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Terrorism and governance in South Africa and Eastern Africa

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1. Introduction

Because of its sheer scale, terrorism is seen as the kind of crime which states should prevent rather than prosecute. Many therefore accord the state special leeway against it. Anti-terrorism legislation accordingly curtails individual rights, allowing action against terrorist suspects before their guilt is proven. It may also relax the requirements for proving guilt if the suspect gets to court. Proponents of this view argue that any harsh treatment which may result is the price which society has to pay to protect the general public.

Here we find a paradox of the anti-terrorism debate, because a second argument sees, in this same legislation, protection for the terrorist *suspects*. This argument accepts that additional powers, beyond those in ordinary criminal and procedural law, may be needed in order to combat terrorism. However, it then demands that the government articulate exactly when these powers will arise and what their extent will be. Under such an argument, legislation must define clearly what terrorism is and establish the limits of executive action against it. In this way, the government will be constrained by the anti-terrorism legislation, rather than acting extra-legally, and its exercise of power will be subject to review.

In this chapter, we explore this debate in the context of the anti-terrorism programme of four African states: South Africa and the East

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African countries of Kenya, Tanzania and Uganda. We ask whether anti-terrorism legislation is, indeed, necessary for the effective prevention and prosecution of terrorism, referring to examples of anti-terrorism action taken in the absence of anti-terrorism laws (Kenya) or within the apparent framework of ordinary criminal procedure when an alternative anti-terrorism framework is available (South Africa). We also investigate whether anti-terrorism legislation protects the rights of suspects. Comparing the human rights protection of systems with and without anti-terrorism legislation, we identify a gap between the legislation and the situation on the ground. This gap suggests that the legislation in itself may play a negligible role in countering terrorism and is inadequate to protect human rights. Anti-terrorism legislation could, however, be effective at both attempts if it is accompanied by respect for the rule of law.

2. Background to the anti-terrorism legislation of South Africa and Eastern Africa

The 2005 version of this chapter considered the international anti-terrorism regime in some detail, as well as the anti-terrorism legislative framework in South Africa, Kenya, Uganda and Tanzania. The international context is now dealt with elsewhere in this edition.[1] We will deal only briefly with the content of the legislation in the surveyed states, highlighting changes and aspects relevant to the thematic discussion to follow.[2] To discuss how the legislation has been implemented, we analyse anti-terrorism practice in the surveyed states in terms of various themes, namely: the geographical location and significance of the states in the context of the global 'war on terror'; the internal legitimacy of anti-terrorism laws; human rights concerns, particularly the suppression of political opposition, the conduct of security forces and renditions of terrorism suspects; and, finally, court decisions dealing with the anti-terrorism laws.

The four countries surveyed in this chapter share a legal heritage, having adopted, albeit to slightly different extents, the common law tradition. As this chapter demonstrates, however, the legal responses to contemporary terrorism are in some ways markedly different. In 2005, both Uganda and Tanzania had anti-terrorism legislation in force, but Kenya's Suppression of Terrorism Bill of 2003 had encountered considerable opposition from

[1] See C. H. Powell, Chapter 2, this volume.

[2] A more detailed discussion of the content of the legislation may be found in this chapter in the first edition of this volume.

politicians and civil society, and had not been passed.[3] South Africa's anti-terrorism legislation came into force in 2005.[4] It had a long and difficult birth, taking eight years to come into law. It was criticised from two perspectives: one on the basis of principles of constitutionalism and human rights, the other based on fears of victimisation, similar to those raised in East Africa, with criticisms coming particularly from the Muslim community and from trade unions.[5]

The status of the legislation remains largely unchanged. The South African Act has not been amended. Kenya continues to lack specialist anti-terrorism legislation. In May 2006, the Kenyan government drafted a further suppression of terrorism bill, but did not submit it to Parliament,[6] and it is thought to be unlikely that legislation will be reintroduced in the near future.[7] The Kenyan position will thus be discussed with reference to the 2003 Bill. Efforts are underway to update the Tanzanian Act,[8] but at the time of writing it remains unchanged. No amendments to the Ugandan legislation have been tabled,[9] although provisions on surveillance have been supplemented by other legislation.[10]

3. The anti-terrorism regimes of South Africa and Eastern Africa

This section analyses the anti-terrorism legislation of South Africa and the East African states under two themes. The first examines legislative provisions which empower the state to prevent acts of terrorism. The second deals with provisions governing the trial of those charged with terrorism-related offences. An additional section discusses possible challenges to the constitutionality of the South African legislation, drawing

[3] C. H. Powell, 'Terrorism and governance in South Africa and Eastern Africa', in Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005), p. 566.

[4] The Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. The Act was passed by the National Assembly on 12 November 2004, assented to by the President on 4 February 2005 and became law on 20 May 2005.

[5] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 566–7.

[6] Authors' survey of bills presented to Parliament on www.kenyalaw.org; US Department of State, *Country Reports on Terrorism*, Chapter 2 – Country Reports: Africa Overview (2006), available at www.state.gov/s/ct/rls/crt/. The Kenyan government seemed to lack the political capital to pass such a controversial measure.

[7] Anton du Plessis, Institute for Security Studies, Correspondence with the authors, 20 September 2010.

[8] Du Plessis, Correspondence with authors, 20 September 2010.

[9] Authors' search of Ugandan Government Gazettes.

[10] The Regulation of Interception of Communications Act was passed in September 2010.

on comparisons with South Africa's anti-organised crime legislation. For ease of reference, the legislation of the three East African states is discussed together.

A. South Africa's anti-terrorism legislation

i. Prevention

The South African anti-terrorism act links the investigation and prevention of terrorism with South Africa's anti-organised crime legislation, extending the ambit of the Prevention of Organised Crime Act (POCA) to include terrorism. POCA thereby provides for the civil forfeiture of property 'associated with terrorist or related activities'. Property which was 'acquired, collected, used, possessed, owned or provided for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission' of the crimes in the anti-terrorism act may be forfeited. It is not necessary to institute a criminal prosecution against any person involved in such an 'entity', but the civil forfeiture requires a court order.[11]

Section 22 of the anti-terrorism act activates Chapter 5 of the National Prosecuting Authority (NPA) Act,[12] which gives investigating officers in terrorism cases the same powers as officers investigating organised crime. The Investigating Director of the Directorate of Special Operations (the DSO)[13] was empowered to conduct a particular investigation and assign officers to it.[14] Such officers were given expanded powers of search and seizure. While required to obtain a court order to search a suspect's property, officers are not required to specify the particular articles they hope to find.[15]

One change came in 2008, when the DSO was controversially disbanded, a move attributed to the unit's investigation and prosecution of several senior political figures. In its stead, the Directorate for Priority Crime Investigation, a specialist unit of the South African Police Service (colloquially known as the 'Hawks'), has assumed the DSO's powers.[16]

[11] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 569–70.
[12] Act No. 32 of 1998.
[13] Colloquially known as the 'Scorpions', the DSO had special powers to investigate organised crime: J. Redpath, *The DSO: Analysing the Scorpions* (Pretoria: Institute for Security Studies Monograph no. 93, 2004).
[14] NPA Act, s. 28. [15] Ibid., s. 29.
[16] See the National Prosecuting Authority Amendment Act 56 of 2008.

