in Africa, promoting Intra-African co-operation against terrorism, training measures for combating terrorism, conducting studies, setting up data basis for gathering and exchanging information, monitoring and analyzing information relating to terrorism and assisting in implementation of International Conventions relating to terrorism.

1.2. DECLARATION OF THE CODE OF CONDUCT FOR INTER- AFRICAN RELATIONS PROVISION, 1994.

Africa's commitment in combating terrorism can be traced back as far as July 1992, when the OAU, during its 28th Ordinary Session, held in Dakar, Senegal, adopted

³¹ CM/Dec.540(LXXII) Rev.1

³² African commitments to combating organized crime and terrorism., at 59.
www.iss.co.za/pub/other/ahsi/Goredema-Botha/pt2chap7.pdf

resolution AHG/Res.213 (XXVIII), aimed at enhancing cooperation and coordination of efforts among Member States with the zeal to fight extremism.³³

In June, 1994, at its 30th ordinary Session, held in Tunis, Tunisia, the OAU Summit adopted declaration AHG/Decl.2 (XXX) on the code of conduct for Inter-African Relations, which categorically rejected fanaticism and extremism or the use of religion to commit acts of violence, including terrorist acts. Nevertheless, the code of conduct recognises that the freedom of religious belief and its peaceful expression are a fundamental right of all human beings as enshrined in the Universal Declaration of Human rights and also recognises the threats posed by movements based on religious, political and tribal extremism.³⁴ They want Africa to be a source of peace, open to dialogue, co-operation and exchange with the rest of the world, and committed to the search for common responses to future challenges.³⁵

1.3. PRINCIPLES OF INTERNATIONAL LAW ON TERRORISM: MEASURES TO ELIMINATE INTERNATIONAL TERRORISM.

Despite the fact that there is no universal acceptable of definition of terrorism in international level, however, United Nations adopted what can best be described as ‘sectorial approach’ and held several general meetings on eliminating international

³³ Preventing and Combating Terrorism; March 14, 2012. <http://www.peaceau.org/en/pages/dsd-counter-terrorism>

³⁴ See preamble of Declaration of a Code of Conduct for Inter-African relations, Assembly of Heads of State and Government, Thirtieth Ordinary Session, Tunis, Tunisia, 13-15 June 1994.

³⁵ Id.

terrorism; such as Resolution 49/60 of the General Assembly, 1994, Resolution 51/210 of the General Assembly, 1996 and Resolution 52/164.

Resolution 49/60: The 84th Preliminary meeting of the UN's General Assembly, held on 9th December, 1994, known as 'Resolution 49/60', recalled its resolutions of 45/51 of 1991 and 48/411 of 1993, of depth consideration of question on measures to eliminate international terrorism. The assembly was convinced that the adoption of the declaration on measures to eliminate terrorism should contribute immensely to combating international terrorism.³⁶ They, therefore, approved the Resolution 49/60, Declarations on measures to Eliminate International Terrorism, as guided by the purpose and principles of the UN's Charter. In its annex, it affirms its resolution to eliminate international terrorism and other related offences.³⁷ The Resolution further stipulates that all States must take appropriate measures in accordance with the relevant provisions of international law and international standards of human rights to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts in accordance with the relevant provisions of their national law.³⁸

Resolution 51/210: Further, the UN in its 88th plenary meeting on 17th December, 1996, known as Resolution 51/210, which is a supplement to Resolution 49/60, recalls the said Resolution 49/60 and states that they are disturbed by the persistence of terrorist acts.³⁹ At the meeting, the General Assembly, also recalls

³⁶ See United Nation's A/RES/49/60. Measures to eliminate international terrorism

³⁷ Id. at its annex.

³⁸ Supra note 34 at par.5(a-f).

³⁹ See A/Res/51/210. Measures to eliminate international terrorism, 1996.

that in the 84th plenary meeting, that States were encouraged to review urgently the scope of existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms.⁴⁰

The General Assembly categorically condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed.⁴¹

They also encouraged States to exchange verified information on facts related to terrorism.⁴² States were urged to become parties to Conventions on terrorism and other related offences if they have not done so and also re-emphasis on the need for States to enact appropriate domestic legislation necessary to implement the provisions of those Conventions and protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts and to provide support and assistance to other governments for those purpose.⁴³

But, the perturbing question remains; how will this common goal of eliminating international terrorism be achieved in different States with different national laws and legislations, without infringing on principles of international human rights?

Can terrorism be justifiable? How can one actually claim that terrorist act is part of the person's religion? Is this a sort of fanatic blasphemy (although it sounds philosophical), or are they actually the reality of such religion? In discussing these

⁴⁰ Id.

⁴¹ Id at 1 of part I.

⁴² Id. at 4 of part I.

⁴³ Id. at 6 of part I.

questions, some terrorist incidents that had taken place in some parts of African States under review, shall be considered in Chapter two of this dissertation.

It is becoming more glaring, from the above discussions, that most of these national legislations (discussed supra) are in conflict with the UN requirements for combating terrorism. How then, is the best way to counter terrorism without infringing on human rights in Africa?

Chapter two of this dissertation, centres on the scope of terrorism, its' effects to the stability, economic and security of the States. To be able to properly introduce the concept of terrorism, the chapter starts by differentiating between Terrorism, Insurgency and Armed conflict. Then proceed to evaluate justifications some people claim for being terrorists and actually deduce if there is any reasonability in such assertions (though, already mentioned briefly in this present chapter) and the motives or objectives behind the activities of the terrorists.

Further, the same chapter two evaluates terrorism and violation of human rights, for the purpose of finding the balance between terrorism and human rights. This discourse is approached from two different perspectives; firstly, from the terrorist angle; whether the person's act is actually right? If the person has a right to claim justification under human rights law violation, bearing in mind the equitable maxim of 'whoever that comes into equity must come with clean hands', on the other side, from the legal point of view on the side of the terrorist combatants and the legal

provisions on terrorism. The outcome of the evaluation determines if the legal provisions are in conflict with human rights and humanitarian law? Do they have to prioritize Human Rights law over combating terrorism effectively?

This leads to the next stage of discussion, though under the same chapter, the impact of war on terror on African States. How terrorism has affected the security, economic status of African States, and even their international relations with other countries. That is, an analysis on the scope of terrorism in African States.

Chapter three is on a legal analysis on the existing OAU Convention on Preventing and Combating of Terrorism, 1999 (Algiers Convention), which seems to be the main convention for AU in combating terrorism. Firstly, critical analyses of definition of terrorism under the Convention are discussed, to determine its scope of coverage. Its sectional analyzes, such as the roles and jurisdiction of Member States on terrorist Acts, extradition of terrorists, extra-territorial investigations (Commission Regoire) and mutual assistance and the reservation provision is made. Also discussion on the Convention is made in order to actually ascertain if the convention is in compliance with the UN requirement for combating terrorism.

Further, under the same chapter, the enforcement of the Convention and the Member States ratification of the Conventions; and then, the effects of the existing convention on the Member States, are also evaluated in order to ascertain if they

(Member States) had complied or are yet to comply with the requirements of the OAU Convention.

Chapter four focuses on a comparative analysis of the OAU Algiers Convention, 1999 with two other Conventions that have some African origin: Arab Convention for the Suppression of Terrorism, 1998 and Convention of the Organization of Islamic Conference (OIC) on Combating International Terrorism, 1999. Most Members States to the two Conventions are Africans. From the comparative analysis, the originality of the OAU Algiers Convention, 1999 is extracted and re-assessed. Then, it becomes clearer, if it is a duplicate of another Convention or if it is in the actual sense 'original'.

Finally under this same chapter four, detailed responses to the convention by some African Member States (Ethiopia, Somali, Kenya, Sudan and Nigeria) is assessed; to determine if they have already complied with their obligations under those Conventions and other International Conventions that they are Member States. If they have not, then what are they doing and what approaches do they use for combating terrorism in their respective national states. How effective are these approaches, if any, and how has it helped to curb terrorist acts in their national countries.

Chapter five is the conclusion and recommendation. As stated before, this dissertation asserts that terrorism should be better fought or combated as one, in

International or Regional (because AU is region) Level than on a national level in Africa, mainly, due to its' economic undeveloped power, corruption, partiality, lack of resources and most especially for avoidance of conflict with humanitarian and human rights law.

Under the same chapter five, recommendations on how practicable and effective the thesis of criminalizing and penalizing terrorism or combating terrorism jointly on regional level, instead of on national level is made. Also, it is important to note that, it can be practicably achieved so far in African Union, since the OAU Algiers Convention 1999, has a provision for amendment and agreements in the Convention.⁴⁴ More so , there is a universal acceptable definition of terrorism in the Convention by the Member States, and the fact that, terrorist act as defined in Art.1(3) of the OAU Algiers Convention, 1999, is the violation of the criminal laws of a state party, which is committed in any other person's state. AU already has a multilateral agreement for extradition and extra territorial investigations and mutual assistance,⁴⁵ which can be conveniently handled by a centralized judicial body for the Union.

⁴⁴ OAU Algiers Convention., Supra note 26 at Art.21.

⁴⁵ Id., at Art.7, Parts IV and V.

1.4. CONCLUSION.

This dissertation is unique in so many ways from that of previous scholars because as stated before, most scholars had not suggested that combating terrorism in Africa should be effectively done in regional level as opposed to the current national level.

Also, recommendations and practical procedures through which to achieve this thesis are the author's sole initiatives. None of the previous published studies had examined the possibility of approaching combating terrorism at a regional level in Africa as a union, instead of the national level, as mentioned supra, by amending the OAU Algiers Convention to include a central court, vested with jurisdiction on combating terrorism. Solidarity as enshrined in the AU Constitutive Act should be maximized to the fullest for better result, not just for effectiveness of combating terrorism, but, also for other issues that needs urgent attention in AU.

To re-emphasis again, in order to avoid conflicts and find the proper balance between counter-terrorism and Human Rights law in Africa, there should be a Universal Court vested with terrorist jurisdiction.

CHAPTER TWO.

SCOPE OF TERRORISM AND ITS DANGER TO THE STABILITY OF STATES.

2.0. INTRODUCTION.

Before 9/11, terrorism was not considered a significant threat to the security of Africa, despite the US embassy bombings at Kenya and Tanzania. African Countries' were not considered as a safe haven for terrorist activities, although it was seen as a potential breeding ground for terrorism.⁴⁶

The modern terrorism differs from that in the 1960's. It poses great danger to the world as a result of different religious affiliations mixed with political ideology and geo-political goals.

The origin of the word 'terror' (*terrere*), which means 'frighten' was first introduced by French in the fourteenth (14th) century and was used by the English in 1928.⁴⁷ The French Legislature led by Maximilien Robespierre, concerned about the aristocratic threat to the revolutionary government, ordered the public execution

⁴⁶ Ted Dagna. Africa and the war on terrorism. 2002, CRS Report for Congress. Congressional Research Service.

⁴⁷ Reuven Young. Defining Terrorism: The evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation. 29 BCICLR 23 at 3.

of seventeen thousand (17,000) people, (*“regime de la terreur”*) to educate the citizenry of the necessity of virtue.⁴⁸

After World War II, terrorism developed a new methodology. Terrorist hijackings of civil aviation aircraft became common. The international community responded with series of treaties.⁴⁹ The UN also responded with the same enactment of treaties, such as International Convention Against taking of Hostages, 1979 and so on.

Certainly, there are many treaties, conventions and laws both internationally and nationally on prevention of terrorism, but the static point is that, enacting those treaties, conventions and laws alone are insufficient; the effectiveness of enforcing same to prevent terrorist occurrences is the trivial point.

For better understanding of the term ‘terrorism’, the author shall attempt to distinguish it between insurgency and armed conflict, to clear the ambiguity between the terms in this chapter, especially, for the fact that some scholars are using the terms interchangeably as if they are one and the same terminology.

Further, the perturbing question as regards the possibility of justification of terrorism will be discussed in this chapter, so also the conflict between combating terrorism and violation of human rights.

⁴⁸ Id.

⁴⁹ Id.

The effects of these terrorist acts in the security, economic stability and international relations of States cannot be over-looked.

2.1. DIFFERENCE BETWEEN TERRORISM, INSURGENCY AND ARMED-CONFLICT.

“The search for a legal definition of terrorism in some ways resembles the quest for Holy Grail: periodically, eager souls set out, full of purpose, energy and self confidence, to succeed where so many others before have tried and failed”⁵⁰.

Till date there is still lacuna in international law because of the absence of universal acceptable definition of the word ‘Terrorism’. Trudy Govier comments that “the United Nations has been trying to define terrorism for some thirty years, and has given up in its quest for a definition that everybody can agree upon. A major problem is that Western governments wanted to make sure that state agents could never be considered terrorist, while Islamic countries wanted to make sure that national liberation movements in the Middle East and Kashmir could never be considered terrorist.”⁵¹

Further, the human rights voices said that the reason for UN’s inability to have a definite definition of the term is due to the standoff with the Organization of the Islamic Conference (OIC).

“The Arab Terrorism Convention and the Terrorism

⁵⁰ Geoffrey Levitt. Is ‘Terrorism’ worth defining?; 13 OHIO N.U.L. REV. 97, 1986.

⁵¹ Trudy Govier. A Delicate Balance: What philosophy can tell us about.

Convention of the Organization of the Islamic Conference (OIC) defined terrorism to exclude armed struggle for liberation and self-determination. This claim purports to exclude blowing up certain civilians from the reach of international law and organizations. It is central to interpreting every proclamation by states which have ratified these conventions in any forum purporting to combat terrorism”⁵²

Therefore, internationally, terrorism may be difficult to define because it has so many emotions attached to it. The absence of the universal definition of terrorism has made possible none existence of terrorism in international level. It would simply be a

“phenomenon which is denounced as shameful and reprehensible by all but understood by none. Its legal value will be instrumental and incantatory, yet inefficient.”⁵³

“It would merely be a word of art meant to brand one’s enemies, a label used loosely, selectively and invariably pejoratively ...where the defining elements of terrorism are often confused with value judgements about those accused of it”⁵⁴

The absence of its definition in international level has also led to the unceasingly international acts of terrorism, especially on the ground that some States harbour terrorists. Investigation and prosecution on the basis of a crime of terrorism alone would likely violate the precepts of certainty and legality if it were to be concluded

⁵² See the Human Rights Voices; There is No UN definition of terrorism. www.humanrightsvoices.org/EYEontheUN/un-101/factd/?p=61

⁵³ Jean Marc Sorel. Some questions about the definition of terrorism and fight against its financing; 14(2) Eur.J.INT’L L. 365, 2003 at 370.

⁵⁴ Robert P. Barnidge, Jr. Non-State Actors and Terrorism. Applying the law of State Responsibility and the Due Diligence principle. T.M.C.Asser Press. 2008 at 15.

that customary international law has not yet sufficiently defined the term 'terrorism'.⁵⁵

States define terrorism to mean what they think is the best definition for it within their territory. That is to say, what may constitute a terrorist act in one country may not be so in another country. How it is perceived depends on who the terrorist is, where the terrorist act is committed and who is at the receiving end. Some terrorize their states in the name of freedom fighters. It is not a question of unwillingness by a majority of nations to define terrorism, but rather a question of the obstacles to reaching agreement as well as scepticism about using any universal definition for narrow purposes.⁵⁶ Professor Bruce Ackerman stated that:

*"terrorism is a 'product of the free market in the world of high technology' and even with peace and democracy around the world, fringe groups would still have the capability to undertake acts of terrorism."*⁵⁷

Although, there were some early proposed definitions of terrorism at international law, but none has been accepted as the universal definition of the term under the international law. It therefore, remains a nebulous concept for the international legal system.

Terrorism was first used as a legal term in 1931 at the third conference for unification of penal law of Brussels; they tried to define an act of terrorism as:

⁵⁵ Id. at 16.

⁵⁶ Upendra D. Acharya. War on terror or Terror war: The problem in defining terrorism. 2009. 37. DENJILP 653 at 12.

⁵⁷ Bruce Ackerman. Before the Next Attack. 2006 at 14.

*“The intentional use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, liberty or physical integrity of persons or directed against private or state property with the purpose ...social ideas....”*⁵⁸

Later the sixth conference of Copenhagen in 1935 adopted a text that defined terrorism in its Article I as:

*“International acts directed against life, physical integrity, health or freedom of a head of state, as well as crown princes, members of government, people enjoying diplomatic immunity, and members of the constitutional, a legislative or judicial bodies[if a perpetrator creates] a common danger, or a state of terror that might insight a change or raise an obstacle to the functioning of public bodies or a disturbance to international relations.”*⁵⁹

Following the assassination of King Alexander I of Yugoslavia and the French Foreign Minister in 1934, France proposed an “International measures” to be taken.⁶⁰

In the 1937 Terrorism Convention, acts of terrorism were defined as:

*“Criminal acts directed against a state and intended or calculated to create a state of terror in the mind of particular persons, a group of persons or the general public”.*⁶¹

⁵⁸ M.K. Nawaz & Gurdip Singh, Legal Control of International Terrorism, 17 Indian J. Int’L, 66, 1977,

⁵⁹ Reuven Young. Supra note 47 at 7.

⁶⁰ Id.

⁶¹ Convention for the Prevention and Punishment of Terrorism, 1937, League of Nations Doc. C546M.383, 1937.

The UN General Assembly always adopt resolutions condemning acts of terrorism but never reached a consensus on what 'acts' constitutes terrorism. A universally accepted definition is paramount for the unification of combating terrorism. Before, 9/11, the General Assembly in 1995, defined terrorism as:

*"Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes 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."*⁶²

In Security Council Resolution, 1566 (2004), adopted by the Security Council at the 5053rd session , the UN while condemning the act of terrorism, still did not define the term 'terrorism', they only condemned acts of terrorism;

" Acting under Chapter VII of the Charter of the United Nations,
*1. Condemns in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security; ... "*⁶³

It seems that general/universal definition of terrorism will limit some powerful countries' unilateral power to handle terrorist acts the way they deem fit. Overuse has made terrorism a 'politicized and emotive' term.⁶⁴ But the universal acceptable definition remains the solid foundation in combating terrorism.

⁶² See the General Assembly Resolution 49/60 of 1995.

⁶³ See 1 of Security Council Resolution 1566 (2004).

⁶⁴ Nathan A. Canestaro. Small Wars and The Law: Options for prosecuting the insurgents in Iraq. 43 CLMJTL 73

Ben Saul in his article, 'the Challenge of defining Terrorism', Chapter 7, confirms that, an ultimate successful definition of terrorism will have to reconcile political with international law.⁶⁵ To both academics and lawyers alike, a consistent definition of terrorism has remained 'increasingly elusive' and unsuccessful efforts to draft one have consumed much ink.⁶⁶ The definition will also enhance intelligence sharing and international co-operation.⁶⁷

Interestingly, although there is no universal definition in international level, some regions, such as the ones under review in this dissertation (OAU, OIC & The Arab Conventions), succeeded in having a universal definition of terrorism in its' different Conventions.

OAU defined Terrorist 'acts' in its Article 1 (3) of OAU Convention on The Prevention And Combating of Terrorism, 1999 as:

- “(a): any act which is a violation of 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 number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:*
- (i): intimidate, put 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*

⁶⁵ Ben Saul. Defining terrorism-How far Have We come? 17 Sept. 2012. www.isn.ethz.ch

⁶⁶ Nathan A. Canestaro. Supra note 64 at 30.

⁶⁷ Reuven Young. Supra note 47 at 5.

- of any essential service to the public or 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)".⁶⁸*

The Organisation of Islamic Conference Convention On Combating International Terrorism, 1999, defined Terrorism and terrorist crimes respectively in its Articles 1(2), (3) as follows:

- “ 2. “Terrorism” means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.*
- 3 “Terrosist Crime” means any crime executed, started or participated in to realize a terrorist objectives in any of the Contracting States or against its nationals, assests or interests or foreign facilities and nationals residing in its territory punishable by its law. ”⁶⁹*

Also, the Arab Convention for The Suppression of Terrorism, 1998, defined terrorism and terrorist offence in its Article 1(2) & (3) accordingly as follows:

“2. Terrorism

⁶⁸ See Article 1 of the OAU Convention on the Prevention and Combating of Terrorism; supra note 26.

⁶⁹ See Article 1(2) & (3) of The Organization of the Islamic Conference on Combating International Terrorism, which is an Annex to Resolution No: 59/26p of the organization.

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.

3. *Terrorist offence*

Any offence or attempted offence committed in furtherance of a terrorist objective in any of the contracting States, or against their nationals, property or interests, that is punishable by their domestic law. The offences stipulated in the following conventions have not been ratified by Contracting States or where offences have been excluded by their legislation, shall also be regarded as terrorist offences:

- (a) The Tokyo Convention on offences and Certain Other Acts Committed on Board Aircraft, of 14 September 1963;*
- (b) The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, of 16 December 1970;*
- (c) The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, of 23 September 1971, and the protocol thereto of 10 May 1984;*
- (d) The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973;*
- (e) The International Convention against the Taking of Hostages, of 17 December 1979;*
- (f) The provisions of the United Nations Convention on the Law of the Sea of 1982, relating to piracy on the high seas.⁷⁰*

⁷⁰ See Article 1(2) & (3) of The Arab Convention For The Suppression of Terrorism, 1998.

Despite the existence of the definition of terrorism in the above mentioned national Conventions, the starting question still remains, how effective are the application of these laws to combating terrorism in those nations?

At certain situations, the two concepts, 'insurgency' and 'terrorism', are in play at the same time. Some terrorists hide under the cloak of insurgency to terrorize a state. Such acts are usually in violation of criminal laws of that state; concurring with President of the United States of America, Barack Obama who labelled terrorism "a human-caused disaster".⁷¹ In such a situation, insurgents are not exempted from their terrorist acts; immunity under insurgency cannot veil them for their terrorist actions. An example of such situation can be attributed to Al-Shabaab group in the East Africa that is linked to the notorious Al-Qaeda, Islamic extremist group, which continues to wage war against the government of Somalia in the name of insurgency.

Also, the fact that National Liberation Movements have complicated the legal regulation of internal conflict, terrorism has become entangled with the right to self determination as per international law.⁷² Some nations have anchored on the provisions of the United Nations Charter on inherent right to self determination⁷³ to free themselves from being labelled as terrorists.

⁷¹ Yonah Alexander and Micheal S. Swetnam. *Al-Qa'ida ten years after 9/11 and beyond*. 2012, Potomac Institute Press at xiv. at 17.

⁷² Nathan A. Canestaro. *Supra* note 64.

⁷³ See Article 1 of United Nations Charter, *supra* note 2.

Insurgency (sometimes called ‘guerrilla warfare’) can be viewed as a revolution, usually legitimate, which involves physical violence as war, but specifically for political and military gains rather than for private benefits.⁷⁴ In other words, insurgency is strictly for political reasons, advancement into government or to overthrow the government, unlike terrorism that is for selfish reasons. The principle is always to prevent the government forces from employing its full might in the contest.⁷⁵

Insurgency has also been defined as;

“a protracted struggle conducted methodically, step by step, in order to attain specific intermediate objectives leading finally to the overthrow of the existing order”⁷⁶

Terrorists are seen as unrepresentative and abnormal outliers in society while insurgency is the manifestation of deeper, widespread issues in society.⁷⁷

Insurgency is usually a small war used as an auxiliary form of fighting, especially behind enemy lines.⁷⁸ The tactics employed by the insurgents can be best described as ‘hit and run’.

“Insurgency is a struggle between a non-ruling group and ruling authorities in which the non-ruling group consciously uses political resources.... And violence to destroy, reformulate, or sustain the basis of legitimacy of one or more aspects of politics.”⁷⁹

⁷⁴Id.

⁷⁵ Ariel Merari. Terrorism as a strategy of insurgency. Terrorism and political violence, Vol.5, No. 4 (Winter 1993), pp.213-215.

⁷⁶ Ganesh Sitaraman. Counterinsurgency, the war on terror, and the laws of war. 95 VALR 1745 at 21.

⁷⁷ Id. at 24.

⁷⁸ Ariel Merari. Supra note 75.

⁷⁹Nathan A. Canestaro. Supra note 64.

Although both insurgents and terrorists neither wears uniform nor carry arms openly and induces fear and violence; but terrorism is different in the sense that its use of force is directed at non combatants.⁸⁰ The major difference between insurgency and terrorism is that the former tries to establish physical control for a territory unlike the later.⁸¹ Insurgency is confined within the national boundary and it is directed against one's own government. On the other hand, terrorism can cross over the national boundary and it may be directed against one's own or other countries. Insurgents advocate ideologies, pay individuals to conduct operations, employ violence and intimidation, and exploit local grievances such as communal or sectarian conflicts.⁸²

The weapons usually used by terrorists are most sophisticated than that of the insurgents that use infantry-type light weapons but sometimes artillery pieces as well.⁸³ The insurgents main targets are the political opponents, military and police, while the terrorists' targets both political opponents and the public at large.⁸⁴

The major purpose of terrorist acts is to obtain publicity, by attacking targets that represents what they oppose and they feel mission accomplished when the public and government reacts to their attacks. They (terrorists) do not usually challenge the government forces openly, rather, they aim at changing the perception as to the effectiveness or legitimacy of the government itself. Terrorism is seen as either a

⁸⁰ Id.

⁸¹ Ariel Merari; Supra note 75 at 10.

⁸² Ganesh Sitaraman. Supra note 76.

⁸³ Ariel Merari. Supra note 75 at 11.

⁸⁴ Id.

law enforcement or military problem, rooting out a few bad apples, while insurgency is a social problem, requiring mobilization of all elements of government power.⁸⁵

An Armed conflict (some scholars refers to armed conflict as ‘Conventional war’) is usually a direct clash with the government and the military. The conflict is normally between different military branches on uniform. They use more sophisticated weapons (air force, armour, artillery) than terrorists.⁸⁶

Currently, just like terrorism, there is no specific definition of “armed conflict” in international law, although the term ‘armed conflict’ is used in the Geneva Convention(s) and the Additional Protocols.⁸⁷ Under the Geneva Convention, armed conflict is classified into two (2): International armed conflict and Non-International armed conflict, but the terminology “armed Conflict” was not defined in the convention.⁸⁸ Although Article 3 of the Geneva Conventions did not explain the term, armed conflict, but it excluded situations of political unrest accompanied by nothing more than sporadic acts of violence.⁸⁹ Also Article 1(2) of Additional

⁸⁵ Ganesh Sitaraman. *Supra* note 76.

⁸⁶ Ariel Merari. *Supra* note 75 at 11.

⁸⁷ See generally Geneva Convention I: Geneva Convention for the Amelioration of the Codition of the Wounded and Sick in Armed Forces in the Field; 1949, 6 U.S.T. 3114, 75 U.N.T.S 31. Geneva Covention II: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85. Geneva Convention III: Geneva Convention Relative to the treatment of Prisoners of War: 1949, 6 U.S.T 3316, 75 U.N.T.S. 135. Geneva Convention IV: Geneva Convention Relative to The Protection of Civilian Persons in Time of War; 1949, 6 U.S.T 3516, 75 U.N.T.S. 287. Additional Protocol I: Protocol Additional to The Geneva Conventions; 1949 and Relating to the Protection of Victims of International Armed Conflict; 1977 1125 U.N.T.S. 3. Additional Protocol II: Protocol Additional to The Geneva Conventions; 1949 and Relating to The Protection of Victims of Non-International armed Conflict; 1977, 1125 U.N.T.S. 609.

⁸⁸ *Id.*

⁸⁹ *Id.*

Protocol II affirms this interpretation because it excludes from the ‘material field of application’ of the protocol ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence of a similar nature, as not being armed conflicts.’⁹⁰

Article 3 of the Geneva Convention, 1949 states thus:

“In the case of armed conflict not of an international Character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, Including members of armed forces who have laid their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
 - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
 - (b) taking of hostages;*
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;*
 - (d) the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*
- (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflicts should further endeavour to bring into force, by means of special agreement, all or part of the other provisions of the present Convention.*

⁹⁰ Id.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Insurgency has been defined as:

“A general overarching concept that refers to a Conflict between a government and an out group or opponent in which the latter uses both political resources and violence to change, reformulate, or uphold the legitimacy of one or more of four key aspects of politics.”⁹¹

In Prosecutor V Dusko Tadic, the court explained the existence of armed conflict thus:

“....exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups....”⁹²

Insurgency and Armed conflicts adhere to international norms regarding the law of war in achieving their goals, but terrorists are simply committing crimes under both civil and military legal codes.⁹³

Insurgency is neither terrorism nor armed conflict, though the three concepts share the same use of force to achieve political ends with different scales of violence. Both terrorism and insurgency needs support and finance to succeed, or else both will eventually succumb to the efforts of the State but insurgency has a distinct characteristic of support and mobilization from local populace which is a

⁹¹ O’Neill B.E. *Insurgency & Terrorism: From Revolution to Apocalypse*. 2005. 2nd ed. Washington D.C; Potomac Books Inc.

⁹² Prosecutor V. Dusko Tadic. Case No. IT-94-1. Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction; 1995 at par. 65-66.

⁹³ See generally the International terrorism and security research. Differences between terrorism and insurgency. http://www.unc.edu/depts/diplomat/item/2008/1012/comm/smith_defining.html

prerequisite for their success unlike terrorism.⁹⁴ The supportive local populace provides the insurgents with intelligence, recruits and shelter.⁹⁵

From the above analysis, one can be both a terrorist and a freedom fighter. The person can fight for freedom and adopt terrorism as a method of fighting.⁹⁶ Therefore, the lacuna of acceptable definition of terrorism in International law in contradiction to freedom or resistance fighters is clearly one of the contributing factors that encourage violence in the name of higher theological and ideological principles.⁹⁷

2.2. DOES TERRORISM HAVE JUSTIFICATION?

Apart from the absence of universal acceptable definition of terrorism in international law, another perturbing question in the mind of average legal personnel is 'the justification of terrorism'. The members of the Security Council stated and reaffirmed, while commenting on attack in Somalia, that:⁹⁸

"terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security, and that any acts of terrorism are criminal and unjustifiable regardless of their motivation, wherever and whenever and by whomever committed."

⁹⁴ James D. Kiras. Irregular Warfare: Terrorism and Insurgency. http://indianstrategicknowledgeonline.com/web/bay_3

⁹⁵ Nathan A. Canestaro. Supra note 64.

⁹⁶ Igor Primoratz. A philosopher looks at contemporary terrorism. 29 CDZLR 33 at 3.

⁹⁷ Yonah Alexander and Michael S. Swetnam. Supra note 71 at xiv.

⁹⁸ See Security Council Press statement on Terrorist attack in Somalia. SC/11300; AFR/2831.

Some terrorists claim justification on moral grounds, especially, Islamic extremists, who claim to be fighting just war in the name of jihad, re-echoing the cliché that ‘one man’s terrorist is another man’s freedom fighter’.

In order to understand their point of view and actually deduce if there is any justification from their view, a brief summary of origin of just war and jihad may clarify what forms the intention or underlying motives of Islamic extremists in morally justifying terrorism.

2.2.1. ORIGIN OF JUST WAR AND JIHAD.

The theological challenges presented by modern terrorists, especially the Islamic extremists, like al-Qa’ida, justifying unlimited use of force against “enemies of God,”⁹⁹ has made the globe to re-think about the fearful strategic dangers of the clash of civilization as demonstrated by the ‘just war,’ ‘jihad’ concepts and their relevancy to the ‘battle of ideas’ between the culture of life and the culture of death.¹⁰⁰

The beginning of just war theory may be linked to the Romans. It originated in the Middle Ages as Christian theologians, such as Augustine and Thomas Aquinas, sought to determine under what conditions it would be morally right to engage in

⁹⁹ Id. at xviii.

¹⁰⁰ Id.