Although these powers are now wielded by a different organisation, they remain substantively unchanged.

ii. Trial

The first edition of this volume noted that terrorist suspects faced trial under some of the most broadly and vaguely defined crimes in South African law.[17] The Act codified a range of treaty crimes, and introduced two new main offences: terrorism, and the 'offence connected with terrorist activities', which provides for extensive accomplice liability.[18] The offence of terrorism consists of three broadly defined elements: an act, an intention and a motivation. The act may be set out in detail, but is nonetheless unclear and broad. For example, the 'systematic, repeated or arbitrary use of violence' constitutes 'terrorist activity'. Most forms of violence would be qualified by one of these three adjectives, meaning that only the elements of intention and motivation distinguish the serious crime of terrorism from any other act of violence. The remainder of the activities listed generally cause severe harm.[19]

The three terrorist intentions are: to threaten the unity and territorial integrity of a state, to intimidate or cause feelings of insecurity in the public, and unduly to compel or induce a person, the government or the general public to do or abstain from any act. These intentions are broad and require a lower burden of proof. The state can establish either that the accused had the intention, or that such intention can, by its nature and context, reasonably be inferred. In drawing that inference, a court may rely on an accused's 'constructive knowledge' of a fact.[20] As far as the element of motivation is concerned, an act which satisfies one of the criteria in the definitions of act or intention becomes a terrorist activity if it is carried out for an individual or collective political, religious, ideological or philosophical cause.[21] The act contains significant duplication, with a wide range of treaty-based offences being created which could easily be covered under the offence of terrorism.[22] The offence of terrorism itself

[17] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 572–8.
[18] Sections 1, 2 and 3.
[19] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 573–4.
[20] Under s. 1(6), a person is deemed to have knowledge of a fact if he or she had actual knowledge, failed to obtain information to confirm the existence of a fact or believed that it was reasonably possible that the fact existed.
[21] Powell, 'Terrorism and governance in South Africa and Eastern Africa', p. 574.
[22] Ibid., pp. 574–6.

includes numerous existing crimes, and accomplice liability is provided for at least four times.[23]

Maximum sentences upon conviction for terrorism or a related offence are very high.[24] As with POCA, the anti-terrorism act increases the ordinary sentencing limits of magistrates' courts. The basis for doing so is unclear, as is the advisability of the change.[25] On conviction, the anti-terrorism act provides for the mandatory forfeiture of assets connected to the crime.[26] Third parties have the usual prescription period of three years to claim restitution or compensation for their interests in the property.[27] Third parties must establish that they acquired the property in good faith, and for consideration.[28] Furthermore, they must show either that the surrounding circumstances were not such as to arouse a reasonable suspicion of terrorist use of the property, or that they could not prevent such use.

iii. Constitutionality

In the first edition it was argued that the constitutionality of the anti-terrorism act could face similar challenges to POCA. It was suggested that POCA might be challenged for infringing various constitutional rights, in particular the right to silence, the presumption of innocence, the right not to be deprived of property, the right to privacy and the right to dignity.[29] By 2005, no such challenges to the constitutionality of POCA had succeeded, although the challenges had been limited in their scope and had not produced judgments that pronounced decisively on the issue. It was suggested that courts might respond more favourably to legislation aimed at organised crime than to legislation against terrorism, due to the greater threat organised crime is perceived to pose to South African society. It was noted that in considering POCA, South African courts had acknowledged the threat to the international community posed by organised crime, and that if the perceived needs of the international community were to influence South African courts, they might accept that terrorism is an even greater threat. In light of the generally sympathetic response

[23] Ibid., pp. 575–6. [24] Ibid., pp. 576–7. [25] See further ibid. pp. 576–7.
[26] See further ibid., p. 578. [27] Section 20.
[28] This may be contrasted with s. 17(6), under which those accused of financing terrorism under s. 4 may defend themselves by showing that they dealt with the property in question purely to preserve its value.
[29] Sections 35(1), 35(3)(h), 25, 14 and 10 of the Constitution of the Republic of South Africa Act 108 of 1996. See Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 578–9.

to POCA, this suggested that the anti-terrorism act might pass constitutional muster.[30] It was also argued that the courts were likely to interpret the act restrictively, as has been done to preserve the constitutionality of some sections of POCA.[31]

The Constitutional Court has since dealt with POCA on several occasions,[32] although few cases presented a direct attack on the legislation. In *Prophet*, a direct challenge was made to the provisions of POCA relating to asset forfeiture. It was argued that the rights of dignity, privacy, fair trial, silence, the presumption of innocence and the right not to be arbitrarily deprived of property were infringed. However, this challenge was dismissed on procedural grounds.[33] The Constitutional Court appears to accept the constitutionality of POCA in principle, while being aware of its potentially harsh impact. The objective of civil forfeiture of assets, namely, curbing serious crime, has been described as 'worthy and noble',[34] but judges are alive to the potentially draconian nature of the remedy, especially in light of a lower burden of proof and the fact that it is not necessary to show that the owner of property has committed an offence in order to obtain a forfeiture order.[35] If forfeiture were to amount to an arbitrary deprivation of property, it would be unconstitutional.[36] In *Shaik*, the Court considered the restraint and seizure of property provisions of POCA. It identified the primary purpose of this part of the Act as being to ensure that no-one could benefit from his or her own wrongdoing, with subsidiary purposes of general deterrence and crime prevention. The Court found these to be legitimate under South Africa's constitutional order.[37]

The courts will, however, subject the constitutionality of the particular forfeiture to close scrutiny. The test applied by the courts considers firstly whether the property is an 'instrumentality' of an offence; and then assesses whether the forfeiture is proportional, by balancing the severity of the interference with individual property rights against the extent to which the property has been used in the commission of the offence.[38]

[30] Ibid., pp. 578–81. [31] Ibid., pp. 580–1.

[32] *Mohunram and Another* v. *National Director of Public Prosecutions and Another (Law Review Project as* Amicus Curiae) 2007 (4) SA 222 (CC) (*Mohunram*); *Prophet* v. *National Director of Public Prosecutions* 2007 (6) SA 169 (CC) (*Prophet*); see also *S* v. *Shaik and Others* 2008(5) SA 354 (CC) (*Shaik*).

[33] *Prophet*, [49]–[53].

[34] *Mohunram*, [118] (Moseneke DCJ). [35] See ibid.

[36] Ibid., [141] (Sachs J). [37] *Shaik*, [51]–[52] and [57].

[38] See *Prophet*, [55], [57]–[58].

The Court will be more likely to grant a forfeiture order the more closely related the criminal activities in question are to the objectives of POCA, and vice-versa. Courts are required to weigh the deterrent purpose of POCA against the impact on the individual owner – a disproportionate impact would violate the principle of dignity.[39] This analysis is far from straightforward,[40] and is fact and context sensitive.[41] In *National Director of Public Prosecutions* v. *Rautenbach*,[42] a majority of the Supreme Court of Appeal held that where there was good reason to believe that the value of the restrained property would materially exceed the prospective confiscation order, the Court must limit the scope of the restraint. In *Mohunram*, a majority of the Constitutional Court found that the forfeiture under consideration was disproportionate, as no link had been shown between the underlying offence and the purpose of POCA.[43]

These decisions suggest an implicit acceptance of the constitutionality of POCA, and it seems unlikely that further challenges would now succeed. However, the decisions bear out the suggestion that it would be open to the courts to interpret anti-terrorism legislation restrictively, and in light of constitutional rights and values, in order to ameliorate potential harshness in the application of the legislation. The POCA case law suggests that it is possible that the courts may accept the aims of a legislative scheme, and yet be careful to ensure that it is not applied without constraint.[44]

As for the substantive aspects of the act, the chapter in the first edition of this volume suggested that the vagueness of the definition of terrorism could conceivably be cured by a very restrictive reading of the text. It was also argued that s. 23, which adopts the Security Council's list of terrorist organisations for the purposes of asset forfeiture, could be seen as an unconstitutional delegation of legislative power to an international body.[45] It would be interesting to see, were such an issue to arise, whether the South African courts might be emboldened to take such an approach

[39] *Mohunram*, [145]–[146] (Sachs J).

[40] As is demonstrated by *Mohunram*, where the Constitutional Court split 6:5 on whether the forfeiture order was disproportionate, with a plurality formed by two separate judgments.

[41] See Sachs J's distinguishing of *Prophet* in *Mohunram*, [147]–[149].

[42] 2005 (4) SA 603 (SCA).

[43] *Mohunram*, [129] (Moseneke DCJ).

[44] See the discussion of *Minister of Safety and Security and Others* v. *Mohamed*, below.

[45] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 581–2. See also C. Powell, 'Terrorism and the separation of powers at the national and international level' (2005) *South African Journal on Criminal Justice* 151.

in future following the example of the European Court of Justice in *Kadi*.[46] In this case, the Grand Chamber of the European Court of Justice overturned the European implementation of a listing decision against a Saudi Arabian national, on the basis that the European measures violated European constitutional law and the rights treaties applicable to members of the EU.

B. *Anti-terrorism legislation and draft legislation in Eastern Africa*

i. Prevention

The executive in Kenya, Tanzania and Uganda enjoys a far wider discretion in identifying terrorism suspects and in deciding how to proceed on that suspicion. All three countries allow the relevant Cabinet Ministers to declare groups to be terrorist organisations or people to be terrorists, with Uganda granting the legislature some powers to annul changes to the list of organisations set out in the Act. Tanzania's legislation provides for some judicial oversight, but reference in guidelines to the view of the UN Security Council may effectively mean that the view of the executive will prevail. In Kenya, the draft legislation would have allowed the Minister of National Security to declare an organisation terrorist merely on the belief that it met the guideline criteria of terrorism provided in the Bill, although the declaration would be subject to judicial review.[47]

Once an organisation is declared to be a terrorist organisation, provision is made for funds to be frozen and assets to be forfeited to the state. The Kenyan draft legislation would grant less discretion to the executive in this respect, as pre-trial asset forfeiture is only permitted on an *ex parte* application to a court.[48] Regarding investigation and powers in respect of suspected persons and objects, the Ugandan Act does not provide for any special powers of arrest and search and seizure. The Tanzanian Act contains fairly unexceptional provisions allowing for arrest without a warrant on reasonable suspicion, and for search and seizure without a warrant, if applying for a warrant would cause a prejudicial delay.[49]

All three states allow for the seizure of property upon suspicion of terrorist connections, but with varying degrees of executive discretion. The

[46] Judgment of the European Court of Justice in Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities* (3 September 2008).
[47] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 583–4.
[48] Ibid., p. 584. [49] Ibid., pp. 584–5.

Ugandan legislation requires court orders to search for and seize property on reasonable grounds. In Tanzania, detention orders against vehicles or aircraft may be issued by the Inspector-General of Police, but may be varied by the Minister. The police may seize property on suspicion of a terrorist connection, but must then apply for a court order to authorise further detention of the property. In Kenya, the draft legislation would allow for search and seizure only in specifically defined circumstances and on order of a court, unless obtaining such an order would cause a delay prejudicial to public safety and public order.[50]

Unlike the South African legislation, all three East African states make provision for the surveillance of terrorism suspects. Authorisation is given by the Minister in Uganda, the Minister or a court in Tanzania, and, in Kenya, the draft Bill would require a court order. The Ugandan legislation specifically requires the Minister to protect, *inter alia*, the public interest and the national economy when authorising the monitoring. In Tanzania, private bodies may be co-opted in the interception of information.[51]

Beyond criminal investigations, the legislation grants powers to the executive to control access to the respective states. The Tanzanian legislation empowers the Minister to make regulations to prohibit the entry of persons to Tanzania, and provides for the refusal of entry to suspected terrorists, and the deportation of suspected terrorists already in Tanzania. The Minister may also refuse refugee status to applicants suspected of terrorist involvement. Similarly, the Kenyan Bill would allow the Minister to issue exclusion orders against non-nationals suspected of terrorist involvement, and even against Kenyan nationals with dual nationality. This would prevent the entry of persons and allow the removal of persons already present in Kenya.[52] Finally, and especially controversially, immunity was granted for members of the executive who act against terrorist suspects, which covers damage to property and the causing of injury, or even death.[53]

ii. Trial

The legislation in all three states creates the offence of terrorism, and a range of ancillary and convention crimes. The definition of terrorism is generally organised around constituent elements of act, purpose and

[50] Ibid., pp. 585–6. [51] Ibid., p. 586.

[52] Ibid., pp. 586–7. This is a potentially significant power in the context of Kenya's porous borders, as discussed under section III A.