State violence war.¹⁰¹ It was an outgrowth of the association of religions with international relations. The performance of such religious rites was assigned to the *collegium fetialium*, the priests or fetiales were entrusted with the task of deciding if a foreign country had failed to perform its duties toward the Roman State.¹⁰² If a foreign state subject to Roman rule refused to perform the specified religious rites, and no settlement was reached within an allocated period for negotiation and deliberation, a just cause of war was said to exist, and the matter was placed before the senate.¹⁰³ Subsequently, Saint Augustine justified Christian participation in war on such grounds as injury to the country, or unjustified occupation of territory. While punishment out of all proportion to the act would be considered unjust, the redress of grievances was justifiable, the ultimate purpose of war being the achievement of peace.¹⁰⁴

It was Thomas Aquinas who laid down three criteria for the justified initiation of war: First, it must be authorized by the prince; second, there must be a just cause for it, such as un-redressed grievances; and third, the belligerents must attempt to achieve a just peace. This theory was both used to curb feuds within a state and applied to conflicts between independent states.¹⁰⁵

In the Middle Ages, Spanish jurists such as Francisco Victoria (*circa* 1480 – 1546) held that not only is self-defense justifiable, but also defense of one's friends or

¹⁰¹ Andrew Valls. *Ethics in international Affairs*, ed. 2000.

¹⁰² Yonah Alexander and Michael S. Swetnam. *Supra* note 71 at xviii.

¹⁰³ Draper Gerald. *Reflections on Law and Armed Conflicts*; The Hague, Neitherlands: Kluwer Law International, 1998.

¹⁰⁴ Yonah Alexander and Michael S. Swetnam. *Supra* note 71 at xviii.

¹⁰⁵ *Id.* at xix.

required to aid the belligerent whose cause was “just”. Also, Emmerich de Vattel (1714 – 1767) held that the theory of a “just war” was moral, and did not affect the legality of the war.¹⁰⁹ By the beginning of the 19th century, the concept of a “just war” underwent a period of disuse. The theory that a war could be considered legal or illegal was discarded. It was replaced by the concept of supreme sovereignty. To judge the legality of a war would necessitate the deliberation and judgement of sovereignty by a third party, and this would be considered an impairment, as states were considered equal. This did not mean that violence was sanctioned, but rather, that the doctrine of “just war” no longer met the needs of the political actualities of Europe in the 19th century. Methods were adopted in an attempt to restrict the worst consequences of conflict, such as political alignments and the formulation of rules of warfare to reduce widespread destruction.¹¹⁰

The 20th century brought a revitalization and reformulation of the “just war” doctrine developed in earlier periods. It condemned certain wars and condoned others. It returned to the theory that wars of aggression were illegal, while self-defense was justifiable. This theory was implemented in the Versailles Peace Treaty of 1919.¹¹¹ The opinion of the Allies is clearly illustrated by George Clemenceau in the letter to the president of the German Delegation covering the Reply of the Allied and Associated powers:

*“In the view of the Allied and Associated powers,
the war which began on 1 August 1914, was the
greatest crime against humanity...that any nation...”*

¹⁰⁹ Id.

¹¹⁰ Id. at xx.

¹¹¹ Id.

has ever consciously committed...not less than several million dead lie buried in Europe... Because Germany saw fit to gratify her lust for tyranny by resorting to war...the Allied and Associated Powers believe that they will be false To those who have given their all to the freedom of the world if they consent to treat this war on any other basis than as a crime against humanity and right".¹¹²

But certain wars were still considered to be just. Negotiations for the ratification of the Pact illustrated that the right to self-defense was not denied. In the words of US Secretary of State Frank B. Kellogg: "Every nation is free at all times to defend its territory from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defense." A signatory of the Pact of Paris could engage in a "just war" and yet remain within its terms.¹¹³

The "just war" doctrine was invoked before the Second World War to justify American aid to the Allies, and after it to justify the punishment of those allegedly responsible for starting it. In 1945, the concept of "just war" had been embodied in the Charter of the UN. Although the Charter provides for arbitration and adjudication, the right of self-defense has been maintained. Article 51 provides thus:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN, until the Security Council has taken the measures necessary to maintain international peace and security".

¹¹² Id.

¹¹³ Id. at xxi.

The UN thus recognized 'just' wars begun in self-defense against armed aggression. These are, however, divergent opinion as to what constitutes "self-defense." The UN has been reluctant to recognize cases that may expand the definition of self-defense.¹¹⁴

It is against the foregoing background of mostly "Western" perspectives and experiences of the "just war" concept that the "Jihad" doctrine must be understood. According to numerous Islamic scholars, it is apparent that Muslims have consistently used theologically based criteria for distinguishing between "just" and "unjust" violence. For instance, violence was justified to defend an Islamic society from "religious impurity" threats or from a foreign invading army. "Jihad" therefore, represented a sanctified form of resistance force directed against disobedience to the command of Allah. "Jihad's" comprehensive meaning thus represents a struggle for personal and public faithfulness rather than an inevitable call for war. In fact, Muslim communities are duty-bound to explore every peaceful means available for conflict resolution before resorting to violence. And then when hostilities are undertaken, the Muslims are obligated to utilize measured and proportional responses to threat. Their fighters are obligated during battles not to kill civilians, including women and children, and to treat prisoners of war humanely.¹¹⁵

¹¹⁴ Id.

¹¹⁵ Id. at Xxii.

Regardless of record, for militant Islam as graphically illustrated by al-Qa'ida's declared intentions and actions, the concept of "jihad" has projected a new ominous level of brutalization against humanity. Its ideological foundation has been nourished by radical Islamic concepts, doctrines, and interpretations. For example, the Middle Age school of Salafiyya (the venerable forefathers) in advocating that Islam had been corrupted by idolatry and therefore must be purified has influenced al-Qa'ida's thinking.

A more profound impact on al-Qa'ida's theological radicalization was made by Islamic scholars in the 20th century who argued that Islam was in real danger of being destroyed by Western influences. The teachings, for instance, of Maulana Maudoodi and Rashid Rida who developed the theory that modern Western culture represented the pre-Islamic period (jahiliyya) coupled with the assertions of Sayyid Qutb that the US is Islam's most challenging spiritual adversary have particularly impacted al-Qa'ida's extremist attitudes and violent actions against America and its friends and allies.¹¹⁶

Jihad organizations refer to the concept "jihad" as a religiously sanctioned military confrontation in a revolutionary sense.¹¹⁷ In his book, 'Mu'Alin Fi Al-Tariq', Sayyid Qutb gave to the concept 'Jihad' a new revolutionary meaning: 'Jihad' religious war against Muslim leaders who fail to fulfil the tenets of Islam and are therefore to be considered infidels. The idea of jihad in this sense was first espoused

¹¹⁶ Id.

¹¹⁷ Anneli Botha and Hussein Solomon. Terrorism in Africa. Centre for International Political studies(CIPS) at 5.

by the Islamic liberation party but was developed into a general concept and modus operandi by Muhammad Abd-Salam Farji, the Jihad organization's ideologist, who assassinated Sadat in November, 1981. In his book, 'Al-Farihda Al-Ghayba' Farji explains the revolutionary meaning of jihad.¹¹⁸ He accuses the religious sages of neglecting Jihad and sees it as the only way of reinstating Islam to its former glory, through: Using force against governments perceived as heretic, particularly because those in power neglected the duty of Islam in renewing the image of Islam; Establishing an Islamic state based on their interpretation of Islam; Giving higher priority to war against infidel Muslim leaders rather than war against foreign imperialism based on the assumption that imperialism stems from the infidel rulers themselves; Organizing underground conditions into a military framework; Making a special effort to penetrate security power bases – the army and security forces – in order to acquire weapons and useful means to fight the particular regimes.¹¹⁹

The afore-mentioned characteristics of the activities of Islamic extremism could be presented as: attempts to implement the Shari'a or Islamic Law and to turn countries into Islamic Republics.¹²⁰ These demands have been voiced in Nigeria, Senegal, Tanzania, Ethiopia and Somalia.¹²¹ Already adopted by Sudan and in part, by Nigeria; an attempt to destabilize the traditional orthodox establishment on all levels. This has been the case in Nigeria, Senegal, Tanzania and Kenya, the manipulation of racial and social ferments based on sense of discrimination and

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Id.

deprivation of Muslims. In Tanzania, Senegal, Kenya, Nigeria and Uganda social ferment led to violence and riots.¹²²

2.2.2. JUSTIFICATION OF TERRORISM.

It is becoming obvious that some people, who try to justify terrorism seems to discuss insurgency in the name of terrorism. This is in accordance with the fact that, the terminologies “terrorism” and “insurgency” are often misused by some scholars, forgetting the fact that the two have distinct meanings.

Igor Primoratz attempts to morally justify terrorism on two ethical theory of moral philosophy, namely; Consequentialism and Non-Consequentialism. Consequentialism advices to judge human action solely in terms of its consequences. When its consequences are good (on balance), an act or policy is right; when they are bad (on balance), it is wrong. Nothing is right or wrong, obligatory or prohibited, in itself, but only in the light of its consequences. The goodness or badness of consequences is understood in terms of how they affect those whom they affect.

Terrorism, too, is judged in terms of its consequences, and in these terms only.¹²³

A consequentialist justification of an act or policy of terrorism must show three things: that the aim sought is good enough to justify the harm inflicted; that the aim

¹²² Id.

¹²³ Igor Primoratz. Supra note 96.

will indeed be achieved by terrorism; and that it cannot be achieved in any other less costly way; example, liberation.¹²⁴

The objection of consequentialism is that terrorist acts against innocent victims are justified because of moral defense put up by terrorists. Terrorism cannot be strictly judged by its consequences because it is wrong intrinsically for the fact that it is a violation of basic rights and a gross injustice. Actions should be judged by their consequences. In bringing hope, popular recognition, and ultimately relief to the plight of a group, terrorism is aimed at laudable objectives and can achieve sufficient good to outweigh the evil of its methods. The end does not justify the means. The consequences of any action are by no means clear. The success of terrorism is not guaranteed; it is an immoral gamble to kill people in the hope of achieving something else. And even if the goal was realised, the price paid is literally incalculable.

Non-consequentialist theory is not of the opinion that consequences do not matter, but that, in addition, other considerations, such as justice and rights matters. Also that some acts or lines of action are right or wrong themselves, independently of their consequences. From their point of view, terrorism does appear as never, or hardly ever, morally justified.¹²⁵

¹²⁴ Id.

¹²⁵ Id.

Two central non-consequentialist objections to moral justification are: firstly, terrorism violates the fundamental moral principle of respect for persons. This principle of respect for persons can be interpreted in three ways; it enjoins respect for the core of individuality of each and every person, a concern for seeing things from the point of view of the other person, in terms of her character or “ground project.” This is opposite of the impersonal, objective, calculating way in which terrorists consider, and treat, their victims. On another interpretation, respect for persons demands recognition and respect for certain basic human rights of every human being, which safeguard a certain area of personal freedom. Persons are to be respected as holders of rights. Terrorists cannot show this type of respect.¹²⁶

On a third interpretation, showing respect for persons can be understood as not treating individuals as mere means.

The second major non-consequentialist objection to terrorism is basic moral distinction which is the distinction between responsibility and lack of it, or between guilt and innocence. Its import is that hostile treatment of another human being must be justified by the fact that the person is responsible for some wrongdoing whose gravity is proportionate to the gravity of the response. Those who are not responsible for such wrongdoing should not be subjected to hostile treatment, and in particular must not be subjected to violence.¹²⁷

¹²⁶ Id.

¹²⁷ Id.

All human beings are immune to start with; our right not to be attacked is a feature of normal human relationships.”¹²⁸ Yet, terrorists deliberately attack, kill, and otherwise severely harm innocent people; thus, the aim of intimidation and coercion they seek to achieve in this way, makes them terrorists. Terrorism is not wrong because it has bad consequences (on balance), and accordingly only insofar as it has such consequences. It is rather wrong in itself, because of what it is. Moreover, it is extremely morally wrong in itself.

Igor rejects the consequentialist view that terrorism is justified whenever its consequences are good (on balance), and gave two conditions under which terrorism may be justified. In certain extreme, terrorist acts may be defended on account of the moral disaster they prevent or stop. The two conditions are: (a) in the face of a moral disaster, understood in a special, highly restrictive sense as an imminent threat of extermination or ethnic cleansing of an entire people; and (b) when there are good reasons to believe that terrorism is indeed the only method available and likely to succeed in preventing the disaster, stopping it in its tracks, or reversing a wide range of its consequences.¹²⁹

Some scholars also argue that, it is legitimate and justified in extreme cases to resort to terrorism when peaceful and democratic methods have been exhausted. In cases of repression and suffering, with an implacably oppressive state and no obvious possibility of international relief, it is sometimes necessary to resort to violence to

¹²⁸ Michael Walzer. *Just and Unjust Wars: A Moral argument with historical illustrations*. 3rd Edition, 2000

¹²⁹ Igor Primoratz. *Supra* note 96.

defend one's people and pursue one's cause. Therefore, terrorism is justified by its success in achieving results when peaceful means have failed.

Some moral prohibitions are central to our moral experience, so deeply entrenched in it, that they "function in our moral thinking as a sort of touchstone of moral and intellectual health."¹³⁰ Accordingly, the suspension of such a prohibition would "bring about an upheaval in the moral perspective." Its rejection would lead to "an imbalance and incoherence in moral thought and practice."¹³¹ The prohibition of deliberately killing and maiming innocent people, against which the terrorist offends, is one such prohibition. Therefore, rejection of terrorism ought to be absolute. Igor concludes by saying that the correct position on the morality of terrorism, is that terrorism is almost absolutely wrong.¹³²

Another interesting view on justification of terrorism, apart from moral justification, is the issue of freedom fighters. It is argued that, terrorism can be justified on the ground of freedom fighters employing terrorism as a method of securing the liberation. Terrorist groups normally group themselves as National Liberation Movement Fighters against social, Economic, Religious, or Imperialist operation, or any combination of these.¹³³

¹³⁰ C.A.J. Coady & Michael O' Keefe. *Terrorism, Just War and Supreme Emergency*, in *Terrorism and Justice: Moral argument in a threatened world* . 2002.

¹³¹ Igor Primoratz. *Supra* note 96.

¹³² *Id.*

¹³³ Ariel Merari. *Supra* note 75.

Those who think that terrorists are freedom fighters may be right, but they fail to acknowledge the fact that some of these freedom fighters commit terrorist acts, thereby becoming terrorists. It is important to point out again that freedom fighters fight for freedom, but terrorists commit acts of terror. Obviously, freedom fighters and terrorists do exactly the same thing, 'fight'. How can one justify whether the cause is good or bad in order to deduce a terrorist act from that of freedom fighter.

According to Hafiz al-Asad, former president of Syria,

"a terrorist is a mercenary who is motivated by desire to kill, while those who struggle are freedom fighters who have a cause, in defense of which they exert all their spiritual and material efforts".¹³⁴

The Arab reality of terrorism and its ability to act under the guise of freedom fighter negates regional responsibility of terrorists acts, which are aimed at colonial, and interventionist forces. Sheik Muhammad Hussein Fadlallah said that "they do not see themselves as terrorists because they do not believe in terrorism, they see themselves as mujihadeen who fight a holy war for the people".¹³⁵ Some people support what they think is right and will not tag it as terrorist acts, just as one man's fight is another man's terrorist. The difference is that we might support some causes and not others because we see them as morally virtuous or vices.

The utilization of the term 'terrorism' is then a moral judgement; and if one party can successfully attach the label terrorist to its opponent, then it has indirectly

¹³⁴ Aaron M young sr and David H. Gray. Insurgency, Guerilla Warfare and Terrorism: Conflict and its application for the future. Globalsecuritystudies.com/young

¹³⁵ Id.

persuaded others to adopt its moral view point.¹³⁶ Terrorists do have a mind and they honestly believe they are pursuing their cause in a justified way. Therefore, they will do anything humanly possible to obtain their aim, even if it leads to civilians' death and widespread destruction.

Terrorism is not the monopoly of enemies of freedom. Indeed, many national liberation movements have made use of terrorism, whether occasionally or in a more systematic way; the Front de Liberation Nationale (FLN) in Algiers...¹³⁷ This is in line with the mainstream view in just war theory: one does not lose one's immunity against acts of war only by fighting in an unjust war, but rather by fighting in any war.¹³⁸

The killing of innocent people in the unjust war is also justified on the ground that they are not innocent because they are either directly or indirectly responsible for the appointment or approval of the 'target', whom the terrorists aims to fight. Igor gave some examples of such incidents as follows: Emile Henry was a French anarchist who lived in the nineteenth century, but engaged in terrorism of the twentieth-century type. He planted a bomb at the office of a mining company which, had it gone off, would probably have killed or maimed a number of people who were not party to the company's wrongdoings and merely happened to live in the same building. He also planted a bomb in a café that did go off, injuring twenty

¹³⁶ Id.

¹³⁷ Igor Primoratz. *Supra* note 96.

¹³⁸ Id.

people, one of whom later died of his injuries. When explaining his actions in court, he said:

“What about the innocent victims? ...The building where the Carmaux Company had its offices was inhabited only by bourgeois; hence there would be no innocent victims. The whole of the bourgeoisies lives by the exploitation of the unfortunate, and should expiate its crimes together.”¹³⁹
“Those good bourgeois who reap their dividends and live idly on the profits of the workers’ toil, they also must take their share in the reprisals. And not only they, but all those who are satisfied with the existing order, who applaud the acts of the government and so become its accomplices ... in other words, the daily clientele of terminus and the other great cafes.”¹⁴⁰

This goes in line with the view of responsibility and liability, justifying that there is nothing like innocent citizens in terrorist attacks. It says that all members of a social class—men and women, young and old, adults and children—are liable to be killed or maimed. Some are guilty of operating the system of exploitation, others of benefiting from this exploitation, and still others of supporting the system.¹⁴¹

Another example is provided by Osama bin Laden in an interview in the aftermath of the attacks on September 11, 2001, where he said: “The American people should remember that they pay taxes to their government and that they voted for their president. Their government makes weapons and provides them to Israel, which they use to kill Palestinian Muslims. Given that the American Congress is a committee that represents the people, the fact that it agrees with the actions of the

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Id.

American government proves that America in its entirety is responsible for the atrocities that it is committing against Muslims".¹⁴²

The conceptually and morally decisive trait of terrorism is that it is violence against the innocent; that is, violence against those who, on any credible understanding of responsibility and liability, are not responsible, or not responsible enough, for the real or alleged injustice or suffering the terrorist fights against. Given this understanding of responsibility and liability, the victims of terrorist violence will not be found innocent from the terrorist's own point of view.¹⁴³

Considering, this moral (religious) justification of terrorism, the God Almighty, or Allah (as popularly called by Muslims) will never command anybody to kill another in His name or in the name of worshiping Him. One of His ten commandments is that "Thou shall not kill"¹⁴⁴ It is not justifiable in all ramifications that men should be fighting for God by killing innocent people. God is so magnificent for mere mortals to fight for Him. Since He is all knowing and all powerful, He knows how best to fight His battles.

Some scholars approach the question of justification of terrorism through 'Just War theory. The just war theory inquires into (i) the possible moral grounds for going to

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ See Good News Bible. Deuteronomy chapter 5, verse 17. See also from verses 6-22 for God's Ten Commandments. Also, King James Version Bible (KJV); Exodus 20 verse 13, God says, "Thou shall not kill.

war which is *Jus Ad Bellum* and (ii) the manner in which a just war must be carried out or fought, which is *Jus In Bello*.

Terrorism is almost universally condemned, whereas violence by states, even when war has not been declared, is seen as legitimate, if not always justified.¹⁴⁵ For rules in *jus ad bellum* to be applicable in a just war, the following conditions must be present, (1) Just cause, (2) Right intention, (3) Competent authority Public declaration, (4) Last resort, (5) proportionality and (6) probability of success.

A state is deemed to have a just cause when it defends itself against aggression.¹⁴⁶

The just war theory holds that the state has a right to defend itself against the aggression of other states.¹⁴⁷ The states's moral status is a derivative and not foundational. It is derivative of the individuals within it. The right that is usually cited as being the ground for the state's right to defend itself is the right of self determination.¹⁴⁸

Under some circumstances, some groups enjoy a right to self determination. The circumstances may include and, or limited to cases of injustice towards the group.¹⁴⁹ The right may be enjoyed by nations only or by any group within the territory. It may be that the right of self determination does not automatically grant a right to political independence, but if some form of self determination cannot be

¹⁴⁵ Andrew Valls. Supra note 101.

¹⁴⁶ Aggression, according to Andrew Valls, means, the violation of or the imminent threat of the violation of its territorial integrity or political independence.

¹⁴⁷ Andrew Valls. Supra note 101.

¹⁴⁸ Id.

¹⁴⁹ Id.

realized within an existing state, then it can, under these circumstances grant such a right.¹⁵⁰ Groups other than those constituted by the state in which they live can have a just cause to defend their right to self-determination.¹⁵¹

The UN definition of 'just cause' recognizes the rights of peoples as well as states. In Article 7 of the definition of aggression, the UN refers to "the right of self determination, freedom and independence", as derived from the Charter of peoples being forcibly deprived of that right. So, both morally and legally, peoples or nations enjoy right to self determination and when that right is frustrated, they have the same just cause that states have when the self determination of their citizens is threatened.¹⁵²

Normally, under the just war theory, A state may go to war only if the decision has been made by the appropriate authorities, according to the proper process, and made public, notably to its own citizens and to the enemy state(s).¹⁵³

It therefore, follows that once it is acknowledged that stateless peoples may have right to self determination, it would render that right otiose to deny that the right could be defended and vindicated by some non-state entity.¹⁵⁴

¹⁵⁰ Id.

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ Tomis Kapitan. Can terrorism be justified? 2007.

¹⁵⁴ Andrew Valls. Supra note 101.

A state must intend to fight the war only for the sake of its own just cause and can only resort to war only if it has exhausted all plausible, peaceful alternatives to resolving the conflict in question.¹⁵⁵ The condition of probability of success under the just war theory must needs to be satisfied. If one judges that the end has little chance of being achieved through violence, the criterion requires that the violence not be commenced.¹⁵⁶ A state may not resort to war if it can reasonably predict that doing so will have no measurable impact in achieving the goal of the just cause as required by just war theory's condition of proportionality.¹⁵⁷

Applying these conditions of *jus ad bellum* in the present situations, terrorism can be said to meet some of the conditions, such as just cause, in a situation of radical self- defense. It may also satisfy the conditions of proportionality and last resort given that the aggression is unjustified and that standard measures of self-defense have been tried and failed.¹⁵⁸

But what about the other conditions of *jus ad bellum*? Andrew Valls is of the opinion that if modern warfare is sometimes justified, terrorism, in which the violence is usually on a far smaller scale, can be justified as well.¹⁵⁹

Under the *jus in bello*, the following conditions are applicable: (1) Proportionality, (2) Discrimination, (3) Legitimate means and (4) Benevolent Quarantine for POWs.

¹⁵⁵ Tomis Kapitan. *Supra* note 109.

¹⁵⁶ Andrew Valls. *Supra* note 101.

¹⁵⁷ Tomis Kapitan. *Supra* note 109.

¹⁵⁸ *Id.*

¹⁵⁹ Andrew Valls. *Supra* note 101.

Unlike the proportionality condition under the jus ad bellum discussed supra, this proportionality requirement is applied to particular acts within the war. It forbids conducting the war in such a way that it involves inordinate costs, costs that are disproportionate to the gains.¹⁶⁰

How will this condition be satisfied by terrorist in order to defend their act? Andrew Valls argues that, terrorist acts cannot satisfy this condition. Given that the scale of deaths and destruction usually involved in terrorist acts pales in comparison with that involved in wars commonly thought to be just, it would seem that terrorism would satisfy this requirement more easily than war (assuming the goods to be achieved are not dissimilar). So if the means of terrorism is what places it beyond the moral pale for many people, it is probably not because of its disproportionality.¹⁶¹

The principle of discrimination holds that Non-combatants should be immune from attack. However, there is some disagreement as to the moral basis of this distinction, which creates disagreement as to where exactly this line should be drawn. While usually based on the notion of moral innocence, non-combatant status can be said to have little to do with innocence, for often combatants are conscripts, while those truly responsible for aggression are usually practically, not liable to attack.¹⁶²

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id.

The legitimate means condition of *jus in bello* requires that there should be no use of evil weapons methods, such as rape, genocide and so on. Also prisoners of war must be treated humanely. While others argue that, there are situations in which it is morally justified, if not legally. Having laws against use of violence is of course eminently sensible, but laws can only be deemed legitimate if they serve to protect everybody, not simply the government itself or a favoured majority. Rebels who use illegal violence against the police or military in a dictatorship might be morally and politically justified as a last resort.

Andrew Valls concludes that if war can be justified, then terrorism can be as well.¹⁶³ While terrorism often fails to be morally justified, this failure is contingent, not necessary. Terrorism cannot be defined into a moral corner where we do not have to worry any more about justification.¹⁶⁴

Another justification of terrorism is that it attracts government's attention. Some argue that terrorism is justified on the ground that it is the best way to attract the government's attention if they want to achieve their aim, when the government ignore them. Though, it may be admitted that, terrorism can raise the profile of a neglected cause; example, the hi-jackings of the 1970s and 1980s brought publicity to the Palestinian cause, helping to bring it to the attention of the world.

¹⁶³ Andrew Valls. *Supra* note 101.

¹⁶⁴ *Id.*

But, whatever approach these scholars had tried to justify terrorism, they always arrive at the conclusion that it can never be justified, after much analysis. How can terrorism be justified when it deprives people of their basic fundamental human rights? No one has a right, legally, morally or otherwise to kill and, or destroy another's property.

2.3. TERRORISM AND VIOLATION OF HUMAN RIGHTS.

Whether the actors are characterized as terrorists or freedom fighters, regardless of justification or moral equivalence, the acts themselves, directly or indirectly, results in attacks on human rights. Frequently, the counter-terrorism response is equally damaging.¹⁶⁵

Absence of universal definition of terrorism has gravely affected the effectiveness of countering terrorism both in international law and domestic law and at the same time maintaining and abiding by the human rights obligations.

International criminal law often prohibits conduct which infringes values protected by human rights law, without proclaiming those values directly. Numerous resolutions of General Assembly since 1970's and the UN Commission on Human Rights since the 1990's have asserted that terrorism threatens or destroys fundamental human rights and freedoms.¹⁶⁶

¹⁶⁵ Mark D. Kielsgard. A Human Rights Approach to Counter-Terrorism. 36 CAWILJ 249

¹⁶⁶ Ben Saul. Three reasons for defining and criminalizing terrorism at 3.

The ultimate goal of law is to maintain justice by facilitating human dignity and worth, while defining substantive aspects of rights and duties of individuals and nations in the international legal context.¹⁶⁷

One of the AU's primary concerns for combating terrorism is that terrorism violates basic human rights, particularly freedom of expression, freedom from fear, the right to life, right to development, the right to practice religion and the right to security. Terrorism also stands on the way of the aspirations of African peoples, particularly those envisaged in the Constitutive Act of the African Union and in other continental common frameworks. In adopting the 1999 Algiers Convention, African Leaders were convinced that terrorism constitutes a serious violation of human rights, such as the right to physical integrity, life, freedom and security.¹⁶⁸

The members of the Security Council, while commenting on the terrorist attack in Somalia, reminded States that they must ensure strict adherence to their obligations under international law, in particular international human rights, refugee and humanitarian law.¹⁶⁹

In as much as human rights and humanitarian laws are also necessary in terrorism cases, regardless, priority should be given to social stability, than securing an

¹⁶⁷ Upendra D. Acharya. *Supra* note 56.

¹⁶⁸ See African Union, the Peace Security Agenda. <http://www.africa-union.org/root/au/AUC/Departments/PSC/counter...>

¹⁶⁹ Security Council; *Supra* note 98.

individual's right at a very critical moment, especially when the individual is the perpetrator of the terrorist act.

Human Right Law (HRL) is applicable at all times, including during armed conflicts, while International Humanitarian Law (IHL) is applicable only during armed conflict. The two bodies of law, while complementary in some respects, often conflict with each other.¹⁷⁰ IHL developed to address war between states-international armed conflicts. However, by Common Article 3 of the four Geneva Conventions, basic protections have been extended to situations of non-international-armed conflict, that is, where one of the parties is not a state. These protections were developed under Additional Protocol II of 1977.¹⁷¹

Through the United Nations, many resolutions have expressed the international community's opinion that terrorism is repugnant because it (1) seriously undermines human rights; (2) jeopardizes political order and peaceful deliberative politics and (3) can threaten international peace and security.¹⁷² Kalliopi Koufa, the Special Rapporteur for the U.N sub-Commission on the promotion and protection of Human Rights (Special Rapporteur) has stated, "There is probably not a single human right exempt from the impact of terrorism." Not only do terrorist groups deprive individuals of their human rights, they drive states to take counter-terrorism

¹⁷⁰ Natasha Balendra. Defining Armed Conflict. 29 CDZLR 2461 at 2.

¹⁷¹ See International Council on Human Rights. Talking about terrorism risks and choices for human rights organisations, at 30. The report can be found at www.ichrp.org/files/reports/35/129_report_en.pdf

¹⁷² Ben Saul. *Supra* note 65.

measures, which also serve to denigrate human rights. Thus, the pervasive impact of terrorism to human rights can be seen both directly and indirectly.¹⁷³

The direct impact of terrorism is clearly illustrated by its immediate consequences. These consequences usually fall into three categories of violations: the right to “life, liberty, and dignity of human individual; the right to a democratic society; and ... rights relating to social peace and public order.”¹⁷⁴

Terrorist acts include, but not limited to, murder, kidnapping, and seriously injuring innocent parties, which all deny victims their human rights to life, liberty, and dignity. Terrorists seek to impose their will not only on states but also upon the individuals in those states.¹⁷⁵ The unwillingness of terrorists to submit to the democratic process and their attempts to thwart or disrupt that process are attempts to overthrow the democratic rights of the individuals in that state. The actions of terrorists not only deprive individuals of their rights to life, liberty, dignity, and democracy, but also foster an atmosphere of fear and dread that devastate social peace and public order. In this atmosphere, countermeasures and other precautions, which are perceived as safeguards, impede the essential functions of the social order and lead to inefficiency, lower standards of living, mutual distrust, and a fearful, brutish lifestyle.¹⁷⁶

¹⁷³ Mark D. Kielsingard. *Supra* note 166.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

The indirect impact of terrorism stems from overly intrusive, reactionary, counter-terrorist measures. Terrorist acts frequently provoke states into overreacting by implementing serious breaches of human rights and freedoms.¹⁷⁷ Moreover, it should be remembered that an equitable maxim states that 'whoever comes into equity must come with clean hands'; therefore terrorists have no equitable justification of claiming breach of their fundamental right in combating their acts.

Within the military paradigm, provisions of military aids to nations with a common goal of eradicating terrorism is a valid practice for developing states preventive capacity, but not if the aid is to be used to perpetrate greater human rights abuses and stimulate greater resentment.¹⁷⁸

2.3.1. INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS.

The fight against terrorism is no longer a domestic criminal matter, but a global human rights issue.¹⁷⁹ In 1993, the Vienna Declaration served a junction between international counter-terrorist law and human rights law. Paragraph 17 of the Vienna Declaration explicitly linked terrorism with human rights and reflected emerging acceptance of greater international scrutiny and state responsibility.¹⁸⁰

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ Id.

¹⁸⁰ Id.

In addition to dramatic advances in human rights law, this emerging worldview recognizes terrorism as an international scourge against human rights and allows for a global response that imposes greater scrutiny and state responsibility. Unfortunately, the domestic response to terrorism has been largely based on the law enforcement and military models, frequently at the cost of human rights.¹⁸¹

In contrast, Article 27 of the Convention of the Islamic Resistance Movement, Hamas states, “We will become its soldiers and fuel for its fire that will burn the enemies.”¹⁸² Therein lies the dichotomy; one side possesses unprecedented power and wealth that it refuses to relinquish, whereas the other possesses the desperation of peoples with nothing left to lose, and where compromise equals death. In this postmodern lion’s den, it is understandable how consensus has eluded the United Nations.¹⁸³

The UN counter-terrorist activity resulted from the remarkable world conference on human rights of Vienna Declaration of 1993. Paragraph 17 of the Vienna Declaration explicitly asserted the link between terrorism and human rights for the first time by affirming that terrorist acts “aim at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of states and destabilizing legitimately constituted Governments.”¹⁸⁴ This assertion mandates that terrorism is a political and international issue and no longer merely a

¹⁸¹ Id.