[53] Powell, 'Terrorism and governance in South Africa and Eastern Africa', p. 587.

motivation, although these are not always set out systematically, and it is sometimes unclear whether all three elements are required. The definitions in the legislation and draft legislation of all three states are unclear to varying degrees.[54]

In all three states, the rules of evidence are relaxed in order to assist the state in proving these charges, most notably through the introduction of reverse onuses of proof for many offences.[55] Uganda and Tanzania impose harsh penalties for terrorist offences. In Uganda, the Act provides that the death penalty is mandatory for acts of terrorism which result in death, and may be imposed for all lesser forms of terrorism.[56] However, in *Susan Kigula and Others* v. *Attorney-General*,[57] the Constitutional Court of Uganda found, by a 3:2 majority, that provisions of Ugandan law prescribing mandatory death sentences were inconsistent with the Constitution.[58] In Tanzania, the only offence which carries a minimum sentence of less than fifteen years' imprisonment is that of arranging a terrorist meeting,[59] for which the sentence range is between ten and fifteen years' imprisonment.

Kenya's draft legislation seems milder, providing for a maximum sentence of ten years' imprisonment for ancillary offences such as weapons training, possessing articles for terrorist purposes, collecting and transmitting information and membership of a terrorist organisation.[60] It is a curious anomaly that no penalty is attached to terrorism as such, as the Bill does not expressly render terrorism an offence.[61] This is especially strange since the Bill does provide for a term of life imprisonment for the offence of directing the activities of a terrorist organisation,[62] but yet fails to make terrorism itself a criminal offence.

In both Kenya and Uganda, courts have discretion to order the forfeiture of property on conviction for a terrorist or terrorist-related offence. The draft Kenyan Bill provides no guidance on how a court should exercise this discretion, but Uganda allows the forfeiture order to be made if the Court believes that the property will be used for further terrorist

[54] Ibid., pp. 587–90. [55] See ibid., pp. 590–2.
[56] Sections 7(1)(a) and (b) of the Ugandan Act.
[57] Constitutional Petition No 6 of 2003, available at www.ulii.org//cgi//cgi-bin/uganda_disp.pl?file=ug/cases/UGCC/2005/8.html&query=terrorism.
[58] See p. 45. The judgment expressly identified s. 7(1)(a) of the Anti-Terrorism Act as one of the impugned pieces of legislation.
[59] Tanzanian Act, s. 26. [60] Kenyan Bill, cll. 4, 6 and 10.
[61] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 592–3.
[62] Clause 3.

offences. The onus is on the person attempting to preserve the property to show that it will not be used in this way.[63] Kenya and Uganda allow third parties to assert their rights in the property.[64]

4. Domestic politics and terrorism in Africa since 2005

Having set out the provisions of anti-terrorism legislation in the region, we now turn to examine post-2005 developments and anti-terrorism practice in the surveyed countries under four themes: the significance of the geographical location of the countries surveyed; the public perception and legitimacy of anti-terrorism legislation; the impact of anti-terrorism measures on human rights; and the application of anti-terrorism legislation by courts.

In the first edition of this volume it was noted that, despite a long and difficult history of violence and civil war, the African continent in general had not experienced much terrorism, in the sense of ideologically motivated, 'peacetime' attacks on civilians with the intention of causing terror within the targeted community.[65] Terror attacks had generally manifested themselves as attacks by organised groups engaging in criminal activities or as violations of the laws of armed conflict, whereby rebel groups terrorised, robbed and coerced civilians to assist in military campaigns.[66] However, South Africa and Eastern Africa had had experience of terror attacks against civilian targets in peacetime.[67] Perhaps the most infamous of these was the 1998 bombing of the US embassies in Nairobi and Dar es Salam, but there have been other high-profile incidents, such as an attack on an Israeli hotel in Mombasa, Kenya in 2002. South Africa experienced a series of bombings between 1994 and 2000, although these were felt to be criminally rather than ideologically motivated.[68] This trend

[63] Section 16(5) of the Ugandan Act.

[64] The Ugandan Act seems to expect interested parties to make application immediately upon conviction of the person who used the property for terrorist purposes: see s. 16(6). The Kenyan Bill would allow third parties six months to bring an application: see cl. 22 and sch. 3.

[65] C.H. Powell, 'Defining terrorism: how and why', in N. LaViolette and C. Forcese (eds.), *The Human Rights of Anti-Terrorism* (Toronto: Irwin Law, 2008).

[66] Powell, 'Terrorism and governance in South Africa and Eastern Africa', p. 563.

[67] See A. Oloo, 'Domestic terrorism in Kenya', in W. Okumu and A. Botha (eds.), *Domestic Terrorism in Africa: Defining, Addressing and Understanding its Impact on Human Security* (Pretoria: Institute for Security Studies, 2007), pp. 85–94.

[68] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 563–4; A. Botha, 'Domestic terrorism in South Africa', in Okumu and Botha, *Domestic Terrorism in Africa*, pp. 65–76.

has continued post-2005, with the most high-profile incident of terrorism being the recent bomb blasts in Kampala, Uganda during the 2010 World Cup football final, which killed seventy-six people.[69]

A. *Geographical location*

The three East African states surveyed are of particular significance in the global anti-terrorism context due to their geographical location. The states are in close proximity to the 'Horn of Africa', which consists of Sudan, Ethiopia, Eritrea, Djibouti and Kenya itself. This region is regarded as especially vulnerable to recruitment by al-Qaeda affiliated groups, which in turn poses a threat to the stability of the African countries in surrounding areas.[70] This instability is attributed in large part to Somalia, which has lacked an effective central government since the early 1990s and is regarded as a focal point for growing Islamic extremism in the region. This dynamic is further complicated by the presence of large communities of ethnic Somalis in many other countries in the region.[71] Kenya is regarded as having unsecured borders, which makes it vulnerable to possible infiltration by terrorist groups.[72] Tanzania is also regarded as being vulnerable to terrorism, with the network alleged to be responsible for the 1998 embassy bombings said to remain active in the region.[73]

Uganda is a particularly complex case, as it is exposed to terrorism threats which have been attributed to extremist organisations based in Somalia,[74] and also has extensive experience of armed conflict. Two rebel

[69] BBC news, '"Somalia link" as 74 World Cup fans die in Uganda blasts', 12 July 2010, available at news.bbc.co.uk/2/hi/africa/10593771.stm; Ben Simon, 'Uganda charges 32 over World Cup bombings', 18 August 2010, available at www.mg.co.za/article/2010–08–18-uganda-charges-32-over-world-cup-bombings.

[70] US State Department, *Annual Terrorism Report*, cited in VOANews.com, 'US Anti-Terror Report cites potential Al-Qaida link to African insurgencies', 1 May 2008.

[71] See 'Horn of Africa could become major front for anti-terrorism efforts', *USA Today* 21 October 2006; Institute for Security Studies, *Africa Terrorism Bulletin*, December 2008 (quoting Ugandan military officials warning the Somali community in the Kisenyi region not to become involved in terrorist activities).

[72] US Department of State, *Country Reports on Terrorism*, Chapter 2 – Country Reports: Africa Overview (2007).

[73] US Department of State, *Country Reports on Terrorism*, Chapter 2 – Country Reports: Africa Overview (2008).

[74] Uganda's geographical proximity to Somalia, as well as its support for Somalia's vulnerable interim government, has made it vulnerable to such threats. Ugandan peacekeepers are based in Mogadishu, and the al-Qaeda linked group al-Shabab has previously threatened attacks on Kampala. This is seen as the most likely explanation for the World Cup final day bomb blasts in Kampala. See BBC news, '"Somalia link" as 74 World Cup

forces, the Lord's Resistance Army (LRA) and the Allied Democratic Forces (ADF),[75] conduct military campaigns in the country and have been declared 'terrorist organisations' by the government.[76] Notwithstanding arrest warrants issued by the International Criminal Court against several LRA leaders, and some tentative peace negotiations, the activities of these groups continue.[77] As with Kenya, Uganda's borders are regarded as vulnerable, and combined with the insecurity in the region, this leaves it vulnerable to terrorist activity. Reports suggest that Uganda has been used as a transit point for extremists moving between the Horn of Africa, and North Africa and Europe.[78]

The heightened threat of terrorism from Eastern Africa – both real and imagined – suggests that the region will continue to be an important arena in the global anti-terrorism context.

B. The public perception and legitimacy of anti-terrorism laws

In the first edition of this volume, the hypothesis was put forward that the presence of terrorist threats within the four states might indicate that there would be a strong internal need and support for anti-terrorism legislation. However, there was significant opposition to the new anti-terrorism regime, with critics in East Africa accusing governments of introducing measures in response to foreign pressure, in particular from the United States.[79]

Since 2005, in addition to incidents of traditional 'terrorist' activity, there have been outbreaks of violent instability in some of the states which, although they would not normally be considered to constitute terrorism, might have been expected to have created public support for counter-terrorism style measures. Examples include the violence that followed

fans die in Uganda blasts'. Al-Shabaab has claimed responsibility for the attack: Simon, 'Uganda charges 32 over World Cup bombing'.

[75] The ADF, a dissident group with bases in the DRC, was blamed for a series of attacks between 1997 and 1999 characterised by bomb throwing in pubs, markets, taxi stops and other public places. Privacy International, '*Terrorism Profile – Uganda*', 19 December 2004, available at www.privacyinternational.org/article.shtml?cmd%5b347%5d=x-347–359656.

[76] See Powell, 'Terrorism and governance in South Africa and Eastern Africa', p. 564.

[77] W. Okumu, 'Domestic terrorism in Uganda', in Okumu and Botha, *Domestic Terrorism in Africa*, pp. 77–84; K. Apuuli, 'The ICC arrest warrants for the Lord's Resistance Army leaders and peace prospects for Northern Uganda' (2006) 4 *Journal of International Criminal Justice* 179.

[78] US Department of State, *Country Reports* (2007), (2008).

[79] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 564–5.

Kenya's elections in 2007, violent service delivery protests in South Africa, and the wave of xenophobic violence in South Africa in 2008. However, there does not appear to have been any discernable shift in public attitudes towards anti-terrorism legislation; international terrorism still tends to be viewed as a Western problem and is seen as less pressing than domestic issues such as the threat of HIV/AIDS and violent crime.[80] This attitude is evident from continued opposition to anti-terrorism legislation in Kenya. Whitaker remarks that:

> Kenyans still see terrorism largely as an American (or Israeli) problem. In this view, Kenyans are just collateral damage in a conflict between these countries and terrorists. Kenyans are not involved nor are they the intended targets; they are innocent bystanders. Without the recognition of terrorism as a local problem, there is little homegrown demand for stronger counterterrorism measures.[81]

Scepticism has been exacerbated by the tendency of local anti-terrorism units to be heavily funded by Western powers, particularly the United States.[82] Even in the absence of anti-terrorism legislation, these groups conduct operations against terrorism suspects which have created considerable resentment within local communities.[83] In 2007, the United States announced that it would provide US $14 million worth of training and equipment to Kenyan security forces, to counter terrorist activities in the Horn of Africa.[84] The following year, Kenyan anti-terrorism police conducted raids to search for suspects in the 1998 US Embassy bombings. The raid failed to capture the suspects, and was criticised as a publicity-

[80] Center on Global Counter-Terrorism Cooperation and Institute of Security Studies, *Implementing the UN Global Counter-Terrorism Strategy in Southern Africa* (Discussion Paper, 2007), p. 3.

[81] Beth E. Whitaker, 'Reluctant partners: fighting terrorism and promoting democracy in Kenya' (2008) 9 *International Studies Perspectives* 266. There are exceptions, with some Members of Parliament supporting the anti-terrorism Bill: see, 'MPs support anti-terrorism bill', *Kenyan Broadcasting Corporation* 11 November 2008, available at www.kbc.co.ke/story.asp?ID+53746.

[82] The United States Africa Command (AFRICOM) makes funding available to support African states in combating terrorist threats. See 'US anti-terror report cites potential al-Qaida link to African insurgencies', *voa.news.com* 1 May 2008.

[83] Notably Kenyan Muslims: see Stephanie McCrummen, 'Hunt for suspects in embassy bombings elicits anger in Kenya', *Washington Post*, 15 August 2008.

[84] BBC News, 'Kenya gets US anti-terror funds', *BBC News* 4 May 2007, available at news.bbc.co.uk/go/pr/fr/-/2/hi/africa/6623635.stm. A significant portion of the US $100 million East African Counter-Terrorism initiative was assigned to Kenya, and the US provided training for Kenya's anti-terrorism police. Beth E. Whitaker, 'Exporting the Patriot Act? Democracy and the "war on terror" in the Third World' (2007) 28(5) *Third World Quarterly* 1024.

seeking exercise by the anti-terrorism units to ensure continued US funding.[85] Aid and other financial support, particularly from the United States, has increasingly been perceived as being contingent on the receiver states implementing anti-terrorism legislation. The impact of foreign aid cannot be underestimated, as it often makes up a significant proportion of the budget of African states.[86]

This has led to strong perceptions that anti-terrorism legislation is simply being implemented at the behest of the United States.[87] This perception was apparent in the reaction to the 2006 Kenyan draft bill. Politicians promised to block the bill on the basis that it was being promoted by the United States, and the public perception that the legislation was being imposed by the United States continued.[88] In Tanzania, while the Act encountered fairly limited opposition when it was passed, provisions allowing government to share information with foreign state authorities regarding Tanzanian citizens provoked widespread protests against the United States when FBI officials were involved in the arrests of two Muslim leaders in Tanzania.[89]

C. *Anti-terrorism measures and violations of human rights*

The first edition of this volume noted fears that anti-terrorism laws were not used to protect citizens of the surveyed countries, but to suppress particular groups, with Muslims, in particular, feeling targeted. Concerns were expressed that the legislation would be abused by governments in order to crack down on opposition, particularly in light of allegations that the Tanzanian government had tortured members of opposition groups, and the Ugandan government had engaged in widespread mistreatment of its opponents.[90]

[85] McCrummen, 'Hunt for Suspects'.