¹⁸² Hamas, Covenant of the Islamic Resistance Movement, Art. 27, 1988.

¹⁸³ Mark D. Kielsgard. *Supra* note 166.

¹⁸⁴ Universal Declaration of Human Rights, General Assembly Resolution 217A at 71.

domestic criminal matter. Some of the conventions and resolutions ratified during this period reflect a more sophisticated approach to terrorism, such as the Declaration on Measures to Eliminate International Terrorism and the International Convention for the Suppression of the Financing of Terrorism.¹⁸⁵

Notable development during this period was the proliferation of conventions adopted by the regional organizations in developing area, such as the League of Arab States and the OAU, now known as the African Union (AU) . The Constitutive Act of the African Union (AU) is one of the few treaties to specifically address the act of assassination. Article 4 recognizes a number of principles, including provision for “respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.” The impact of the Constitutive Act of the AU is limited, however, by the relatively small number of AU member states, and the fact that it is currently the only regional treaty that specifically addresses acts of assassination.¹⁸⁶

But discourse on counter terrorism and human rights have become more interesting since the establishment of Counter Terrorism Committee (CTC) in Security Council resolution 1373, 2001. The Security Council Resolution 1456, 2003 and later resolutions, stated that “States must ensure that any measure taken to combat terrorism must comply with all their obligations under International Law and should

¹⁸⁵ Mark D. Kielsgard. *Supra* note 166.

¹⁸⁶ Mark V. Vlasic. 43 *GEOJIL* 259 at 9.

adopt such measures in accordance with International Law, particularly International Human Rights, Refugee and Humanitarian Law”.

After the 9/11 attacks, the Security Council passed Resolutions 1368 and 1373 and the General Assembly adopted Resolution A/56/1. Resolutions 1368 and 1373 designated acts of international terrorism threats to international peace and security as defined in Chapter VII of the U.N. Charter. Articles 41 and 42 of that Charter authorize the Security Council to call on states to sever diplomatic ties, to impose economic sanctions, and to intervene militarily in response to threats to the peace. In addition, Resolution 1368 stresses the responsibility of states that host terrorist organizations, stating,

“Those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable ...”

Resolution 1373, 2001’s Preamble, reaffirms the need to combat by all means, “in accordance with the Charter of UN” threats and International peace and security caused by terrorist acts.

Security Council Resolution 1963, 2010, re-emphasizes that counter-terrorism measures are more effective when there is respect for human rights. The resolution also emphasizes that respect for rule of law is necessary for effective combating of terrorism.¹⁸⁷ While categorically condemning terrorism and recognizing the duty of States to protect those living within their jurisdictions from terrorism, the UN has

¹⁸⁷Protecting human rights while countering terrorism.www.in.org/en/sc/ctc/rights.html

placed a priority on the question of protecting human rights in the context of counter-terrorism measures.¹⁸⁸

Any measure taken to counter terrorism must be equal to our democratic value. In particular, laws designed to protect people from the threat of terrorism and enforcement of these laws must be compatible with people's right and freedom.¹⁸⁹

It is essential to note that, although, immediately after September 11, 2001, emergency laws were passed which allowed for the indefinite detention of foreign nationals who were suspected of being terrorists without arraignment or conviction of the crime, but following the Counter review, most of such laws had been scraped.¹⁹⁰

The human rights activists opines that most state governments hide under the cloak of combating terrorism and infringe on people's fundamental human rights, more especially for their political gains. Usually, members of the opposing political party are often denied their fundamental rights to freedom of speech and freedom of movement. This scenario can be clearly seen in the issue of Ethiopian journalists' trials that are subject of discussion for the human right activists.

Terrorist acts constitute grave violations of human rights. Our responses to terrorism, as well as our efforts to thwart it and prevent it should uphold the human

¹⁸⁸ UN action to counter terrorism. www.un.org/terrorism-hr.shtml.

¹⁸⁹ Countering terrorism. www.liberty-human-rights.org.uk/human-rights/terrorism/index.php.

¹⁹⁰ Id.

rights that terrorists aim to destroy. Human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism; not privileges to be sacrificed at a time of tension.

Similarly, the U.N. High Commissioner for Human Rights, Louise Arbour, opined that in the long run, “a commitment to uphold respect for human rights and rule of law will be one of the keys to success in countering terrorism, not an impediment blocking our way.”¹⁹¹ These observations suggest that rather than fall victim to terrorism, human rights should be used affirmatively to conquer it.¹⁹²

In 2004, the High-level panel proffered “a new vision of collective security for the 21st century” in a report that included 101 recommendations for revitalizing the United Nations in order to make it capable of addressing modern threats and how to combat it without infringing on human’s right. The key recommendations were contained in Secretary General’s keynote speech at the International Summit on Democracy, Terrorism, and Security on March 10, 2005, in his article of five strategies, which he called the “five D’s.”

The five D’s are shared into 3 models. The first model, military intervention in response to terrorist acts or imminent threat, is grounded in Article 51 of the Charter of the United Nations. Law enforcement, the second model, is grounded in international criminal law and extant core anti-terrorism conventions. The third

¹⁹¹ Mark D. Kielsingard. *Supra* note 166.

¹⁹² *Id.*

model, human rights, consists primarily of preventive measures and is grounded in applicable international and humanitarian law, as well as human rights conventions and jurisprudence. It addresses the causes of terrorism in order to “dissuade the disaffected from choosing terrorist tactics” and “defend human rights in the struggle against the scourge of terror.” The High level Panel specifies numerous social and political justice issues, past grievances, and poverty issues that must be addressed in order to foster a new sense of tolerance in communities currently given to extremism.¹⁹³

A human rights approach consists of a two-part initiative: stand-alone and integrated. The first initiative, a stand-alone approach, is designed to relieve the underlying suffering that foster terrorism. The second initiative, an integrated approach, calls for establishing human rights norms as an integral component in the other two models. To be effective, the law enforcement and military models must place primacy on human rights norms or the reaction to these models will multiply resistance.

The 3 models of the five D’s depend on each other for its effectiveness. Each model cannot stand alone on its own. Each model is less effective by itself; alone, the military model lacks prevention and moral certainty, the law enforcement model lacks strength to act globally against state-sponsored terrorism, and the human rights model lacks enforcement capability.¹⁹⁴ The human rights model implied by

¹⁹³ Id.

¹⁹⁴ Id.

the High-level Panel's recommendation increase the effectiveness of the other models and represents a break from traditional counter-terrorism policy. It does so by ensuring that both law enforcement and military actions are performed in accordance with accepted human rights norms, thus limiting the negative consequences.¹⁹⁵ Conscientious and compassionate performance of duty by law enforcement and military personnel helps to avoid the conditions that promote terrorist recruitment. Because the integrated human rights initiative not only engenders more widespread human rights practices, but also serves to defuse anger and prevent the resort to extremism, it is integral to the struggle against terrorism.¹⁹⁶

Kofi Annan, Secretary General, said that, "While we certainly need vigilance to prevent acts of terrorism,... it will be self-defeating if we sacrifice other key priorities, such as, human rights in the process."¹⁹⁷

The United Nations has recognized that the solution to terrorism is more complex than an artificial prohibition and the use of a military or law enforcement approach. The High-level Panel's observation and recommendations make this recognition apparent. Terrorism is a human rights issue, and the model for a solution should be grounded in a human rights approach using human rights techniques, sensitivities, and jurisprudence.¹⁹⁸ Terrorism has a tremendous effect on human rights, both directly and indirectly and thus, the moral, if not legal, jurisdiction of the human

¹⁹⁵ Id.

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ Id.

rights mechanism is manifest. Without a counter-terrorism solution grounded in human rights, the cure will result in greater deprivation of civil liberties and in a Pandora's Box of atrocities. Developments in the "war on terror" support this prediction.¹⁹⁹

Additionally, a human rights approach is consistent with the emerging understanding that massive human rights abuses may justify piercing national boundaries. Increased globalization creates a greater ripple effect with respect to human rights violations.²⁰⁰ Universal adherence to human rights norms and two generations of human rights efforts have resulted in increased international scrutiny and allow for jurisdiction over egregious human rights deprivations. The recent convergence of human rights instruments with counter-terrorism instruments further cements the link between human rights and terrorism and allows for jurisdiction over state sponsors of terrorism and the activities of non-state actors. Thus, there is a legal, intellectual, moral, and historical grounding for human rights approach to counter-terrorism.²⁰¹

One of the most sustained critiques of the practice of human rights groups was made in Algeria during the 1990s, where rights and advocates were felt to have failed to respond adequately to massive abuses by armed group.²⁰² Human rights organisations are more concerned with the behaviour of the authorities than they are

¹⁹⁹ Id.

²⁰⁰ Id.

²⁰¹ Id.

²⁰² International Council on Human Rights. *Supra* note 172 at 39.

with the crimes of the terrorists, and they fail to acknowledge that states have legitimate security concerns.²⁰³ A subordinate criticism is that human rights organisations are obsessed by government and by government abuses of power. This blinds them to the fact that states have a clear duty to protect the security of those living within their jurisdiction and also play an essential role in protecting rights and freedoms.²⁰⁴

When democracies fight terrorism, they are defending the proposition that their political life should be free of violence. But defeating terror requires violence. It may also require coercion, secrecy, deception, even violation of rights. How can democracies resort to these means without destroying the values for which they stand?...²⁰⁵ But thinking about lesser evils is unavoidable. Sticking too firmly to the rule of law simply allows terrorists too much leeway to exploit our freedoms. Abandoning the rule of law altogether betrays our most valued institutions.²⁰⁶

Resolutions 1373 and 1624 both implicitly give fighting terrorism precedence over protecting human rights. Resolutions 1373 contains no language recalling states' human rights obligations and Sir Jeremy Green-stock, the first chairman of the Counter-Terrorism Committee created to monitor compliance with the resolution, initially made statements to the effect that making sure states continued to meet

²⁰³ Id. at 40.

²⁰⁴ Id.

²⁰⁵ Id. at 42

²⁰⁶ Id.

their obligations under international human rights conventions while implementing the resolution was beyond the Committee's mandate.²⁰⁷ The UN Security Council has recently, mandated that Boko Haram should be held accountable for what may amount to crimes against humanity and hinted at sanctions against the Islamist extremists. The statement approved by all 15 council members was the strongest by the UN's most powerful body on terrorist attacks in Nigeria. The above statement obviously shows that, the Boko Haram's act in Nigeria is also against the infringement of human rights. In such a situation for instance, why would combating Boko Haram be in adherence to human right while, they already violated same.²⁰⁸

From the above analyses, it is safer to combat terrorism by all means, rather than adhere strictly to the human rights law. Many of the terrorist movements that have recently emerged are influenced by ideological assumptions that differ markedly from those governing the conduct of states, or those that inspire human rights law.²⁰⁹ Human rights groups have experience of trying to influence the behaviour of non-state armed groups unlike most of these terrorist groups that are not aware of human rights. Their organisational structure is less compatible with models of human rights accountability.²¹⁰ If there is seriously and genuinely concern about human rights, civil liberties and fundamental freedoms, priority is to be given to the

²⁰⁷ Naomi Norberg. *Terrorism and International Criminal Justice: Dim Prospect for a Future Together*. 8 SANCJIL 11 at 11

²⁰⁸ The new Zealand herald. UN calls for terrorists in Nigeria to face justice.

http://www.nzherald.co.nz/world/news/article.cfm?c_id

²⁰⁹ International Council on Human Rights. *Supra* note 172 at 42.

²¹⁰ *Id.* At 43.

eradication of the root causes of terrorism.²¹¹ “Terrorists” themselves are in breach of the said human rights when they deprive innocent people of their fundamental human rights. Strict application of human rights law will not be effective in combating terrorism. Equal or higher force measures should be applicable in combating terrorists’ attacks. Therefore, human rights should not be prioritized over combating terrorism. Securing social stability of a State should always be paramount over securing an individual’s fundamental human right when they do not even equitably deserve it.

2.4. THE IMPACT OF WAR ON TERROR ON AFRICA STATES AND THEIR SECURITY.

Africa has experienced various forms of terrorist acts. The 1998 embassy bombings in Nairobi, Kenya and Dar-es-Salaam, Tanzania, which killed over 240 Africans and several thousands of others injured, remains the major act of terrorism in the continent.²¹² And it is not as if the continent had not been doing anything to combat terrorism.

The increasing spread of extremism in Africa is the result of the socio-political ferment born out of poor socio- economic conditions, which has characterized African countries ever since independence. African countries are confronted by corruption, worsening these conditions are their government’s inability to deal with

²¹¹ Dr. Hans Koechler. The war on terror, its impact on the sovereignty of states and its implications for human rights and civil liberties. 2002 at 12.

²¹² Preventing and combating terrorism in Africa., <http://www.africa-union.org/root/au/AUC/Departments/PSC/Counte...>

extremism. These conditions made African regimes unable to offer solutions to every-day socio-economic conditions, again contributing to instability.²¹³

Terrorism has legal implications and serious impact on African countries. It has complicated their relations with neighbouring countries, forcing upon the former an agenda that may not always be compatible with regional peace and stability.²¹⁴

Terrorists have damaged infrastructure. Not only do they create anxiety in a targeted audience, but also disrupt the economy. Terrorists hope that economic costs when combined with human losses from economic-damaging attacks will pressure besieged governments to concede to their political demands.²¹⁵ Evaluating the cost of terrorism in terms of loss to human life; international acts of terrorism, Africa recorded 5932 casualties out of 194 acts of terrorism between 1995 to 2001, making Africa the second continent after Asia, with the most casualties. Direct costs, in terms of devastation to infrastructure and indirect costs, through the withdrawal of investors and tourism, one of Africa's biggest industries cannot be calculated.²¹⁶

Terrorism negatively influences a targeted country's economic growth through a number of channels: First, foreign investors will not be at peace investing in a terrorist country, they will rather divert their investments to a safer country. There

²¹³ Anneli Botha and Hussein Solomon. *Supra* note 117 at 16.

²¹⁴ Dr. Hans Koechler. *Supra* note 212 at 7.

²¹⁵ Gaibulloev, Khusrav and Sandler, Todd. The Adverse Effect of Transnational and Domestic Terrorism on Growth in Africa. 2010 at 1. http://research.create.usc.edu/published_papers/152

²¹⁶ Anneli Botha and Hussein Solomon. *Supra* note 117 at 4.

are grounds for anticipating that transnational terrorism will be more detrimental than domestic terrorism on growth. When a terrorist event kills a foreigner or destroys property, there is a greater chance that this will negatively impact foreign assistance and, or foreign direct investment, which then reduces growth. Terrorists deliberately target assets to affect the country's economy adversely.²¹⁷

Second, augmented security outlays by a targeted government may crowd out productive public and private investment. Third, terrorist attacks may dampen growth by destroying or degrading social overhead capital that facilitates commerce and daily routines. Disruption to transportation, communication, and electricity infrastructure may have short- term dire economic consequences.²¹⁸

Consequently, Terrorist attacks in Africa have the potential to disrupt crucial supply lines to the industrial world, especially Nigeria, in West Africa that has rich crude oil growth.²¹⁹

Summarily, terrorism has led to large-scale political and social destabilization in geo-strategically sensitive regions; the impossibility of sustainable social and economic development; new divisions of society and political systems-internally and externally along religious, racial, ethnic lines; economic deprivation of the masses in the affected regions; marginalization of existing international structures.

²¹⁷ Gaibulloev, Khusrav and Sandler, Todd. *Supra* note 215 at 1.

²¹⁸ *Id.*

²¹⁹ *Id.* at 4.

It also has serious impact on the sovereignty of states and citizens alike, on national as well as on individual rights.²²⁰

Both terrorism and internal and external conflicts adversely affect income per capita growth in Africa.²²¹

2.4.1. SOME TERRORIST INCIDENTS IN AFRICAN COUNTRIES UNDER REVIEW.

Africa is now a known continent for war on terrorism, since after 9/11. Sudan and Somalia are perceived as breeding ground for terrorists.²²² But before 9/11, despite the bombing of US Embassy in Nairobi, Kenya on August, 1998 that killed two hundred and thirteen (213) people, twelve (12) out of the 213 people were US citizens, as well as bombing of the same US Embassy in Dar Es Salaam Tanzania that killed 11 people²²³, terrorism was not seen as a major threat to African's security.

In June, 1995, some members of an Islamic Brotherhood allegedly originating in Egypt tried to assassinate President Hosni Mubarak in Addis Ababa, Ethiopia. The weapons used in the assassination attempt were flown into Ethiopia by Sudan Airways. According to a UN report, the passports used by the terrorists were also

²²⁰ Dr. Hans Koechler. *Supra* note 212 at 10.

²²¹ Gaibulloev, Khusrav and Sandler, Todd. *Supra* note 215 at 17.

²²² Prof. Knife Abraham., *The challenge of terrorism to Africa and perspectives of African States*. 2005 at

2.
²²³ *Id.*, at 4.

prepared in Khartoum.²²⁴ Ethiopian Security forces killed five (5) of the failed assassins and captured three. Sudan refused to hand over the remaining terrorists when Ethiopia tried to secure their extradition per bilateral diplomatic channels in order to bring them to justice.²²⁵

Ethiopia took the case to UN Security Council. The UN Security Council passed three resolutions demanding the extradition of the three suspects to Ethiopia, yet, they did not comply. In April 1996, the UN Security Council imposed series of sanctions on the government of the Sudan.²²⁶ The sanction was lifted in September 2001.

Today, Africa rates as one of the major significant area in war of terrorism. Horn of Africa States and some sub-Sahel States of Africa are the major concerns of these terrorist activities.

Three main notorious terrorist groups in operation in Africa are the different Islamic sects known as Al-Qaeda in the Islamic Meghreb, Boko-Haram and Al-Shabaab. There are also other Islamic extremists that claim affiliation to either of these groups. Each asserts its justification for terrorizing the states in the name of 'religion'. The havocs that had been caused and are still causing by these groups in different countries of Africa cannot be undermined. This Islamic resurgence is, in

²²⁴ Id.

²²⁵ Id.

²²⁶ Id.

essence, a response to the confusion and anxiety of modernity and can be described as a socio-political resistance movement based on religious concepts.²²⁷

2.4.1.1. ETHIOPIA:

The Islamic extremism in Ethiopia is mainly found in the Ogaden area in Eastern Ethiopia, among the groups of Somali and Oromo. Tribes resorted to terrorism and harassment against government targets and against civilians in the Ogaden area, preventing the orderly implementation of government in the area. Most radical Islamic activities in Ethiopia are being carried out by the following three organizations: Al-Itihad Al-Islami, whose origin and major infrastructure are in Somalia; The Islamic Liberation Front of Oromo (ILFO), its primary objective is self-determination for the Oromo and for transformation of Oromia to an Islamic State; and the Ogaden National Liberation Front (ONLF), which is considered to be a relatively moderate Islamic movement. The latter, however, formed a militant faction that is mainly active in Gode, Ogaden.²²⁸

In October 2000 the Ogaden National Liberation Front (ONLF) formally announced the reunification of the Islamic Liberation Front of Oromo (ILFO), the Oromo Liberation Council (OLC), the Oromo Liberation Front (OLF), the Oromo People's Liberation Organization (OPLO) and the United Oromo People's

²²⁷ Anneli Botha and Hussein Solomon. *Supra* note 117.

²²⁸ *Id.* at 14.

Liberation Front (UOPLF), and the formation of the joint United Liberation Front of Oromiya (ULFO).²²⁹

In 2007, five (5) Europeans and thirteen (13) Ethiopians were kidnapped in Afar. Ethiopia accused Eritrea of masterminding that kidnapping, but Eritrea blamed an Ethiopian rebel group. All of those hostages were released, though some of the Ethiopians were held more than a month.²³⁰

There had been burning of more than fifty-nine (59) churches and displacement of three thousand (3,000) Christians in Ethiopia. On March 2, 2011, the Muslim youths attacked the community around Asendabo, near the capital of Ethiopia, Addis Ababa and killed one (1) Christian. The prime minister blamed the incidence on Muslim. He said that “elements of Kaiwarja sects and other extremists” had been preaching religious intolerance.²³¹

In January 2012, gunmen attacked a group of European Tourists in Addis Ababa, Ethiopia, killing five (5), wounding two (2) and kidnapping two (2). Two (2) Germans, two Hungarian and an Australian are the five (5) tourists that were shot. The Ethiopian government called the attack “an act of open terrorism” and said the

²²⁹ Id.

²³⁰ Ethiopia terrorist attack leaves 5 tourists dead. www.CBSNews.com 2014.

²³¹ Aaron Maasho., Meles Zenawi blames Muslim sect over church attacks. March 13, 2011. www.ethiopiaforum.com/melesZenawi-blames-Muslim-sect-over-church-attacks

gunmen came from neighboring country, Eritrea. Eritrea government refuted this claim by saying that it was Ethiopians' internal problem.²³²

In mid October 2013, suspected Al-shabaab members in Addis Ababa tried to carry out terror attack against Ethiopian fans who were gathered to watch World Cup qualifier against Nigeria. However, their bomb blew up while they were making it killing two (2) of them. The victims were Somalia citizens. Police then took three (3) suspects into the custody.²³³

There is also the presence of Al-Ittihad al Islamiya (AIAI) terrorist organization in Ethiopia. In the mid 1990's, this group initiated several attacks against Ethiopian Security forces in Ethiopia and Ethiopian government fought them back.²³⁴

2.4.1.2. SOMALIA:

Somalia's Muslim population is predominantly moderate, but since the breakdown of state authority with the fall of Mohammed Siad Barre's regime in January, 1991 and the political void that it created, an opportunity has been presented to Islamic extremists to step up their activities. Radical Islamic organizations, which had previously operated in a limited and clandestine manner, began to function in the open. These organizations favour the spread of Islam, the conversion of Somalia into an Islamic Republic and support a stricter observance of Islamic law known as

²³² Ethiopia terrorist attack leaves 5 tourists dead., January 18, 2012. www.cbsnews.com/8301-202_162-57361145/Ethiopia-terrorist-attack-leaves-5-tourists-dead

²³³ Tesfa-Alem Tekle Ethiopia accuses Eritrea, Al Shabaab of plotting attack, the Sudan Tribune, 2013

²³⁴ Terrorist organization profile: al-Ihihaad, al-Islami; by National Consortium for the study of terrorism and responses to terrorism.
www.start.umd.edu/start/data_collections/tops/terrorist_organization_profile.asp?id=4329 terrorism

‘Shari’a’ as a means of instilling some form of law and order.²³⁵ Therefore, the origin of terrorism in Somalia started from political instability in the country, which gave birth to lack of recognised governance and the emergence of different governments in the same country.²³⁶

Somalia has played specialized roles in the activities of Islamic terrorism.²³⁷ It has primarily served as a transit point for the movement of people and materials through their unsecured and corrupt boarder between Somalia and Kenya, which has been a preferred site of terrorist attack.²³⁸

Al-Ittihad Al Islamiya (AIAI), which is based in Somalia, and indigenous local groups including the Oromo Liberation Front (OLF),²³⁹ the militant wing of the Ogden Liberation Front and now quiescent Islamic Front for the Liberation of Oromo had carried out kidnappings, assassination attempts, mining of roads and bombing of bars, hotels and public buildings.²⁴⁰ AIAI distinguished itself by its development of an armed force and its focus on recruiting urban semi-educated youth. It also had plans to establish both a national and regional network including the Somali-inhabited areas of Ethiopia. It was responsible for several bombing

²³⁵ Anneli Botha and Hussein Solomon. *Supra* note 117.

²³⁶ Julie Cohn. *Terrorism Havens: Somalia*. Council on Foreign Relations, 2010 at 1.

²³⁷ Prof. Knife Abraham, *supra* note 223 at 6.

²³⁸ *Id.* at 5.

²³⁹ The Oromo Liberation Front(OLF), is an organization established in 1973 by Oromo nationalists to promote self determination for its people against what they call “Abyssinian Colonial rule”, but it has been outlawed and labeled terrorist organization by the Ethiopian government.

²⁴⁰ Prof. Knife Abraham., *supra* note 223 at 5.

attacks in Ethiopia and Somalia. The state labelled AIAI a terrorist organization in 1996.²⁴¹

AIAI's political platform is the imposition of an Islamic government in all Somalia-inhabited zones of the region, including Eastern Ethiopia. AIAI's aim is to integrate into local communities to avoid presenting itself as an easy target. It has adopted a long term strategy to prepare Somalia for Islamic rule by building up its activities in education, media, judiciary and commerce and has de-emphasized use of violence as a tactic.²⁴² Some business owners are suspected of being sympathetic to members of AIAI. It is also possible that a few of the Islamic charities in Somalia may be misused as fronts for terrorists.²⁴³

Somalia is also home for Al-Shabaab. Al-Shabaab literally means 'the youth'.²⁴⁴ Al-Shabaab originated when it began its insurgency in late 2006, in opposition to Somalia government and it is one of the Africa's most fearsome militant Islamist groups. It contains much of the southern Somalia and has waged an insurgency against Somalia's transitional government and its Ethiopian supporters since 2006. It claims affiliation to Al-Qaeda.²⁴⁵ The leader of the group is Ahmed Abdi Godane, known as Sheik Mukhtar Abdirahman Abu Zubeyr. They have been terrorizing the Somalia public, chopping off hands, stoning people to death and banning

²⁴¹ Princeton N. Lyman. The war on terrorism in Africa. Africa in world politics by John Harbeson. Westview press.

²⁴² See Special Report: Terrorim in the Horn of Africa. United states institute of Peace. www.usip.org Jan. 2014 at 10.

²⁴³ Prof. Knife Abraham., supra note 223 at 6.

²⁴⁴ Julie Cohn. Supra note 237 at 4.

²⁴⁵ See The New York Times, Thursday, April 19, 2012., <http://topics.Nytimes.com/top/reference/timetopics/organizations/s/al-shabaab>

televisions, music and even bars. They are so determined to turn Somalia into seventieth-century style Islamic State. Their acts caused full blown famine in some parts of the country and even blocked starving people from fleeing the country.²⁴⁶

In February, 2008, the United States labelled the group terrorist group.²⁴⁷

It had claimed responsibility for several suicide attacks, including the February 2009, which killed eleven (11) Burundian soldiers in the deadliest attack on AU peacekeepers since their deployment. And following the lethal U.S attack on Saleh Ali Nabhan, a top leader of al-Qaeda, Al-Shabaab launched a suicide attack that killed seventeen (17) peacekeepers and a number of civilians.²⁴⁸

In October 4, 2011, an enormous truck bomb was detonated right outside a highly fortified government compound in one of the few Mogadishu neighbourhoods that Somalia's transitional government actually controls. Dozens of people, of which many of them were students, standing around waiting for their results were killed, sending the signal that Al-Shabaab may be making a comeback after several months of losing grounds.²⁴⁹ Two weeks later, Kenya sent hundreds of troops into Southern Somalia.²⁵⁰

On 4 April, 2012, The National theatre of Magadishu, where the Transitional Federal Government (TFG) Prime Minister and other government officials were

²⁴⁶ Id.

²⁴⁷ Julie Cohn. Supra note 237 at 4.

²⁴⁸ Id.

²⁴⁹ The New York Times. Supra note 246.

²⁵⁰ Id.

attending a meeting was bombed, killing eight (8) people.²⁵¹ In 12 September of the same year, President Hassan Sheikh Mohamud survived an attempted assassination during a press conference with Kenya's foreign minister. Several AMISOM and TFG were killed in the suicide attack.²⁵²

In January 1, 2014, two car-bombs exploded outside Jazira hotel in Mogadishu, capital city of Somalia, killing six (6) people and wounding eight (8). The said hotel is often used by foreigners and government officials. Two (2) men who appeared to be suicide bombers also died in the attack as they were shot by security forces when tried to force their way into the hotel.²⁵³ It was in this same hotel that an assassination attempt of Somalia's president took place in September, 2012, on his second day in office.²⁵⁴

In February 21, 2014, Nine (9) Al-Shabaab militants wearing military fatigues attacked President Hassan Sheikh Mohamud, at presidential residence in Mogadishu, Somalia. The president was unharmed but two (2) government officials were killed, the former intelligence commander and an aide to the prime minister. The attack was in form of car bombs explosion in the compound of president and prime minister, which ended up killing the whole nine (9) terrorist group that came

²⁵¹ See U.S Department of States Diplomacy in Action, 2014.

²⁵² Id.

²⁵³ The associated press. Twin car bombs kill at least 6 outside hotel with popular foreigners in Somali capital.

²⁵⁴ Id.

for the attack.²⁵⁵ Weapons meant for the Somalia army could have been used by the militants in the attack.²⁵⁶

In May 4, 2014, a remote controlled device was detonated on a crowded street in Mogadishu, killing six (6) people, including the targeted government officials; and injuring many. Suffice it to note also that, in the mid-April, two (2) Somali parliamentarians were killed in separate incidents of shooting and car bombing.²⁵⁷

2.4.1.3. KENYA:

Kenyan government admitted in May, 2003, that a key number of the al Qaeda terror network was plotting attacks on western targets, confirming al-Qaeda's presence in Kenya.²⁵⁸ The trial of four men linked to the bombing of US Embassy in Kenya, discussed above, revealed a terror network that had grown in Kenya, because of the poor immigration and security laws.²⁵⁹ Two thousand (2,000) members of AIAI, the most powerful radical group in the Horn of Africa, was funded by Al-Qaeda in the past.²⁶⁰ Late Osama Bin Laden stated that²⁶¹ 'the 1998 August terrorist bomb which destroyed the US embassy in Kenya and killed more than two hundred (200) Kenyans was a punishment by Al-Qaeda for Kenya's link

²⁵⁵ The Associated Press. Al Shabab terrorists attack presidential palace in Somalia. <http://www.nydailynews.com/news/world/al-shabab-terrorists-attack-presidential-palace-somalia-article-1.1622278>

²⁵⁶ Id.

²⁵⁷ United Nations News Centre-Somalia: Security Council condemns latest terrorist bombing in Moga

²⁵⁸ Prof. Knife Abraham., supra note 223 at 5.

²⁵⁹ Id.

²⁶⁰ Id.

²⁶¹ The founder and leader of Al-Qaeda, before he was killed in 2011.

with the US.²⁶² Terrorist bombing of Paradise Hotel in Mombasa in 2002 by members of Al-Qaeda was to punish the country for its link with the Israeli and the choice of hotel was not accidental because it was being owned by an Israeli.²⁶³

Al-Shabaab staged attacks in Kenya since Nairobi sent troops into Somalia in October 2011, as mentioned supra, to pursue the group. The bomb blast incidence of March 31, 2012 at Coastal City, Mombasa in Kenya, killed one (1) person and injured thirty one (31). The attack was linked to Al-Shabaab terrorist group in Somalia.²⁶⁴ Tanzania is also being terrorized by this same Al-Shabaab group in Somalia.

In September 21, 2013, the Al-Shabaab terrorist group in Somalia attacked Westgate shopping mall in Nairobi, Kenya. The attack lasted for three days. About sixty two (62) people were killed and many more injured by gun shots.

On 4 May, 2014, bombs simultaneously exploded on two (2) buses travelling on Thika highway in Nairobi, leaving three (3) dead and sixty-two (62) injured.²⁶⁵ Before this incidence, there was another incidence of bombing the previous day at Coastal town of Mombasa, that killed four (4) people.²⁶⁶

²⁶² A terrorist attack on Kenya is inevitable/flashback. <http://kenyastockholm.com/2010/01/27/a-terrorist-attack-on-kenya-is-inevitable-flashback>

²⁶³ Id.

²⁶⁴ Kenya casts suspicion on Al-shabaab for blasts, April 1, 2012. <http://news.yahoo.com/Kenya-casts-suspicion-on-Al-shabaab-for-blasts>

²⁶⁵ Ed Adamczyk. Kenya bus bombing leave six dead and citizens worried. www.upi.com

²⁶⁶ James Ryder. Terrorist bombing attack in Kenya causes death and injury in Nairobi. Fox CNN world factbook; May 2014.

2.4.1.4. SUDAN:

Sudan was the first African country to become deeply enmeshed in international terrorism.²⁶⁷ The main reason for terrorism in Sudan is its geographical location, insufficient government control and a young Muslim population faced with inadequate socio-economic conditions, presents a breeding ground for extremism as well as a transit point for external elements into Africa.²⁶⁸ The Sudanese government has used its territory to provide safe haven, training bases and staging areas to numerous terrorist organisations, including Al-Qaeda, Egyptian Islamic Jihad (EIJ), Hezbollah, Hamas, Palestinian Islamic Jihad (PIJ), Abu Nidal and Gama'at al Islamiyya.²⁶⁹

The country is on the United States of America (US) list of States that sponsor terrorism, since 1993, because it openly harbored Bin Laden and Al-Qaeda from 1991 to 1996,²⁷⁰ and had been sanctioned by the UN. Most of the terrorist attacks of the 1990's were linked, directly or otherwise to Sudan.²⁷¹

Late Osama Bin Laden lived in Khartoum, Sudan, where he was given authority to establish twenty-three (23) military training camps and bases of operation.²⁷² Sudan had been regarded as a safe haven for terrorist. Three major factors that militate

²⁶⁷ Princeton N. Lyman. *Supra* note 242.

²⁶⁸ Anneli Botha and Hussein Solomon. *Supra* note 117.

²⁶⁹ See Special Report. *Supra* note 243 at 14.

²⁷⁰ Prof. Knife Abraham., *supra* note 223 at 6.

²⁷¹ *Id.*

²⁷² Jason R. Waller., *Forecasting effects of the Southern Secession* . Sept.4, 2011.
<http://smallwarsjournal.com/node/11416>

against effective combating of terrorism in Sudan are, the country's strategic location, tolerant environment and porous borders.²⁷³

Also, there are humanitarian crises in Darfur, Sudan. Terrorist groups in operation in Sudan are Al-Qaeda, Hezbollah, Hamas, Palestinian Islamic Jihad, The Abu Nidal Organization, Jamaat Al-Islamiyya and Egyptian Islamic Jihad.²⁷⁴

In September 2, 2010, at the city of Tabra, Janjiweed militia on camels swept through a market and slaughtered over seventy (70) people including eighteen (18) children; and in August 23, 2012, at least one (1) person was reported killed when Arab militia invaded an African refugee camp in Kassab city and raped dozens of women and injuring twenty (20). Also, in October 28, 2012, the Islamic Republic of Sudan aerial bombed several Christian villages in Delami city, killing a one (1) year old baby, injuring nine (9). In November 2, 2012, Janjaweed militia attacked Sigili village and killed over a dozen residents and injured five (5). Same, in November 17, 2012, three (3) Christian villagers were killed in two targeted bomb attacks by the Islamic republic.²⁷⁵

The second time, the US administration said in May 2014, that it was including Sudan on its list of countries aiding and abetting terrorism including Ugandan

²⁷³ Id.

²⁷⁴ State Sponsors: Sudan. www.cfr.org/sudan/state_sponsors-sudan

²⁷⁵ See Islamic Terrorist Attacks in Sudan data, from September 11, 2001 to December 22, 2012

rebels of the Lord's Resistance Army (LRA).²⁷⁶ The US accused the government in Khartoum of Harboring 'multinational foreigner terrorist' bases in Sudan which serve as logistics centres. It also said that, Sudan is involved in terrorist activities in Somalia, Mali, Kenya and other parts of the world and that many militants groups with Sudanese nationals are active members who fought in recent conflicts in West Africa, Somalia and Afghanistan.²⁷⁷

Notably, in 2011 South Sudan got its independence. It is one of the least developed country, and recovering from twenty-two (22) years of civil war.

2.4.1.5. NIGERIA:

Nigeria has been rated as the fifth country with highest terrorist attack of the ten most countries with terrorist attacks.²⁷⁸ There are two types of terrorism going on in Nigeria and they can be best described as: Religious motivated terrorism on ethnic borders between Muslims and Christians. Kaduna in northern Nigeria forms the basis of conflict between Christians and Muslims; Economic motivated terrorism for control of oil reserves, particularly in southern Nigeria, directed against multi-national corporations,²⁷⁹ popularly known as 'Niger-Delta crises'.

²⁷⁶ APA. Sudan harbouring terrorist bases- Washington report. www.washington-report-Africa-News-starAfrica.com 2014 at 1.

²⁷⁷ Id.

²⁷⁸ See page 4 of Annex of Statistical information Country reports on terrorism 2012, published by National Consortium for the Study of Terrorism and Responses to Terrorism, A department of Homeland Security Science and Technology centre of excellence based at the University of Maryland. It states that "the average lethality of terrorist attacks in Nigeria (2.54 deaths per attack) is more than 50 percent higher than the global average of 1.64.

²⁷⁹ Anneli Botha and Hussein Solomon. Supra note 72 at 10.

Therefore, Nigeria is beset by militant raids in Niger-Delta, by sectarian violence and by radical Islamist attacks in the Northern part of the country for some years now. However, these violent activities going on in the country did not make the country internationally recognized as a terrorist country, but now it is one of the most focused countries that have terrorist activities going on in it.

The country became more conspicuous as a terrorist country on 25 December, 2009, when 'the underwear suicide bomber', Umar Farouk Abdulmutallab²⁸⁰, a Nigerian citizen, attempted to explode Northwest Airline 253 en route Amsterdam to Detroit, Michigan. The fact that the underwear suicide bomber, Umar Farouk Abdulmutallab got his terrorist training in Yemen, and links with Al-Qaeda in the Arabian Peninsula, does not remove Nigeria from the terrorist watch list because he is a Nigeria citizen.

Umar Farouk Abdulmutallab stated, before his sentencing, that "he was proud to kill in the name of God; today is a day of victory and God is great". He also said that "Al-Qaeda would one day be victorious" and that acts like his will continue

²⁸⁰ Umar Farouk attended high school in Togo, later proceeded to University College London, where he obtained his degree in Mechanical Engineering in 2008. He was the president of the Islamic society in the University. He got his multiple visa entry to US from the US Embassy in United Kingdom in 2008. Later on in July of 2009, he attended University of Wollongong in Dubai and in August the same year, he attended Iman University, known to have links with al-Qaeda. On December 25, 2009, he boarded Northwest Airline 235 en route Amsterdam to Detroit and attempted to explode the flight with 76 grams of pentaerythritol tetra nitrate, plastic explosive sewn in his underwear. He was arrested and arraigned in the federal High court of Detroit. He pleaded guilty to the charges and convicted of eight counts and sentenced to life imprisonment on February 16, 2012 at Federal High court Detroit.

until “the righteous servants of Allah inherit the world.” He actually saw his failed suicide mission as a divinely inspired and continuous mission.²⁸¹

Also, the Islamic sect in the Northern Nigeria known as Boko-Haram is terrorizing the country, with their continuous bombing of people, places, especially Christian Churches, massacre of innocent citizens, especially Christians, continuous threat to the government, arsons, to name but a few. ‘Boko-Haram’ as the name implies, means “western education is a sacrilege”. It is a jihadist terrorist organization based in Northern Nigeria, founded by Mohammed Yusuf in 2001. Mohammed Yusuf was killed in 2009, since then; there is no known leader of this Islamic terrorist sect. They have been known as “faceless” group of people.

Boko-Haram became internationally known due to sectarian violence in Nigeria in 2009. It is considered to be a major potential terrorist threat affecting Nigeria and other countries and believed to have link with Al-Qaeda. Boko-Haram claims to be prosecuting a holy war (jihad) against infidels on behalf of their god. One of their notorious terrorist acts was the trunk bomb planted by them in Abuja, capital of Nigeria, in August 26, 2011, which killed dozens of people and destroyed much of UN country headquarters in Abuja. This Islamic terrorist sect had vowed to continue their violence activities until the country is ruled by Sharia law.²⁸² Boko

²⁸¹ Jason Ryan., Underwear bomber Abdulmutallab: “proud to kill in the name of God”. Feb. 16, 2012. <http://abcnews.go.com/blotter/underwear-bomber-abdulmutallab-sentenced-life-prison/story?id=15681576>

²⁸² Monica Mark., Boko-Haram vows to fight until Nigeria establishes Sharia law. Guardian.co.uk. Friday, January 27, 2012. www.guardian.co.uk/world/2012/jan27/boko-haram-nigeria-sharia-law

Haram rates second out of the ten perpetrator groups with the most attacks world wide, 2012.²⁸³

In April 26, 2012, a suicide bomber drove into the office of THISDAY Newspaper in Jabi district of Abuja, the Nigerian capital, killing two (2) private security men and himself. The bomb blast affected some part of the building and that of the NIGERIAN-TRIBUNE Newspaper, located beside their building. More so, exactly the same day, at about the same time, another suicide bomber drove car into the office of the same THISDAY Newspaper in Soji Plaza on Kontagora road in Kaduna State, Nigeria, killing three (3) passers-by and wounding several others.²⁸⁴

The reason behind the terrorists targeting media houses are yet to be known. The president nevertheless stated unequivocally that Nigeria will continue to encourage freedom of speech in the country.

In May, 2013, the Nigerian Government declared a state of emergency in some states of the country, namely, Borno, Yobe and Adamawa because of the incessant attacks of this Islamic extremist.

The worst of all terrorist attack by Boko Haram is the raiding and abduction of two hundred (200) girls from girls school in towns of Chibok and Gamboru Ngala in

²⁸³ See Annex of Statistical information country reports on terrorism 2012. Supra note 217 at 7. It rated Boko Haram second after Taliban, with 364 total attacks, 1132 total killing and 3.11 Average number killed per attack.

²⁸⁴ Nigerian Tribune., Black Thursday for media. As terrorist bomb THISDAY offices in Kaduna, Abuja. 5 killed, scored injured. Sun, Movement Newspaper affected. Johnathan, others condemn attack. How bomber hit hit THISDAY-sss. April 27, 2012. <http://tribune.com.ng/index.php/front-page-news/39998-black-thursday-for-media-as-terrorist-bomb-thisday-offices-in-kaduna-abuja-5-killed-scored-injurestations>.

Northern Nigeria, in April 15, 2014 and threatened to sell them off as slaves. In May 12, they released a video showing one hundred and thirty (130) of the girls that has been forcefully converted to Muslims, wearing Islamic clothing.²⁸⁵ A man claiming to be Shekau, said in the video released, 'I abducted your girls. I will sell them in the market, by Allah. There is a market for selling humans. Allah says I should sell. He commands me to sell. I will sell women. I will sell women.'²⁸⁶

In 2006 however, a new group, calling itself the Taliban, launched an attack in the northeast city of Borno. In April 2007, the same group launched a more serious attack in Kano, killing thirteen (13) policemen and wounding five (5) more.²⁸⁷

In 2013, the US State Department included the Nigerian extremists, Boko Haram on its official list of terrorist groups and placed seven million dollars (\$7) bounty on the head of the leader Abubakar Shekau.²⁸⁸

Again, in early May, 2014, the same Boko Haram attacked a boarding school in Northern Nigeria and slaughtered more than fifty (50) male students between the ages of 16 and 18. They let the female students go free and ordered them to get married. Also, a week before this attack, they set off suicide bombs at a bus

²⁸⁵ The Yomiuri Shimbun. World must quickly help rescue of abducted Nigerian school girls. The Japan News. May 15, 2014.

²⁸⁶ Isha Sessay and Vjaimir Duthiers and Chelsea J. Carter. Boko Haram attacks Nigerian village used by military in search for abducted girls. Abuja, Nigeria.
<http://edition.cnn.com/2014/05/07/world/africa/nigeria-abducted-girls>

²⁸⁷ Princeton N. Lyman. Supra note 242.

²⁸⁸ James Kitfield. A risky counterterrorism mission in Nigeria. www.yahoonews.com

terminal in Abuja, Capital territory of the country and attacked several major buildings.²⁸⁹

In May 4, 2014, Boko Haram bombed a bridge linking the town of Gaboru to the Borno state capital, Maiduguri, the headquarters of the Nigeria Military offensive, killing about three hundred (300) people. This attack was committed on their way back from the attack on Gaboru's main market, where at least fifty (50) bodies have since been discovered from debris of burnt shops.²⁹⁰

There emerged a new Islamic terrorist group in Nigeria, since 2012, known as Ansarul Muslimina Fi Biladis Sudan (Vanguard for the protection of Muslims in Black Africa); commonly called 'Ansaru'.²⁹¹ They are also based in Northern Nigeria and broadly aligned with al Qaeda. They stated that their targets for the attacks are the British and Western interests. Since 2012, they have kidnapped at least eight (8) hostages, mainly Europeans and are believed to have killed a good number of hostages, including two (2) British nationals.²⁹² The group claimed responsibility for the attack on a detention facility of the police special Anti-Robbery Squad (SARS) in Abuja on 26 November 2012.²⁹³

Some of the Ansaru's kidnap attacks in Nigeria are as follows:

²⁸⁹ Scott Johnson. Nigeria's abducted girls are the latest victims of the country's religious divide. www.takepart.com

²⁹⁰ America officials in Nigeria to help find kidnapped girls as report says government had warning of attack. www.Foxnews.com

²⁹¹ Terrorism. www.Gov.uk

²⁹² Id.

²⁹³ Id.

-A British construction worker, held hostage in Nigeria and other six(6) foreign nationals in Bauchi State in February 2013.

- A French national worker kidnapped in his residence in Katsina State, in December, 2012, but he escaped in November 17, 2013.

-The kidnapping and killing of Lebanese nationals in 2012 at Kaduna State.

-Kidnapping and killing of a German national in January 2012.

Furthermore, the long standing Niger-delta crises in Nigeria has turned that part of the country into terror. The killing and kidnapping of both foreign and indigenous citizens are on the increase. Nigeria is made up of thirty six (36) states and nine (9) states out of the thirty six states are known as the Niger-delta. The states are Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers.

The area is characterized by ethnic pluralism as inhabited by Andoni, Bekwara, Bini, Efik, Egbema, Ekoi, Ibibio, Igbo, Ijaw, Isoko, Itsekiri, Ogoni, Urhobo and several others.²⁹⁴

The crises in Niger-Delta can be regarded more as a political act. They involve in hostage taking of oil and oil related multinational company staff (both foreign and local), sabotage of company property, pipeline vandalisation, bombing of oil installations, kidnapping for ransom, sea piracy and robbery on the waterways. It is more or less conflict between local patriots and freedom fighters.

²⁹⁴ See O. Otite. Ethnic pluralism, Ethnicity and Ethnic Conflicts in Nigeria; 2000.

The Nigerian State formulated fiscal policies and laws such as the Petroleum Act, which gives the Federal Government the exclusive ownership of oil resources in Nigeria; the Land use Act which vests the ownership of lands on State Governments; The exclusive Economic Zone Act by which federal Government has exclusive right over all resources within 200 nautical miles from the coast to the sea, thus the dichotomy between on-shore and off-shore oil and so on. These laws and their operation are perceived by the ethnic group owners of their territories to be oppressive, derivational, and alienating. These views and experiences form the basis of agitation for demand over resource ownership and control by the people of the Niger Delta.

The region produce over 90 percent of income to the country and yet they are not developed. Their resources are being used to develop the capital territory and places outside their own territory, to finance bureaucracies and personalised individual conspicuous consumption, official and non-official corruption. This infuriates the Niger Delta.

The most serious kidnapping incident occurred on 31 July, 2000, when armed youths attacked two oil-drilling rigs and took one hundred and sixty five (165) hostages, including seven (7) US citizens and five (5) Britain. All hostages were

released unharmed on 4 August.²⁹⁵ They destroyed Gbaramutu Kingdom, expensive new king's palace in Ijaw and other community property in 2009.²⁹⁶

On the other hand, fighting continued between two ethnic groups: Itsekiris and Ijaw residents of the Niger Delta. Tensions between the Itsekiris and the Ijaw communities remained high in 2003, with intermittent reports of violence. Tribal clashes in March 2003 forced the withdrawal of major oil companies from the area. Ethnic clashes in the region led to dozens of death, and forced multi-national oil giants to curtail operations in the area. Oil companies were forced to shut down 40 percent of the country's output as the Ijaw and Itsekiris traded gunfire. Ethnic fighting resurfaced in Nigeria's oil-rich Niger Delta in mid-August 2003. This was the most serious fighting in the area since March. But in October 2003, James Ibori, the then governor of Delta State, brought the warring Ijaw and Itsekiri communities together to agree a fragile peace. Fighting between the two groups killed more than two hundred (200) people during 2003 and forced the government to send in troop reinforcements to restore order.

What is now known as the Nigerian Oil Crisis began on 25 September, 2004 when the Niger Delta people's Volunteer Force (NDPVF) threatened to attack oil facilities and infrastructure in the Delta region. Royal Dutch Shell responded the next day by evacuating two hundred and thirty five (235) personnel from its oil fields. The NDPVF threatened to declare an all-out war against Olusegun

²⁹⁵ Anneli Botha and Hussein Solomon. *Supra* note 117 at 10.

²⁹⁶ Prof. Onigu Otite., *The complexities behind Nigeria's Niger-delta crises.*
<http://bomblackmag.com/crises-Nigeria-Delta.html>

Obasanjo's government (the then president of Nigeria), on October 1, and told oil companies and their foreign workers to leave the Delta. Obasanjo entered into negotiations with the group and a ceasefire and disarmament plan were declared in September 29.

By October, Alhaji Mujahid Dokubo-Asari, the leader of the NDPVF, withdrew from disarmament obligations. The rest of October was punctuated by a series of oil workers strikes and fluctuations in the global price of oil. In October 28, the NDPVF began to turn its weapons over to the government.

In November, strikes continued and by the 15th, the government agreed to lower domestic oil prices. The unions suspended their strikes the next day. Unfortunately, fighting began anew when members of the Niger Delta Vigilante (NDV) attacked the Okirika region. The NDPVF responded by dropping out disarmament plans. In November 30, the Nigerian government revealed that over one million barrels of crude were lost each week during November.

In January 2006, a new militant group, the Movement for the Emancipation of the Niger Delta (MEND), entered the fray. MEND is closely linked to the NDPVF and is demanding among other things the release of Asari, who was arrested for treason on 20 September 2005 and \$1.5 billion in compensation from Shell for the pollution they claim it caused.

MEND's first significant act was an attack on Italy's Eni SpA petroleum company. The deaths of nine (9) Eni officials forced the company to evacuate its staff and contractors from the area. Along with further kidnappings and another withdrawal of Shell workers, it was estimated that the instability had resulted in a ten percent (10%) drop in Nigerian oil production.²⁹⁷

2.5. CONCLUSION.

The incessant terrorist acts' going on in most parts of African States has led to instability of security and economy in the continent. There is no justification for terrorism from whatever angle it is evaluated. A terrorist cannot claim an infringement of fundamental human right while he is also guilty of violation of human rights. The equitable maxim of 'whoever that comes into equity must come with clean hands' should not be dispensed with'.

Under insurgency and armed conflicts, strict adherence to human rights should be adhered to but not in combating terrorism.

Terrorist acts in Africa have seriously deterred the economic growth of the continent despite its natural resources. Most investors no longer consider some States in the continent safe enough to invest their money or establish business. In addition, the security laxities of some States in the continent are a deterrent factor to combating terrorism effectively, though, acceptable that poverty greatly affects

²⁹⁷ Nigeria – Niger Delta. www.bornblackmag.com/crises-Niger-Delta.html

security measures of a State. The challenge of terrorism in Africa is to balance a legitimate program of security improvements with a continuing and sustained attack on poor governance, poverty, and deprivation of human rights.

Therefore, the focus should be in devising means of achieving the most effective method to combat and put to an end the increase of incessant terrorist acts in most African states, starting by re-viewing or re-assessing the existing laws on combating terrorism in Africa.

CHAPTER THREE.

LEGAL ANALYSIS OF THE OAU CONVENTION ON PREVENTING AND COMBATING TERRORISM.

3.0. INTRODUCTION.

The continent of Africa has a long history in making efforts to prevent and combat terrorism, which gave birth to the OAU Convention on Preventing and Combating Terrorism of 1999. It marked the first major comprehensive legislative approach to addressing the scourge of terrorism in Africa. The OAU Algiers Convention of 1999 forms the major pillar for the enactment of other OAU (AU) legislations on peace and security in Africa.

The AU at its 28th Ordinary Session held in Dakar, Senegal in 1992, adopted a resolution on the strengthening of cooperation and coordination among African States.²⁹⁸ Also, in its 30th Ordinary Session held in Tunis, Tunisia, in June 1994, it adopted the Declaration on the Code of Conduct for Inter-African relations,²⁹⁹ in which it rejected all forms of extremism and terrorism, whether under the pretext of sectarianism, tribalism, ethnicity or religion. The declaration also condemned as

²⁹⁸See AHG/Res. 213 (Xxviii) in which the Union pledged to fight the phenomena of extremism and terrorism.

²⁹⁹ See AHG/Del.2 (Xxx).

criminal, all terrorist acts, methods and practices, and expressed its resolve to enhance cooperation to combat such acts.³⁰⁰

The OAU Algiers Convention of 1999 also states its believe in the principles of the International law, Charter of OAU and UN in combating terrorism. It provides thus:

“ ...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 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 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexed thereto;”³⁰¹

The Convention further reaffirms the “legitimate right of peoples for self-determination and independence pursuant to the principles of international law and the provisions of the Charter of the Organizations of African United Nations as well as the African Charter on Human and People’s Rights.”³⁰²

OAU (AU) is also convinced that “terrorism constitutes a serious violation of human rights and, in particular, the rights to physical integrity, life, freedom, security, and impedes socio-economic development through destabilization of

³⁰⁰ See also, The African Union Counter Terrorism framework. www.Caert.org.dz/official-documents/AU-CT-Framework.pdf

³⁰¹ See the preamble of the OAU Algiers Convention 1999. Supra note 26.

³⁰² Id.

States.”³⁰³ It is also convinced that terrorism has no justification and should be combated by all means, which they are determined to do.

“Convinced further 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 or indirectly, without regard to its origin, causes and objectives.”³⁰⁴

The 1999 OAU Algiers Convention is divided into five (5) main parts with 23 Articles and many paragraphs. Part I is the ‘Scope of application’ comprising of Articles 1 – 3. Part II is ‘Areas of Cooperation’ subdivided into Articles 4 and 5. The next part which is Part III deals with ‘State jurisdiction and contains Articles 6 and 7. Part IV is the ‘Extradition’ part, containing Articles 8 – 13. Next to it is Part V which is the ‘Extra-territorial investigations (Commission Rogaroire) and mutual legal assistance’ that is subdivided into Articles 14 – 18. The final part is VI, ‘The final provision’ which is again subdivided into Articles 19 – 23. Then Annexed to the Convention is the list of international instruments.

These Parts of the 1999 OAU Algiers Convention shall be the focus of discourse in this chapter, followed by OAU (AU) compliance with the international law (UN) requirements for combating terrorism and the effects of the existing convention on the Member States in combating terrorism so far.

³⁰³ Id.

³⁰⁴ Id.

3.1. DISCOURSE ANALYSIS OF OAU ALGIERS CONVENTION OF 1999.

3.1.1. DEFINITION OF TERRORISM UNDER THE 1999 OAU ALGIERS CONVENTION.

The starting point for many definitions of terrorism is a violent act committed with the purpose of intimidating a population or compelling a government to do or abstain from doing something. Thus, the basic concept of the definition in the OAU Algiers Convention 1999 rests on two pillars: first, the commission of an act that causes or may cause death or injury; second, that the act was intended to intimidate the government, the population or disrupt any public service.³⁰⁵

In the OAU Algiers Convention 1999, terrorist act is defined in its Article 1 (3) (a)

– (b) 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 persons or causes or may cause damage to public or private property, natural resources, environment 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

³⁰⁵ S Jagwanth and F Soltau. Africa and terrorism, Joining Global Campaign. Terrorism and Human Rights in Africa. Published in Monograph No 74, July 2002, Chap.2 at 5. It can also be found at <http://www.iss.co.za/pubs/Monographs/no74/chap2.html>

- (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).”³⁰⁶

This definition can as well be construed under two arms: firstly, the terrorist act must be in “violation of criminal laws” of a State Party and secondly the terrorist act “may endanger the life, physical integrity....” In other words, the two elements must be present for it to amount to a terrorist act. If the crime is not in violation of the criminal law of a nation, then it is not a terrorist act.

How effective and justifiable will cooperation among State Parties be attained, when it is obvious that their respective national criminal laws are not the same? Is it not obvious that extradition may not be that easy among the Member States especially if the offence of which the extradition of a person is requested is not in violation of the criminal law of that nation? The definition should not include a prerequisite that an action must first be a violation of criminal law in order for it to amount to ‘terrorist act’. Clear and specific obligations to adopt mandatory procedures to establish criminal jurisdiction are then needed to indict or extradite perpetrators.³⁰⁷

³⁰⁶ Part 1, Article 1 (3) (a) of the OAU Algiers Convention 1999. Supra note 26

³⁰⁷ Gregory Rose and Diana Nestorovska. Towards an ASEAN Counter-Terrorism Treaty; 2005 9SYBIL 157

Further, the Convention in its Article 3, explicitly differentiated between acts that should be regarded as ‘terrorist acts’ from the ones that are ‘liberation and self determination’. It states thus:

“(1) Notwithstanding the provisions of Article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.”³⁰⁸

This exclusion is limited by the immediate following provision, which states that ‘Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.’³⁰⁹

The broadness and vagueness of the definition of acts of terrorism needs attention and cannot be seen to be a legitimate limitation of rights. A basic tenet of the principle of legality is that legislation should not be vague and should define with reasonable precision the ambit of prohibited conduct. Under the definition of OAU Algiers Convention 1999, a strike by teachers or municipal workers, an action that could be interpreted as being ‘calculated’ to ‘disrupt a public service’ in the cause of which some incidental damage is caused to public or private property, could be construed as a ‘terrorist act’.³¹⁰

³⁰⁸ Article 1 (3) (b) of the OAU Algiers Convention 1999. Supra note 26.

³⁰⁹ Id. at Article 3.

³¹⁰ S Jagwanth and F Soltau. Supra note 305.

Nevertheless, some scholars had praised the OAU Algiers Convention 1999 as one of the best regional conventions on combating terrorism with a clearer definition of terrorist acts. No doubt the Convention provides a useable definition, but what seems like a noticeable pitfall from the definition is that the particular criminal act must already be defined as a crime under the national law, as stated in the beginning sentence of definition of terrorist act, in its Article 1 (3) (a), before it can qualify to be classified as a terrorist act.

3.1.2. ROLES AND JURISDICTION OF MEMBER STATES ON TERRORIST ACTS.

The Convention sets out detailed obligations of Member States for the purposes of the objectives set forth in the Convention. Article 2 of Part I of the OAU Algiers Convention 1999 stipulate what State Parties are required to do in compliance with the Convention. It states that they undertake to:

- “(a) review their national laws and establish criminal offences 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 offences;*
- (b) consider, as a matter of priority, the signing or ratification of, or accession to, the international instruments listed in the Annexure, which they have not yet signed, ratified or acceded to; and*
- (c) Implement the actions, including enactment of legislation and the establishment as criminal offences of certain acts as required in terms of the international instruments referred to in paragraph (b) and that States have ratified and acceded to and makes such acts punishable by appropriate penalties which take into account*

*the grave nature of those offences;
(d) Notify the Secretary General of the OAU
of all the legislative measures it has taken
and the penalties imposed on terrorist acts
within one year of its ratification of, or
accession to, the convention.”*

Notably, “State Party” is defined in its Article 1 (2) as “any Member State of the Organization of African Unity which has ratified or acceded to this Convention and has deposited its instrument of ratification or accession with the Secretary general of the Organization of African Unity”.

Part II of the OAU Algiers Convention 1999 provides for areas of counter-terrorism cooperation among State Parties. Article 4 of the Convention states that Parties undertake to refrain from acting in such a way as to support the commission of terrorist acts, including the issuing of visas and travel documents; and are required to adopt legitimate measures to prevent and combat terrorism in accordance with their national structure and the provisions of the Convention, emphasizing on what they shall do in Article 4 (2). In the Convention’s exact words, it provides thus:

“(1) State Parties 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.

(2) State Parties shall adopt any legitimate measures aimed at preventing and combating terrorist acts in accordance with the provisions of this Convention and their respective national legislation, in particular, they shall do the following:

- (a) prevent their territories from being used as a base for planning, organization or execution of terrorists acts or for the participation or collaboration in these acts in any form whatsoever;*
- (b) develop and strengthen method of monitoring and detecting plans or activities aimed at illegal cross-border transportation, importation, export, stockpiling and use of arms, ammunition and explosives and other materials and means of committing terrorists acts;*
- (c) develop and strengthen methods or controlling and monitoring land, sea and their borders and customs and immigration check points in order to pre-empt any infiltration by individuals or groups involved in the planning, organization and execution or terrorist acts;*
- (d) strengthen the protection and security of persons, diplomatic and consular missions, premises or regional and international organizations accredited to a State Party, in accordance with the relevant conventions and rules or international law;*
- (e) promote the exchange of information and expertise acts and establish data bases for the collection and analysis of information and data on terrorist elements, groups, movements and organizations;*
- (f) take all necessary measures to prevent the establishment terrorist support networks in any form whatsoever;*
- (g) ascertain, when granting asylum, that the asylum seeker is not involved in any terrorist act;*
- (h) arrest the perpetrators of terrorist acts and try them in accordance with national legislation, or extradite them in accordance with the provisions of this Convention or extradition treaties concluded between the requesting State and the requested State and, in the absence of a treaty, consider facilitating the extradition of persons suspected of having committed terrorist acts; and*
- (i) establish effective co-operation between domestic security officials and services and the citizens of*

the State Parties in a bid to enhance public awareness of the scourge of terrorist acts and the need to combat such acts, by providing guarantees and incentives that will encourage the population to give information on terrorist acts or other acts which may help to uncover such acts and arrest their perpetrators.”³¹¹

Therefore, summarily, State parties must refrain from encouraging terrorism in any form and shall adopt measures to prevent and combat terrorism by doing the following: Securing their boarder and territories from being used as a terrorist base or activities; Protect and strengthen their boarder control; Strengthen the security and protection of foreign diplomats in their nation in accordance with International Law; Promote exchange of information and ways of collecting and analysing information collected; Discourage establishment of any network that will encourage and support terrorism; Make sure that an asylum seeker is not a terrorist; Arresting and prosecuting a person alleged of committing terrorist act in accordance with the national law or extradite the person in accordance with the provisions of the OAU Algiers Convention 1999; Create awareness and effective cooperation among domestic security and citizens for combating terrorism.

Under Article 5 of the same Part II of the OAU Algiers Convention 1999, Member States are encouraged to cooperate among themselves in preventing and combating terrorism in accordance with their national laws, strengthening their exchange of information by revealing terrorist groups, their leaders, camps and so on; communicating the *modus oprandi* used by the terrorists.

³¹¹ See Part II, Article 4 of the OAU Algiers Convention 1999. Supra note 26.

“ 1. State Parties undertake to strengthen the exchange of information among them regarding:

- (a) acts and crimes committed by terrorists 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;*
- (b) the communication and propaganda methods and techniques used by the terrorist groups, the behaviour of these groups, the movement of the leaders and elements, as well as their travel documents.”³¹²*

Member States shall also exchange information leading to the arrest of any person charged with terrorist act against any State Party or the nation; secure and confiscate the arms and ammunitions used by the terrorist.