[86] Donors are estimated to fund close to half of Uganda's budget: see W. Ross, 'Museveni: Uganda's fallen angel', *BBC News*, 30 November 2005, available at news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4482456.stm.

[87] See International Summit on Democracy, Terrorism and Security, 3 March 2005, available at summit.clubmadrid.org/contribute/democracy-and-terrorism-the-impact-of-the-ant.html, alleging that recipients of USAID assistance were being required to sign agreements conforming to anti-terrorism conditions. However, the US has expressed concerns about the human rights implications of the Kenyan draft Bill, and has given significant military aid to Kenya, Uganda and Tanzania – therefore military aid, at least, is not necessarily contingent on anti-terrorism legislation. Whitaker, 'Exporting the Patriot Act?' 1022, 1024.

[88] Ibid., 1024. [89] Ibid., 1028–9.

[90] Powell, 'Terrorism and governance in South Africa and Eastern Africa', pp. 565–6.

These concerns remain, as was illustrated by the 2008 raids in Kenya, and by criticisms that the 2006 Kenyan Bill singled out Muslim members of the population.[91] Kenya's Muslim and Somali communities have complained of being targeted and harassed by counter-terrorism units.[92] Analysts note that allegations of human rights violations have increased since 2007, with security forces in northeast Kenya intensifying efforts to capture terrorism suspects fleeing the conflict in Somalia.[93]

Another serious human rights issue is the unlawful removal of terrorism suspects to other states or locations. Kenyan civil society organisations contend that, while large numbers of Kenyans are arrested on suspicion of terrorist activities, very few are successfully tried. However, large numbers of people, including Kenyan nationals, are alleged to have been sent to Ethiopia or Somalia for questioning, without charge or access to legal representation, and allegations of torture in Kenyan and Ethiopian custody have been recorded.[94] During the period between December 2006 and February 2007, reports document at least 150 people, many having fled the conflict in Somalia, being arbitrarily detained in Kenya and held for several weeks without charge.[95] Most were denied access to a lawyer or consular assistance, and were unable to challenge the legality of their detention or to assert possible refugee status.[96] A large number of the detainees are alleged to have been 'rendered' to Somalia without any legal process being followed; the rest are believed to have been transferred to Ethiopia.[97]

Uganda is also facing serious allegations of abuse and misconduct by anti-terrorism forces. In 2009, Human Rights Watch accused Uganda's Joint Anti-Terrorism Task Force (JATT)[98] of systematic and serious

[91] US Department of State, *Country Reports* (2006), (2007).

[92] William Church, 'Somalia: CIA blowback weakens East Africa', 23 October 2006, available at www.sudantribune.com/spip.php?page=imprimable&id_article=18301.

[93] McCrummen, 'Hunt for suspects'; Whitaker, 'Reluctant Partners', 258, 264–5.

[94] McCrummen, 'Hunt for suspects'; BBC News, 'Kenya gets US anti-terror funds'; Redress and Reprieve, *Kenya and Counter-Terrorism: A Time for Change* (2009) (alleging mass arbitrary detentions, deportations and transfers).

[95] Redress and Reprieve, *Kenya and Counter-Terrorism*, p. 1. Similar allegations were made by Human Rights Watch: see *Why Am I Still Here? The 2007 Horn of Africa Renditions and the Fate of those Still Missing* (2008), which reports at least ninety people as having been unlawfully rendered from Kenya to Somalia and then to Ethiopia during 2007. A year later, at least ten were alleged to remain in Ethiopian prisons, and the fate of several more was unknown.

[96] Redress and Reprieve, *Kenya and Counter-Terrorism*, p. 1. [97] Ibid., p. 1.

[98] The JATT is described as a paramilitary group operating under the authority of the Chieftaincy of Military Intelligence, although it lacks a codified mandate. It draws its

human rights abuses, including the incommunicado detention of suspects and the routine use of torture during interrogations.[99] The report documents 106 cases of illegal detention by the JATT over a two-year period, and more than twenty-five instances of torture or other ill treatment.[100] Uganda's Human Rights Commission has been thwarted in its attempts to inspect the safe houses of the JATT.[101] Human Rights Watch charged that JATT personnel 'typically operate in unmarked cars, carry out arrests wearing civilian clothes with no identifying insignia, and do not inform suspects of the reasons for their arrest'.[102]

According to the Human Rights Watch report, detainees are often not told where they are being taken, and are frequently blindfolded, handcuffed and beaten. They are denied access to lawyers or family members. The detention centre on which the Human Rights Watch investigation focused is not a legal detention centre, as the requisite notice required by the Ugandan Constitution has not been given. In contravention of ordinary rules of Ugandan constitutional law and criminal procedure, suspects are not handed over to the police or brought before a magistrate within the required time and detainees are held for long periods of time in poor conditions. Incidents of deaths and enforced disappearances of detainees have also been recorded.[103] It should be noted that, in respect of officials authorised to carry out interceptions of communication or surveillance activities under the Act, the Act specifically criminalises torture, inhuman and degrading treatment, illegal detention and intentional harm to property.[104]

General concerns have been expressed about the increasing influence of the army in Ugandan society and politics. This concern was illustrated during the 2005 trial of Kizza Besige, a prominent opposition politician seen as a likely challenger to Ugandan President Yoweri Museveni. Besige and his fellow accused had been granted bail, but opted to remain in prison after a group of armed men in civilian clothes surrounded the

members from the Ugandan Defence Force, the police and Uganda's internal and external security organisations: US Department of State, *2009 Human Rights Report: Uganda*, 11 March 2009.

[99] Human Rights Watch, *Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda* (2009).

[100] Ibid., p. 3.

[101] G. Bareebe, 'Uganda: rights body blocked from safe houses', *The Monitor*, 23 February 2010.

[102] Human Rights Watch, *Open Secret*, p. 3. [103] See ibid., p. 3

[104] Section 21(e) read with s. 1. It is notable that the Act does not criminalise these offences more generally.

court building. An army statement claimed they were members of the anti-terrorism unit.[105] Such activities seem to fall some way outside a normal understanding of the role of anti-terrorism forces,[106] and indeed were subsequently found to have been unconstitutional by the Ugandan Constitutional Court.[107] Ugandan authorities have also been accused of using the threat of prosecution under the Anti-Terrorism Act to intimidate journalists and stifle dissent.[108] Critics have accused Ugandan President Museveni of using the threat of terrorism as a pretext for delaying political reforms and silencing opposition.[109]

The experience in these countries demonstrates that the often draconian powers granted by anti-terrorism legislation may be turned against suspects whose alleged offences in fact bear little relation to 'terrorism', as it is traditionally understood. In many of the Ugandan cases described above, the anti-terrorism legislation has failed either to protect human rights or to prevent and prosecute terrorism. However, the problem clearly goes deeper than the anti-terrorism legislation itself. Kenya has carried out several anti-terrorist operations, despite having no legislation targeting terrorism at all. These operations may have disrupted terrorist activities.[110] However, they have also violated individual rights. The mass arbitrary arrests and transfers in Kenya can be seen as a significant part of Kenya's anti-terrorism operations.[111]

Even South Africa, often lauded as a shining example of constitutionalism and the rule of law on the African continent, has struggled to

[105] Ross, 'Museveni'; *Uganda Law Society* v. *Attorney General of the Republic of Uganda – Constitutional Petition No. 18 of 2005* [2006] UGCC 11 (31 January 2006) (*Uganda Law Society*).

[106] It should also be noted that the Ugandan military has been accused of human rights abuses in other contexts, apparently unrelated to counter-terrorism. See, 'Uganda army accused of Karamoja torture abuses', *BBC News* 17 August 2010, available at www.bbc.co.uk/news/world-africa-10996764; International Press Institute, *In Wake of Deadly Uganda Riots: Journalist Beaten and Detained; Four Radio Stations Closed*, available at www.freemedia.at/site-services/singleview-master/4546/.

[107] *Uganda Law Society* [2006] UGCC 11 23.

[108] International Federation of Journalists, 'IFJ condemns spying allegations against journalists in Uganda', 25 January 2004, available at www.ifj.org/en/articles/ifj-condemns-spying-allegations-against-journalists-in-uganda.

[109] Whitaker, 'Exporting the Patriot Act', 1027.

[110] US Department of State, *Country Reports on Terrorism*, Chapter 5 – Country Reports: Africa Overview (2005); US Department of State, *Country Reports on Terrorism*, Chapter 2 – Country Reports, Africa Overview (2006); US Department of State, *Country Reports* (2007).

[111] Redress and Reprieve, *Kenya and Counter-Terrorism*, p. 2.

reconcile counter-terrorism with its human rights obligations. A high-profile example is the case of Pakistani national Khalid Rashid, who disappeared from South Africa in November 2005 in circumstances that remain unclear. The Department of Home Affairs maintained that Rashid was legally deported from South Africa, on the basis that he was a foreigner illegally present in South Africa. While acknowledging allegations that Rashid was connected to international terrorist cells, the Department maintained that there had been insufficient grounds on which he could be extradited.[112]

This explanation has caused commentators to question why, if Rashid was indeed a terrorist suspect, he was not arrested and dealt with under anti-terrorism legislation. Allegations have been made that the Department requested the Police to 'provide legal cover' for Rashid's arrest and handover to Pakistani authorities, and suspicions linger that Rashid may have been subjected to an extraordinary rendition.[113] In 2009, the Supreme Court of Appeal found that while Rashid's initial arrest had been lawful, his subsequent detention and deportation had been unlawful due to failure to comply with South Africa's immigration legislation (the case does not mention anti-terrorism legislation).[114] The applicants did argue that Rashid's deportation was also unlawful for having been a disguised extradition because of allegations of Rashid's links to terrorist groups. However, the Court found that this argument had not been successfully made out.[115]

The event nonetheless raises the concern that, like their East African counterparts, South African authorities may be conducting anti-terrorism operations outside the framework of the country's terrorism legislation, thus placing individuals subject to these actions outside the protections provided for in the legislation. The Kenyan and South African examples also appear to provide support for the argument that 'democracy can make it difficult for governments to cooperate *publically* with the United States in the "war on terror", though *private* cooperation often continues behind the scenes'.[116]

[112] Institute of Security Studies, *African Terrorism Bulletin*, June 2006, Issue 006.

[113] D. Strumpf and N. Dawes, 'Khalid Rashid: Govt's cover is blown', *Mail & Guardian*, 9 June 2006, available at www.mg.co.za/article/2006–06–09-khalid-rashid-govts-cover-is-blown; Institute of Security Studies, *African Terrorism Bulletin*.

[114] *Jeebhai* v. *Minister of Home Affairs* 2009 (5) SA 54 (SCA), esp. [37], [53] (*Jeebhai*).

[115] *Jeebhai*, [40]–[45], [64]–[66].

[116] Whitaker, 'Reluctant partners' 256.

D. *Application of anti-terrorism legislation by the courts*

It is perhaps not surprising, given this context, that courts have begun to resist certain aspects of the anti-terrorism regime. In the *Uganda Law Society* case, the Ugandan Constitutional Court found that the trial of individuals on charges of terrorism before a General Court Martial, while they were simultaneously awaiting trial on charges of treason arising from similar facts before the High Court, was unconstitutional. A key component of this finding was s. 6 of the Act, which gives the High Court exclusive jurisdiction over the offence of terrorism.[117]

While there have yet to be any reported judgments handed down under the South African anti-terrorism Act,[118] some support can be seen for the hypothesis that the courts will be likely to subject anti-terrorism measures to close scrutiny, as seen in the *Jeebhai* case, discussed in the previous section. In *Minister of Safety and Security and Others* v. *Mohamed and Another*,[119] a majority of the Court set aside a search warrant used to raid the homes of two men suspected of terrorist activities. Police suspected the men of having formed an Islamic terrorist group, but the Court found that the warrant was over-broad, and that the magistrate had failed to apply his mind properly in issuing the warrant. The Court reacted strongly against the state not placing the full affidavit on which the warrant was issued before the reviewing courts, remarking that it 'smacks of

[117] *Uganda Law Society* [2006] UGCC 11, 20–1, 74.