“ 1. States Parties undertake to exchange any information that leads to:

- (a) the arrest of any person charged with a terrorist act against the interest of a State Party or against its nationals, or attempted to commit such an act or participated in it as an accomplice or an instigator;*
- (b) the seizure and confiscation of any type of arms, ammunition, explosives, devices or funds or other instrumentalities of crime used to commit a terrorist act or intended for that purpose.”³¹³*

The Member States undertakes also to keep all the information received and exchanged confidential within the nations and only the concerned Member States. The paragraph states that the ‘State Parties undertake to respect the confidentiality of the information exchanged among them and not to provide such information to

³¹²Id. at Article 5 (1) (a) (b).

³¹³ Id at Article 5 (2) (a) (b).

another State that is not party to this Convention, or to a third State Party, without the prior consent of the State from where such information originated.³¹⁴

Member States are further encouraged to cooperate with one another in regard to arresting and prosecuting terrorist acts in accordance with the national law.

“4. State Parties undertake to promote co-operation Among them and to help each other with regard to procedures relating to the investigation and arrest of persons suspected of, charged with or convicted of terrorist acts, in conformity with the national law of each State.

5. State Parties shall co-operate among themselves in conducting and exchanging studies and researches on how to combat terrorist acts and to exchange expertise relating to control of terrorist acts.”³¹⁵

Member States are also required to cooperate among themselves in providing technical assistance to one another. The Article provides that ‘State Parties shall co-operate among themselves, where possible, in providing any available technical assistance in drawing up programmes or organizing, where necessary, and for the benefit of their personnel, joint training courses involving one or several State Parties in the area of control of terrorist acts, in order to improve their scientific, technical and operational capacities to prevent and combat such acts.’³¹⁶

Article 5 above focuses mainly on respective Member States’ national laws in combating terrorism. What then is the fate of Member States that are financially incapacitated to follow the necessary procedures for prosecuting terrorist acts

³¹⁴ Id. at Article 5 (3).

³¹⁵ Id. at Article 5 (4) & (5)

³¹⁶ Id. at Article 5 (6).

effectively in their nations? Or what about nations, whose functioning arms of government are greatly affected by presence of terrorist groups in their nation (for instance, Somalia discussed in chapter 2 supra)? Why is it not necessary that a general regional procedures and Court be created to help such Member States combat terrorism effectively, rather than leaving it at national levels while encouraging other Member States to help? These questions need to be addressed by AU, if it really desires to combat terrorism effectively.

Part III of the same Convention deals with jurisdiction of trial of the terrorist offence, how and when a state has the power to adjudicate on a terrorist offence. Article 6 (1) (a)-(c) provides for direct territorial jurisdiction of a Member State. It states thus:

“1. Each State Party has jurisdiction over terrorist acts defined in Article 1 when: the act is committed in the territory of that State and the perpetrator of the act is arrested in its territory or outside it if this is punishable by its national law;
(a) the act is committed on board a vessel or a ship flying the flag of the State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
(b) the act is committed by a national or group of nationals of that State.”

While, Article 6 (2) (a)–(e) covers instances where a state shall have the power to assume jurisdiction in trial of terrorist offence, stating that:

“2. A State Party may also establish its jurisdiction over any offence when:
(a) the act is committed against a national of

- that State; or*
- (b) the act is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises, and any other property, of that State;*
 - (c) the act is committed by a stateless person who has his or her habitual residence in the territory of that State; or*
 - (d) the act is committed on board an aircraft which is operated by any carrier of that State; and*
 - (e) the act is committed against the security of the State Party.”*

Further, State Parties are mandated in Paragraph 3 of the same Article 6, to notify the secretary general of the jurisdiction taken in accordance with sub-section 2 of this Article 6. ‘Upon ratifying or acceding to this Convention, each State Party shall notify the Secretary General of the Organization of African Unity of the jurisdiction it has established in accordance with paragraph 2 under its national law. Should any change take place, the State Party concerned shall immediately notify the Secretary General.’³¹⁷

State parties are also mandated to establish jurisdiction over the acts set forth in Article 1 of the Convention where extradition is not required. Paragraph 4 of Article 6 provides that:

“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the acts set forth in Article 1 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the State Parties which have established their jurisdiction in accordance with paragraphs 1 or 2.”³¹⁸

³¹⁷ Id. at Article 6 (3).

³¹⁸ Id. at Article 6 (4).

Article 7 of the same Part III provides for procedures a State Party shall undertake to investigate the presence of a person alleged to have committed any terrorist act. It states thus:

- “1. Upon receiving information that a person who has committed or who is alleged to have committed any terrorist act as defined in Article 1 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its national law to investigate the facts contained in the information.*
- 2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its national law so as to ensure that person’s presence for the purpose of prosecution.”³¹⁹*

The alleged person’s rights are also stipulated under Article 7(3) (a)-(d) and which said rights shall be exercised in accordance with the national law of the state in which the person is present as stipulated in paragraph 4 of the same Article 7.

- “3. Any person against whom the measures referred to in paragraph 2 are being taken shall be entitled to:*
 - (a) communicate without delay to the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled, to protect that person’s rights or, if that person is a stateless person, the State in whose territory that person habitually resides;*
 - (b) be visited by a representative of that State;*
 - (c) be assisted by a lawyer of his or her choice;*
 - (d) be informed of his or her rights under subparagraphs (a), (b) and (c).*
- 4. The rights referred to in paragraph 3 shall be exercised in conformity with the national law of the State in whose territory the offender or alleged offender is present; subject to the provision that the said laws must enable full*

³¹⁹ Id. at Article 7 (1) & (2).

effect to be given to the purposes for which the rights accorded under paragraph 3 are intended."³²⁰

The Convention, in enacting paragraph 3 of Article 7, escapes accusation of infringement on fundamental human right of an accused person under domestic and international law.

3.1.3. EXTRADITION OF TERRORISTS.

Under international law, extradition is a necessary element of international cooperation in combating international terrorism. Extradition is generally described as "the process by which a person charged with or convicted of a crime under the laws of one state is arrested in another state and returned to the former state for a trial or punishment"³²¹. Since there is no universal rule binding states to extradite accused offenders, the practice of extradition is predominantly founded upon the notion of mutuality. In theory, alleged criminals, including terrorists, would not be able to flee prosecution by escaping to another state.³²²

General international law prohibits a State in the absence of a treaty, from taking measures on the territory of another State to enforce its national laws without the consent of the latter. One State may not arrest a person or serve summons on him or

³²⁰ Id at Article 7 (3) & (4).

³²¹ Black's Law Dictionary 623. 8th Ed. 2004.

³²² Carol A. Bahan. International terrorism: the legitimization of safe harbour states in international law; 2009/2010. 54 NYLSLR 333.

execute an order for the production of documents on the territory of another except under terms of a treaty or other forms of authorization. This flows from the proposition that jurisdiction is territorial and remains the best foundation for international law.³²³ A State cannot demand the surrender of an alleged criminal as of right, subject of course to the exception of crimes under international law, such as war crimes, crimes against humanity and crimes against peace. States must depend on the cooperation of other States to obtain surrender of suspected or convicted criminals who are or have fled overseas.³²⁴

The principles of extradition law provide the procedure to regulate such mutual cooperation, based, in part, on reciprocity. Globalisation has not changed this rule; on the contrary, it has made it more relevant. The Convention, thus, confers on each Member State the right to request for the extradition of persons alleged to commit offences falling within the ambit of the Convention.³²⁵

The Convention, thus, serves as the legal basis for Member States to make extradition request from each other irrespective of whether or not there has been a previous extradition treaty between them.³²⁶ Member States are also requested under Article 9 of the OAU Algiers Convention 1999, to incorporate terrorist acts covered by the Convention into their national laws as extraditable offences.

³²³ Nsongurua J. Udombana. *Fighting Corruption Seriously? Africa's Anti-corruption Convention*, 2003. 7 *Sing. J. Int'l & Comp. L.* 447.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

Acceding to a request for extradition is not automatic. Thus, where there is a request for extradition, a requested State may, if it has within its territory any person charged with or convicted of offences, refuse to extradite the person on the ground that it has jurisdiction over the offences.³²⁷ Where that happens, then the requested State shall, without fail and delay, submit the case to its competent authorities for prosecution unless otherwise agreed with the requesting State.

Under Part IV, Article 8 of the OAU Algiers Convention 1999, Member States shall extradite any person charged or convicted within the territory of terrorist act in the territory of another Member State if the State requests and it shall be in accordance with this Convention or extradition agreement between the Member States, if any.

Article 8 stipulates that:

“ 1. Subject to the provision of paragraph 2 and 3 of this article, the States Parties shall undertake to extradite any person charged with or convicted of any terrorist act carried out on the territory of another State Party and whose extradition is requested by one of the State Parties in conformity with the rules and conditions provided for in this Convention or under extradition agreements between the State Parties and within the limits of their national laws.”³²⁸

Member State has a right to enact a legislation under which extradition shall be granted in its nation and transmit same to the Secretary General, who shall circulate same to all Member States as stated in paragraph 2 of the same Article 8 that;

“2. Any State Party may, at the time of the deposit of its instruments of ratification or accession,

³²⁷ Id.

³²⁸ Article 8 (1) of the OAU Algiers Convention 1999. Supra note 26.

transmit to the Secretary General of the OAU the grounds on which extradition may not be granted and shall at the same time indicate the legal basis in its national legislation or international conventions to which it is a party which excludes such extradition. The Secretary General shall forward these grounds to the State Parties."³²⁹

Article 8 (3) stipulates limitations to granting extradition as follows:

"3. Extradition shall not be granted if final Judgement has been passed by a competent authority of the requested State upon the person in respect of the terrorist act or acts for which extradition is requested. Extradition may also be refused 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."

A Member State is bound to prosecute the alleged offender without delay if extradition was not granted by it. 'A State Party in whose territory an alleged offender is present shall be obliged, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution if it does not extradite that person.'³³⁰

Member States are mandated to include 'terrorist act' as defined in Article 1 of this Convention as an extraditable offence in its national law. 'Each State Party undertakes to include as an extraditable offence any terrorist act as defined in

³²⁹ Id. at Article 8 (2).

³³⁰ Id. at Article 8 (4).

Article 1, in any extradition treaty existing between any State Parties before or after the entry into force of this Convention.³³¹

Article 10 provides for means of exchanging extradition request between Member states. It states that ‘exchange of extradition requests between the State Parties to this Convention shall be effected directly either through diplomatic channels or other appropriate organs in the concerned States.’

Article 11 further stipulates procedures and contents of extradition request as follows:

“Extradition requests shall be in writing, and shall be accompanied in particular by the following:

- (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 offences for which extradition is being requested, indicating the date and place of its commission, the offence 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 together with any other may assist in establishing the person’s identity and nationality.”*

Article 12 provides for method of extradition under urgent cases. The competent authority may in urgent cases request for the arrest of the alleged offender in

³³¹ Id. at Article 9.

writing for reasonable period in accordance with the national law of the requesting state. It states thus:

“ In urgent cases, the competent authority of the State making the extradition may, in writing, request that the State seized of the extradition request arrest the person in question provisionally. Such provisional arrest shall be for a reasonable period in accordance with the national law of the requested State.”

Furthermore, in a situation where a Member State receives requests from different Member States for extradition of a particular person, the Member State shall decide which of the Member States to extradite the alleged offender to, considering the dates of request and shall in addition deliver to the state the funds and materials for the commission of the offense. The Art. provides that:

- “ 1. Where a State Party receives several extradition requests from different States Parties in respect of the same suspect and for the same or different terrorist acts, it shall decide on these requests having regard to all the prevailing circumstances, particularly the possibility of subsequent extradition, the respective dates of receipt of the requests, and the degree of seriousness of the crime.*
- 2. Upon agreeing to extradite, States Parties shall 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.*
- 3. Such funds, incriminating evidences and related materials, upon confirmation of their use in the terrorist act by the requested State, shall be transmitted to the requesting State even if, for reasons of death or escape of the accused, the extradition in question cannot take place.*
- 4. The provisions in paragraphs 1, 2 and 3 of this Article shall not affect the rights of any of the States Parties or bona fide third Parties*

*regarding the materials or revenues mentioned above.*³³²

Generally, extradition treaties intend to play a particularly important role in the cooperative efforts to combat terrorism. Yet, their effectiveness has been hampered by the fact that the political offence exception contained in all extradition treaties, protects from extradition of political offenders of all types, non-violent and violent alike, including terrorists.³³³ Practice has shown that extradition is far from perfect, as various obstacles can prevent the successful extradition of criminals. With regard to international terrorism, extradition can be hindered by a number of obstacles including the principle of *aut dedere aut judicare*³³⁴, the political offence exception and state-sponsored terrorism.³³⁵

³³² See Article 13 (1) – (4) of the OAU Algiers Convention 1999. Supra note 26.

³³³ Antje C. Petersen. Extradition and the Political offence exception in the Suppression of terrorism; 1992, 67 Ind. L. J. 767.

³³⁴ The principle of *aut dedere aut judicare* is the duty to extradite or prosecute. It is a component of extradition. The principle permits a custodial state, which has established jurisdiction over the offense, to exercise its sovereignty by either extraditing the alleged offender to a requesting state or prosecuting the alleged offender under its domestic laws. Although the principle is based in treaty law as it is included in at least seventy international treaties and conventions, there is an ongoing debate as to whether it should qualify as a norm of customary international law. As pertains to universal jurisdiction for international crimes (example, war crimes and crimes against humanity), the obligation of *aut dedere aut judicare* is compulsory for all states regardless of their legal obligations or the source of law for the designated crimes treaty or customary international law. Currently, the international law commission (ILC) has undertaken an effort to investigate whether *aut dedere aut judicare* may qualify as such norm. Yet states seem hesitant to extend the binding obligations of customary international law to *aut dedere aut judicare* due to its predominant formulation by treaties. Hence *aut dedere aut judicare* has yet to gain the requisite status under customary international law to bind states regardless of their treaty obligations or lack thereof. See Carol A. Bahan; Supra note 322.

With regard to international terrorism, the principle *aut dedere aut judicare* is a significant obstacle to the effective enforcement of the multilateral conventions. The framework of principle as applied to terrorist acts was first established in the Convention for the Suppression of Unlawful Seizure of Aircraft, also known as The Hague Convention or the Unlawful Seizure Convention. See Carol A. Bahan; Supra note 322.

³³⁵ Carol A. Bahan. Supra note 322.

Therefore, the problem with extradition in this OAU Algiers Convention 1999 as well as international law is that some States that have interest in that particular terrorist act committed by the alleged offender may refuse to extradite the offender and opt to try the offender by itself as required under Article 8 (4) of the Convention. The law is that, the contracting state in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to the appropriate authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.³³⁶

Although, the theory of extradition is that no terrorist can escape prosecution by fleeing to another Member State because that State would have the obligation to prosecute him if it chooses not to extradite him, regardless of the state's reason for refusal, but that is not obtainable in practice. The requirement under Article 8 (4) of the OAU Algiers Convention 1999 is that the State should immediately submit to competent authority for prosecution. There is no indication that the case must proceed past the investigative inquiry stage, as the investigation will be dictated by domestic evidentiary and procedural law. Another problem is that there will probably be insufficient evidence available in the state seeking prosecution.³³⁷ So, despite the principle of good faith present in all international treaties, two legal

³³⁶ See Article 7 of Convention for Suppression of Unlawful seizure of Aircraft, 1971.

³³⁷ Carol A. Bahan. *Supra* note 322.

scholars have essentially labelled *aut dedere aut judicare* in its current application as 'little more than a façade of justice'.³³⁸

In other words, no matter how cooperative Member States are required to be among them by the Convention, extradition is not free from bias, especially in cases of State sponsored terrorism. It can thus be rightly said that extradition can as well create safe haven for terrorists. Basically, an offender who succeeds in placing himself outside the territory of the state where he committed the crime also places himself beyond the reach of the law that he violated.³³⁹

3.1.4. EXTRA-TERRITORIAL INVESTIGATIONS (COMMISSION REGATOIRE) AND MUTUAL LEGAL ASSISTANCE.

Commission Regatoire is a French word which literally means "letter of request". It means a formal request from a court to a foreign court for some type of judicial assistance. Extra-territoriality is jurisdiction exercised by a nation in other countries by treaty or by its own ministers or consuls in foreign lands. Impliedly, domestic law can be applied beyond the State's geographical boundaries. This concept stems from the writings of French legal theorist and jurist Pierre Ayrant, who proposed the theory that certain persons and things, while within the territory of a foreign sovereign state, remained outside the reach of local judicial process.

³³⁸ Id.

³³⁹ Christopher C. Joyner. International extradition and global terrorism: Bringing international criminals to justice; 2003. 25 Loy. L.A Int'l & Comp. L. Rev.

The Letter of request or commission regatoire usually contains:

- Names of the Member State requesting its execution and the Member State requested to execute.
- The names and addresses of the parties to be investigated and their representatives.
- The nature of the investigation that is required, giving all necessary information in the regard thereto.
- Other evidence to be obtained or other judicial act to be performed.
- The questions to be put to the person to be investigated or a statement of the subject-matter about which they are to be investigated
- The document or other property, real or personal to be inspected.
- Any requirement that the evidence is to be given on oath or affirmation.
- Any special method or procedure to be followed.³⁴⁰

Part V, Articles 14-18 of the OAU Algiers Convention 1999 provides for Extra-territorial investigations (Commission Regatoire) and mutual legal assistance like its counterparts in counter-terrorism legislations. Member States has a right to request each other's assistance and cooperation in allowing the State to come into the latter's territory to investigate any judicial proceeding concerning an alleged terrorist offender while recognising the sovereign rights of the State Party. The Convention provides thus:

³⁴⁰ See A O Advocates. Obtaining evidence in Guernsey: Commission regatoire. 2011. www.Lexology.com/library/detail.aspx

“Any State Party may, while recognizing the Sovereign rights of States Parties in matters of criminal investigation, request any other State Party to carry out, with its assistance and cooperation, on the latter’s territory, criminal investigations related to any judicial proceedings concerning alleged terrorist acts and, in particular;

- (a) the examination of witnesses and transcripts of statements made as evidence;*
- (b) the opening of judicial information.*
- (c) the initiation of investigation processes;*
- (d) the collection of documents and recordings or, in their absence, authenticated copies thereof;*
- (e) conducting inspections and tracing of assets for evidentiary purposes;*
- (f) executing searches and seizures; and*
- (g) service of judicial documents.”³⁴¹*

Article 15 provides for grounds on which commission rogatoire may be refused. It states that:

“A commission rogatoire may be refused:

- (a) where each of the State Parties has to execute a commission rogatoire relating to the same terrorist acts;*
- (b) if that request may affect efforts to expose crimes, impede investigations or the indictment of the accused in the country requesting the commission rogatoire;*
- (b) if the execution of the request would affect the sovereignty of the requested State, its security or public order.”*

The Extra-territorial investigation shall be in accordance with the requested state’s national laws and principles of bank’s confidentiality shall not be a ground for refusing such commission. ‘The extra-territorial investigation (commission rogatoire) shall be executed in compliance with the provisions of national laws of the requested State. The request for extra-territorial investigation (commission rogatoire) relating to a terrorist act shall not be rejected on the grounds of the

³⁴¹ Part V, Article 13 of the OAU Algiers Convention 1999. Supra note 26.

principle of confidentiality of bank operations or financial institutions, where applicable.”³⁴²

Articles 17 and 18 provides for more cordial cooperation needed by Member States for effective Extra-territorial investigation. The Articles stipulates that:

*“The State Parties shall extend to each other the best possible mutual police and judicial assistance for any investigation, criminal prosecution or extradition proceedings relating to the terrorist acts as set forth in this Convention.”*³⁴³

*“The State Parties undertake to develop, if necessary, especially by concluding bilateral and multilateral agreements and arrangements, mutual legal assistance procedures aimed at facilitating and speeding up investigations and collecting evidence, as well as cooperation between law enforcement agencies in order to detect and prevent terrorist acts.”*³⁴⁴

Therefore, extra-territoriality can also be seen as the right or privilege of a state to exercise authority in certain circumstances beyond the limits of its territory. Its investigation involves concurrent jurisdiction, which inevitably produces occasion of tension. The manner in which some Member States will respond to it often impedes the effectiveness of extra- territorialism.

Generally, commission rogatoire is time consuming. When a prosecutor wants a particular piece of evidence for use at a trial that is set for a date certain,

³⁴² Id. at Article 16.

³⁴³ Id. at Article 17.

³⁴⁴ Id. at Article 18.

chances are that the prosecutor may not get the evidence on time before the trial date that had been set.

3.1.5. FINAL PROVISION.

The final part of the Convention which is Part VI, provides for procedures for Member States' ratification or accession to the Convention, method of withdrawing their membership and enforcement of the Convention. It provides thus:

- “1. This Convention shall be open to signature, ratification or accession by the Member States of the Organization of African Unity.*
- 2. The instruments of ratification or accession to the present Convention shall be deposited with the Secretary General of Organization of African Unity.*
- 3. The Secretary General of the Organization of African Unity shall inform Member States of the Organization of the deposit of each instrument of ratification or accession.*
- 4. No State Party may enter a reservation which is incompatible with the objects and purposes of this Convention.*
- 5. No State Party may withdraw from this Convention except on the basis of a written request addressed to the Secretary General of the Organization of African Unity. The withdrawal shall take effect six months after the date of receipt of the written request by the Secretary General of the Organization of African Unity.”³⁴⁵*

³⁴⁵ Id. at Article 19 (1) – (5).

Article 20 provides for effective date of the Convention entering into force and State's effectiveness to membership after ratification as follows:

- “1. The Convention shall enter into force thirty days after the deposit of the fifteenth instrument of ratification with the Secretary General of the Organization of African Unity.*
- 2. For each of the States that shall ratify or accede to this Convention, shall enter into force thirty days after the date of the deposit by that State Party of its instrument of ratification or accession.”*

The Convention was adopted on 14 June 1999 and entered into force on 6 December, 2002 in accordance with Article 20 (1) of the Convention stated supra.

Article 21 is what shall be called the ‘special provision’ that provides for the amendment of this Convention if need arises. It also provides steps or procedures for such amendment.

- “1. Special protocols or agreements may, if necessary, supplement the provisions of this Convention.*
- 2 This Convention may be amended if a State Party makes a written request to that effect to the Secretary General of the Organization of African Unity. The assembly of Heads of State and Government may only consider the proposed amendment after all the States Parties have been duly informed of it at least three months in advance.*
- 3 The amendment shall be approved by a simple majority of the State Parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedures three months after the Secretary General has received notice of the acceptance.”*

Article 21 is ‘special’ in the sense that it creates the avenue under which the thesis of this dissertation can be achieved by amending the Convention to include a universal Court for trial of terrorist acts, rather than leaving it on the hands of domestic courts of Member States.

The Convention stipulates, in Article 22, how the contents of this Convention shall be interpreted. It provides that the Convention shall not be interpreted as derogating from the general principles of international law and African Charter. If there is any dispute between Member States in interpreting this Convention, it shall be amicably settled between them by direct agreement. Failure to reach a consensus by the Member States, they can then refer to International Court of Justice for interpretation of the Convention. The wordings of the said article are:

- “1. Nothing in this 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 Peoples’ Rights.*
- 2. Any dispute that may arise between the States Parties regarding the interpretation or application of this Convention shall be amicably settled by direct agreement between them. Failing such settlement, any one of the State Parties may refer the dispute to the International Court of Justice in conformity with the Statute of the Court or by arbitration by other States Parties to this Convention.³⁴⁶*

Article 23 provides different official languages of the OAU (AU) Member States, in which the original version of this Convention was written and deposited with the secretary general of the Organization.

³⁴⁶ Id. at Article 22 (1) & (2).

“The Original of this Convention, of which the Arabic, English, French and Portuguese texts are equally authentic, shall be deposited with the Secretary General of the Organization of African Unity.”

The Convention ends with an Annex, containing the list of all international instruments.³⁴⁷

3.2. OAU (AU) COMPLIANCE WITH THE UNITED NATIONS REQUIREMENTS FOR COMBATING TERRORISM.

Is the OAU Algiers Convention 1999 in compliance with the UN requirements? In 2001, a Counter Terrorism Committee (CTC) was created by Resolution 1373 to monitor all member states counter terrorism ratification as required by UN.

The OAU Algiers Convention 1999 is a regional treaty, which finds its basis in the numerous United Nations Conventions and Resolutions that deal with counter-

³⁴⁷ (a) Tokyo Convention of Offences and Certain Other Acts Committed on Board Aircraft of 1963; (b) Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 and the Protocol thereto of 1984; (c) New York Convention on the Prevention and Punishment of Crimes against International Protected Persons, including Diplomatic Agents of 1973; (d) International Convention against the Taking of Hostages of 1979; (e) Convention on the Physical Protection of Nuclear Materials of 1979; (f) United Nations Convention on the Law of the Sea of 1982; (g) 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 of 1988; (h) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf of 1988; (i) Convention for the Suppression of Unlawful Acts against Maritime Navigation of 1988; (j) Convention on the Making of Plastic Explosives of 1991; (k) International Convention for the Suppression of Terrorist Explosive Bombs of 1997; (l) Convention on the Prohibition of the use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 1997. See Annex of OAU Convention on Preventing and Combating Terrorism.

terrorism measures. The OAU Algiers Convention of 1999 states categorically among other preambles that,

“Believing in the principles of international law, the charter.... and the latter’s relevant resolutions on measures aimed at combating international terrorism and, in particular, resolutions 49/60 of the General assembly of 9 December, 1994... as well as resolution 51/210 of the General Assembly...”³⁴⁸

On the 84th plenary meeting of the General Assembly, the resolution 49/60, known as Measures to Eliminate International Terrorism, held on December 9, 1994³⁴⁹, urged all United Nations Member States in accordance with the provisions of the Declaration, to take all appropriate measure at the national and international levels to eliminate terrorism with immediate effect.³⁵⁰ In its Annex, it recalls and is concerned by the increase in many regions of the world, of acts of terrorism based on intolerance and extremism, firmly determined to eliminate international terrorism in all its forms and manifestations; ‘Convinced also, 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’³⁵¹

The resolution also declares that:

“States must also fulfill their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are

³⁴⁸ See the preamble of OAU Convention on preventing and Combating of Terrorism, 1999.

³⁴⁹ See A/RES/49/60

³⁵⁰ Id., at 4.

³⁵¹ See the Annex of A/RES/49/60.

*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....*³⁵²

Additionally, in Resolution 51/210, Measures to Eliminate International Terrorism, the General Assembly at its 88th plenary meeting of 17 December, 1996, recalled its resolution 49/60, supra. It recalled that in the Declaration on Measures to Eliminate International Terrorism, the General Assembly “encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there was a comprehensive legal framework covering all the aspects of the matter.”³⁵³ It also reaffirmed the declaration on Measures to Eliminate International Terrorism contained in the annex to resolution 49/60.³⁵⁴

These two resolutions and other international legal provisions formed the core basis for enacting the OAU Algiers Convention, 1999. Also, wordings of Article 22 of the OAU Convention stated above, shows that OAU Convention is an instrument enacted in accordance with the requirements of international law in combating terrorism and should not be interpreted as derogating from the general principles of international law, particularly principles of international humanitarian law and African charter on Human and peoples’ right.

³⁵² Id., at 5.

³⁵³ A/RES/51/210.

³⁵⁴ Id., at 7.

Therefore, suffice it to say that the enactment of the OAU Algiers Convention 1999 is in compliance with the United Nations requirement for combating terrorism.

3.3. EFFECTS OF THE OAU ALGIERS CONVENTION 1999.

The main point lies not in enactment of the law, but the enforceability of the enacted law. As far back as 1985, on the 40th anniversary of the signing of the UN Charter, the then Secretary General, Javier Perez de Cuellar stated that:

“Mere condemnation ofterrorist acts is insufficient. Effective international action is required. Resolutions and conventions have been adopted in the past... These provide a vital framework for countermeasure. It is tragically evident, however, the new, multilaterally coordinated efforts are urgently required to deal with the terrible phenomenon, which is beyond the capacity of any one country to handle alone.”³⁵⁵

Did Javier Perez de Cuellar’s statement supra make any impact in enactment of counter-terrorism laws in UN and at world at large? How has the OAU Convention impacted Africa in preventing and combating terrorism?

The UN Counter-Terrorism Committee (CTC) was created in 2001 to monitor the implementation of Security Council Resolution 1373. The CTC Consists of all 15 members of the Security Council. They took the unprecedented step of imposing

³⁵⁵ Dr Paul Norman. The United Nations and Counter-terrorism After September 11: towards the assessment of the impact and prospects of counter-terror ‘spill-over’ into international criminal justice cooperation. Paper presented to British Society of Criminology conference 6-9th July 2004 at University of Portsmouth. 004, Jan 2005, Vol. 2.0.

uniform obligations on all UN Member States³⁵⁶ and enforce Member States to ratify all existing UN and regional legal instruments on terrorism and to enact domestic legislation necessary for their enforcement.

Then, as a result of concern, that the 1999 OAU Algiers Convention had inherent weaknesses which could impair its implementation by the Union, the AU enacted Protocol to the OAU Convention on Prevention and Combating of Terrorism for the effective implementation of the Convention in 2004.

The preamble of the Protocol states that the Union is:

“Gravely concerned at the increasing incidence of terrorist acts worldwide, including in Africa, and the growing risk of linkages between terrorism and mercenarism, weapons of mass destruction, drug trafficking, corruption, transnational organized crimes, money laundering, and the illicit proliferation of arms;

Determined to combat terrorism in all its forms and manifestations and any support thereto in Africa;

... 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 relevant General Assembly resolutions;

Reaffirming our commitment to the OAU Convention for the Elimination of Mercenarism in Africa, adopted in Libreville, Gabon, in July 1977;

... Reaffirming our commitment to OAU Convention on the Prevention and Combating of terrorism adopted by

³⁵⁶ Eric Rosand. Security Council Resolution 1373, the Counter-Terrorism Committee, and the fight against terror; 2003, American Journal of International Law 97 at 333.

the 35th OAU Summit in Algiers, Algeria, in July 1999;

...Further Recalling the plan of Action for the Prevention and Combating of Terrorism adopted by the intergovernmental High Level meeting of Member States of the African Union, held in Algiers, Algeria, in September 2002;

....Stressing the imperative for all Member States of the African Union to take all necessary measures to protect their populations from acts of terrorism and to implement all relevant continental and international humanitarian and human rights instruments; and

Desirous of ensuring the effective implementation of the OAU Convention on the Prevention and Combating of Terrorism.”³⁵⁷

Apparently, the main purpose of the protocol 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 (PSC) 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 in the implementation of other relevant international instruments.³⁵⁸ The Protocol also provides for the mechanism for implementation of the OAU Algiers Convention 1999 in its Article 4 (a)–(f), which states thus:

“The Peace and Security Council (PSC) shall be responsible for harmonizing and coordinating continental efforts in the prevention and combating of terrorism. In pursuing the endeavor, the PSC shall:

- (a) establish operating procedure for information gathering, processing and dissemination;*
- (b) establish mechanisms to facilitate the*

³⁵⁷ See the preamble of the protocol to the OAU Convention on the Prevention and Combating of Terrorism.

³⁵⁸ Id at Article 2 (2).

- exchange of information among States Parties on patterns and trends in terrorist acts and activities of terrorist groups and on successful practices on combating terrorism;*
- (c) present annual report to the Assembly of the Union on the situation of terrorism on the continent;*
- (d) monitor, evaluate and make recommendations on the implementation of the Plan of Action and programmes adopted by the African Union;*
- (e) examine all reports submitted by States Parties on the implementation of the provisions of this Protocol; and*
- (f) establish an information network with national, regional and international focal points on terrorism.*³⁵⁹

The PSC is the supreme organ of the AU charged with the responsibility to prevent and combat terrorism in Africa. Article 7(i) of the Protocol Relating to the Establishment of the PSC gives it the power to ensure the implementation of the Algiers Convention and other relevant international, continental and regional conventions and instruments, as well as harmonise and coordinate efforts at the regional levels to combat international terrorism.

International concern about Africa has more to do with its weak states providing safe haven for terrorists, from which to finance and launch terrorist attacks or hide from international retribution.³⁶⁰ The most glaring omission from the OAU Algiers Convention of 1999 is any reference to monitoring or compliance mechanisms. The Article 23 (2) of the Constitutive Act of the African Union, 2000, closes this gap, in theory, by providing for sanctions against a Member State which “fails to comply

³⁵⁹ Id at Article 4 (a)-(f)

³⁶⁰ Kathryn Sturman. The AU Plan on Terrorism. Joining the global war or leading an African Battle. The Essay can be found on www.issafrica.org/armsnetafrica/sites/default/files/sturman

with the decisions and policies of the Union". In practice, however, the AU has no precedent and little power to enforce compliance.

The AU Plan of Action is premised on the need to strengthen the capacity of African States through intergovernmental co-operation and co-ordination.³⁶¹ Ratification and implementation of the OAU Algiers Convention, 1999 is the first undertaking of the Plan of Action. A primary objective of the AU Commission and the Institute for Security Studies (who were partners in the project) in convening the Algiers Senior Officials' Meeting was to build up momentum for the 15 ratifications required for the Convention to enter into force. This target was met and exceeded at the said Algiers meeting of 2002, with South Africa being the 15th Member State to ratify the Convention.

Although it is not mandatory, the plan of Action specifically sets out a monitoring and enforcement role for the new Peace and Security Council (PSC) and the commission of the AU. Under Article 7 of the Protocol relating to the Establishment of the PSC, adopted at the AU Summit in Durban, July 2002, the PSC is specifically charged to ensure the implementation of the Algiers Convention and other relevant international, regional and sub-regional instruments to combat terrorism.³⁶² The PSC (or the existing Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution) shall request all Member States to report annually on the steps they have taken to prevent and combat terrorism, and

³⁶¹ See the preamble and Article (7) Plan of Action of the African Union for the Prevention and Combating Terrorism, adopted at Algiers on 14 August 2002. it can also be found on www.iss.co.za

³⁶² Kathryn Sturman. Supra note 360.

specifically, to implement the Algiers Convention, 1999; present an annual report on terrorism to the Assembly or the Union; and monitor and make recommendations on the implementation of the AU Plan of Action on the Prevention and Combating of Terrorism. The AU Commissioner in charge of Peace and Security will also examine and follow up on the reports submitted by Member States, and “provide advice on matters pertaining to counter-terrorism action including preparation of model legislation and guidelines to assist Member States”.³⁶³

Another important proposal which was accepted in the meeting is the establishment of African Research Centre on Terrorism; therefore, the African Centre for the Study and Research on Terrorism (ACSRT) was established through the AU plan of Action meeting, 2002. The ACSRT provides forum for interaction and cooperation among Member States and Regional mechanism. The centre is considered part of the Peace and Security Department of the AU Commission and plays an important role in guiding the AU’s counter-terrorism efforts and implementing the AU counter-terrorism framework. It works in collaboration with a number of regional and international partners to ensure coherent and co-ordinated counter-terrorism efforts in the continent.³⁶⁴

³⁶³ Plan of Action of the African Union for the Prevention and Combating Terrorism. Supra note 361 at Article 16 (b)-(d).

³⁶⁴See Dr Liess Bourka’ address in the meeting on Resolution 1373(2001) held on 10 June 2010 at UN Heaquarter, New York by UN Security Council Counter-Terrorism Committee. www.un.org/en/sc/ctc/docs/2010/2010_06_10_acsrt.pdf

The mandate of the ACSRT is to centralize information, studies of and analyses of terrorism and terrorist groups, as well as to initiate research and develop training programmes by organizing training schedules, meetings and symposia with the assistance of international partners, with the view to raise maximum awareness, prevent and eliminate the threat of terrorism in the continent. The ACSRT is envisaged to provide the AU with the necessary expertise for realising the AU's Counter-terrorism objectives as well as translating the continental and international commitments of the Member States into concrete actions.³⁶⁵

Paragraph 17 of the OAU Plan of Action and Article 5 of the Protocol to the OAU Convention on the Prevention and Combating of Terrorism specify the responsibilities of the AU Commission as well. Their duties includes: the provision of technical assistance on legal and law enforcement matters, including matters related to combating the financing of terrorism; the preparation of model laws and guidelines to help Member States to formulate legislation and related measures for preventing and combating terrorism; and follow-up with Member States and with regional mechanisms on the implementation of decisions taken by the PSC and other organs of the AU on terrorism- related matters.

Despite the Protocol and AU's Action Plan for the effective implementation of the 1999 OAU Algiers Convention 1999, there are still incessant terrorist acts going on in Africa. The current debacle in Somalia may have dragged the AU into an untenable situation that could fundamentally undermine the promise of that

³⁶⁵ Id.

organization as a force for peacemaking and improved governance.³⁶⁶ The main challenge remains the full implementation of the counter-terrorism instruments and relevant decisions of the AU policy organs.

Funding is necessary for more effective compliance with the OAU(AU) Convention on counter-terrorism especially among the weak states. Economic instability is the major factor that affects effective implementation of counter terrorism legislations. Another major challenges encountered by the AU in implementing its counter-terrorism agenda is the lack of adequate human and financial resources. While this problem is not peculiar to counter-terrorism, it is, however, a severe stumbling-block to fully and timely realise the AU's counter-terrorism objectives, especially if the Union is to be proactive in its response to terrorism.³⁶⁷

The AU is also unable to verify which Member States are complying with or actually implementing the AU and international counter-terrorism regimes and which ones are not. Though Member States are required to report to the chairperson of the commission on their activities, many are still reluctant to do so, complaining and reporting fatigue.³⁶⁸

The AU still lacks the capacity to develop a list of perpetrators of terrorist acts as provided for in the Plan of Action. This is compounded by lack of a regional or

³⁶⁶ Princeton N Lyman. *Supra* note 242.

³⁶⁷ Martin Ewi and Kwesi Aning. *Assesing the role of the African Union in preventing and combating terrorism in Africa*. Institute for Security studies; African Security Review 15.3.

³⁶⁸ *Id.*

continental arrest warrant which could permit the AU to investigate arrest and detain persons accused or suspected of terrorist acts.³⁶⁹

Though, OAU (AU) needs to be praised for drafting the Convention for preventing and combating of terrorism, but implementation of the said convention is still ineffective for combating terrorism in the continent.

3.4. CONCLUSION.

In as much as priority should be given to effective combating of terrorism over human rights law, however, in-depth review of this Convention shows that combating terrorism will likely clash with principles of international humanitarian law, notwithstanding that Article 22 of the Convention states otherwise.

The OAU Algiers Convention 1999 requires States Parties to proscribe terrorist acts, punish them with penalties taking 'into account the grave nature of such offences'. Some human right activists argue that, while acts of terrorism may be very grave, States should bear in mind that the death penalty is an extreme exception to the right to life and should be applied only to the most serious crimes.³⁷⁰

³⁶⁹ Id.

³⁷⁰ S. Jagwanth and F Soltau. *Supra* note 305.

But these human right activists should also bear in mind that terrorist is a serious crime that deprives people of their basic fundamental human rights as well.

The OAU Algiers Convention 1999 entrench the principle of 'extradite or punish'.

The extradition provision of the Convention have the potential to clash with the human rights commitments by states not to extradite alleged offenders to jurisdictions where they could face the death penalty.³⁷¹ Therefore, even on paper, the Convention is not in all ramifications, compliance with the requirements of international law in combating terrorism, same as the applicability of the stated Convention.

The Convention mandates Member States to enact their national legislations in combating terrorism as required by the UN Security Council, without actually considering how some poor Member States will effectively combat such grievous offense as terrorism. What then happens to such Member States that does not have capability of prosecuting and convicting terrorists due to its economic power? Why should the continent not provide a universal court vested with terrorist jurisdiction for the AU and mandates all State Members to refer such offence to the court?

Notably, the AU's Charter stated among other objectives, that their union will promote unity and solidarity of African States, co-ordinate and intensify their cooperation and efforts to achieve better life for people of Africa. Article 5 of the OAU Algiers Convention of 1999, focuses on Member States' cooperation in preventing and combating terrorist acts in their national levels; which could be so

³⁷¹ S. Iagwanth and F Soltau. Supra note 305.

easily attained in regional level since the region already has an agreed and acceptable definition of “terrorist acts”. This definition is binding on all the Member States that have ratified the Convention in accordance with Article 1(2) of the convention and shall not make any national law contrary to this regional convention.

Certainly, some Member States are economically down and enmeshed with terrorist activities (for example Somalia), how can one expect an effective prevention and combating of terrorism in that state, when the arms of government are already suffering, or in Senegal and Mozambique that are overwhelmed with the catastrophic effects of genocide, drought and HIV/Aids? If only the OAU/AU can establish a regional court, it will be easier for such weak nations, such as Somalia, Senegal, Mozambique, etcetera, to combat terrorism more effectively.

Therefore, what has been provided so far in Africa regional counter-terrorism instruments remains largely to be translated into action.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF THE OAU CONVENTION ON PREVENTING AND COMBATING OF TERRORISM AND SOME OTHER CONVENTIONS ON COUNTER-TERRORISM WITH SOME AFRICAN ORIGIN.

4.0. INTRODUCTION.

So many countries adopted similar laws in such a short time after 9/11 because of the development of legal resemblance of anti terrorism laws that has a different cause. For the first time in history and at a fastest speed, legal systems around the globe adapted to a changed world by responding to the same threat, for the same reason, all States were ordered to fight terrorism in a common template forged by international organizations; and most States actually did.³⁷²

But this is not the case for African continent; long before the 9/11 incidence, Africa as a region and some organizations with Africa origin already adopted anti-terrorism legislations. Some of the laws are: Arab Convention on the Suppression of Terrorism, 1998, known as 'Arab Convention', which is chronologically the first out of the three Conventions to be discussed in this chapter. The Arab Convention was adopted in April, 1998 at Cairo by the Council of Arab Ministers of Justice and was later revised on 28 March, 2008. Convention of the Organization of the Islamic

³⁷² Kim Lane Scheppele. The International Standardization of National Security Law; 2010, 4 JNSLP 437.

Conference on Combating International Terrorism came next in 1999. It is known as 'OIC Convention' and was adopted at the 26 session of the Organization of Islamic Conference of foreign ministers at Ouagadougou, Burkina Faso in July, 1999; then followed by the OAU Convention on the Preventing and Combating of Terrorism, 1999, adopted in Algiers, Algeria on 14 July 1999 as discussed in previous chapters.

These three Conventions (Arab Convention, OIC and OAU Algiers Conventions) have so much in common with the UN Security Council and General Assembly declarations on terrorism. They also share common elements with the international conventions and protocols. All the three Conventions , explicitly or implicitly, condemn terrorism to be a criminal act that is not to be considered a political crime; state the aim of multilateral co-operation; make provision for preventive measures; call for the exchange of information and co-operation for preventing and combating terrorist crimes; and establish common prosecution and extradition procedures. The most noticeable differences relate to their definitions (or lack of formal definition(s)) of terrorism and the extent to which they make provision for exceptions relating to the right to self-determination.³⁷³

This chapter begins with a brief history of the Arab League Organization and Organization of Islamic Conference, followed by discourse on their respective anti-terrorism Conventions before making a comparative analysis of the three

³⁷³ Du Plessis, Anton. Global and regional initiatives to combat terror, 2005 WLNLR 26454593,Chap. 4 at 16

Conventions in order to ascertain the originality of the OAU Algiers Convention 1999 or to otherwise conclude that it is a duplicate of the Arab Convention and OIC Convention.

Further, under this same chapter, some State Party's (Ethiopia, Somalia, Kenya, Sudan and Nigeria) response to the Convention is assessed to certify compliance with their obligations under the OAU Algiers Convention 1999 ; and to determine the effectiveness of approaches they are using (if any) in combating terrorism in their respective nations.

4.1. BRIEF HISTORY OF THE ARAB LEAGUE AND ORGANIZATION OF ISLAMIC CONFERENCE.

4.1.1. ARAB LEAGUE:

The Arab League officially called 'The League of Arab States', is a voluntary association of countries whose peoples are mainly Arabic speaking or where Arabic is an official language. The League of Arab States was created to "strengthen the close relations and numerous ties which bind the Arab States" and "direct their efforts towards the goal of the welfare of all Arab States ...[and] the guarantee of their future and the realization of their aspirations," and today, primarily serves to

promote political, economic, cultural, and scientific cooperation among Arab states.³⁷⁴

The idea of the Arab League was mooted in 1942 by the British, who wanted to rally Arab countries against the Axis powers. However, the league did not take off until March 1945, just before the end of World War II. At that time the issues that dominated the League's agenda were freeing those Arab countries still under colonial rule, and preventing the Jewish community in Palestine from creating a Jewish state.

The Organization started off with six (6) members namely, Egypt, Iraq, Transjordan (renamed Jordan in 1949), Lebanon, Saudi Arabia and Syria. Currently, the League has 22 Member States namely; Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen. Syria's participation has been suspended since November 2011, as a consequence of their government's repression during the ongoing uprising and civil war.

The highest body of the league is the Council, composed of representatives of Member States, usually foreign ministers, their representatives or permanent delegates.³⁷⁵ The daily affairs of the league are coordinated by the General Secretariat, headed by a Secretary-General. The General Secretariat is the

³⁷⁴ See Article 2 of Pact of The League of Arab States, March 22, 1945.

³⁷⁵ Id. at Article 3

administrative body of the league, the executive body of the council and the specialized ministerial councils.³⁷⁶

4.1.2. ORGANIZATION OF ISLAMIC COOPERATION (OIC):

The OIC is an inter-governmental organization, comprised of Islamic states with its headquarters in Jeddah, Saudi Arabia. It is the second largest inter-governmental organization, after the United Nations, with membership of fifty seven (57) States spread over four continents.³⁷⁷ OIC was founded on 25 September 1969, following an appeal from the former Mufti of Jerusalem to all Islamic States to join the First Islamic Summit at Rabat, Morocco.

The summit was held in response to the August arson attack on the holy al-Aqsa Mosque in Jerusalem. This historic meeting was instrumental in the formation of the OIC, and Islamic Solidarity became the framework to increase cooperation and exchange among the Islamic states. In 1971, the Islamic Foreign Ministers' Conference formally established the OIC by approving the Charter, which a majority of Member States had ratified by February 1973.³⁷⁸

The present Charter of the Organization was adopted by the 11th Islamic Summit held on 13 and 14 March 2008 which laid down the objectives and principles of the

³⁷⁶ Id. at Article 12.

³⁷⁷ See the article on 'About OIC' found at <http://.oicun.org/2/23/>

³⁷⁸ Devon A. Hansen and Mohammad Hemmasi. The State of the Organization of the Islamic Conference (OIC) at the dawn of the millennium. www.gcsu.edu/.../state/20of_20the_20world

organization and fundamental purposes to strengthen Islamic solidarity and cooperation among the Member States. Over the last forty (40) years, the membership has grown from its founding members of twenty five (25) to fifty seven (57) states.³⁷⁹

Although not clearly defined by the Charter, the term 'Muslim State' implies where Muslims are majority. To become an OIC member, a Muslim State submits an application expressing its willingness to adopt the Charter. One of the main goals of the OIC is to reduce the gross inequalities among Islamic Member States.³⁸⁰

The Member States are: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladeshi, Benin, Brunei, Burkina Faso, Cameroon, Chad, Comoros, Cote d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgystan, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Surinam, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan and Yemen; although Nigeria renounced its membership in 1991, the OIC has not recognized this decision.

Some of the objectives among others under the OIC charter are to strengthen Islamic solidarity among Member States; to consolidate cooperation in the political,

³⁷⁹ About OIC. Supra note 377.

³⁸⁰ Devon A Hansen and Mohammad Hemmasi. Supra note 378.

economic, social, cultural and scientific fields; to safeguard the dignity, independence, and national rights of Muslim people; to safeguard the Holy Places and support the struggle of the Palestine people; to eliminate racial discrimination and all forms of colonialism; and, to promote cooperation and understanding between Member States and others.³⁸¹

In order to realize these objectives, Member States shall act in accordance with the following principles:

*All Member States commit themselves to the purposes and principles of the United Nations Charter; All Member States shall settle disputes through peaceful means and refrain from use or threat of use of force in their relations; All member States undertake to respect national sovereignty, independence and territorial integrity of other Member States and shall refrain from interfering in the internal affairs of others; Member States shall uphold and promote, at the national and international level, good governance, democracy, human rights and fundamental freedoms, and the rule of law.*³⁸²

The principal institutional framework of the OIC is comprised of three parts. First, the Conference of Kings and Heads of State and Government defines the strategy for Islamic policies. Second, the Islamic Conference of Foreign Ministers examines the progress on implementing the Islamic Summit's decisions. Finally, the General Secretariat is the executive organ of the OIC and headed by a Secretary General,

³⁸¹See Chapter 1, Article 1 of the Charter of the Organisation of the Islamic Conference, 2004.

³⁸²Id. at Article 2.

who executes the decisions of the Islamic Summit and the Islamic Conference of Foreign Ministers.³⁸³

The Organization of Islamic Conference changed name into Organization of Islamic Cooperation in June 2011, at the 38th session of the Council of Foreign Ministers. “OIC” as an acronym remains in use.³⁸⁴

4.2. ARAB CONVENTION FOR THE SUPPRESSION OF TERRORISM, 1998 (ARAB CONVENTION)

4.2.1. AN OVERVIEW OF THE ARAB CONVENTION:

The Arab Convention is divided into four (4) main parts and the parts are further divided into chapters, sections, 42 Articles and paragraphs. Part I is the ‘Definition and General Provision’ that comes after the Preamble. It is subdivided into Articles 1 and 2.

Part II concentrates on the ‘Principles of Arab Cooperation for the Suppression of Terrorism’. It is divided into two (2) Chapters with five (5) sections which are further subdivided into Articles and paragraphs. First Chapter focuses on ‘The security field’ and Section I of Chapter I is on ‘Measures for the Prevention and

³⁸³ Id. at Chapters III – XI.

³⁸⁴ DA Hansen. Amserdam Law forum. www.Pcag.uwinnipeg.ca/prairie-perspectives/pp-vol04/Hansen-Hemmasi.pdf

Suppression of terrorist offences, containing Article 3; Section II is on 'Arab Cooperation for the Prevention and Suppression of terrorist offences containing Article 4 with sub-headings and paragraphs. Chapter II of Part II centres on 'The judicial field' and contains five (5) Sections. Section I is on 'Extradition of Offenders' containing Articles 5-8; Section II is the 'Judicial Delegation' containing Articles 9-12; Section III is on 'Judicial Cooperation' containing Articles 13-18; Section VI is the 'Seizure of assets and proceeds derived from the offence' containing Articles 19 and 20 and; Section V is on 'Exchange of evidence containing only Article 20.

Part III focuses on 'Mechanism for Implementing Cooperation'. It is divided into three (3) major Chapters. Chapter I is the 'Extradition Procedures' containing Articles 22-28; Chapter II is on 'Procedures for Judicial Delegation containing Articles 29-33 and Chapter III is the 'Measures for the Protection of Witnesses and Experts containing Articles 34-38. The final part is Part Four, titled 'Final Provision' containing Articles 39-42.

4.2.2. REVIEW OF THE ARAB CONVENTION:

The Arab Convention on the Suppression of Terrorism (the Arab Convention) was the first comprehensive attempt by Arab states to legislate collectively against terrorism. Like other regional agreements, the Conventions are designed to improve

the cooperation between Member States; nevertheless it did not overlook the importance of reaching out, participating and consolidating forces in the international efforts to combat terrorism.³⁸⁵

Its preamble states among others thus:

“...promote mutual cooperation in the suppression of terrorist offences, which pose a threat to the security and stability of the Arab Nation and endanger its vital interests,

Being committed to the highest moral and religious Principles and, in particular, to the tenets of the Islamic Sharia, as well as to the humanitarian heritage of an Arab Nation that rejects all forms of violence and terrorism and advocates the protection of human rights, with which precepts the principles of international law conform, based as they are on cooperation among peoples in the promotion of peace;

Being further committed to the Pact of the Arab States, the Charter of the United Nations and all other international conventions and instruments to which the Contracting States to this Convention are parties.”³⁸⁶

Article 1(1) defines ‘Contracting Parties’ as ‘Member States’. The Arab Convention further set out a definition of ‘terrorism’ in Article 1(2) as discussed in chapter two supra, while Article 1(3) defines ‘Terrorist Offence’ as also cited in the same Chapter two of this dissertation.³⁸⁷ It is important to note that this Article 1(3)

³⁸⁵ See International Co-operation in Counter terrorism: The United Nations Regional Organizations in the fighting against terrorism; as edited by Edith Nesi, 2006, Published by Ashgate Publishing Ltd. ISBN: 0-7546-4755-2.

³⁸⁶ See generally the preamble of The Arab Convention for The Suppression of Terrorism, 1998, supra note 70.

³⁸⁷ See supra note 70.

incorporated the definition of terrorism in the mentioned Conventions as definition of terrorist offences too, therefore, making the definition cumbersome.

The definition is immediately followed by an article that expressly excludes acts that are undertaken as part of a struggle against foreign occupation. That exclusion is underlined in the preamble, which affirms the rights of peoples to combat foreign occupation and aggression by any means, including armed struggle, in order to liberate their territories and secure their right to self-determination and independence. However, that right must be exercised in accordance with the purposes and principles of the Charter of the UN and with the UN's resolutions but it does not exclude "any act prejudicing the territorial integrity of any Arab State".³⁸⁸ These references to the right to armed struggle against oppression suggest where some of the difficulties may lie in achieving a universal definition of 'terrorism'.³⁸⁹

Article 3, Part II of the Convention deals with obligations and duties of Contracting States. It is divided into two major paragraphs. Paragraph I calls on the Contracting States to take preventive measures against perpetrating of terrorist acts in its territory and ensure safety of diplomats in its territory. Paragraph II which is on measures of suppression mandates Contracting States to arrest, investigate, communicate and prosecute terrorist offences in accordance with the national law or extradition in accordance with the Convention.

³⁸⁸ See Article 2 (a) and Article 2 (b) (i)-(vi) of the Arab Convention. Supra note 70.

³⁸⁹ Dr. Myra Williamson. *Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001*; 2013 Ashgate Publishing Ltd.

Article 4 requires the Member States to cooperate for prevention and suppression of terrorist offences in accordance with their national law by exchanging information, investigations and exchange of expertise.³⁹⁰

Article 5 provides for extradition, just like in the 1999 OAU Algiers Convention's extradition section. It states thus; "Contracting States shall undertake to extradite those indicted for or convicted of terrorist offences whose extradition is requested by any of these States in accordance with the rules and conditions stipulated in this convention". Article 6 stipulate conditions and circumstances under which extradition shall not be granted.³⁹¹

Article 9 focuses on mutual legal assistance between Member States, while Article 10 discusses grounds on which legal assistance may be refused. Article 11 provides that such request shall be granted in accordance with the municipal law of the requested State and at a convenient time for the requested State to execute the request.

Articles 13–17 urges Member States for judicial cooperation by assisting each other for investigations and prosecutions relating to terrorist offences and Article 18 states that this judicial cooperation shall not hinder the victim of the offence from claiming his civil law rights.

³⁹⁰ Article 4(I)-(III) of the Arab Convention. Supra note 70.

³⁹¹ Id. at Article 6 (a)-(h).

Article 19 further buttress extradition proceedings. It states that in an extradition request, the requested state shall extradite alongside with the alleged offender, all property and money relating to the commission of the terrorist offence for which the victim is being extradited. One of the concerns raised by Amnesty International is that the Convention includes wide extradition powers, “there is a risk that individuals might be returned to countries where they will face serious human rights abuses, including being subjected to torture, unfair trials, or the death penalty.”³⁹² Article 20 immediately limits the provision of Article 19 by providing reasons under which assets and proceeds derived from the offence cannot be handed over to the requesting State. Then, Article 21 encourages Member States to exchange information by commission Rogatoire.

Part III provides generally for rules in application of legal mutual assistance between Member States. Part III, Chapter I, Articles 22-28 stipulates the requirements and procedures for extradition. Article 26 specifically provides that persons may be detained without trial for up to sixty (60) days pending extradition.³⁹³ Prolonged detention without charge or trial is drastic erosion into the right to liberty and must be seen as a measure of last resort. Under any circumstances, compelling reasons needs to be presented before resorting to detention without trial because of its potential for the use of torture.³⁹⁴

³⁹² The Arab Convention for Suppression of Terrorism, a serious threat to human rights. www.shrc.org/en/?p=19869

³⁹³ Article 26 of the Arab Convention. Supra note 70.

³⁹⁴ S. Jagwanth and F Soltau. Supra note 304.

Article 11 of the Convention Against Torture and Other cruel, Inhuman or Degrading Punishment requires States Parties to keep under 'systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest and detention with the aim of preventing any cases of torture. The Human Rights Committee, commenting on Article 9 of International Covenant on Civil and Political Rights (ICCPR), has stated that the period of custody before an individual must be brought before court may not exceed a few days.³⁹⁵

Also, the Human Rights Committee, addressing the question of derogations from rights under Article 4, held that: "State Parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or pre-emptory norms of international law, for instance... through arbitrary deprivations of liberty or by deviating from fundamental principles of a fair trial, including the presumption of innocence".³⁹⁶

Further, the committee underlined that for non derogable rights to be upheld, recourse to a court to decide the legality of detention had to be preserved when a State decided to derogate from the Covenant.³⁹⁷

Chapter II, Articles 29-33 of the Arab Convention provides for judicial delegations and requirements the requesting State need to provide, while Articles 34-38 which

³⁹⁵ Id.

³⁹⁶ Id.

³⁹⁷ Id.

focuses on measures for protecting the witnesses and experts in requesting States' territory, provides that, if a requesting State requests for an appearance of a witness and expert from a requested State, the former shall undertake to pay for travel and subsistence expenses. Article 35 states that if a witness refuses to appear despite the summons, he shall not be guilty of any offence and if he decided to appear on his own accord in the requesting State, he should be bound with the domestic legislation of that state. Further, Article 36 provides for the immunity an expert or a witness acquires while in the requesting State, which the said immunity lapses thirty (30) days after his presence is no longer required in the requesting State's territory.³⁹⁸

Under Part IV, the final provisions, Article 39 discusses the ratification of the Convention by Member States, while Article 40 stipulates how and when the Convention shall enter into force. Article 40 states thus:

- “1. This convention shall enter into force on the thirtieth day after the date as of which instruments of ratification, acceptance or approval have been deposited by seven Arab States.*
- 2. This Convention shall enter into force for any other Arab State only after the instrument of ratification, acceptance or approval has been deposited and 30 days have elapsed from the date of that deposit.”*

Article 42 provides that “no Contracting State may make any reservation that explicitly or implicitly violates the provisions of this Convention or is incompatible with its objectives”.

³⁹⁸ Article 36 (1)-(3) of the Arab Convention. Supra note 70.

Arab League received numerous criticism due to the Convention, no wonder it took a long time for it to enter into force.

In March 2002, in an additional effort to further the effectiveness of the Convention, the Arab League Council decided to include the following acts within the scope of the Convention: Incitement and applauding terrorism; Printing and distribution of documents supporting terrorism; Collecting charity contributions for the benefit of terrorism; The acquisition and usage of property for terrorism. Consequently, a drafting committee formulated an amendment to the Convention that corresponds with the Council's decision and that was finally adopted; but, the adoption of the Convention in 1998 presented an outstanding example for regional cooperation in combating terrorism, paving the way for other regional organizations to realize the possibility of achieving such levels of cooperation and thus being encouraged to follow.³⁹⁹

Nevertheless, the Arab Ministers of interior during their meeting on measures to combat terrorism in January, 2004 at Tunis, Tunisia, noted that "many of the provisions of the Convention do not conform with the obligations of Member States of the Arab League under the UN Charter and international human rights law. The

³⁹⁹ Edith Nesi. *Supra* note 385.

Convention also fails to recognize and maintain many other rights and obligations enshrined in human rights and humanitarian law”.⁴⁰⁰

Further, the Amnesty International called for amendment of the Arab Convention and raised so many concerns with the existing Convention. Among the concerns raised by Amnesty international are:

“The definition of ‘terrorism’ in the Convention is so broad that it lends itself to wide interpretation and abuse.” Other terms in the Convention, including “violence”, “terrorist purposes”, and “terrorist groups” are not defined.⁴⁰¹

Some provisions of the convention clearly threaten the right to freedom of expression, including those measures that, according to the Convention, aim to strengthen the “media services” of the security forces. In the absence of a clear definition of these measures, there is a serious risk that they could be interpreted to allow for censorship and interference with freedom of expression, imposed or required by the respective authorities in the region, on the pretext of “security”.⁴⁰²

The Convention does not require judicial review or prior judicial authorization when surveillance and monitoring measures are used against individuals and groups. The authorities, therefore, would be collecting and exchanging information

⁴⁰⁰ The Arab Convention for Suppression of terrorism a serious treat to human rights. Supra note 392.

⁴⁰¹ Id.

⁴⁰² Id.

about people who are otherwise engaged in peaceful legitimate activities, and where the methods used to collect information may violate the right to privacy.⁴⁰³

There are no safeguards in relation to surrender of individuals or extradition in the Convention. Amnesty International believes that surrender and extradition must not be carried out to a jurisdiction where alleged suspects would become prisoners of conscience, subject to the imposition of death penalty, or torture, cruel, inhuman or degrading treatment or punishment. The organization insists that alleged perpetrators should have a fair trial. Although the Convention details measures for the arrest and trial of accused persons, it is totally silent about guarantees for fair trial for those accused of crimes of “terrorism”, and in some cases includes provisions that actually undermine such safeguards.⁴⁰⁴

The Convention fails to incorporate safeguards for the rights of detainees, including guarantees for the right to be promptly brought before a judge, and to be tried within a reasonable time, or released. It does not include a prohibition of arbitrary detention, or a clear prohibition torture. There are no provisions to allow for challenging the lawfulness of detention.⁴⁰⁵ Under the pretext of punishing crimes of “terrorism”, the convention widens the scope of the death penalty in many countries and does not prohibit its imposition against minors, pregnant women and mentally handicapped persons. Amnesty International opposes the death penalty in all cases

⁴⁰³ Id.

⁴⁰⁴ Id.

⁴⁰⁵ Id.

as it violates the right to life and is the ultimate cruel, inhuman and degrading punishment.⁴⁰⁶

Some provisions in the Convention could provide impunity for perpetrators of certain crimes, including the crimes that fall clearly under the responsibility of the international community to investigate, and where there is sufficient evidence; prosecute on the basis of universal jurisdiction.

Furthermore, the Convention specifically does not allow for extradition in cases when an amnesty has been issued covering the perpetrators of these crimes in the requesting State.⁴⁰⁷ Arab league still need to review their existing Convention on Terrorism to ensure its compliance with international law and UN requirements.

4.3. CONVENTION OF THE ORGANISATION OF THE ISLAMIC CONFERENCE ON COMBATING INTERNATIONAL TERRORISM (OIC).

4.3.1. AN OVERVIEW OF THE OIC CONVENTION:

It will not be an understatement to say that OIC is simply a replica of Arab Convention. It is similar to the later in all ramifications except for some wordings which are differently construed but resultantly almost the same, if not same. Analysing all the parts of the OIC tantamount to repeating already discussed Arab

⁴⁰⁶ Id.

⁴⁰⁷ Id.

Convention supra, nevertheless it will still be briefly discussed especially on areas that portray slight difference with the later.

Like the Arab Convention, OIC also has four (4) major parts, sections, 42 Articles and paragraphs. Part I which is the 'Definition of General Provisions' follows the preamble. The part contains Articles 1 and 2 with paragraphs.