[118] There have been cases decided under the Act, mostly relating to the activities of the right wing 'Boeremag' group, but as decisions of Magistrates' Courts in South Africa are not published, it is difficult to obtain judgments if the case is not heard by a High Court. The 'Boeremag' is a white right-wing group, twenty-one members of which are being tried for offences of high treason, murder and terrorism after a series of bomb blasts in 2001. See Institute for Security Studies, *Assessing South Africa's Commitment to Prevent and Combat Terrorism*, 21 July 2008. A possible high-profile prosecution which may take place in South Africa is that of Henry Okah, a former MEND (Movement for the Emancipation of the Niger Delta) leader, who was arrested in South Africa under the country's anti-terrorism legislation following the October 2010 car bombings in Abuja, Nigeria: Ola Awoniyi, 'Nigerian police name suspects in deadly blasts', *Mail & Guardian*, 4 October 2010, available at www.mg.co.za/article/2010–10–04-nigerian-police-name-suspects-in-deadly-blasts. At the time of writing, Okah had been charged with engaging in terrorist activities, conspiracy to do so, and delivering, placing and detonating an explosive device. His application for bail has been denied: 'Okah case postponed for decision', *Independent Online*, 5 November 2010, available at www.iol.co.za/news/crime-courts/okah-case-postponed-for-decision-1.722306; L. Faull, 'Terror-accused Henry Okah denied bail', 19 November 2010, available at www.mg.co.za/article/2010–11–19-okah-denied-bail.

[119] Unreported judgment, Case No. A 228/09, 30 April 2010 (*Mohamed*).

executive interference with a matter which is the exclusive confines [sic] of the judiciary'.[120] The Court also emphasised the need for judicial officers, in issuing search warrants, to ensure that constitutional rights are protected. [121]

Another notable feature of the *Mohamed* case was that the warrant in question had been issued under normal laws of criminal procedure.[122] In light of the majority's finding that the warrant was too general, over-broad and unclear in setting out the documents sought,[123] it is puzzling that the anti-terrorism legislation was not relied on to activate the broader search and seizure powers provided for in the NPA Act.[124]

5. Conclusion

In this section, we return to the contradictions which emerge from the anti-terrorism programmes of these regions and investigate what they can tell us about the role of anti-terrorism in preventing terrorism and protecting rights.

As noted above, some commentators support anti-terrorism legislation as an essential instrument against terrorism. These commentators accept the rights restrictions that may result for terrorist suspects as a necessary evil in protecting the broader society. Others support anti-terrorism legislation because, while limiting certain rights, it can establish those limitations with legal certainty, allowing suspects to call on law for protection should the executive act beyond its powers.[125]

If we measure these arguments against the experience of the countries in this study, both appear inadequate. First, the Kenyan experience suggests that anti-terrorism legislation may not even be necessary for an anti-terrorism programme. The South African practice discussed through

[120] Ibid., [12], [15]–[17]. [121] Ibid., [18], [45].

[122] Namely the Criminal Procedure Act 51 of 1977. See the judgment of Louw J in *Mohamed*, unreported judgment, [2]–[3].

[123] Ibid., [38], [41] and [42] (Moosa J).

[124] See note 15 above. To illustrate the scope this would allow, s. 29(1)(d) of the NPA Act provides that an investigating officer may 'seize … anything on or in the premises which has a bearing or might have a bearing on the investigation'.

[125] See D. Dyzenhaus, 'Accountability and the concept of (global) administrative law', in H. Corder (ed.), *Global Administrative Law: Development and Innovation* (Cape Town: Juta, 2009), pp. 22–3, for an illustration of how, even under oppressive apartheid laws in South Africa, officials implementing the laws were operating in terms of powers vested by statute. This allowed decisions to be challenged in order to establish some protection of the rights of South Africans affected by the apartheid laws, however limited these rights might be.

the *Jeebhai* and *Mohamed* cases might also appear to suggest that anti-terrorism law is unnecessary, since both cases were dealt with in terms of 'normal' immigration and criminal procedure laws. What, it might be argued, is the purpose of specialised anti-terrorism legislation if states are not going to make use of it?

On the other hand, the Kenyan operations in particular appear to have violated human rights. This suggests that it may be desirable to enact anti-terrorism laws, not so much because such laws are essential to combat terrorism, but because they can set limits on the executive's extraordinary powers.

When we turn to Uganda, however, we find support for the traditional critique that anti-terrorism legislation increases the potential for human rights abuses. Allegations of human rights abuses levelled against anti-terrorism units in the security forces appear to demonstrate the danger of anti-terrorism legislation failing to provide protection for individual rights, and allowing for repressive actions by law enforcement agencies.

Perhaps the solution lies in the fact that, in many of these examples, the 'ordinary laws' were violated as well as, occasionally, the anti-terrorism laws themselves. There is, in other words, a gap between the proclaimed law and governmental conduct – whether it relates to terrorism or not. The larger this gap, the more questionable the value of anti-terrorism legislation will be. We submit that, in any system where the rule of law is not respected, governmental obedience to its own legislation will be piecemeal. Government is likely, in other words, to rely on the extra powers which anti-terrorism legislation grants it, but ignore the legal restriction of those powers. In such cases, anti-terrorism legislation is more likely to become an alibi for the abuse of power than an instrument to prevent terrorism within a clear legal framework.

We do not mean, through this argument, that anti-terrorism legislation should be abandoned. We do, however, argue that it must proceed hand-in-hand with the strengthening of the rule of law. In this regard, we suggest that a primary goal of any anti-terrorism programme should be the clarity of its scope. We suggest that there is a need for a clear legal framework, whether through specialist anti-terrorism legislation or otherwise, that has as its basis a clear definition of terrorism. Over-broad and unclear definitions of terrorism seem to be at the heart of the problematic instances of anti-terrorism discourse being misused by the executive, as a means of clamping down on opposition and dissent.[126] If additional

[126] Whitaker, 'Exporting the Patriot Act', 1028.

powers, beyond those in ordinary criminal and procedural law, are really needed in order to combat terrorism, then safeguards can be provided by forcing governments to articulate exactly what they mean by terrorism and defining what powers they will employ to combat terrorism, and the limits on those powers. The legal framework ought to allow for some form of judicial review of executive action, even if this only occurs after the fact. Sometimes, the exigency of a terrorist threat may make it genuinely impossible and undesirable to constrain the executive's ability to act by requiring judicial oversight beforehand. None of this, however, disposes of the essential role of law itself – and therefore of the courts – in containing the power of the organs of government.

Finally, there is no reason why a legislative framework for counter-terrorism should not expressly be aligned with human rights. Any attempt to see these two legal regimes as mutually exclusive ought to be rejected, as common ground can be found between the two. After all, the preservation of human rights is, or at least should be, one of the motivating factors behind efforts to prevent terrorism in the first place.[127]

[127] See *The Ottowa Principles on Anti-Terrorism and Human Rights* (2006), available at aix1.uottawa.ca/~cforcese/hrat/principles.pdf; Powell, 'Defining terrorism: why and how'.