Part II is the 'Foundation of Islamic Cooperation for Combating Terrorism' and is subdivided into two (2) Chapters, Divisions, sections, Articles containing paragraphs. Chapter I of the part is the 'Field of Security' that is divided into two (2) divisions. Division I is on 'Measures to prevent and Combat Terrorist Crimes'; it contains Article 3(A) and (B) with paragraphs. Division II is on 'Areas of Islamic Cooperation for preventing and combating terrorist crimes' containing Article 4 with its sub-paragraphs. Chapter II of the same Part II focuses on 'the Judicial field'. It contains five (5) sections. Section I is on 'Extraditing Criminals' which is made up of Articles 5-8; Section II is on 'Rogatory Commission' containing Articles 9-13; Section 3 is the 'Judicial Cooperation', which contains Articles 14-18; Section 4 is on 'Seized Assets and Proceeds of the Crime' containing Articles 19 and 20. Section 5 is 'Exchange of Evidence' which contains Article 21 only.

Part III centres on 'Mechanism for Implementing Cooperation' which is further divided into three (3) Chapters, Articles and paragraphs. Chapter I is the 'Extradition Procedures' containing Articles 22-28; Chapter II is on 'Mechanism

for Rogatory Commission' with Articles 29-33. Chapter III is on 'Measures for protecting Witnesses and Experts' and Articles 34-38 makes up the Chapter.

Finally, Part IV is the 'Final Provisions containing Articles 39-42.

4.3.2. ANALYSIS OF THE OIC CONVENTION:

In 1999, the OIC adopted "the Convention of the Organization of Islamic Conference on Combating International Terrorism". The Convention entered into force in 2002 after the deposit of the seventh instrument of ratification in accordance with Article 40 of the Convention. The Convention contains two particular points of friction with general international law on terrorism. One is the broad definition of terrorism and the second is the exemption of certain causes for terrorism which the OIC endorses.⁴⁰⁸

Article 1 of OIC Convention follow the same way in its definition of terrorism as that of Arab Convention except that it additionally defined 'Terrorist Crimes' while the later defined 'Terrorist Offences'. The preamble confirms the legitimacy of the right of peoples to struggle against foreign occupation and colonialist and racist regimes by all means, including armed struggle'. Some part of the preamble provides as follows:

"....Adhering to the principles of International Law

⁴⁰⁸ DA Hansen. Supra note 384.

and the United Nations Charter as well as all relevant UN resolutions on procedures aimed at eliminating international terrorism, and all other conventions and international instruments to which states acceding to this Convention are parties and which call, inter alia, for the observance of the sovereignty, stability, territorial integrity, political independence and security of states and non-intervention in their international affairs;
Desiring to promote cooperation among them for combating terrorist crimes that threaten the security and stability of the Islamic States and endanger their vital interests;
Being committed to combating all forms and manifestations of terrorism and eliminating its objectives and causes which target the lives and properties of people;”

‘Terrorism’ is defined in Article 1(2) and goes on to extend the elements of such a plan to include also harming people’s honour, freedoms, security or rights, exposing the environment or any public or private property to hazards, occupying or seizing property, endangering national resources or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of any state.⁴⁰⁹

The definition of ‘terrorism’ in the Convention is extensive but inadequately defined. For example, the notion of harm to people’s rights or of exposure of the environment to hazards are extraordinarily vague and do not adequately describe acts of violence. The inclusion of threats to the political unity of a state would encompass separatist movements regardless of their peaceful means, pre-judging

⁴⁰⁹ See supra note 69 for the definition of Terrorism in the Convention of the Organisation of the Islamic Conference on Combating International Terrorism.

the legitimacy of political motivation. Thus, in addition to being vague, the OIC Convention definition has a steep political slant and is not objective.⁴¹⁰

The OIC Convention provides a separate definition of a ‘terrorist crime’ and also stipulates that crimes against UN terrorism-related conventions are considered to be ‘terrorist crimes’.⁴¹¹ It defines “terrorist crime” more broadly as any crime perpetrated, commenced or participated in to realize a terrorist objective in any Contracting State or against its nationals, assets, interests or foreign facilities, punishable by its national laws. The prerequisite of criminality under the national legislation of the OIC Convention Contracting Parties also renders the definition subjective.⁴¹²

Struggle, including armed struggle, by people against foreign occupation, aggression, colonialism and hegemony, aimed at liberation and self-determination in accordance with the principles of international law, is not to be considered a terrorist crime.⁴¹³

Article 1(4) lists crimes stipulated in various multilateral conventions and deems those acts to be “terrorist crime”, but only if the conventions were ratified by the party concerned.⁴¹⁴ The utility of the cross-reference to multilateral conventions is

⁴¹⁰ Gregory Rose and Diana Nestorovska. *Supra* note 307.

⁴¹¹ Article 1(3) of the OIC. *Supra* note 69.

⁴¹² Gregory Rose and Diana Nestorovska. *Supra* note 307.

⁴¹³ *Id.* at Article 2.

⁴¹⁴ See Article 1 (4) of the OIC. *Supra* note 69.

undercut by excluding application to non-parties to those conventions.⁴¹⁵ This implies that the Convention incorporated the definitions of terrorist crimes defined in the above stipulated Conventions as terrorist crimes just exactly the same manner in which Arab Convention incorporated same.

Article 2 provides for exceptions to what shall be deemed as terrorist crimes thereby limiting the ambit of Article 1(3) and (4). Article 2 (a) of the OIC Convention provides that a peoples' struggle "including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with principles of international law shall not be considered a terrorist crime". This exception contemplates that acts that would otherwise be considered terrorist are condoned for a wide range of purposes. The purposes are broad and imprecise.⁴¹⁶

Further, Article 2 (d) stipulates that all "international crimes" aimed at financing terrorist objectives shall themselves be classed as terrorist crimes. This part of the definition extends the meaning of "terrorist crime" to include other criminal activities, such as trafficking in narcotics and human beings, that are intended to finance terrorist plans.

Part II of the OIC Convention sets out extensive areas of cooperation required by Member States to combat and prevent terrorist crimes. Article 3 (1) calls upon the

⁴¹⁵ Gregory Rose and Diana Nestorovska. *Supra* note 307.

⁴¹⁶ *Id.*

member parties not to support terrorist acts and Article 3 (II)(A) lists the preventive measures that each Member Party “shall see to”. These include barring their territories from being used as arenas for planning, organizing and executing terrorist crimes; developing and strengthening border control and surveillance on transfer or stockpiling of weapons; and strengthening security of protected persons, international organizations, vital installations and public transport facilities. Article 3 (II) (B) of the OIC Convention lists “combating measures” as an area for cooperation that includes arresting perpetrators of terrorist crimes, ensuring protection of witnesses and investigators to terrorist crimes, and establishing effective cooperation between the concerned government agencies and the citizens for combating terrorism.

Under Article 4 Member States are encouraged to exchange information regarding terrorist activities and legal assistance in prosecuting terrorist activities. Members are also encouraged to incorporate in researches and studies that will help to combat terrorism.

Article 5 makes provision for the extradition of alleged terrorists within Member States. Member States undertake to extradite those indicted or convicted of terrorist crimes. Article 6 further sets out circumstances under which extradition should not be granted. Extradition may be refused if the crime for which extradition is requested is deemed, under the laws in the requested State, to be one of a political

nature,⁴¹⁷ as political crimes is exempted from terrorist crimes under Article 2 (b) of the Convention. The only situation which can be contemplated under Article 6 to legally compel the requesting State to extradite is when the crime has been committed in the requesting State's territory by a person who is not a national of the requested State.⁴¹⁸ Article 7 provides that if a person requested to be extradited is under trial, the extradition shall be postponed.

Section III of Chapter II centres on judicial cooperation among Member States. It provides that a Member State may request another state to prosecute the alleged terrorist in its country on the requesting State's behalf.⁴¹⁹ The national law of the Member State, where the trial is taking place shall be followed.⁴²⁰

Article 19 is the handing over of property and money along with the alleged offender for extradition under the Convention. A proceeding in handing over the required assets and grounds on which it may be withheld is provided for under Article 20. Further exchange of protection and evidence obtained are covered under Article 21.

Part III stipulates procedures for implementing cooperation among Member States. Extradition procedures and requirements are provided under its Articles 22-28. Article 23 provides that any request for extradition must be accompanied by the

⁴¹⁷ Article 6 (1) of the OIC Convention. Supra note 69.

⁴¹⁸ Edith Nesi. Supra note 385.

⁴¹⁹ Article 15 of the OIC Convention. Supra note 69.

⁴²⁰ Id. at Article 17

original or an authenticated copy of the indictment or arrest order issued in accordance with the conditions stipulated in the requesting State's legislation. Parties must also provide a statement of the acts for which extradition is sought, which specifies details such as dates and places, and a description of the subject wanted for extradition. These procedural requirements are specific, which is advantageous in the absence of other extradition arrangements.⁴²¹ Articles 29-32 stipulate procedures and requirements for Rogatory commissions. Art. 33 require an explanation for refusal of Rogatory Commission. The Article provides thus "any refusal for Rogatory commission shall be explained."

Just like Arab Convention the wellbeing of witnesses and experts while in the territory of a requesting State is covered under Articles 34-37 of Chapter III of the Convention. Article 38 provides that a summoned witness or an expert who is already in prison of the requested State can be transferred provisionally to the location of the hearing. The same Article 38 provides grounds on which such a request may be denied as follows:

- "(a) If the witness or expert refuses.*
- (b) If his presence is necessary for undertaking Criminal procedures in the territory of the requested State.*
- (c) If his transfer would prolong his imprisonment.*
- (d) If there are considerations militating against his transfer."*

Article 39 of the final part is the ratification of the Convention by Member States while Article 40 provides for the entry into force of the Convention. Article 41 urges Member States not to make any reservation contrary to this Convention and Article

⁴²¹ Gregory Rose and Diana Nestorovska. Supra note 307.

42 stipulates the procedure to be followed by a Member State who wishes to withdraw from this Convention.

OIC Convention has been criticised by some authors and Human Right Watch (HRW). The OIC Convention provides two separate, yet, overlapping definitions for the terms 'terrorism' and 'terrorist crimes'. Such a distinction is problematic and creates difficulty in the application of an instrument dedicated primarily to law enforcement.⁴²² In addition, the definition of the term 'terrorism' is wide and encompasses certain ambiguous and sometimes political concepts, thus adding to the difficulty in applying and enforcing the Convention.⁴²³

HRW noted that international law prohibits attacks against civilians no matter the circumstances, and requested the OIC to amend its definition of terrorism "to clarify that its condemnation of terrorism makes no exemptions, even if in the name of causes that OIC Member States endorse".⁴²⁴ HRW also criticised the OIC Convention for using vague language which has led the definition to go beyond the generally accepted understandings of the concept of terrorism and suggested that the definition be amended to cover only those acts committed with the intention of causing death or serious bodily injury, or taking of hostages, which is in line with the statements by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁴²⁵

⁴²² Edith Nesi. *Supra* note 385.

⁴²³ *Id.*

⁴²⁴ DA Hansen. *Supra* note 384.

⁴²⁵ *Id.*

On the prosecution side, the OIC Convention provides for a general obligation on the Member States to prosecute or extradite, however, without requiring the states to establish the terrorist acts as a crime under national law or subject to criminal jurisdiction. This has legal implications for cooperation and extradition processes, especially when viewed in light of the definition of terrorism in Article 1 which may be subject to states' different interpretations. For example, under Article 6, the only situation where a state is legally compelled to extradite is when the crime has been committed in the requesting state's territory by a person who is not a national of the requested state.⁴²⁶ The lack of effective law enforcement instruments can allow perpetrators of terrorist acts to escape punishment and prevent a state from exercising national jurisdiction on a terrorist crime it may consider within its competence.⁴²⁷

The Convention is very ambitious in the extent of obligations of prevention and combating to be fulfilled. However, it is left to the discretion of each Contracting State to decide how to fulfil the obligations to cooperate. Unless it was the common interest of the relevant States to cooperate in certain aspects of a certain case, such cooperation may not be achieved solely on the basis of the legal nature of the obligation.⁴²⁸

⁴²⁶ Id.

⁴²⁷ Id.

⁴²⁸ Edith Nesi. *Supra* note 385

Like Arab Convention, the Convention also needs to be reviewed by the OIC in order to make it an effective law enforcement instrument for combating terrorism. Such a review should include redefining terrorism and terrorist acts and unifying the two terms; revising the issue of political crimes; establishing terrorist acts as crimes under national laws and providing for the situations where jurisdiction must be established; refining the language of the Convention to overcome ambiguities and legal uncertainties.⁴²⁹

4.4. COMPARATIVE ANALYSIS OF THE THREE CONVENTIONS (ARAB CONVENTION, OIC AND OAU ALGIERS CONVENTION) ON COMATING TERRORISM.

The 1998 Arab Convention informs the 1999 OIC Convention and the two are virtually identical.⁴³⁰ The parties to the Arab Convention are also parties to the OIC Convention, which has double the membership of the Arab League. Furthermore, some of them with the double membership are also members of the OAU Algiers Convention 1999.

There are many similarities and relatively minor differences between the three Conventions, especially as it relates to Arab Convention and OIC Convention. The drafting of the OAU Algiers Convention 1999 is noticeably different from the other

⁴²⁹ Id.

⁴³⁰ Gregory Ross and Diana Nestorovska. Supra note 307

two, despite the undeniable fact that the former two Conventions inform its ideas. Some of these similarities and differences are discussed below.

The OIC Convention condemns terrorism and stresses its unjustifiable nature. It also sweepingly defines it but explicitly excludes, in a nod to, among others, Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law". The Arab Convention takes essentially the same position in that it excludes "all cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law". Likewise, the detailed definition of terrorism in the OAU Algiers Convention 1999 is qualified by its exclusion of 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 and domination by foreign forces".⁴³¹

Under the OIC Convention, the meaning of "international crimes" is not clear and does not address the financing by simple donation of funds by supporters, perhaps the most ubiquitous form of financing. It casts "terrorism", "terrorist crime", "international crimes", as well as 'ordinary and political crimes', together into one conceptual swamp. The vague sweep of this definition is unsatisfactory.⁴³² This is

⁴³¹ Robert P. Barnidge, Jr. *Supra* note 54.

⁴³² Gregory Ross and Diana Nestorovska. *Supra* note 307.

one of the main differences between Arab Convention, OIC Convention and OAU Algiers Convention 1999. OAU Algiers Convention of 1999, defined 'terrorist acts' only; OIC defines both 'terrorism' and terrorist crimes' while the former defines 'terrorism' and 'terrorist offences'

The three regional conventions 'carving out' acts committed by liberation movements in the pursuit of self-determination, implies that violence in pursuit of certain just causes should not be classified as terrorism.⁴³³ One of the exemptions is also rather self-serving. The Arab Convention exempts liberation violence from being regarded as terrorism, but where it is not directed against Arab States themselves. In principle, it might be thought that the Arab States have already attained self-determination during decolonization, and thus that there could not exist any legitimate self-determination claim against the independent Arab States.⁴³⁴

Suffice it to say that, the sweeping exclusion clauses in these three Conventions, reflecting as they do, the political and ideological sympathies of the OIC, the Arab League, and the OAU (AU), almost swallow the rule condemning terrorism, thus meaning that all such "legitimate" forms of violence fall outside the OIC, Arab, and OAU Algiers Conventions simply because of the conventions' exculpatory language.⁴³⁵

⁴³³ Ben Saul. *Counter Terrorism: International Law Practice*. Edited by Ana Maria Salnus, De Frias Karja L H Samuel and Nyel D White. Oxford University Press. ISBN: 978-19-960892-8.

⁴³⁴ *Id.*

⁴³⁵ Robert P. Barnidge, Jr. *Supra* note 54.

The three Conventions usefully identify common areas for cooperation in preventive measures, as being the stockpiling of weapons, border controls over dangerous goods and suspected persons, and security for protected persons. None of these Conventions address the prevention of terrorist financing and none provide strong models for implementation of preventive measures.⁴³⁶

Provisions to suppress the financing of terrorism are found in the OAU Conventions, where Parties undertake to refrain from financing terrorist acts.⁴³⁷ A terrorist act is defined to include “sponsoring”.⁴³⁸ The OIC Convention also contains relevant provisions but merges money laundering with terrorist acts where it states that money laundering aimed at financing terrorism is itself to be considered a terrorist crime.⁴³⁹ It would seem a better approach to prosecute perpetrators of money laundering activities intended to finance terrorist acts under the two separate charges of money laundering and of terrorist financing so as to maintain the conceptual distinction between money laundering and terrorist financing.⁴⁴⁰

Under Article 5 of OAU Algiers Convention 1999, Parties undertake to strengthen the exchange of information among them regarding acts and crimes committed by terrorist groups and the communication methods used by such groups.⁴⁴¹ Both the

⁴³⁶ Id.

⁴³⁷ Article 4 (1) of the OAU Algiers Convention 1999. Supra note 26.

⁴³⁸ Id. at Article 3 (b).

⁴³⁹ Article 2(d) of the OIC. Supra note 69.

⁴⁴⁰ Gregory Ross and Diana Nestorovska. Supra note 307.

⁴⁴¹ Article 5(1) of the OAU Algiers Convention 1999. Supra note 26.

OIC and OAU Algiers Conventions oblige the Parties to respect the confidentiality of any information passed to them.

Although Articles 9 and 10 of the Arab Convention which is on 'Judicial delegation' is a bit different from Part V of the OAU Algiers Convention 1999 on 'Extra-Territorial Investigations (Commission Rogatoire) and Legal Mutual Assistance'; but its Article 14 is almost the same meaning with Articles 9 and 10, only that the wordings are different. The said Article 14 of the OIC Convention provides that each party shall extend to the other every possible assistance for investigation or trial proceedings related to terrorist crimes. OAU Algiers Convention Parties undertake to exchange information leading either to the arrest of any person charged with a terrorist act against the interest of a Party, or to the seizure of arms.⁴⁴²

Part V of the OIC Convention outlines procedures in relation to extra-territorial investigations and mutual legal assistance. Article 14 (1) provides that any Party may request another Party to carry out, with its assistance and cooperation, on the latter's territory, criminal investigations related to judicial proceedings concerning alleged terrorist acts.⁴⁴³

The three Conventions are impliedly the same, even though the sectional arrangements and some wordings are different.

⁴⁴² Article 5 (2) of the OAU Algiers Convention 1999. Supra note 26.

⁴⁴³ Gregory Ross and Diana Nestorovska. Supra note 307.

4.5. THE ORIGINALITY OF THE OAU CONVENTION ON PREVENTING AND COMABTING TERRORISM 1999.

Many of the regional conventions are modelled after the multilateral conventions, covering proscribed offences; establishing jurisdiction and extradition elements; and calling on Member States to combat terrorism.⁴⁴⁴ In 2006, the UN General Assembly formerly adopted the UN Global Counter-Terrorism Strategy.⁴⁴⁵ The Strategy essentially call upon Member States to actively combat International terrorism by taking various types of measures. The measures and their requisite actions, are categorized as follows:

- “(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 UN system in this regard; and*
- (4) measures to ensure respect for human rights all and the rule of law as the fundamental basis of the fight against terrorism.”*

Thus, while ambitious, the Strategy thus provides some guidance to both Member States and UN institutions, in order to take the necessary steps, to not only combat international terrorism, but to prevent it as well.⁴⁴⁶

⁴⁴⁴ Carol A. Bahan. Supra note 322.

⁴⁴⁵ G.A. Res. 60/288, U.N. Doc. A/Res/60/288 (2006). According to the UN, the strategy is the “first ever comprehensive , collective and internationally approved global framework for tackling the problem of terrorism.” UN Peace and security Section, UN Action to Counter-Terrorism Strategy (2009), http://www.un.org/terrorism/pdfs/CT_factsheet_March2009.pdf

⁴⁴⁶ Carol A. Bahan. Supra note 322.

But, before the 2006 UN Global Counter-Terrorism Strategy, OAU Convention on Preventing and Combating Terrorism, under review, was already enacted in 1999, after the Arab Convention of 1998 and the OIC Convention of 1999; and it seems to be in line with the prescribed measures by UN Global Counter-Terrorism Strategy of 2006. But the question is: how original is the OAU Algiers Convention of 1999?

From, the above discussion on comparative analysis of the three Conventions, it is clear that OAU Algiers Convention 1999 is not 'unique' per se but rather a duplicate of Arab Convention and OIC Convention. Its underlying ideas are that of Arab Convention and OIC Convention. Although, it is drafted slightly different from the other two conventions, the contents are almost the same. For example; Article 1 of the three conventions are drafted the same way by firstly defining convention, followed by the meaning of 'Member States', then terrorist acts or terrorism, but in different wordings. The noticeable differences are, as stated before, while Arab Convention and OIC Conventions defined terrorism in addition to 'terrorist offence' and 'terrorist crime' respectively, OAU Algiers Convention 1999 defined only 'terrorist act'. Again, it did not import other definitions of terrorism in other Conventions as part of its definition of 'terrorist act' in the convention, like its counter parts (Arab Convention and OIC Convention),⁴⁴⁷ rather, it replaced it by mandating the Member States to review their national laws and include 'terrorist act' defined in this Convention, as a criminal offence in their national laws;⁴⁴⁸

⁴⁴⁷ See Article 1(3) of the Arab Convention; Supra note 70 and Art. 1(4) of the OIC Convention; Supra note 69.

⁴⁴⁸ Article 2 of the OAU Algiers Convention 1999. Supra note 26.

though, it listed other Conventions in its Annex,⁴⁴⁹ but made no reference to them in other parts of its Convention. OAU Algiers Convention 1999 exempted liberation for self-determination including armed struggle against colonialism from its definition of ‘terrorist act’ just like Arab Convention and OIC Convention.

Another example of derivative idea can be seen in the Part II of the OAU Algiers Convention 1999, which is the same as Part II of the other two conventions except that OAU Algiers Convention 1999 titled its own Part II ‘Area of Cooperation’ while the other two titled their own ‘Measures for Prevention and Suppression of Terrorist Offences (Terrorist Crimes)’, but the law in Part II of the three conventions are the same. In the said Part II of the three conventions, the Member States agree not to use or allow the usage of their territory for any act of terrorism.

Further, 1999 OAU Algiers Convention Part III which is ‘States Jurisdiction’ is the same as the ‘Judicial Field’ of Arab Convention in its Chapter two of Part II. The extradition provisions of the three conventions are almost the same, only that the drafting and the required procedures for achieving extradition in OAU Algiers Convention of 1999 is different from that of the Arab Convention and OIC Convention. Also, there is no exemption to the specific types of crimes that should be extradited under OAU Algiers Convention 1999 like its other counterparts that listed circumstances under which extradition shall not be granted.

⁴⁴⁹ See the Annex of the OAU Algiers Convention 1999. Supra note 347.

More so, final provisions of the three conventions are the same only that the sectional arrangements are different. Another noticeable difference between the three conventions is the obvious fact that Arab Convention and OIC Convention contains 42 Articles each while OAU Algiers Convention 1999 has 23 Articles; but the content remains almost the same.

It is therefore conclusive to state unequivocally, that OAU Algiers Convention 1999 is not 'original per se' but an imitative and modified version of Arab Convention and OIC convention.

4.6. THE STATE PARTIES' RESPONSES TO TERRORISM.

Since the OAU Algiers Convention of 1999 mandates Member States to criminalize and combat terrorism in their different nations, what are these States' responses to acts of terrorism in their countries? How effective are these responses if any? Could it be better if responded and handled as one crime in regional level and by a centralized regional court? Or should it be included in the jurisdiction of the ICC, or that of the African Court of Human and Peoples' Right (AfCHPR),⁴⁵⁰ or create another Special Court vested with jurisdiction for terrorist cases in the Region, since

⁴⁵⁰ The African Court of Human and Peoples Right (AFCHPR) was created by Article 1 of 'The Protocol on the Statute of the African Court of Justice and Human Rights with reference to the constitution of a single court of justice in Article 3 of the AU Constitutive Act of 2000. The AFCHPR complements the protective mandate of the African Commission on Human and People's right. Their decisions are binding on the member states, though it is not yet in force.

there is definition of terrorist act in the OAU Algiers Convention 1999⁴⁵¹ that is acceptable by the Member States? And, have the Member States complied with the requirements of the OAU Convention 1999?

The OAU Algiers Convention of 1999, urged all Member States to

*“review their national laws and establish criminal offences 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”*⁴⁵²

In response to the mandate, some African States have responded by enacting counter-terrorism legislations and taking some other measures in combating terrorism. For instance, some Member States of the Inter-governmental Authority on Development (IGAD), comprising of Ethiopia, Kenya, Uganda, Sudan, Eritrea, Djibouti and Somalia, have taken measures to counter terrorism because their population have sustained the loss of thousands of lives and considerable destruction of property in recent years.⁴⁵³ IGAD countries had held meetings on combating of terrorism. The issue on combating of terrorism was firstly introduced at IGAD Council of Ministers’ Meeting held in Khartoum in January 2002, and was discussed in details at the Addis Ababa meeting from 25 to 27 June, 2003. IGAD members are of the opinion that terrorism can be effectively combated if they team up as one, than fighting it in national levels. An Ethiopian government official

⁴⁵¹ OAU Algiers Convention 1999; Supra note 14 at Article 1 (3).

⁴⁵² Id., at Article 2 (a).

⁴⁵³ Prof. Knife Abraham., supra note 21 at 9.

stated clearly that, ‘it is obvious that no matter how economically and militarily strong a state may be, it cannot, alone, fight terrorism’.⁴⁵⁴

The countries under-review in this dissertation has responded in the following ways:

4.6.1. ETHIOPIA:

After signing onto the OAU Convention on the Prevention and Combating of Terrorism, Ethiopia passed a new anti-terrorism law known as “A Proclamation on Anti-Terrorism No:652/2009” in accordance with Article 55(1) of the Constitution of the Federal Democratic Republic of Ethiopia, signed into law by their president, Girma Woldegiorgis in 2009.

The Proclamation on Anti-Terrorism No: 652/2009 is divided into five parts. In the preamble of the Anti-terrorism Proclamation 652/2009, the country noted that it is necessary to enact adequate legal provisions “since the laws presently in force in the country are not sufficient to prevent and control terrorism”⁴⁵⁵. The Act in its definition section, defined terrorist organizations but did not define ‘terrorism’;⁴⁵⁶ it also defined terrorist acts⁴⁵⁷ and related offences.⁴⁵⁸ The Act also went well beyond even the AU’s broad definition, specifying that terrorist acts are “acts that might

⁴⁵⁴ Id. at 11.

⁴⁵⁵ see preamble part of A Proclamation on Anti-Terrorism No:652/200 of Ethiopia

⁴⁵⁶ A Proclamation on Anti-Terrorism No:652/200, at part 1(2)

⁴⁵⁷ Id. at Part 1(3).

⁴⁵⁸ Id. at Part 5.

endanger or increase a risk of persons, property, public services, and environmental resources while the perpetrators was attempting to coerce the government or intimidate a segment of the population”.⁴⁵⁹ In addition to criminalizing terrorism, the law also criminalizes planning, preparation, conspiracy, attempt, rendering support, encouragement, and other acts. Moreover, the crime of terrorism is punishable by death.⁴⁶⁰

The Proclamation gave the House of People’s Representatives the power “upon submission by the government to proscribe and de-proscribe an organization as terrorist organization.”⁴⁶¹ The Act also provides for penalties for terrorist acts.

In Part 6 (31) of the Proclamation, both the Federal High Court and the Supreme Court are vested with jurisdiction to try terrorist cases. It also declared in the same sub-section 31 that

“Articles 13 and 17(1) (b) of the 2004 Criminal Code of the Federal Republic of Ethiopia relating to jurisdiction shall also include terrorism offences.”

Since February 12, 2012, the UN Human Rights activists have been voicing against the use of the anti-terrorism laws to curb the freedom of speech in Ethiopia. Human Rights Watch has condemned the law by saying that It provides “the Ethiopian government with a potent instrument to crack down on political dissent... . It would permit long-term imprisonment and even the death penalty for ‘crimes’ that bear no

⁴⁵⁹ Id. at Part 2, Article 3.

⁴⁶⁰ Id. at Article 4.

⁴⁶¹ Id. at Part 25 (1).

resemblance, under any credible definition, to terrorism”.⁴⁶² Several journalists were sentenced to prison for no just cause under such legislation. Ethiopia should apply the Anti-Terrorism legislation cautiously and in accordance with the country’s International Human Rights obligations.⁴⁶³

Most of the human rights activists are actually blaming the Prime Minister Meles Zenawi for using his position in mis-application of the anti-terrorism law by infringing on the fundamental human rights of the people in the country.

Ethiopian Penal Code includes a list of acts that constitute terrorist acts if they are perpetrated against an individual or group with the aim of seriously disrupting public order. Among the list are “deliberate attacks on human life”, deliberate attacks on the physical integrity of the person”, “theft” and “destruction”.

Other measures Ethiopia had taken in combating terrorism is by being a party to many International Conventions and Protocols relating to terrorism. It motivated the adoption of the OAU Algiers Convention 1999 and ratified same in 2003. Article 9 (4) of the Constitution of Federal Republic of Ethiopia made international and regional instruments relating to combating of terrorism part and parcel of their national law.⁴⁶⁴ The country also entrusted the National bank of Ethiopia with the responsibility of overseeing banking and monetary activities in the country to

⁴⁶² Kim Lane Scheppelle. *Supra* note 372.

⁴⁶³ Frank La Rue., Ethiopia’s Anti-Terrorism Laws must not be misused to curb rights-UN; <http://www.UN.org/apps/news/story.asp?NewsID=41112&Cr=journalist&Cr1=>

⁴⁶⁴ Prof. Knife Abraham., *supra* note 21 at 13.

ensure no illegal transfer of funds and to avoid sponsoring of terrorism. It has also tightened its boarder control system.⁴⁶⁵

Ethiopia is also a Member State of the Inter-Governmental Authority on Development and participated actively in its Security Sector Program, which builds the capacity of its Member States to mitigate, detect and deter advances by terrorists. Ethiopia was an active participant in the AU's counter-terrorism efforts and participated in its Centre for Study and Research on Terrorism and in meetings of the Committee of Intelligence and Security Services of Africa.⁴⁶⁶

The Ethiopian government froze assets allegedly used in planning terrorist acts, pending investigation as to whether those assets can be legally confiscated. The Government of Ethiopia's Charity and Societies Agency is responsible for monitoring non-profit organizations to prevent misuse of funds and terrorist financing.⁴⁶⁷

Ethiopia, Kenya, Somalia and Sudan are members of Partnership for Regional East African Counter-terrorism (PREACT). PREACT, formally known as the East African Regional Strategy Initiative, is the East Africa counterpart to the Trans-Sahara Counter-terrorism Partnership (TSCTP). PREACT, first established in 2009, is a US funded and implemented multi-year, multi-faceted program designed to

⁴⁶⁵ Id., at 14.

⁴⁶⁶ See Chapter 2 of US Department of Sate: Diplomacy in action. It can be found at www.state.gov>...>country reports on terrorism 2012 .

⁴⁶⁷ Id.

build the counter-terrorism capacity and capability of Member countries to thwart short-term terrorist threats, counter violent extremism and address longer-term vulnerabilities.⁴⁶⁸

4.6.2. SOMALIA:

Somalia has no anti-terrorism legislation yet, though the Somalia's Cabinet has recently submitted an anti-terrorism law to the Parliament for their approval. This could be as a result of the present unrest in the country caused by Al-Shabaab Islamic extremist group terrorizing the country as discussed in Chapter two. The country is a member of many Regional and International Conventions on terrorism. Only those International and Regional Conventions that the country is a party to, is sustaining the country right now in terms of combating terrorism. Kenya, its neighbouring country, is also helping them fight the terrorist Islamic sect by sending some troops into the country.

In 2012, the Somalia government worked with international and regional partners, including Kenya, Ethiopia, the AU, and the UN to degrade al-Shabaab as a domestic threat to stability and a terrorist threat abroad. Somalia is a member of the AU, the Inter-governmental Authority on Development, the League of Arab States, and the Organization of Islamic Cooperation. The Puntland regional government stepped up its security campaign against al- Shabaab by encouraging citizens to

⁴⁶⁸ Id.

report any actions they believed could lead to insecurity or may be linked to or assist al-Shabaab.⁴⁶⁹

From August 2012, the Transitional Federal Government (TFG) and the Government of Somalia along with regional governments, continued to pursue al-Shabaab suspects throughout the year. In partnership with African Union Mission in Somalia (AMISOM) and neighbours, the government conducted a successful military campaign against al-Shabaab strongholds in southern and central Somalia, capturing al-Shabaab strongholds of Baidoa, Afgoye, Afmadow, Balad, Lanta Buuro, Merca, Miido, Wanla, Weyn and Jowhar. Their most significant victory was the September 28 capture of the port-city of Kismayo, which al-shabaab has used as a primary source of revenue through extortion activities and charging of duties, in particular on the export of charcoal.⁴⁷⁰

The Somalia government has increasingly become more adept at proactively countering al-Shabaab's violent extremist messaging. Examples of successful counter-messaging included the countering Violent Extremism programs on Radio Mogadishu and the state-owned TV station. In 2010, the TFG's Ministry of Information and Telecommunications began airing the Islamic Lecture Series (ILS)⁴⁷¹ in Mogadishu, a program which has since expanded to include former al-Shabaab strongholds of Baidoa, Beledwyne, Dhusamareb, and Abudwaq.

⁴⁶⁹ Id.

⁴⁷⁰ Id.

⁴⁷¹ ILS is a one-hour, call-in radio program designed to undercut al-Shabaab's effort to acquire religious legitimacy for its violent extremist ideology. See supra note 467.

4.7.3. KENYA:

Kenya have series of legislative Acts or laws relating to terrorist acts, examples, Penal Code (Cap 63) of laws of Kenya, Anti-Money laundering and Crime proceeds of Crime Bill, Criminal Procedure Code (Cap75) and so on.

In 1998, Kenya revoked the registration of muslim NGO's, including Al-Haramin, because of their links to terrorism. In Febuary 2003, the government formed an Anti-Terrorist Police Unit composed of officers trained in anti-terrorism. At the same time, the cabinet authorised negotiations between the executive and legislative branches on legislation to detect and punish suspected terrorists. In June 2003, foreign minister Musyoka called on parliaments to expeditiously pass an Anti-Terrorism Bill. This led to the enactment of Suppression of Terrorism Bill, published in Kenya, 2003, which was rejected after fierce opposition from Human Rights activists in Kenya. They are of the opinion that the provisions of the bill conflicts with basic human rights because it provides for indefinite detention of terrorist suspects and confiscation of their assets among other provisions.⁴⁷² But in October, 2011, the Bill was discussed again in the conference of Kenyan activists and legal experts.⁴⁷³

On 12 October, 2012, the President of the country signed 'The Prevention of Terrorism Act, 2012, No 30 of 2012' which is an act of parliament to provide

⁴⁷² Joyce Maulama., Opposition to Anti-terror law that violates even basic rights.
<http://ipnews.net/Africa/nota.asp?idnews=36894>

⁴⁷³ Id.

measures for the detection and prevention of terrorist activities; to amend the extradition (Commonwealth Countries) Act and the Extradition (Contiguous and foreign Countries) Act, and for connected purpose.⁴⁷⁴ It is made up of six (6) parts with fifty-three (53) Sections. The Act became effective on 24 October, 2012.

Section 2 (m) (a) contains the definition of ‘terrorist Act’ and commission of terrorist act is provided under Section 4 of Part III of the Act.

Nevertheless, Kenya has demonstrated its commitment to combat terrorism together with Uganda and Tanzania via the establishment of a joint East African Community (EAC) committee which coordinates activities against terrorism.⁴⁷⁵ Kenya has also expressed willingness to collaborate with the other IGAD Member States to fight terrorism. Just like Ethiopia, Kenya is also a party to many Protocols and Conventions relating to terrorism.

In August 2010, Kenya passed a new Constitution, which allows it to apply International laws within its jurisdiction.⁴⁷⁶ They believe that the provision will be of immense help to the country in combating terrorism and other international crimes. They can prosecute terrorism using the provisions of the Money laundering law and organized crimes law, which was passed by Kenya’s parliament.⁴⁷⁷

⁴⁷⁴ See the beginning part of Kenya’s Prevention of Terrorist Act, 2012, No 30 of 2012.

⁴⁷⁵ Prof. Knife Abraham., supra note 21 at 15.

⁴⁷⁶ The Constitution of Kenya, 2010.

⁴⁷⁷ Kenya: law reforms boasts fight against terrorism and crimes. May 20, 2011.

www.hiiraan.com/news/2011/may/kenya_law_reforms_boasts_fight_against_terrorism_and_crimes

Kenya's Prevention of Terrorism Act, marked a key legislative milestone in the fight against terrorism. Combined with the 2009 proceeds of crime and Anti-Money Laundering Act and the 2010 Prevention of Organized Crime Act, Kenyan prosecutors have a robust suite of tools for bringing individuals and organizations to justice; tools which will also greatly facilitate international cooperation and mutual legal assistance in terrorism cases. Even, prior to the passage of the new law, Kenyan authorities began prosecution of two ongoing high-profile terrorist cases against Iranian citizens and alleged Islamic Revolutionary Guard Corps-Qods Forces; persons Ahmad Abolfathi and Sayed Mansouri on explosive charges, and against British citizen Jermaine Grant on charges of plotting to kill Western tourists on behalf of al-Qa'ida.

Kenya is also a member of the Eastern and Southern Africa Anti-Money Laundering Groups, a Financial Action Task Force (FATF)-style regional body. The FATF had previously highlighted the deficiencies in Kenya's anti-money laundering/combating the financing of terrorism regime and intimated possible counter-measures against Kenya. In response, Kenyan authorities developed and made significant progress on an action plan to address those deficiencies, including the establishment of the Financial Reporting Centre (FRC) and adoption of the Prevention of Terrorism Act (POTA) in October.⁴⁷⁸

Other measures within the State in combating terrorism are: the Ministry of Finance establishment of Task Force on Anti-Money Laundering and Combating the

⁴⁷⁸U.S Department of State. Supra note 466.

Financing of Terrorism, consisting of representatives from finance, trade and foreign affairs ministries; the Central Bank; the police, the criminal investigation department (CID); and the National security intelligence service. These team seeks to review existing legislation and recommend a national policy on combating the financing of terrorism.⁴⁷⁹

Kenya is an important partner in the U.S Combined Joint Task Force-Horn of Africa (CJTF-HOA) in Dgibouti that seeks to check terrorism. This program envisages the U.S training of regional militaries in counter-terrorism procedures. Furthermore, as part of the multinational campaign, a special Anti-terrorism Squad, composed of the German Naval Air Wing, is currently based in Mombassa to monitor ships plying the gulf of Aden and the Somalia coast.⁴⁸⁰

Kenya was an active law enforcement partner and participated in the Department of State's Anti-terrorism Assistance (ATA) program. ATA programs focused on strengthening border security, enhancing investigative capacity, promoting respect for human rights, and building critical incident response capacity through training, mentoring, advising and equipping Kenyan counter-terrorism- focused law-enforcement agencies. Kenya also continued its partnership with the United States on expanding Personal Identification Secure Comparison and Evaluation System, PISCES, border controls to additional ports of entry.⁴⁸¹

⁴⁷⁹ Special report: Terrorism in horn of Africa. Supra note 243.

⁴⁸⁰ Id.

⁴⁸¹ U.S Department of State. Supra note 466.

Kenya is also a member of the AU, the Inter-Governmental Authority on Development, the Community of Eastern and Southern African, and the East African Community. The Kenyan government coordinated with these groups significantly during its military campaign against al-Shabaab militants in Somalia. Kenyan law enforcement agencies worked closely with the international community, including the United States, to increase their counter-terrorism abilities, secure porous land borders, and improve maritime security. Kenya hosted numerous trainings involving law enforcement professionals from neighbouring nations to build counter-terrorism capacities and increase regional cooperation. Kenya also cooperated with the United States and other nations to secure especially dangerous pathogens and enhance the Kenyan government's capability to prevent the sale, theft, diversion, or accidental release of chemical, biological or radiological weapons-related materials, technology and expertise.⁴⁸²

4.6.4. SUDAN:

Sudan had succeeded in convincing the UN to lift the terrorism related sanctions placed on it. In 1999, Sudan signed the International Convention for the Suppressing of Financing terrorism which showed that it is ready to cooperate in combating of international terrorism.⁴⁸³ The following year, 2000, it ratified the International Convention for Suppression of Terrorist Bombing, which led to the

⁴⁸² Id.

⁴⁸³ State Sponsors: Sudan. www.cfr.org/sudanstate-sponsors-sudan

UN to lift the sanction against Khartoum, Sudan in 2001. Sudan also ratified the OAU Algiers Convention in 2003 and the same year signed Counter-Terrorism Agreement with Algeria, Yemen and Ethiopia.

In 2000, the US and Sudan entered into a counter-terrorism dialogue, prompting Sudan to close down the popular Arab conference, which had been functioning as a forum for terrorists. In May 2003, Sudanese authorities raided a suspect terrorist training camp in Kardufan State, arresting more than a dozen extremists and seizing illegal weapons. Four months later, a Sudanese court convicted a Syrian engineer and two Sudanese nationals of training group of Saudis, Palestinians, and others to carry out attacks in Iraq, Eritrea, Sudan and Israel. In August 2004, Sudanese authorities arrested, prosecuted and convicted Eritrean who hijacked a Libyan aircraft and forced it to land in Khartoum.⁴⁸⁴ In 2007, the US State Department called Sudan a 'strong partner in the war on terror', and praised Sudan for aggressively pursuing terrorist operations that threatened US interests.⁴⁸⁵

The most significant development of Sudan's statute with US took place on 9 July 2011, when the southern portion of the country seceded to become South Sudan.

Notably, Sudan has an Anti-Terrorism Act, 2001, which vests jurisdiction of terrorist cases on special court known as Anti-Terrorism Courts. They also have Rules of Procedures for Anti-Terrorism Courts, 2008, which prescribes the

⁴⁸⁴ Preeti Bhattacharji. State Sponsors: Sudan. Council foreign relations, 2008 at 4.

⁴⁸⁵ Id.

procedures to be followed by the Anti-Terrorism Court in prosecuting terrorist case.⁴⁸⁶

Human Rights activists are in opposition of the activities of the Anti-terrorism Courts on the ground that it infringes the International Human Rights and Humanitarian Laws, especially the Court's trial procedures and imposition of penalties.⁴⁸⁷

Sudan also has Anti-Money Laundering and the Financing of Terrorism 2010. It consists of 37 Articles and is the first comprehensive legislation for fighting money laundering and financing terrorism. The law was made as a substitute to the law combating money laundering 2003, so as to cope with the international legislative developments of fighting the money laundering phenomenon.⁴⁸⁸

Further, in 2014, the National Assembly endorsed the new Anti-terrorism and Anti-Money Laundering Laws, thereby convincing the FATF to remove them from list of countries classified as a high risk in the field of money laundering and anti-terrorism.

⁴⁸⁶ see Rules of Procedures for Anti-Terrorism Courts, 2008

⁴⁸⁷ Sudan: End sham Trials by Anti-Terror Courts. April 25, 2012. www.UNhcr.org/refworld/country,,HRN,,SDN,,489c1b2614,o.html

⁴⁸⁸ Ibrahim Musa .,Sudan: terrorism and money laundering . August 7, 2010. <http://sudanow.info/en/en/main-story.php?ID=121&show=sc>

4.6.5. NIGERIA:

Nigeria has “the Economic and Financial Crimes Commission (Establishment) Act” (EFCC), 2004. It also has another Anti-Terrorism legislation known as Terrorism (Prevention) Act, 2011, which was signed into law on June 3, 2011 by the president of the country, Goodluck Jonathan but the Act has an Amendment Act known as “Terrorism (Prevention) Amendment Act, 2013”.

The 2011 Act provides for the Prevention and Combating of Acts of Terrorism and for the Suppression of Financing Terrorism in Nigeria.⁴⁸⁹ It also emphasized on the effectiveness of OAU Algiers Convention, 1999.

The Act did not define terrorism per se, but it provided for “Acts of Terrorism” and Related Offences. It also provided penalties for such acts. The power to prosecute the offender is vested on the Attorney General of the Federation (AG)⁴⁹⁰ and it also confers sole jurisdiction of trial of the offence and imposition of penalties under the Act on the Federal High Court.⁴⁹¹ Section 33 of the Terrorism (Prevention) Act, 2011 provides for penalties for terrorist offence and related offences, starting from one million naira (N1, 000 000), and three years imprisonment to life imprisonment depending on the category of the crime. The Act also prescribed hostage taking as an act of terrorism,⁴⁹² as described in Niger-Delta crises supra; invariably,

⁴⁸⁹ see The Terrorism(Prevention) Act, 2011

⁴⁹⁰ Id. at Section 30

⁴⁹¹ Id. at 32.

⁴⁹² Id. at 11.

criminalizing and grouping the Niger-delta crises going on in the country as terrorist acts.

But, the 2011 Act ensued heated debate among the members of the house that led to the amendment of the Act in 2012, by enacting the “Amendment Bill 2012” as an addendum to the existing Terrorism (Prevention) Act, 2011. However, there were obvious differences between the bills that prompted the re-submission of the two bills for review by both Chambers to reconcile the difference. The outcome of the reconciliation of the two Acts is the “Terrorism (Prevention) Amendment Act, 2013”. It is an Act which amends the ‘Terrorism (Prevention) Act, 2011’, makes provision for extra-territorial application of the Act and strengthens terrorist financing offence.⁴⁹³

The Act altered some sections of the existing Terrorism (Prevention) Act of 2011 by deletion and addition of new sections. Importantly, the 2013 Amendment Act provides “that anybody guilty of the offence under this Act is liable on conviction to maximum of death sentence”.⁴⁹⁴ It also deleted Section 11 (Hostage taking) of the 2011 Act, but provided for the same offence of ‘Hostage taking’ in Section 15 of the 2013 Amendment Act.

The Nigeria incidence of January 24, 2011, in which the notorious Boko-Haram, Islamic sect, bombed Kano state, killing two hundred people, induced the Federal

⁴⁹³ See the preamble of Terrorism (Prevention) Amendment Act, 2013.

⁴⁹⁴ Id. at Section 1.

government of the country to launch the Integrated Assistance for Countering Terrorism (I-ACT), projects on conflict prevention and internal Coordination and Information sharing among law enforcement.⁴⁹⁵ The law promotes information and intelligence sharing among law enforcement agencies in Nigeria, facilitated by the UN Counter-terrorism Implementation Task Force (CTITF).⁴⁹⁶ On April 24, 2012, Nigeria military joint task force invaded a suspected Boko-Haram bomb factory in a suburb of the restive Northern city of Kano.⁴⁹⁷

Nigeria is also a member of the Trans- Sahara Counter-terrorism Partnership (TSCTP), established in 2005, that is a US funded and implemented multi-faceted, multi-year effort designed to counter violent extremism and contain and marginalized terrorist organizations. TSCTP's core goals are to enhance indigenous capacities of government in the Pan-Sahel, to confront the challenge posed by terrorist organizations in the Trans-Sahara, and to facilitate cooperation between those countries and US partners in the Maghareb.⁴⁹⁸

Furthermore, Nigeria is a member of the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA), a financial Action Task Force (FATF)-style regional body. The country was publicly identified by the FATF in February 2010 for the strategic anti-money laundering and combating the financing

⁴⁹⁵ Victoria Ojeme FG launches counter terrorism projects. January, 25, 2012. www.vanguard.com/2012/01/fg-launches-counter-terrorismprojects.

⁴⁹⁶ Id.

⁴⁹⁷ Ibrahim Garba.,Nigerian force raid suspected Boko-Haram bomb factory. April 24, 2012. www.csmonitor.com/world/Africa/2012/2012/0424/nigerian-frce-raid-suspected-boko-haram-bomb-factory

⁴⁹⁸ U.S Department of State. Supra note 466.

of terrorism deficiencies. In October 2011, Nigeria was named in FATF Public Statement for its lack of progress in implementing its action plan. In 2012, Nigeria made significant progress in addressing its outstanding deficiencies, including, through the adoption of amendments to its Money Laundering (Prevention) Act.⁴⁹⁹

The Ministerial Plenary Meeting of the Global Counter-terrorism Forum (GCTF), Nigeria announced it would partner with Switzerland to co-host a Sahel Working Group meeting on combating the financing of terrorism in early 2013. In January, the UN Counter-Terrorism Implementation Task Force Launched three projects under the Integrated Assistance for Counter-Terrorism initiative to support Nigerian government efforts to combat terrorism. Nigeria is a lead member of the Economic Community of West Africa States and has committed ground forces and logistical support for a possible intervention force in Mali. Through its Office of the National Security Adviser, Nigeria has taken a lead role in initiating dialogue between regional countries on how they can better coordinate their efforts to confront networks of terrorist groups that span international borders.⁵⁰⁰

Moreso, in response to the '200 missing school girls', abducted by Boko- Haram (discussed in Chapter two), Nigerian President accepted assistance of foreign countries in finding the missing girls that was kidnapped by Boko Haram. The assistance includes communications, logistics and intelligence planning but will not

⁴⁹⁹ Id.

⁵⁰⁰ Id.

include any military operations.⁵⁰¹ The U.S deployed a Military Surveillance aircraft to try and locate the students and dispatched hostage negotiation experts and other specialists to Nigeria. Britain also sent a team of experts and France had proposed holding talks among the leaders of Nigeria and nearby nations to discuss how to handle the situation. The Japanese indicated willingness to offer assistance to bring stability to the region and prevent violence against women.⁵⁰²

Also, by way of response to the Niger-Delta Crises, Nigerian government, in October 2009, persuaded all major militant leaders to renounce violence and surrender their arms in exchange for amnesty, government stipends, training opportunities, and pledges of greater development for the Niger-Delta. Most militant groups in the Niger Delta accepted the then president's offer of amnesty in 2009, and the overall level of violence there declined. Although, the amnesty led to a sharp decline in attacks by militants, kidnapping for ransom, armed robberies and gang wars; fighting connected to the theft of crude oil (known as illegal oil bunkering) continued and contributed to the region's general insecurity and lack of economic viability.

By the end of 2012, at least twenty-six thousand, three hundred and sixty-eight (26,368) former militants had benefited in some way from the amnesty program. Many former militants received vocational training and stipends. At year's end five

⁵⁰¹ America officials in Nigeria to help find kidnapped girls as report says government had warning attack. www.foxnews.com

⁵⁰² See The Yomiuri Shimbun. World must quickly help rescue of abducted Nigeria School girls.; the Japan news of May 15, 2014.

thousand, two hundred and eighty (5,280) former militants were undergoing vocational training, with one thousand, five hundred and thirty-eight (1,538) attending courses abroad. The amnesty program resulted in a sharp decline in militant violence in the region.

Furthermore, with the establishment of a Ministry of Niger Delta Affairs, manned by indigenes of the area, it is expected that visible changes will occur in matters of youth employment, industrialization and the provision of amenities, that will finally end the crises in Niger-Delta.

4.7. CONCLUSION.

No doubt that most Member States have complied with the requirement of the OAU Algiers Convention 1999, by enacting anti-terrorism laws and other security laws in their respective nations, including establishment of criminal offences for terrorist act. But how effective are these laws in combating terrorism in their nations?

Despite all these existing legislations on combating terrorism, terrorist acts are still on the increase in Africa. Most of these national anti-terrorism legislations are being criticized by legal experts and human rights activists on the ground that it infringes on International Human Rights and Humanitarian Laws. Is it therefore right to

conclude that, those national anti-terrorism legislations are not in compliance with the UN's requirements for combating of terrorism?

A critical look at the three Conventions above shows that the OAU Algiers Convention 1999 got its foundational ideas and initiatives from the Arab Convention and OIC Convention, but undoubtedly enacted more precise anti-terrorism Convention than the other two Conventions. Also, some of these Member States in OIC and Arab Convention are also members of the OAU Algiers Convention, as Stated before, and the Conventions defined terrorism in their own different ways; which of the definitions will the Member States, with multiple membership, be bound with?

There is need for AU to review, amend, delete and add sections to its already existing Convention on terrorism, to reflect what is practicable within the capability of the continent, bearing in mind the Member States' economic and technological power, in combating terrorism as a nation. Convention should not merely be enacted to fulfil ones obligation under UN mandate. UN is interested in effectiveness of the Convention achieving its purpose.

Therefore, duplicating or imitating a more advanced States' or regional conventions will not impede terrorist acts in Africa because they are economically and technologically sophisticated than Africa. Applicable laws in those regions should not be copied because it will never be effectively enforceable in Africa.

CHAPTER FIVE.

CONCLUSION AND RECOMMENDATION.

5.0. CONCLUSION.

This dissertation has reviewed the OAU Conventions on Preventing and Combating terrorism and assessed its effectiveness in combating terrorism in the continent of Africa.

Notwithstanding the highlighted pitfalls of the OAU Algiers Convention of 1999, the OAU Algiers Convention forms the major pillar for the enactment of other OAU (AU) legislations on peace and security in Africa. Comparatively, among the three conventions discussed in this dissertation (OAU Algiers Convention, 1999, Arab Convention, 1998 and OIC Convention 1999), some scholars had praised the OAU Convention as one of the best regional conventions on combating terrorism with a clearer definition of terrorist acts.

But, arriving at appropriate implementation of the OAU Algiers Convention 1999 remains an important task for the continent, despite the AU's action plans; especially because of poor economy level of Member States, porous borders and lack of modern technologies in the continent for tracking down and prosecuting terrorist acts.

The purpose of the Plan of Action on the Prevention and Combating of Terrorism was to provide a concrete expression to the commitment and obligations of African countries, to combat terrorism and to enhance their access to appropriate counter-terrorism resources. It sought to provide robust guidelines and strategies for collective and individual state action against terrorism by incorporating continental and international standards for combating terrorism with particular attention to the provisions of resolution 1373.⁵⁰³ But this purpose has not been attained so far. Also, the presence of PSC neither increases the efficacy of the applicability of 1999 OAU Algiers Convention and its preventive measures nor combat terrorism itself.

The biggest shortfall of Africa's engagement of the war on terror is the absence of an effective and efficient continental mechanism to support the required cooperation between states, give effect to the OAU Algiers Convention of 1999, implement its operative provisions and assist Member States to comply with international law and continental obligations.⁵⁰⁴

The international mandate to fight terrorism in the same way has generated an extraordinary level of compliance, but that compliance has been customized at the level of Member States, resulting in a set of laws that may not in fact provide the

⁵⁰³ Martin Ewi and Kwesi Aning. *Supra* note 367.

⁵⁰⁴ Du Plessis, Inus. *The impact of war on Africa Security*. 5/1/05 SREVSAFR 47 at 10.

common legal framework that the architects of the Security Council anti-terrorism resolutions had in mind.⁵⁰⁵

It is difficult to discern clearly the practical impact of many of the regional conventions. At present, the sheer diversity of regional definitions is sufficient to militate against the view that there is any embryonic customary definition of terrorism. While some of the more recent treaties include generic definition of terrorism, others have deliberately refrained from this, following the approach of the older regional treaties. Among those treaties which include generic definition, it is further difficult to discern any underlying shared conception of terrorism. As the International Court of Justice stated in the Asylum case, these treaties reflect ‘so much uncertainty and contradiction, so much fluctuation and discrepancy ... that it is not possible to discern in all this any constant and uniform usage, accepted as law’.⁵⁰⁶

The principal obligation in international treaties against terrorism is to incorporate the crimes defined in the treaty into the domestic criminal law and further to make them punishable with sentences that reflect the gravity of the offence. State parties also agree to participate in the construction of “universal jurisdiction” over these offences. Partly because of the lack of political will among a number of states to support the international cooperation against terrorism, and partly because of the belief that terrorism is a notion dependent on an individual’s political belief, it has

⁵⁰⁵ Kim Lane Scheppelle. *Supra* note 372.

⁵⁰⁶ Ben Saul. *Counter terrorism: International Law practice.* *Supra* note 433.

so far been impossible to achieve a universal consensus on a comprehensive anti-terrorism convention and on a universal definition of terrorism.

International human rights law lays down obligations and duties which Party States are bound to respect and fulfil. This obligations means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means the states must be of positive action to facilitate the enjoyment of basic human rights.⁵⁰⁷

Through ratification of international human rights treaties, Government undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. The domestic legal system, therefore, provides the principal legal protection of human rights guaranteed under the international law. Where domestic legal proceedings fail to address human right abuses, the mechanisms and procedures for the individual and group complaints are available in the regional and international levels to help ensure that international human rights standard are indeed respected, implemented and enforced at the local level.⁵⁰⁸

A comparative analyses of five states' responses (Ethiopia, Somalia, Kenya, Sudan and Nigeria) demonstrates that economic level, security laxity, religious differences

⁵⁰⁷ The foundation of International Human rights Law. www.un.org/en/document/udr/hr/law.shtml

⁵⁰⁸ Id.

and political interest of Member States largely affect the effectiveness of combating terrorism in the continent.

The difficulty of overcoming the politically subjective nature of terrorism remains a significant obstacle to the drafting of any comprehensive international anti-terrorism treaty. International law has not emerged as an effective tool for prosecuting terrorism and is perhaps only “useful as a measure of international concern and opinion...lacking methods and mechanisms for enforcement, it cannot be said to be an effective deterrent.”⁵⁰⁹

A number of human rights issues have arisen from OAU Algiers Convention 1999 and its Member States domestic anti-terrorism laws designed to deal with terrorism. The Special Rapporteur on Terrorism and Human Rights notes that the ‘definitional problem is the major factor in the controversy regarding terrorism’, not believing that broad definitions of acts of terrorism can be justified. Since counter-terrorism is designed to address specific conduct, the necessary definitions ought to be delineated with precision.⁵¹⁰

The provisions of the Convention, no doubt, appear to be in contravention to human rights law. For example; the right to freedom may be implicated under the Convention. Under Article 3 (b) of the OAU Algiers Convention 1999 for example, the definition of terrorist act includes ‘any promotion, sponsoring...incitement,

⁵⁰⁹ Nathan A. Canestaro. *Supra* note 64.

⁵¹⁰ S. Jagwanth and F Soltau. *Supra* note 305.

encouragement... or procurement of such act'. Again, it would be difficult to justify such a blanket and far-reaching limitation of the right and unless it is carefully tailored to meet the ends of fighting terrorism.⁵¹¹

Article 4 (b) and (e) of the OAU Algiers Convention 1999 deal with monitoring and data collection of terrorist elements of groups. Given that the scope of what constitutes terrorist elements of acts is extremely broadly defined, these provisions may constitute a serious violation of the right to privacy and may include the monitoring and collection of information on peaceful and non-criminal activity. Under some domestic laws, search and seizure provisions may also constitute an unjustifiable limitation on the right to privacy.⁵¹² OAU Algiers Convention 1999 can also be said to be derogatory from human rights law because of death penalty imposed in the domestic laws of some Member States' anti-terrorism law.

Since the classification of conduct of terrorism is frequently accompanied by an abridgement of procedural and fair safeguards, it is all the more crucial that the crime is precisely and restrictively defined. This is even more so when it is punishable by death. How to define terrorism is of course a particular vexed issue. It is important that States, when adopting such measures, be vigilant about ensuring the continued protection of rights.⁵¹³

⁵¹¹ Id.

⁵¹² Id.

⁵¹³ Id.

On the other hand, despite these requirements of obligations from Member State to comply with the norms of international human rights law, strict adherence to such obligations will gravely affect the effectiveness of combating terrorism. Terrorism has no justification. Terrorists themselves are not exempted from these obligations being citizens of a State. Although, human rights and humanitarian laws are also necessary in combating terrorism, priority should be given to social stability, than securing an individual's right at a very critical moment, especially when the individual is a perpetrator of terrorist act.

A terrorist cannot claim an infringement of fundamental human right when he is also guilty of violation of human rights. The equitable maxim of 'whoever that comes into equity must come with clean hands' should never be dispensed with'. Human rights activists should think towards reviewing the laws, especially as it relates to 'combating terrorist acts'; find the proper balance between counter-terrorism and human rights law, bearing in mind the extreme cruelty of terrorist acts against innocent people.

The menace posed by international terrorism which demands both national and sub-regional concerted action is, for instance, manifest in the policy pronouncements of Kenya, Uganda, the Sudan, Ethiopia and other IGAD Member States. An official of the Ethiopian government had made this very clear when he stated, "it is obvious that no matter how economically and militarily strong a state may be, it cannot

alone fight terrorism.”⁵¹⁴ Again, in order to avoid conflicts and find the proper balance between counter-terrorism and Human Rights law in Africa, there should be a ‘Universal Court’ vested with terrorist jurisdiction.

5.1. RECOMMENDATIONS:

Solely, obligations and cooperation on the part of Member States of OAU Algiers Convention 1999, as mandated under the OAU Algiers Convention, are not enough to combat terrorism; except where it is in common interest of the Member States concerned, as clearly discussed under extradition in chapter three of this dissertation. Concurring with the Ethiopian government official, who said that no matter how strong a nation may think it is; it cannot combat terrorism alone. Joint effort by all Member States will be the most effective approach to eradicate terrorism in Africa.⁵¹⁵

Most Member States of the AU are financially incapacitated in combating terrorism alone as a nation. The AU should uphold the most important element of their Charter which is “solidarity, development of friendly relations and cooperation among Member States”; and help the less privileged States combat terrorism, not just by mere encouraging or urging Member States to cooperate or offer legal

⁵¹⁴ Prof. Knife Abraham. Supra note 222 at 11.

⁵¹⁵ See supra note 453.

mutual assistance to one another, but, by combating same under one umbrella of a universal court.

The OAU Algiers Convention of 1999 needs to be amended by AU in order to make it an effective law enforcement instrument for combating terrorism. Such amendment should include establishment of ‘universal court’ vested with jurisdiction of terrorism, to deal with this terrible phenomenon, which is beyond the capacity of any one country to handle alone; or in alternative, confer jurisdiction of terrorism on the already existing African Court on Human and People’s right.⁵¹⁶

Parts IV and V of the OAU Algiers Convention 1999, focusing on Extradition and extra-territorial investigation, should also be amended to remove the limitations attached to it, under which a Member State shall not extradite or refuse to legally assist another. General procedure for arraignment of a terrorist offender in a universal court should be included in the Convention, so that even if the offender flees the State in which the crime was committed, the offender cannot escape punishment.

Most importantly, the OAU Algiers Convention of 1999 created an avenue for amendment under its Article 21 (2) and (3), which provides thus:

“This Convention may be amended if a State

⁵¹⁶ The AU has African Court on Human and People’s right, which came into being in January 2004. the court is vested with the jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and People’s rights, the Charter, the Protocol, and any other relevant human rights instruments ratified by the States. See Article 28 of the Protocol on the Statute of the African Court of Justice and Human Rights.

Party makes a written request to that effect to the Secretary General of the Organization of African Unity...
2. The amendment shall be approved by a simple majority of the State Parties. It shall come into force ...received notice of the acceptance."

It should therefore, amend the Convention, through the prescribed procedure of Article 21(2) and (3) supra, to include establishment of universal court for trial of terrorist offences, appoint qualified personnel to handle terrorist offences; in the absence of conferment of terrorism jurisdiction on the African court. The establishment of the universal court will facilitate the tracking, investigation, arrest, trial and punishment of terrorist acts.

More so, there is already a universal acceptable definition of terrorist act in the OAU Algiers Convention 1999⁵¹⁷ by the Member States. AU also has a multilateral agreement for extradition and extra territorial investigations and mutual assistance,⁵¹⁸ which can be conveniently handled by a centralized judicial body for the Union.

Combating terrorism in Africa should be moved from national level to regional level for effective preventing and combating terrorism.

⁵¹⁷ Article 1(3) of the OAU Algiers Convention 1999. Supra note 26.

⁵¹⁸ Id. at Article 7, Parts IV and V.

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